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ANONYMITY IN CYBERSPACE: JUDICIAL AND LEGISLATIVE REGULATIONS

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Historically, the scope of constitutional protections for fundamental rights has evolved to keep pace with new social norms and new technology. Internet speech is on the rise. The First Amendment protects an individual's right to speak anonymously, but to what extent does it protect a right to anonymous online speech? This question is difficult because the government must balance the fundamental nature of speech rights with the potential dangers associated with anonymous online speech, including defamation, invasion of privacy, and intentional infliction of emotional distress. While lower courts have held that there is a right to anonymous online speech, they have not yet adopted a common standard. Meanwhile, to simplify the confusion and protect the rights of those who are injured by anonymous online speech, state legislatures are seeking to restrict some or all anonymous online-speech rights.

This Note explores the history of speech regulation, with a special focus on the history of anonymous online speech, and the justifications for protecting speech rights. It then discusses the judicial standards under which courts require disclosure of anonymous speakers and the current legislative proposals to restrict speech rights. Next, this Note suggests that legislatures should not restrict speech rights, and should instead expand the remedies available to those injured by harmful speech. This Note also suggests that courts should adopt a summary judgment standard that requires plaintiffs to provide evidence demonstrating that the anonymous speaker has committed a tort before requiring the speaker to disclose his or her identity.

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INTRODUCTION

Anonymous speech has played an integral role in American history — both proponents and opponents of ratification of the U.S. Constitution used anonymous speech to convey their arguments to the general public.[2] The Supreme Court has implicitly and explicitly recognized that the right to free speech includes the right to speak anonymously.[3] However, the expansion of the internet is stretching the outer limits of anonymous speech rights. While the internet allows speakers to reach a broad audience quickly, it also allows speakers to cause harm through destructive speech. Common problems associated with anonymous online speech include defamation,[4] tortious interference with business,[5] and copyright infringement.[6] Although the Supreme Court has held that free speech rights apply on the internet,[7] it has not yet addressed the scope of anonymous online-speech rights.

So far, the Fourth and Ninth Circuits have held that there is a constitutional right to speak anonymously but have not adopted a standard to define the scope of that right.[8] For example, some jurisdictions require the plaintiff to meet a summary judgment standard before the court will allow disclosure of a commenter's identity.[9] In other jurisdictions, the plaintiff may need to win on a balancing test that weighs the interest of disclosure against the interest in anonymity[10] or merely show good-faith[11] before he can discover the commenter's identity.

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[2] Alexander Hamilton, James Madison, and John Jay wrote the Federalist Papers under the pseudonym of "Publius" to promote acceptance of the U.S. Constitution. *See* ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, FEDERALIST PAPERS (Goldwin Smith, ed. 1901). The Anti-Federalists, who opposed the ratification of the Constitution, also wrote under pseudonyms, using the names Brutus, Cato, and Centinel. *See* HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST (1981).

[3] *See, e.g.*, Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150, 166–67 (2002) (finding a law that required a permit to distribute pamphlets door-to-door was unconstitutional, because it infringed upon the speaker's First Amendment rights); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995) ("[T]he anonymity of an author is not ordinarily a sufficient reason to exclude her work product from the protections of the First Amendment."); Talley v. California, 362 U.S. 60, 65 (1960) (holding that a regulation prohibiting the distribution of anonymous handbills was unconstitutional).

[4] *See, e.g.*, Doe v. Cahill, 884 A.2d 451 (Del. 2005).

[5] *See, e.g.*, Quixtar Inc. v. Signature Mgmt. Team, LLC, 566 F. Supp. 2d 1205 (D. Nev. 2008) (noting that the plaintiff alleged that the defendant unlawfully interfered in the plaintiff's business through an online smear campaign using anonymous postings).

[6] *See, e.g.*, Sony Music Entm't Inc. v. Does 1–40, 326 F. Supp. 2d 556 (S.D.N.Y. 2004).

[7] *See* Reno v. ACLU, 521 U.S. 844 (1997).

[8] *Compare* SI03, Inc. v. Bodybuilding.com, LLC, 441 F. App'x 431, 433 (9th Cir. 2011) (vacating the district court's decision to apply the summary judgment standard, because the district court had not identified "the nature of the speech in question"), *with In re* Anonymous Online Speakers, 661 F.3d 1168, 1177 (9th Cir. 2011) (noting that the district court did not abuse its discretion in applying a summary judgment standard). The Fourth Circuit addressed the issue of anonymous online speech in *Peterson v. National Telecommunications and Information Administration*, 478 F.3d 626, 633–34 (4th Cir. 2007), but did not address the substantive scope of the right to anonymous speech, instead finding that the right to anonymity was not challenged because the petitioner lacked standing to challenge the constitutionality of the act. For a discussion of the various standards that courts have adopted, see *infra* Part III.A.

[9] *E.g.*, Doe v. Cahill, 884 A.2d 451 (Del. 2005).

[10] *E.g.*, Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D. Cal. 1999); Dendrite Int'l Inc. v. Doe No. 3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

[11] *E.g.*, *In re* Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26 (Cir. Ct. 2000).

Several state legislatures have also tried to address the scope of protections available to anonymous speakers,[12] but only one state has succeeded in passing legislation that outlines the standard by which an anonymous speaker's identity can be disclosed to the interested party.[13]

Two states have passed legislation that restricts the anonymous speech rights of convicted sex offenders.[14] The government, however, cannot restrict the right to free speech without complying with due process requirements of the Fifth Amendment because it is a fundamental right.[15]

Moreover, individuals need sufficient notice of what speech is protected.[16]

The First Amendment prohibits the government from enacting a law that "abridge[s] the freedom of speech,"[17] but such a right is not absolute and is subject to countervailing interests.[18] For example, the government has imposed restrictions on speech that may incite imminent lawless action,[19] fighting words,[20] speech before a hostile audience,[21] obscenity,[22] and defamation.[23] Although anony-

[12] *See infra* Part III.B.

[13] Virginia has enacted legislation that established a uniform standard for granting "John Doe" subpoenas, but does not directly restrict anonymous speech. *See* VA. CODE ANN. § 8.01-407.1 (2012). California considered similar legislation. A.B. 1143, 2003 Leg., Reg. Sess. (Cal. 2003), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1101-1150/ab_1143_bill_20030221_introduced.pdf (last visited Apr. 19, 2013). The measure passed in the Assembly, but was later abandoned by the state senate. *See Complete Bill History*, OFFICIAL CAL. LEGIS. INFO., http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab _1101-1150/ab_1143_bill_20041130_history.html (last visited Apr. 19, 2013). Georgia passed legislation criminalizing the transmission of data under a false name. *See* GA. CODE ANN. § 16-9-93.1 (West 2012). A federal court in Georgia interpreted this law as a restriction on anonymous speech and granted an injunction prohibiting the enforcement of the Act. *See* ACLU of Ga. v. Miller, 977 F. Supp. 1228, 1235 (N.D. Ga. 1997). New Jersey also considered a bill that would require individuals to register with websites before being allowed to post on those websites, significantly undermining the right to anonymity. *See* A.B. 1327, 212th Leg., 1st Sess. (N.J. 2006), *available at* http://www.njleg.state.nj.us/2006/Bills/A1500/1327_I1.PDF (last visited Apr. 19, 2013). Currently, the New York State legislature is considering the Internet Protection Act, which is similar to the New Jersey proposal. *See* A.B. 8688, 2012 Leg., 235th Sess. (N.Y. 2012), *available at* http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=A.8688&term=2011&Summary=Y&Text=Y (last visited Apr. 19, 2013); *see also infra* Part I.C.2.

[14] *See* Californians Against Sexual Exploitation Act, 2012 Cal. Legis. Serv. Prop. 35, § 12 (West) (to be codified at CAL. PENAL CODE § 290.015(a)(4) (West 2013)), *available at* http://vig.cdn.sos.ca.gov/2012/general/pdf/text-proposed-laws-v2.pdf#nameddest=prop35; GA. CODE ANN. § 42-1-12(a)(16)(K) (West 2008), *invalidated by* White v. Baker, 696 F. Supp. 2d 1289 (N.D. Ga. 2010).

[15] *See* U.S. CONST. amend. V.

[16] *See* FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.").

[17] U.S. CONST. amend. I.

[18] STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT: CASES, COMMENTS, QUESTIONS 2 (5th ed. 2011).

[19] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (holding that a state statute that prohibited speech that advocated violence, rather than the incitement of violence, was unconstitutional, because it infringed upon speakers' right to free speech).

[20] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). In *Chaplinsky*, the Court affirmed the conviction of a speaker who violated a state law that prohibited any person from addressing offensive, derisive, or annoying words to any other person, because the law was not unconstitutionally vague. *Id.* at 574.

[21] *See* Feiner v. New York, 340 U.S. 315, 318–21 (1951) (upholding the constitutionality of a statute that prohibited speech that may cause a breach of the peace because the state has the power to prevent the outbreak of violence).

[22] *See* New York v. Ferber, 458 U.S. 747, 763–64 (1982) (affirming constitutionality of a state statute that restricted the sale of pornography depicting children because the First Amendment does not protect child pornography and the law was not overbroad or vague); Miller v. California, 413 U.S. 15, 24 (1973) (holding that states may restrict the sale of pornographic "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value").

[23] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (holding that states may determine the standard for liability for newscasters who make defamatory statements regarding private individuals); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding that a publisher that makes an honest mistake of fact regarding the conduct of a public official cannot be held civilly liable, because the First Amendment protects the free discourse of ideas).

mous online speech may contain elements of speech that may be restricted, it also includes many protected areas of speech, including political speech and other expressive activities that may not be restricted. Thus, it is necessary to evaluate the extent to which the justifications for restricting speech apply to an online context and how such regulation can be shaped to prevent chilling protected elements of anonymous speech.

This Note proceeds in four parts. Part I discusses U.S. Supreme Court jurisprudence relating to speech regulations, civil liability that may curtail speech rights, and the history of anonymous speech in traditional contexts. Part II explores the arguments for and against strengthening anonymous speech rights in an online context. Part III discusses the various standards that courts use when determining whether to grant a subpoena request to disclose the identity of an anonymous speaker. Lastly, Part IV argues that courts should require plaintiffs to meet a modified summary judgment standard before allowing the disclosure of an anonymous speaker and that the legislature should not seek to ban anonymous online speech.

I. LEGAL LANDSCAPE OF ANONYMOUS ONLINE SPEECH PROTECTION

In the United States, the First Amendment protects the right to free speech, which is considered a fundamental right.[24] Despite the Amendment's broad language that "Congress shall make no law . . . abridging the freedom of speech,"[25] there is a near universal acceptance that the right to free speech includes some limits.[26] This part discusses the legal landscape of anonymous speech. Part I.A considers the standard of review of speech regulations, focusing on defamation and commercial speech. Part I.B then examines the history of anonymous speech regulation.

A. Speech Regulation Standards

The standard of scrutiny that the court applies in determining the constitutionality of a law often depends on the type of regulation and its relationship to the aims of the First Amendment.[27] A thresh-

[24] *See, e.g.*, *Sullivan*, 376 U.S. at 269–70 (discussing U.S. Supreme Court cases that considered the fundamental nature of free speech rights); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (discussing how the right to free speech is a "fundamental principle of the American government").

[25] U.S. CONST. amend. I.

[26] *See* SHIFFRIN & CHOPER, *supra* note 17, at 2. The most common example is that there is no right to falsely announce that there is a fire in crowded theater. *Id.*

[27] *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (stating that there is a narrow presumption of constitutionality when legislation restricts a right protected by the first ten amendments).

old question is whether the regulation seeks to proscribe limits on speech or activity.[28] If the law seeks to regulate speech, then the court must determine whether the legislation discriminates based on the content of the speech, whether the legislation is sufficiently specific to give individuals notice of their rights, and whether it limits only unprotected areas of speech.[29] The standard of review that the court applies depends, in part, on the type of regulation. This section discusses the standards for content-based regulation, the overbreadth and vagueness doctrines, and commercial speech.

1. Content-Based Regulations

Content-based regulations, which prohibit speech based on the ideas or subject matter of the speaker's message, are presumptively unconstitutional and subject to strict scrutiny.[30] Under the strict scrutiny standard, the government must prove that such regulations are narrowly tailored to serve a compelling governmental interest.[31] The Supreme Court has found that the government may restrict "fighting words"[32] and words that will incite imminent lawless action,[33] because the government has a compelling interest in maintaining public order and such restrictions do not significantly restrict a speaker's ability to convey a message.[34] The government, however, does not have a compelling interest in regulating speech "in order to maintain what [it] regard[s] as a suitable level of discourse within the body politic."[35]

Content-neutral regulations that restrict speech are subject to intermediate scrutiny because such regulations are less likely to discriminate against certain viewpoints or suppress public dialogue.[36] Under intermediate scrutiny, the government must show that the law is substantially related to an important governmental interest.[37] While content-neutral regulations can be innocent and have a minimal effect on speech, such as through reasonable time, place, and manner restrictions,[38] content-neutral

[28] *See* United States v. O'Brien, 391 U.S. 367, 376 (1968).

[29] *See id.* at 376–77.

[30] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). Strict scrutiny is a standard of review that courts use to evaluate the constitutionality of government action when it deprives an individual or group of individuals of a fundamental right. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 554 (4th ed. 2011). Strict scrutiny requires that the government show it has a compelling interest and that the means used are narrowly tailored or necessary to achieve those ends. *Id.*

[31] *See, e.g.*, *R.A.V.*, 505 U.S. at 395 (finding that an ordinance that regulates speech based on the hostility of content was invalid, because it is not narrowly tailored to serve the compelling government interest of protecting groups that have been historically subject to discrimination).

[32] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (establishing the "fighting words" doctrine under which the government may permissibly proscribe speech that may result in a breach of the peace).

[33] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (holding that speech may be regulated if it is reasonably calculated to incite "imminent lawless action and is likely to incite or produce such action").

[34] *See O'Brien*, 391 U.S. at 381; *Chaplinsky*, 315 U.S. at 572.

[35] Cohen v. California, 403 U.S. 15, 23 (1971).

[36] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

[37] *See* 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 3:2 (3d ed. 1996).

[38] *See id.*

laws may restrict a broader range of speech than content-based regulations.[39] Thus, a court is likely to review with greater judicial scrutiny a law that restricts the use of all anonymous speech, because it would significantly infringe upon speakers' ability to exercise their First Amendment rights.[40]

2. Doctrines of Overbreadth and Vagueness

Furthermore, any regulations on speech must be specific and have a defined scope.[41] A law is unconstitutionally vague when "a reasonable person cannot tell what speech is protected and what is permitted."[42] The limits must be clearly defined both to prevent arbitrary and discriminatory application of the law, and to ensure that individuals have sufficient notice of their rights.[43] The overbreadth doctrine is used to invalidate laws that impose greater restrictions than are constitutionally permissible.[44] These doctrines are particularly relevant in the context of anonymous speech regulation because the regulations must be specific enough to avoid restricting protected speech while being clear enough to give individuals notice of the permissible bounds of their rights.[45]

3. Commercial Speech Regulation

Commercial speech is entitled to less protection than other forms of speech.[46] The Supreme Court laid out the test for regulating commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[47] While there is no clear definition of commercial speech, Professor Erwin Chemerinsky describes commercial speech as a type of advertisement that refers to a specific product and was made with an economic motivation.[48] Under this standard, speech may be limited

[39] *Id.*

[40] *See id.*; *see also* Sharkey's, Inc. v. City of Waukesha, 265 F. Supp. 2d 984, 994 (E.D. Wis. 2003) (holding that content neutral laws "by no means receive a free pass under the First Amendment" (quoting Clarkson v. Town of Florence, 198 F. Supp. 2d 997, 1006 (E.D. Wis. 2002))).

[41] *See* SMOLLA, *supra* note 36, § 6:2.

[42] *See* CHEMERINSKY, *supra* note 29, at 970.

[43] *See id.*

[44] *See id.* at 972; *see also* SMOLLA, *supra* note 36, §§ 6:3–6:4.

[45] *See* SMOLLA, *supra* note 36, § 6:13. The doctrine of vagueness is not unique to speech regulation; it also applies in criminal law and for any deprivation of a constitutional liberty. *See id.*; *see also* United States v. Williams, 553 U.S. 285, 304 (2008) ("Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment."); Connally v. Gen. Constr. Co., 269 U.S. 385, 393 (1926) ("The dividing line between what is lawful and unlawful cannot be left to conjecture." (quoting United States v. Capital Traction Co., 34 App. D.C. 592, 598 (1910))).

[46] *See* Cent. Hudson Gas & Elec. Co. v. Pub. Gas Comm'n, 447 U.S. 557, 562–63 (1980) ("The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

[47] *Id.*

[48] *See* CHEMERINSKY, *supra* note 29, at 1125; *see also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 (1983) (finding a pamphlet to constitute commercial speech because it was an advertisement, referred to a single product, and the speaker had an economic motivation for the speech, but noting that any individual factor was not dispositive).

or proscribed if the speech concerns lawful activity and is not misleading, there is a substantial government interest, the regulation directly advances the government interest, and the regulation is narrowly tailored.[49] The *Central Hudson* test has since been modified, and now—although ostensibly still intermediate level review—it more closely resembles strict scrutiny.[50]

Courts have not yet developed a clear standard for identifying when anonymous online speech is commercial.[51] In some cases, courts have found anonymous speech that interferes with business practices or involves copyright infringement to constitute commercial speech.[52] In other cases, courts have found anonymous speech to be purely expressive and therefore not considered commercial speech.[53] Whether the classification of speech is relevant to determining the appropriate level of protection that courts and legislatures should afford speech will be discussed below.[54]

B. Speech Torts

Although the Constitution restricts the ability of the government to regulate speech, speakers may be held liable for the consequences of their speech in private actions. Speech may give rise to tort actions for defamation, invasion of privacy, and intentional infliction of emotional distress. This part discusses these speech torts and their applicability to online speech.

1. Defamation

Defamation is a tort that allows a plaintiff to bring a civil action to recover damages when he suffers reputational harm due to a defendant's speech.[55] Defamation includes the torts of libel, which occurs when the speech is written, and slander, which occurs when the speech is spoken.[56]

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[49] *See Cent. Hudson Gas & Elec. Co.*, 447 U.S. at 566.

[50] *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 360 (2002) (finding that a federal law restricting the ability of drug providers to advertise their drugs was unconstitutional because the government did not have a sufficient interest in regulating commercial speech in that context); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 562–66 (2001) (stating that strict scrutiny did not apply to a law restricting commercial speech, but conducting a thorough analysis of the state's justification to find the law unconstitutional); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 183–88 (1999); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 504 (1996) (noting that a prohibition on speech unrelated to consumer protection must be reviewed with "special care").

[51] *Cf. In re* Anonymous Online Speakers, 661 F.3d 1168, 1177 (9th Cir. 2011) ("We need not, however, decide if the speech at issue here constitutes commercial speech under the Supreme Court's definition in *Central Hudson*.").

[52] *See, e.g.*, Sony Music Entm't Inc. v. Does 1–40, 326 F. Supp. 2d 556, 558, 562–63 (S.D.N.Y. 2004) (analyzing a copyright infringement claim where there was a low speech interest).

[53] *E.g.*, Dendrite Int'l, Inc. v. Doe, No. 3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) (rejecting a subpoena request for an anonymous commenters' identity, because the plaintiff failed to show harm from an allegedly defamatory comment, and allowing the discovery would chill the commenter's speech rights).

[54] *See infra* Part IV.

[55] CHEMERINSKY, *supra* note 29, at 1078; *see also* Ryan M. 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, 1225–27 (2007).

[56] W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 771 (5th ed. 1984). Libel originated as a crime, while slander could only be

To prove defamation at common law, the plaintiff must show that the defendant made a false, defamatory comment regarding the plaintiff and that the comment was published.[57] A defamatory comment is one that injures the plaintiff's reputation or diminishes "the esteem, respect, good- will or confidence in which the plaintiff is held."[58]

In *New York Times Co. v. Sullivan*,[59] the Supreme Court added a mens rea element that requires plaintiffs to prove that that the publisher acted "with actual malice" when making a statement about a public official.[60]

This requirement means that the publisher knew the falsity of his statement or acted recklessly with regard to the truth.[61] However, a speaker who expresses an opinion, as determined by a court, cannot be held liable for defamation.[62] Although *Sullivan* applied only when the plaintiff was a public official and the defamatory comment related to his or her official conduct, the Court has extended the rule to apply to all public figures.[63]

Defamation is more likely to occur online than in print because there is less editorial oversight in online speech and because online speakers are not bound to the same professional and social mores that restrict journalists' and identified speakers' practices.[64] Defamation in an online context can be difficult to prosecute because in many cases it is obvious that the individual speaker is expressing his or her opinion rather than making a statement of fact.[65] For example, in *Doe v. Cahill*, the court found that readers of a news website would not take seriously comments that criticized a public official's performance as a city councilman, because readers would understand the comments to be opinion.[66] Given the generally informal nature of the internet, it is possible that a broad reading of "opinion" will hinder plaintiffs' ability to bring successful defamation claims.[67]

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brought as a criminal action in conjunction with another offense, such as sedition, blasphemy, or a breach of the peace. *Id.* at 785; *see also* Susan W. Brenner, *Should Online Defamation Be Criminalized?*, 76 MISS. L.J. 705, 709–14 (2007) (discussing the history of defamation law from its common law origins).

[57] *See, e.g.*, 19 AM. JUR. *Trials* § 499 (2012); 53 C.J.S. *Libel and Slander* § 87 (2012).

[58] KEETON ET AL., *supra* note 55, at 773.

[59] 376 U.S. 254 (1964).

[60] *Id.* at 279–80.

[61] *Id.*

[62] *See* RESTATEMENT (SECOND) OF TORTS § 558 (1977); *see also* KEETON ET AL., *supra* note 55, at 839–40.

[63] *See* Curtis Publ'g. Co. v. Butts, 388 U.S. 130, 155–56 (1967) (noting that the similarities in libel actions against public officials and public figures provided a basis for applying the *Sullivan* standard to public figures).

[64] *See* Brenner, *supra* note 55, at 741–42 (discussing how print publishing undergoes a filtering process, whereas online publishing does not).

[65] *See* Doe v. Cahill, 884 A.2d 451, 466 (Del. 2005) ("[A] reasonable person reading a newspaper in print or online, for example, can assume that the statements are factually based and researched. This is not the case when the statements are made on blogs or in chat rooms.").

[66] *Id.* at 465.

[67] S. Elizabeth Malloy, *Anonymous Blogging and Defamation: Balancing Interests on the Internet*, 84 WASH. U. L. REV. 1187, 1190–91 (2006).

2. Invasion of Privacy

Privacy torts may also lawfully restrict speech rights.[68] These torts stem from a general right to privacy, which Samuel Warren and Louis Brandeis characterized as a "general right of the individual to be let alone."[69]

Warren and Brandeis derived this right from the torts of defamation, invasion of property rights, and breach of implied contract.[70] The privacy torts include unreasonable intrusion, public disclosure of private facts, false light, and appropriation.[71] This section will discuss these torts and their relationship to speech rights.

a. Unreasonable Intrusion

The right to privacy protects an individual's right to be protected from unreasonable or offensive intrusion into her private affairs and concerns.[72] This right protects both physical privacy[73] and other intrusions, such as the prohibition on eavesdropping, restrictions on persistent, unwanted telephone calls, and prying into some forms of personal records.[74] The *Second Restatement of Torts* states that an individual will be liable for unreasonable intrusion if he intentionally intruded upon the solicitude or seclusion of another and the intrusion is highly offensive to a reasonable person.[75] While this tort is used in the internet context primarily to prevent information gathering that reasonable people would find offensive, it is also relevant to the concept of anonymous online speech.[76] An individual may have a claim against a speaker who publicizes a private fact that does not have public concern and the disclosure of which a reasonable person would find offensive.[77]

[68] The right to privacy from governmental intrusion developed in the line of cases started by *Griswold v. Connecticut*, 381 U.S. 479 (1965), is conceptually distinct from the right discussed in this Note.

[69] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

[70] *Id.* at 193–95.

[71] *See* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960); *see also* Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 8–9 (2007) (noting that Prosser's four categories of privacy torts have been incorporated into modern American jurisprudence); Maayan Y. Vodovis, Note, *Look over Your Figurative Shoulder: How To Save Individual Dignity and Privacy on the Internet*, 40 HOFSTRA L. REV. 811, 816–17 (2012) (noting that there are four recognized categories of privacy torts at common law).

[72] KEETON ET AL., *supra* note 55, at 854.

[73] The right to physical privacy includes the right to physical solitude, seclusion, and protection of the home. *Id.*

[74] *Id.* at 854–55.

[75] RESTATEMENT (SECOND) OF TORTS § 652B (1977).

[76] *See* Vodovis, *supra* note 70, at 817.

[77] *See* Abril, *supra* note 70, at 9.

b. Public Disclosure of Private Facts

Another category of privacy torts that is relevant in an online context is public disclosure of private facts. The exact requirements of the information that must be disclosed and the circumstances of the disclosure are debated.[78] For example, Prosser argues that to recover damages, a plaintiff must prove public disclosure of private facts that would be "highly offensive and objectionable to a reasonable person of ordinary sensibilities."[79] The *Second Restatement* includes an additional requirement that there is no public interest in the disclosure of the information.[80] Professor Hill, on the other hand, advocates for a more nuanced test that balances the extent of the disclosure with the character of the material that is disclosed.[81] All standards, however, agree that the disclosure must be "highly offensive and objectionable to a reasonable person of ordinary sensibilities."[82]

This tort reflects the tension between a speaker's First Amendment right to anonymous speech and others' common law rights and informational privacy interests.[83] While some commentators suggest that online speech should be given greater protection despite its sometimes offensive nature,[84] courts have generally applied a consistent standard to online- and offline-speech torts.[85] Such consistent treatment, however, may be problematic because anonymous online speech may pose unique harms, as discussed below in Part II.B.[86]

c. False Light

False light in the public eye occurs when an individual's speech or conduct characterizes another in an untrue manner or is deceptive.[87] This may, for example, include attributing articles or opinions to the speaker, unauthorized use of another's name on a petition, or filing suit on behalf of anoth-

[78] *Compare* RESTATEMENT (SECOND) OF TORTS § 652D cmt. d, *with* Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1258–62 (1976). For a modern assessment of Professor Hill's disagreement with the *Second Restatement*'s approach, see Robert D. Sack, *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill, "Defamation and Privacy Under the First Amendment,"* 100 COLUM. L. REV. 294, 310–13 (2000).

[79] KEETON ET AL., *supra* note 55, at 856–57.

[80] RESTATEMENT (SECOND) OF TORTS § 652D cmt. d.

[81] *See* Hill, *supra* note 77, at 1258–62.

[82] KEETON ET AL., *supra* note 55, at 856–57. Public figures, however, have a diminished right of privacy. *Id.* at 859–60.

[83] Anita L. Allen, *Privacy Jurisprudence As an Instrument of Social Change: First Amendment Privacy and the Battle for Progressively Liberal Social Change*, 14 U. PA. J. CONST. L. 885, 920–21 (2012).

[84] *See id.* at 924–25; *cf.* Amy Pomerantz Nickerson, Comment, *Coercive Discovery and the First Amendment: Towards a Heightened Discoverability Standard*, 57 UCLA L. REV. 841, 869–70 (2010) (suggesting that there should be a heightened standard before allowing discovery of speech-related activities).

[85] *See* Allen, *supra* note 82, at 924–25 ("[Courts] have tended to view speech that would be tortious off line as tortious online.").

[86] *See also* Abril, *supra* note 70, at 28 (suggesting a new analysis for the public disclosure tort in the online context); Malloy, *supra* note 66, at 1192–93 (discussing how online speech is more harmful than traditional modes of speech).

[87] *See* KEETON ET AL., *supra* note 55, at 863. The statement, however, does not necessarily need to be something negative about the plaintiff and can even involve statements that falsely enhance the plaintiff's reputation. *See* SMOLLA, *supra* note 36, § 24:3.

er.[88] As with defamation, in a false light claim the plaintiff must prove that the defendant acted with knowledge that the facts were wrong or acted with reckless disregard for the truth.[89] Unlike defamation, however, some states do not require the plaintiff to prove that there was an injury to his reputation.[90] Frequently, statements that give rise to a false light claim may be defamatory and give rise to an action for libel or slander.[91]

Nevertheless, the two actions protect different interests.[92] Defamation actions protect an individual's reputation, while false light actions protect the plaintiff's right to be left alone.[93]

d. Appropriation

Appropriation occurs when a defendant uses the plaintiff's name or likeness for the defendant's advantage or benefit.[94] Merely using another's name or publishing some aspects of another's person or property is insufficient unless it identifies a specific individual who can be recognized by others.[95] Appropriation may conflict with the First Amendment when an individual wants to use an image or likeness for disseminating the news or for publicity.[96] Appropriation oftentimes occurs in cases of copyright infringement — and thus courts may give such speech less protection than they gives to other forms of speech[97] — but the Supreme Court has held that the First Amendment may protect some forms of appropriation.[98]

3. Intentional Infliction of Emotional Distress

The tort for the infliction of emotional distress developed from a recognition that, in some cases, speech could cause significant injury.[99]

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[88] *See* KEETON ET AL., *supra* note 55, at 863–64.

[89] *See* Time, Inc. v. Hill, 385 U.S. 374, 387–88 (1967).

[90] *See* SMOLLA, *supra* note 36, § 24:3.

[91] *See* Flowers v. Carville, 310 F.3d 1118, 1132–33 (9th Cir. 2002) (allowing the plaintiff to maintain both false light and defamation claims); KEETON ET AL., *supra* note 55, at 864. *But see* Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1113–15 (Fla. 2008) (holding that Florida does not recognize a false light invasion of privacy tort because the overlap with defamation is too great).

[92] *See* KEETON ET AL., *supra* note 55, at 864.

[93] *See id.*; SMOLLA, *supra* note 36, § 24:3.

[94] *See* RESTATEMENT (SECOND) OF TORTS § 652C (1977); *see also* KEETON ET AL., *supra* note 55, at 851; SMOLLA, *supra* note 36, § 24:4.

[95] *See* KEETON ET AL., *supra* note 55, at 852–53.

[96] *See* Ann-Margret v. High Soc'y Magazine, 498 F. Supp. 401, 404–06 (S.D.N.Y. 1980) (finding that the right to free speech transcends the right to privacy where a defendant used an image of the plaintiff that had appeared in a popular movie); SMOLLA, *supra* note 36, § 24:4.

[97] *Cf.* SMOLLA, *supra* note 36, § 24:4.

[98] *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576–78 (1977) (holding that a plaintiff, whose performance was recorded and replayed on the news without his consent, may maintain an action against the broadcasting company, but noting that there are some cases in which the First Amendment would protect appropriation).

[99] *See* KEETON ET AL., *supra* note 55, at 56–57.

Although the tort originated from cases where the mental distress was associated with another tort, such as assault, battery, or false imprisonment,[100] courts created an independent action for purely mental distress.[101] An intentional infliction of emotional distress claim requires the plaintiff to prove that the defendant acted intentionally or recklessly, the conduct was extreme and outrageous, and it caused the plaintiff to suffer distress that no reasonable person could be expected to endure.[102] In these cases, the injury must be significant; a plaintiff cannot recover against mere insults, indignity, annoyance, threats, or rough language.[103] Although intentional infliction of emotional distress oftentimes may arise from speech, Professor Smolla argues that courts should not mischaracterize defamation or invasion of privacy claims as intentional infliction of emotional distress, because it would disrupt the First Amendment balances inherent in defamation or invasion of privacy claims.[104]

C. Anonymous Speech Regulation

As with all other forms of speech, the Supreme Court has recognized that the right to anonymous speech is not absolute. This part considers the development of the right to anonymous speech and the areas in which the Court has curtailed the right to anonymous speech.

1. Legal Support for Anonymous Speech Rights

Individuals in the United States have been exercising their right to speak anonymously since the time of the nation's founding.[105] The Supreme Court cited the history and importance of anonymous speech — particularly in the context of political speech — in *Talley v. California*,[106] in which the Court held unconstitutional a city ordinance that prohibited the distribution of anonymously printed handbills.[107] In *Talley*, the State argued that the restriction was not content based and was aimed at furthering a compelling government interest—preventing fraud, false advertising, and libel.[108] The Court held that while these were valid purposes, the ordinance was unconstitutional because it was not narrowly tailored to serve those ends as the ordinance was overbroad and would proscribe

[100] *Id.*

[101] *See* Wilkinson v. Downton, (1897) 2 Q.B. 57 (Eng.) (allowing a plaintiff, who suffered serious mental and physical consequences after falsely being told that her husband had been harmed in an accident, to recover against the speaker).

[102] *See* SMOLLA, *supra* note 36, § 24:8.

[103] *See* KEETON ET AL., *supra* note 55, at 59.

[104] *See* SMOLLA, *supra* note 36, § 24:8.

[105] *See supra* note 1 and accompanying text.

[106] 362 U.S. 60 (1960).

[107] *Id.* at 64–65.

[108] *See id.* at 64.

protected areas of speech.[109] The Court instead suggested that regulations specifically addressing fraudulent speech, false advertising, and libel would be more likely to be found constitutional.[110]

The Supreme Court expanded the protections for anonymous speech in *McIntyre v. Ohio Elections Commission*,[111] when it held unconstitutional a state law prohibiting the distribution of campaign literature that did not contain the name and address of the individual or organization issuing the literature.[112] The Ohio Supreme Court had distinguished *McIntyre* from *Talley* on the grounds that the Ohio regulation at issue in *McIntyre* was limited to speech that was "designed to influence voters in an election,"[113] whereas the California ordinance in *Talley* restricted any distribution of anonymous pamphlets.[114] The Court held that there was a strong interest in allowing anonymous political speech and that this provision should be subject to exacting—or strict—scrutiny because it was content based and involved an infringement on political expression.[115] In the Court's opinion, this was a standard that the State failed to meet.[116]

The Supreme Court has also recognized the right of anonymity in the context of the right to freedom of association.[117] In *NAACP v. Alabama ex rel. Patterson*,[118] the Supreme Court held that the government may not compel organizations to disclose the identities of their members because it may restrain members' freedom of association.[119] Although not directly applicable to the issue of anonymous speech, this case establishes that anonymity is a right that may be necessary to protect other fundamental rights.

Although the Supreme Court has not yet addressed the issue of anonymous speech rights in an online context, the Court has held that traditional First Amendment rights apply online.[120] In the case *In re Anonymous Online Speakers*,[121] the Ninth Circuit needed to determine whether a plaintiff could obtain a subpoena to reveal the identity of anonymous commenters who had been accused of tortiously interfering with the plaintiff's business by launching a smear campaign.[122] The court held that online speech "stands on the same footing as other speech—there is 'no basis for qualifying

[109] *Id.* at 62–64.

[110] *Id.* at 64.

[111] 514 U.S. 334, 342 (1995) ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.").

[112] *Id.* at 357.

[113] *Id.* at 344.

[114] *See id.*

[115] *Id.* at 346 (citing Meyer v. Grant, 386 U.S. 414, 420 (1988)).

[116] *Id.* at 357. The Supreme Court affirmed the right to anonymous speech more recently in *Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150 (2002), when it struck down a law that prohibited individuals from going door-to-door, finding that the law may chill ordinary neighborly conduct.

[117] *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

[118] *Id.*

[119] *Id.* at 462.

[120] *See* Reno v. ACLU, 521 U.S. 844, 870–72 (1997) (applying constitutional protections to invalidate a portion of the Communications Decency Act that prohibited indecent communications because the Act was not content neutral).

[121] 661 F.3d 1168 (9th Cir. 2011).

[122] *Id.* at 1172–73.

the level of First Amendment scrutiny that should be applied' to online speech."[123] Nevertheless, the court found that the anonymous online speakers' identities could be disclosed because their speech was not political speech and thus was subject to a lower level of protection.[124]

2. Regulation of Anonymous Speech

The Court has curtailed the right to anonymous speech through disclosure requirements in campaign finance laws that require individuals to disclose the amount of money they have contributed to political parties or candidate's campaigns. In *Buckley v. Valeo*,[125] the Supreme Court reviewed the constitutionality of the Federal Election Campaign Act of 1971 and the 1974 amendments.[126] The Act imposed a maximum contribution limit and required disclosures of contributions and expenditures over a certain threshold.[127] Challengers of the Act argued that the law restricted individuals' First Amendment rights, because campaign contributions are a form of expression and allow individuals to show support for a certain candidate or issue.[128] The challengers also argued that the disclosure requirements infringed upon their freedom of association.[129]

The Court, however, rejected these arguments, finding that, although donations are a form of expression and restrictions on them may infringe upon some speech rights, the restrictions did not undermine the ability of citizens to engage in meaningful debate about the candidates and the relevant issues.[130] The Court also found that the disclosure requirements did not violate individuals' First Amendment rights because the government was able to show that the disclosure served a legitimate governmental interest in maintaining the integrity of the political process, deterring corruption, and enforcing the caps on independent expenditure limits.[131]

The Supreme Court reaffirmed the government's ability to require disclosure in *Citizens United v. Federal Elections Commission*.[132] In one issue determined in *Citizens United*, the Court determined that the disclaimer and disclosure requirements of the Bipartisan Campaign Reform Act[133] did not

[123] *Id.* at 1173 (quoting *Reno*, 521 U.S. at 870).

[124] *Id.* See *infra* Part III.A for a discussion of the standards used by various courts in deciding whether to issue a subpoena to reveal the identity of an anonymous online commenter.

[125] 424 U.S. 1 (1976).

[126] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of 2 U.S.C.).

[127] 2 U.S.C. § 434(f) (2006). The Federal Election Campaign Act of 1971 created the Federal Election Commission and requires candidates and political committees to disclose their contributions, *id.* § 434, limits the contributions individuals can make to candidates, *id.* § 441a(a), imposes caps on presidential candidates' expenditures, *id.* § 441a(b), and imposes other caps on election spending, *id.* § 441a(a).

[128] *Buckley*, 424 U.S. at 14.

[129] *Id.* at 11.

[130] *See id.* at 29.

[131] *Id.* at 66–69.

[132] 130 S. Ct. 876, 913–15 (2010).

[133] Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended in scattered sections of 2 U.S.C and 36 U.S.C.). This Act amended the Federal Election Campaign Act of 1971 and imposed limits on soft money contributions, increased contribution limits for state commit-

violate the First Amendment because, although the requirements may burden speech, they did not prevent speakers from conveying their message.[134] However, the Court found that the regulation suppressing political speech on the basis of the speaker's corporate identity[135] and barring independent corporate expenditures violated the First Amendment.[136] In contrast, the Court upheld the disclaimer and disclosure requirements because it determined that the government's interest in providing the electorate with necessary information to make informed decisions justified the burden it imposed on speech.[137]

II. LEGAL AND POLICY IMPLICATIONS OF ANONYMOUS ONLINE-SPEECH PROTECTIONS

Although the right to anonymous speech is not absolute, the reasons for restricting anonymous speech—such as those advanced in *Buckley* and *Citizens United*—may not be applicable to anonymous online speech because the same countervailing justifications for restrictions may not be present. The Supreme Court has specifically held that *Buckley* does not operate to restrict anonymous speech rights in other contexts because the justification in *Buckley* was limited to avoiding the appearance of corruption and to enforce campaign finance restrictions.[138]

To determine the degree of protection that courts should afford anonymous online speakers, it is necessary to examine the justifications for protecting free speech. Part II.A discusses the historic justifications for free speech protection, focusing on the importance of anonymous speech. Part II.B explores the countervailing justifications for restricting anonymous speech.

A. Rationales for Protecting Anonymous Online Speech

Historically, speech has been protected because it promotes the free exchange of ideas, which is necessary to discover the truth,[139] self-govern, check governmental power, and protect individual

tees of political parties, and imposed reporting requirements on independent expenditures, among other things. *Id.*

[134] *Citizens United*, 130 S. Ct. at 913–14.

[135] *Id.* at 913.

[136] *Id.*

[137] *Id.* at 914.

[138] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 354 (1995) ("Required disclosures about the level of financial support a candidate has received from various sources are supported by an interest in avoiding the appearance of corruption that has no application to this case.").

[139] The truth-seeking function of speech, or the notion of a "market place of ideas," derives from Justice Oliver Wendell Holmes's dissent

autonomy and liberties.[140] These same concerns apply to speech on the internet and can be used to justify extending First Amendment protections to anonymous online speakers.[141] The internet represents a new medium of communication and anonymous bloggers may be considered "the modern- day equivalent of the revolutionary pamphleteer who passed out news bulletins on the street corner."[142] As such, commentators argue that those speakers should not be required to disclose their identities unless the plaintiffs can show that they may have a legitimate claim against the speaker.[143] Courts and commentators agree that anonymous online speech should be protected because the values inherent in promoting free speech continue to apply in an online context,[144] the justifications that exist for restricting anonymous speech in other contexts[145] do not apply to online speech, and the government should protect speakers' legitimate expectations of privacy.[146]

Although *Buckley v. Valeo* upheld disclosure requirements, at least one scholar has suggested that courts reconsider the disclosure requirement in light of technological developments and increased concern for privacy.[147]

Professor Amy Sanders argues that anonymous commenters have an expectation of privacy that should not be defeated unless there is a compelling reason or unless the commenter agreed to disclosure when posting on the website.[148] Courts recognize that if government actions diminish speakers' expectations of privacy, speakers are more likely to restrain their speech, thereby resulting in a chilling effect that deprives individuals of their rights to speak anonymously.[149]

Proponents of broad speech protection argue that anonymous speech helps promote the truth-seeking function by allowing individuals to express themselves without fear that they may be har-

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in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[140] *See* Nickerson, *supra* note 83, at 869–70.

[141] *See* Reno v. ACLU, 521 U.S. 844, 870 (1997) (extending First Amendment protection to online speech).

[142] David L. Hudson, Jr., *Blogs and the First Amendment*, 11 NEXUS 129, 131 (2006) (quoting Sen. John Cornyn) (internal quotation marks omitted); *see also* Daniel J. Solove, *A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere*, 84 WASH. U. L. REV. 1195, 1196 (2006) (discussing Glenn Reynolds's assertion that modern bloggers may supplement and challenge traditional media coverage).

[143] Jocelyn Hanamirian, Note, *The Right To Remain Anonymous: Anonymous Speakers, Confidential Sources and the Public Good*, 35 COLUM. J.L. & ARTS 119, 119 (2011); Hudson, *supra* note 141, at 132.

[144] *See Reno*, 521 U.S. at 870 (holding that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to [the internet]").

[145] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 354 (1995).

[146] *See* Nathaniel Gleicher, *John Doe Subpoenas: Towards a Consistent Legal Standard*, 118 YALE L.J. 320, 360–61 (2008) (discussing how various courts have inquired into the defendant's expectation of privacy). *Compare* Sony Music Entm't Inc. v. Does 1–40, 326 F. Supp. 2d 556, 565 (S.D.N.Y. 2004) (noting that the court should consider the parties' expectation of privacy when deciding whether to allow discovery of identifiable information from an ISP), *with* Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 762 (N.J. Super. Ct. App. Div. 2001) (looking to a website's privacy policy to determine whether defendants had a reasonable expectation of privacy).

[147] William McGeveran, *Mrs. McIntryre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 7 (2003).

[148] Amy Kristin Sanders & Patrick C. File, *Giving Users a Plain Deal: Contract-Related Media Liability for Unmasking Anonymous Commenters*, 16 COMM. L. & POL'Y 197, 207–08 (2011).

[149] *See* White v. Baker, 696 F. Supp. 2d 1289, 1310–11 (N.D. Ga. 2010) (holding that a law that would require the plaintiff to disclose his online identity would chill his right to anonymous online speech); Doe v. Cahill, 884 A.2d 451, 462 (Del. 2005) ("[A]llowing a defamation plaintiff to unmask an anonymous defendant's identity through the judicial process is a crucial form of relief that if too easily obtained will chill the exercise of First Amendment rights to free speech."). *But see* Clay Calvert et al., *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 (2009) (discussing how the internet can be harmful when abused by anonymous speakers).

assed, socially ostracized, or that they may lose their jobs.[150] Furthermore, they argue, anonymity helps ensure that the merits or value of the speaker's message is not discounted, stereotyped, or prejudged on the basis of the speaker's characteristics.[151]

Commentator Mike Godwin notes that online speech and the internet can help promote pluralism by allowing individuals to reach a broader audience.[152]

Proponents of free speech note that broad speech rights provide a check on government power because they allow citizens to voice their grievances or note when public officials behave in a manner that is unacceptable to their constituents.[153] Anonymous speech advances that interest by allowing citizens to voice their concern without fear of direct or indirect reprisal.[154]

Furthermore, protecting the privacy interests of anonymous speakers helps to advance their individual autonomy by "enabling people to engage in unconventional activities and express unpopular ideas without fear of retaliation."[155] The ability of individuals to express their opinions and inner thoughts may give those individuals a sense of intrinsic satisfaction because they can explore new ideas and new identities.[156]

In balancing the interests between speakers and those who may be harmed by speech, commentators have argued that the government should take a pragmatic approach by offering greater protection to the speakers and allowing individual companies or website administrators to take responsibility for restricting such speech.[157] Since website administrators—as nongovernmental actors—are not bound by First Amendment limitations, they may be in a better position to vindicate the rights of those who might be harmed by anonymous speech.[158] As discussed below, however, such an approach may lead to other significant problems.[159]

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[150] *See* Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1570–74 (2007); Nickerson, *supra* note 83, at 847–48.

[151] *See* Brenner, *supra* note 55, at 743–44 ("[T]he less we know about the author of online content, the more difficult it is for us to assess the merits of what she says."); Martin, *supra* note 54, at 1220 (citing IAN C. BALLON, E-COMMERCE AND INTERNET LAW: TREATISE WITH FORMS § 1:06 (2004)).

[152] *See* MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE 298 (1998) (discussing how the rise in internet speech can lead to "radical pluralism").

[153] Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 542 (1977). The role of anonymous online speech in promoting democracy may be best illustrated through the use of social media in recent uprisings in Iran and Egypt. *See, e.g.*, Nassim Nazemi, Note, *DCMA § 512 Safe Harbor for Anonymity Networks Amid a Cyber-Democratic Storm: Lessons from the 2009 Iranian Uprising*, 106 NW. U. L. REV. 855, 866–67 (2012) ("[A]rrests [for posting on social media] helped shine a floodlight on the importance of unfiltered Internet access and online anonymity to U.S. democratization efforts abroad and U.S. access to world news . . . .").

[154] *See, e.g.*, Solove, *supra* note 141, at 1199.

[155] *Id.*

[156] Lidsky & Cotter, *supra* note 149, at 1568–69.

[157] *Id.* at 1577, 1582–86 (arguing that there is a fundamental assumption that audiences of speech are rational and capable of self-governance, and that the Supreme Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), is an example of this assumption).

[158] For example, *The New York Times* allows anonymous or pseudonymous comments on its website but requires users to register their email addresses and reserves the right to moderate or remove comments. *See Comments & Readers' Reviews*, N.Y. TIMES, http://www.nytimes.com/content/help/site/usercontent/usercontent.html (last visited Apr. 19, 2013). Other websites may require the individual to sign in with a social media account, such as Facebook or Twitter. *See Comments and Discussion*, WASH. POST, http://www.washingtonpost.com/wp-srv/interactivity/policy/discussion_faq.html (last visited Apr. 19, 2013) (allowing commenters to post through either social media applications or a registration system).

[159] *See infra* notes 349–52 and accompanying text.

B. Rationales for Restricting Anonymous Online Speech

Despite the compelling reasons for allowing anonymous online speech, there are nonetheless strong arguments for restricting such speech. First, protecting anonymous online speech may not advance traditional free- speech goals because it is not the type of speech that the Supreme Court contemplated in *Talley* and *McIntyre*. Second, ubiquitous anonymous speech may actually restrict the free discourse of ideas. Third, it may increase antisocial behavior that adversely impacts minority groups.[160]

Scholars cite to these countervailing interests to suggest that the government should adopt lower protections for anonymous online speech.[161]

Although the values underlying speech are to discover truth, promote self-governance, and promote individual liberty, in practice, commentators note that most anonymous online speech has low speech value and is thus entitled to lesser protection.[162] A narrow reading of *Talley* and *McIntyre* suggests that the Supreme Court was protecting political privacy rather than creating a broad right to anonymity.[163] Anonymous online speech, by contrast, includes a broader range of speech that may not be political in nature or promote self-governance and democratic principles.[164] Professor James Gardner argues that anonymity allows individuals to act disingenuously and to escape accountability for their actions and opinions, which is antithetical to a healthy political system.[165] As such, the interests of others who may be harmed by anonymous online speech justify certain restrictions on anonymous speech.[166]

Professor James Gardner points out that anonymous online speech may not help promote the free discourse of ideas because internet forums tend to attract like-minded individuals, which may merely reinforce individuals' comments and beliefs.[167] This group polarization can hinder the free discourse of ideas and inhibit the truth-seeking function of speech because individuals with competing viewpoints are not directly engaging with one another in an attempt to persuade others or to discover the truth, but rather merely espousing similar views.[168] Because empirical evidence sug-

[160] *See, e.g.*, Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 64 (2009) (discussing the growth of anonymous online mobs that attack minority groups); Michael L. Siegel, Comment, *Hate Speech, Civil Rights, and the Internet: The Jurisdictional and Human Rights Nightmare*, 9 ALB. L.J. SCI. & TECH. 375, 381 (1999) (discussing how hate groups have used the internet to spread their message).

[161] *See* Gleicher, *supra* note 145, at 330–31 (discussing how the problems with online harassment of minority groups complicate traditional speech analysis).

[162] *See* Malloy, *supra* note 66, at 1190–91 (discussing how some online speakers are careless and irresponsible); Solove, *supra* note 141, at 1196–97 (comparing different types of bloggers and concluding that most blogs have low value).

[163] *See* Calvert et al., *supra* note 148, at 11–13.

[164] *See id.* (suggesting that the right to anonymous speech should be limited to political speech, which was at issue in the relevant Supreme Court precedent).

[165] James A. Gardner, *Anonymity and Democratic Citizenship*, 19 WM. & MARY BILL RTS. J. 927, 940–41 (2011) (citing John Stuart Mill's opposition to the secret ballot and anonymous speech in a political system).

[166] *See* GODWIN, *supra* note 151, at 299 (discussing the rationality of the fear that an anonymous commenter may leave a victim with a damaged reputation and no remedy).

[167] Gardner, *supra* note 164, at 945.

[168] *See id.* at 930.

gests that anonymity may increase antisocial behavior, Professor Gardner suggests that deterring some speech may in fact be desirable.[169]

Moreover, Professor Danielle Citron argues, the rights of anonymous online speakers should be curtailed to the extent that those rights conflict with those of disadvantaged and vulnerable groups.[170] Those in favor of broad speech protection for anonymous online speakers argue that anonymity protects individuals from being harassed for their opinions.[171]

However, Professor Citron notes that those advocates fail to recognize that the internet has become a "breeding ground[]" for intolerant and extremist groups.[172] These anonymous speakers attack members of traditionally disadvantaged groups and can escape reprisal through their anonymity.[173]

Although current First Amendment jurisprudence does not permit the government to impose categorical prohibitions on hate speech,[174] anonymity precludes speakers from the scrutiny and social sanctions that they would face if they made the speech in person.[175] Protecting those who might be injured by harmful speech provides justifications for adopting a flexible disclosure standard for anonymous speakers.[176]

Additionally, Professor Daniel Solove suggests that anonymous speech rights should be curtailed because they often infringe upon the privacy rights of others.[177] Although speech that is of public concern is given a great deal of protection, private speech—like gossip—is given much less protection.[178] Professor Solove argues that anonymous internet speech should get less protection because it often relates to private concerns.[179]

Professor Citron posits that restricting the right of private-concern speech will improve the exchange of ideas and promote political, social, and economic equality.[180] When speakers attack and inspire a sense of fear in others based on issues of private concern, Professor Citron believes that those victims are more likely to leave the online forum than to use additional speech to challenge the attackers' position, contradicting the underlying premise of the truth-seeking rationale of free speech.[181]

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[169] *Id.* at 947.

[170] *See* Citron, *supra* note 159, at 93–95 (discussing the role of anonymity in civil rights

[171] *See, e.g.*, Lidsky & Cotter, *supra* note 149, at 1570–73; Martin, *supra* note 54, at 1220; Nickerson, *supra* note 83, at 847–48.

[172] Citron, *supra* note 159, at 62, 69–81.

[173] *See id.* at 66 (discussing how the structure of the internet allows individuals to escape social stigma for abusive acts).

[174] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992) (holding a city ordinance that prohibited bias-motivated disorderly conduct facially unconstitutional, because it was a content-based regulation of a category of speech that was not otherwise subject to regulation, such as fighting words).

[175] *See* Brenner, *supra* note 55, at 745 (discussing how anonymity allows individuals to engage in antisocial behaviors).

[176] *See* Calvert et al., *supra* note 148, at 14–15; Citron, *supra* note 159, at 94.

[177] Solove, *supra* note 141, at 1198–99.

[178] *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776–77 (1978).

[179] Solove, *supra* note 141, at 1198.

[180] Citron, *supra* note 159, at 99–104.

[181] *Id.* at 101.

Finally, anonymous speech increases search costs.[182] When individuals are associated with their ideas, it helps the public to evaluate the veracity of those messages and to learn of the speakers' potential biases, allowing the public to make more informed decisions as to whether to accept the speaker's message.[183] Although the public may learn of these circumstances or biases through other mechanisms, knowing the speaker's identity helps lower search costs, making it easier to reach a determination regarding the truthfulness or accuracy of a statement.[184]

III. CURRENT SPEECH REGULATIONS

Courts and legislatures have both recognized the tension between protecting anonymous speech rights and guarding against the dangers of unrestricted anonymous online speech. Courts have had to determine whether to grant plaintiff subpoena requests seeking to identify allegedly tortious anonymous speakers. Meanwhile, several state legislatures have passed or attempted to enact legislation that would ban or restrict anonymous online-speech rights. Part III.A discusses the various standards that courts have adopted for granting such subpoena requests. Part III.B considers the various laws that state legislatures have proposed to ban or restrict anonymous online speech.

A. Subpoena Standards for Identity Disclosure

Courts today are faced with the task of determining the appropriate level of protection for anonymous speakers accused of tortious speech. Speakers can communicate anonymously on the internet in a variety of fora, including blogs, chat rooms, message boards, and websites.[185] Under the Communications Decency Act,[186] the Internet Service Provider (ISP) or website host is not considered to be the speaker or publisher of any material that was provided by another user.[187] Thus, they cannot be held civilly liable for "violent, harassing, or otherwise objectionable" material, regardless

[182] *See* Brenner, *supra* note 55, at 743–44.

[183] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 382–83 (1995) (Scalia, J., dissenting) (discussing how allowing anonymous speech makes it easier for people to be untruthful, thus making it more difficult for voters to discover the truth); Amy Constantine, Note, *What's in a Name?* McIntyre v. Ohio Elections Commission*: An Examination of the Protection Afforded to Anonymous Political Speech*, 29 CONN. L. REV. 459, 469–70 (1996).

[184] *See* Lidsky & Cotter, *supra* note 149, at 1565–66 (analogizing trademarks to authorial identity to demonstrate that individuals may rely on the author's reputation as a proxy for the statement's reliability).

[185] Susanna Moore, *The Challenge of Internet Anonymity: Protecting John Doe on the Internet*, 26 J. MARSHALL J. COMPUTER & INFO. L. 469, 470 (2009). Situations in which speakers identify themselves, such as through social media, are beyond the scope of this Note.

[186] Communications Decency Act of 1996, Pub. L. 104-104, 110 Stat. 133 (codified at 47 U.S.C. §§ 230, 560–61).

[187] 47 U.S.C. § 230(c)(1) (2006).

of whether the content is constitutionally protected.[188] As such, claimants challenging the content on a website must bring a suit directly against the person who posted the objectionable material on the website.

Currently, to obtain the identity of an anonymous speaker, a potential plaintiff must first subpoena the website administrator for the speaker's registration information or Internet Protocol address (IP address).[189] Then, the potential plaintiff would need to contact the appropriate ISP to obtain the actual identity of the speaker based on the IP address.[190] This stage may require a second subpoena.[191] This process is controversial because it allows plaintiffs, oftentimes corporate actors, to initiate lawsuits and obtain discovery of speakers' identities without allowing the anonymous commenters an opportunity to challenge the subpoena request.[192]

Frequently, individuals and businesses that are harmed by anonymous speech may be motivated to initiate lawsuits by a desire to silence their critics rather than by a desire to obtain redress for actual harm.[193] These lawsuits are oftentimes referred to as "Strategic Lawsuits Against Public Participation," or SLAPP suits.[194] To prevent legal process from being used to chill speech, several states have enacted anti-SLAPP statutes.[195]

This section reviews the various standards that courts have applied when determining whether to grant a subpoena for the identity of an anonymous speaker and discusses commentators' responses to these standards.[196]

1. Good Faith Standard

Of the various standards, Virginia has adopted the least protective standard for granting subpoenas to reveal the identity of potential anonymous online speakers. In *In re Subpoena Deuces Tecum to America Online*,[197] a trial level court adopted the good-faith standard in a case where a corporate plaintiff sued individuals for publishing "defamatory material misrepresentations and confidential

[188] *Id.* § 230(c)(2)(A).

[189] *See* Moore, *supra* note 184, at 472; *see also* Sony Music Entm't Inc. v. Does 1–40, 326 F. Supp. 2d 556, 558–59 (S.D.N.Y. 2004); Doe v. Cahill 884 A.2d 451, 454–55 (Del. 2005).

[190] *See Sony Music*, 326 F. Supp. 2d at 558–59; *Cahill* 884 A.2d at 454–55; Moore, *supra* note 184, at 472.

[191] *See Sony Music*, 326 F. Supp. 2d at 558–59; *Cahill* 884 A.2d at 454–55; Moore, *supra* note 184, at 473.

[192] David Sobel, *The Process That "John Doe" Is Due: Addressing the Legal Challenge to Internet Anonymity*, 5 VA. J.L. & TECH 3, 14 (2000).

[193] Victoria S. Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL'Y 405, 415 (2003).

[194] *Id.* at 416.

[195] *Id.* Twenty states have enacted anti-SLAPP laws: California, Delaware, Florida, Georgia, Indiana, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, and Washington. *Id.* at 416 n.50.

[196] *See, e.g.*, Calvert et al., *supra* note 148, at 16–26; Gleicher, *supra* note 145, at 350–57; Malloy, *supra* note 66, at 1189–90; Martin, *supra* note 54, at 1228–37; Matthew Mazzotta, Note, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. REV. 833, 844–59 (2010); Moore, *supra* note 184, at 473–81; Nickerson, *supra* note 83, at 864–68.

[197] *In re* Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26 (Cir. Ct. 2000), *rev'd on other grounds sub nom.* Am. Online v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001). The Circuit Court of Virginia is a trial court.

material insider information."[198] Under the good-faith standard, a court will grant a subpoena if the court is "satisfied by the pleadings or evidence supplied to that court," the requesting party has a legitimate, good-faith belief that the speech was actionable, and the requested information is necessary to advance the claim.[199] The Virginia Supreme Court reviewed this case, but did not render a decision on the discovery standard used by the trial court.[200] The Virginia legislature adopted the trial court's standard and has codified it into law.[201]

The Virginia trial court recognized that a low threshold for obtaining the identity of speakers would limit the free speech rights of anonymous speakers.[202] The court reasoned, however, that the potential dangers from revealing the plaintiff's confidential information were greater than the anonymity interests of online speakers.[203] Furthermore, the court reasoned that the state had a compelling interest in protecting companies from such wrongful conduct.[204] Thus, the court decided to adopt a good-faith standard for subpoena disclosures.[205]

Proponents of the good-faith standard argue that traditional libel law and the remedies it provides are not suited to addressing the challenges of an online context and, thus, different standards should be applied for online libel as opposed to traditional print libel.[206] Specifically, they argue, internet speech has greater permanence, reaches a broader audience, and thus can have a larger impact.[207] They believe that adopting a less demanding test for disclosing the identity of the anonymous online speakers would help enforce current libel laws by making it easier for plaintiffs to bring claims for defamation.[208]

Professor Michael Vogel argues that additional standards at the subpoena stage create unnecessary challenges for plaintiffs because the current Federal Rules of Civil Procedure provide sufficient protection to anonymous speakers.[209] Professor Vogel notes that plaintiffs searching for an anonymous speaker are unlikely to waste resources and effort unless they believe that they have a viable legal claim, because initiating a lawsuit can be time consuming and cumbersome.[210] Furthermore, plaintiffs are unlikely to pursue false claims, because they may be subject to Rule 11 sanctions.[211]

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[198] *Id.* at 26–27.

[199] *Id.* at 37.

[200] Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

[201] *See* VA. CODE ANN. § 8.01-407.1 (2012).

[202] *Am. Online I*, 52 Va. Cir. at 35.

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *See* Lyrissa B. Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1373, 1390–91 (2009).

[207] *See* Brenner, *supra* note 55, at 745–46; Martin, *supra* note 54, at 1234.

[208] *See* Constantine, *supra* note 182, at 470 (arguing that liberal disclosure laws are necessary to enforce the law).

[209] Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OR. L. REV. 795, 854–55 (2004).

[210] *Id.* at 854.

[211] *See id.* at 855; *see also* FED. R. CIV. P. 11(c); 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1336 (3d ed. 2004). Rule 11 of the Federal Rules of Civil Procedure requires lawyers to certify that any claim, defense or legal contention they make in a pleading or written motion to the court is warranted by existing law or a nonfrivolous reason for extending the law. *See*

Thus, Professor Vogel argues, it is unnecessary to provide additional legal protections for anonymous speakers, and a good-faith subpoena standard adequately balances the interests of anonymous speakers with potential victims of anonymous speech.[212]

Opponents of the good-faith test find that the good faith standard is the least exacting standard and criticize it as insufficient to protect the rights of anonymous speakers because it is too easily satisfied.[213] These opponents argue that the good-faith test does not establish a practical or reliable standard of determining the plaintiff's actual reasons for filing the lawsuit, essentially depriving the defendant of any right to anonymity.[214]

Furthermore, they believe that the good faith standard fails to provide courts with any guidance as to how the standard should be applied or what amount of pleading or evidence is necessary to "satisfy" the court that a commenter's identity should be disclosed.[215]

2. Balancing Test Standards

In *Columbia Insurance Co. v. Seescandy.com*,[216] the Northern District of California established the prima facie test for granting a subpoena in a case where the defendant allegedly committed trademark infringement under federal and California law.[217] Under the prima facie standard, a court should grant a subpoena that reveals the identity of a defendant if the plaintiff: identifies the party with specificity,[218] makes a good-faith effort to locate the individual and complies with service of process,[219] can withstand a motion to dismiss,[220] and has filed a discovery request that explains why the information is sought and identifies a limited number of persons on whom discovery process might be served.[221] The key difference between this test and the good-faith standard is that the *Seescandy* test requires the plaintiff to provide notice and withstand a motion to dismiss, while the good-faith standard has no such requirement.[222]

FED. R. CIV. P. 11(b)(2); *see also* 5A WRIGHT & MILLER, *supra*, § 1334.

[212] *See* Vogel, *supra* note 208, at 855.

[213] Calvert et al., *supra* note 148, at 41; Martin, *supra* note 54, at 1228.

[214] *See, e.g.*, Solers, Inc. v. Doe, 977 A.2d 941, 952 (D.C. 2009) ("The good faith test . . . may needlessly strip defendants of anonymity in situations where there is no substantial evidence of wrongdoing, effectively giving little or no First Amendment protection to that anonymity."); Calvert et al., *supra* note 148, at 41.

[215] *See, e.g.*, Moore, *supra* note 184, at 474 (theorizing that "satisfied by the pleading" likely did not include a substantive review of the plaintiff's claims).

[216] 185 F.R.D. 573 (N.D. Cal. 1999).

[217] *Id.* at 576; *see also* Sony Music Entm't, Inc. v. Does 1–40, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004) (applying a balancing test in a case alleging copyright infringement for illegal use of file-sharing programs because even though "file sharing is not engaging in true expression," it is still "entitled to First Amendment protection").

[218] Columbia Ins. Co., 185 F.R.D. at 578.

[219] *Id.* at 579.

[220] *Id.* at 579–80.

[221] *Id.* at 580.

[222] *Compare id.*, *with In re* Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26 (Cir. Ct. 2000).

In *Seescandy*, the Northern District of California recognized that the need to provide redress to injured parties must be balanced against the right of individuals to speak anonymously online.[223] The court also recognized that if the standard for revealing subpoenas is too low, individuals could use the discovery process to harass or intimidate individuals who have committed no wrongful act.[224] By requiring the plaintiff to show that it could survive a motion to dismiss, the court believed that it could minimize or prevent the use of discovery in harassing or intimidating anonymous online speakers.[225]

After reviewing *Seescandy*, the Appellate Division of the Superior Court of New Jersey adopted a more demanding version of the prima facie test in *Dendrite International, Inc. v. Doe*.[226] That case arose when anonymous speakers posted allegedly defamatory comments regarding a corporation on a Yahoo! message board.[227] The court held that it would grant the plaintiff's subpoena request if (1) the plaintiff attempted to notify the anonymous posters that they were subject to a subpoena or application for disclosure, (2) the plaintiff identified the statements that constitute actionable speech, (3) the court determined that the plaintiff had a prima facie case against the John Doe defendant that was supported by an evidentiary showing, and (4) the court balanced the defendant's First Amendment right to anonymous speech against the necessity of disclosure for the plaintiff's action to proceed.[228]

Although both the *Dendrite* test and the *Seescandy* test require the plaintiff to identify the defendant, attempt to notify the plaintiff of the pending action, and demonstrate a prima facie case, the *Dendrite* court interpreted the motion to dismiss standard as being more flexible than did the district court in *Seescandy*.[229] The *Dendrite* court indicated its belief that the First Amendment concerns in *Seescandy* were less serious than those in *Dendrite*, because *Seescandy* involved a trademark infringement suit while *Dendrite* involved an allegation of defamation; therefore, the *Dendrite* court adopted a test that more strongly considered the First Amendment concerns.[230] The *Dendrite* test interpreted the *Seescandy* test's motion-to-dismiss prong as a "flexible, non-technical, fact-sensitive mechanism" to ensure that plaintiffs do not abuse the judicial system to harass online speakers or chill online speech.[231] Thus, the court held that it was appropriate for the trial court judge to require evidence of the plaintiff's prima facie case when deciding whether to dismiss the case.[232]

Proponents of the *Dendrite* balancing approach believe that it does not state the right to anonymous speech too broadly, and that it establishes a standard that plaintiffs can potentially meet,

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[223] *Columbia Ins. Co.*, 185 F.R.D. at 578.

[224] *Id.*

[225] *Id.* at 578–79.

[226] 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

[227] *Id.* at 763.

[228] *Id.* at 760–61; *see also* Moore, *supra* note 184, at 478–80.

[229] *Cf. Dendrite*, 775 A.2d at 771.

[230] *Id.* at 767.

[231] *Id.* at 771.

[232] *Id.* at 760.

as demonstrated by cases in which courts have granted plaintiffs' discovery requests.[233] They also believe that the various prongs of *Dendrite* adequately consider the interests of both parties by looking at the sufficiency of the plaintiff's case, which helps to protect the defendant's anonymity unless there is a valid justification.[234]

Professor Vogel has criticized the *Dendrite* balancing test because it grants the trial court judge too much discretionary power, since the test requires the judge to look to the merits of a potential claim.[235]

Furthermore, he argues, the trial judge's determination is reviewed on an abuse of discretion standard, which makes it very difficult for the appellate court to reverse the lower court's determination.[236] This discretionary power can essentially deprive the plaintiff of his right to seek redress because the lawsuit cannot proceed without determining the identity of the defendant.[237]

3. Summary Judgment Standard

In *Doe v. Cahill*,[238] the Delaware Supreme Court established the summary judgment standard—one of the most demanding standards for granting a subpoena—to decide whether disclose an anonymous onlinenm speaker's identity.[239] The *Cahill* standard requires a plaintiff to "support his defamation claim with facts sufficient to defeat a summary judgment motion,"[240] make reasonable efforts to notify the defendant, and "submit sufficient evidence to establish a prima facie case for each essential element of the claim in question."[241] The court noted, however, that the plaintiff would not be required to provide evidence for those elements for which it would be impossible to obtain evidence without knowing the defendant's identity.[242] For example, in a public figure defamation case, the plaintiff would be required to "prove that: (1) the defendant made a defamatory statement; (2) concerning the plaintiff; (3) the statement was published; . . . (4) a third-party would understand the character of the communication as defamatory . . . [and] that (5) the statement is false."[243] The plaintiff would not be required to prove that the defendant made the statement with

[233] *See, e.g.*, Lidsky & Cotter, *supra* note 149, at 1601–02 (including a balancing prong in their test to determine whether to grant a subpoena request); Mazzotta, *supra* note 195, at 862–63; Moore, *supra* note 184, at 483.

[234] Mazzotta, *supra* note 195, at 862–63 (discussing how balancing tests give courts the greatest discretion to consider the specific facts of the case); Moore, *supra* note 184, at 484.

[235] Vogel, *supra* note 208, at 809.

[236] *Id.*

[237] *Id.* at 809–10.

[238] 884 A.2d 451 (Del. 2005).

[239] *Id.* at 457.

[240] Moore, *supra* note 184, at 477.

[241] *Cahill*, 884 A.2d at 463 (citing *In re* Asbestos Litig., 799 A.2d 1151, 1152 (Del. 2002)).

[242] *Id.* at 463.

[243] *Id.*

actual malice.[244] The court denied the plaintiff's subpoena request, holding that any viewer would understand that the comment was intended as an opinion and would be unlikely to believe the veracity of the comment.[245]

In *Cahill*, a public figure had filed a defamation and invasion of privacy claim to seek the identity of an anonymous commenter from a Delaware state news blog.[246] At the trial level, the Superior Court of Delaware had adopted *America Online*'s good-faith standard.[247] However, the Delaware Supreme Court rejected this approach as insufficient to protect the rights of online speakers.[248] The court discussed the unique features of speech on the internet[249] and analogized online speech with the "modern equivalent of political pamphleteering."[250] Thus, the court held that its standard for granting a subpoena must reach the appropriate balance between anonymous free speech rights and the rights of individuals against defamation.[251] The court found that the summary judgment standard would best achieve this balance.[252]

The court rejected the good-faith standard because it believed that plaintiffs would be able to meet that standard too easily, which might cause plaintiffs to harass defendants and chill online speech.[253] The court rejected the motion to dismiss standard because the threshold for a Federal Rule of Civil Procedure 12(b)(6)[254] motion was merely a pleading standard that required the plaintiff to provide the opposing party with notice of the claims against it, and thus, was also insufficient to protect the free speech rights of anonymous online speakers.[255] Although the court approved of *Dendrite*'s heightened standard for granting subpoenas, it found that the standard was too convoluted and unnecessarily complex.[256] Thus, the court adopted the summary judgment standard, finding that it properly balanced the interests of anonymous online speakers with those of individuals who might be harmed by such speech.[257]

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[244] *Id.* at 464.

[245] *Id.* at 465 ("The 'reasonable reader, looking at the hundreds and thousands of postings about the company from a wide variety of posters, would not expect that [the defendant] was airing anything other than his personal views . . . .'" (quoting Global Telemedia Int'l, Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1268 (C.D. Cal. 2001))).

[246] *Id.* at 454. The comments criticized Cahill's performance as a city councilman, stating that "[a]nyone who has spent any amount of time with Cahill would be keenly aware of such character flaws, not to mention an obvious mental deterioration." *Id.* (emphasis omitted). Another comment stated that "Gahill [sic] is as paranoid as everyone in the town thinks he is." *Id.* (alteration in original) (emphasis omitted).

[247] Cahill v. Doe, 879 A.2d 943 (Del. Super. Ct. 2005), *rev'd*, 884 A.2d 451 (Del. 2005).

[248] *Cahill*, 884 A.2d at 454.

[249] Specifically, the court notes that online speech is "less hierarchical and discriminatory than in the real world because it disguises status indicators such as race, class, and age." *Id.* at 456 (internal quotation marks omitted).

[250] *Id.* at 456.

[251] *Id.*

[252] *Id.* at 457.

[253] *Id.* at 457–58.

[254] FED. R. CIV. P. 12(b)(6). A defendant makes a Rule 12(b)(6) motion when the defendant believes that the plaintiff, in their complaint, "fail[ed] to state a claim upon which relief can be granted." *Id.*; *see also* 5B WRIGHT & MILLER, *supra* note 210, § 1355.

[255] *Cahill*, 884 A.2d at 458–59.

[256] *See id.* at 461.

[257] *Id.*

Critics of the *Cahill* standard argue that balancing tests are important to address the various speech concerns implicated by a particular lawsuit, and that a summary judgment standard does not fully consider the potential free speech concerns.[258] They note that a plaintiff may be able to meet the summary judgment standard, but "the harm done by revealing the speaker's identity may far outweigh the damage of the libel."[259]

The *Cahill* summary judgment standard has also been criticized for increasing legal uncertainty.[260] Some courts interpret the *Cahill* standard as less demanding than *Dendrite*, while other courts interpret the *Cahill* standard as more demanding than *Dendrite*.[261] Furthermore, by adopting a procedural label, the court created confusion because the standard does not actually adhere to the strict procedural definitions of the term summary judgment.[262]

Professor Malloy criticizes the *Cahill* standard because it fails to account for the inherent characteristics of online speech.[263] Although courts have thus far sought to treat speech on the internet in the same manner as traditional forms of speech, Malloy notes that online speech is inherently different from traditional forms of speech, because it is more pervasive, permanent, and accessible.[264] For example, defamation requires defendants to make an untrue statement of fact and for readers to view the statement as fact.[265] By finding that readers are likely to interpret the statements on blogs as the speaker's opinion, rather than as a factual assertion, Professor Malloy argues that the *Cahill* court failed to consider that the opinion of others may nevertheless injure the plaintiff's reputation or cause him or her to suffer adverse consequences.[266] Following this reasoning, the *Cahill* standard—which uses a general defamation standard—is not properly suited to online speech, because it is almost impossible for plaintiffs to obtain redress for statements made by anonymous commenters.[267]

[258] *See, e.g.*, Mobilisa, Inc. v. Doe, 170 P.3d 712, 720 (Ariz. 2007) ("[R]equiring the court to balance the parties' competing interests is necessary to achieve appropriate rulings in the vast array of factually distinct cases likely to involve anonymous speech."); Ashley I. Kissinger & Katherine Larsen, *Untangling the Legal Labyrinth: Protections for Anonymous Online Speech*, 13 NO. 9 J. INTERNET L. 1, 19 (2010).

[259] Jonathan D. Jones, Note, *Cybersmears and John Doe: How Far Should First Amendment Protections of Anonymous Internet Speakers Extend?*, 7 FIRST AMEND. L. REV. 421, 439 (2009).

[260] *See* Kissinger & Larsen, *supra* note 257, at 18.

[261] *Compare* Krinsky v. Doe, 72 Cal. Rptr. 3d 231, 242–43 (Ct. App. 2008) (adopting the *Cahill* standard because the *Dendrite* standard "required too much" and the motion to dismiss standard was too low), *with* Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 456–57 (Md. 2009) (adopting the test from *Dendrite*, because the summary judgment standard would set the bar too high and "undermine personal accountability and the search for truth").

[262] Kissinger & Larsen, *supra* note 257, at 18–19.

[263] Malloy, *supra* note 66, at 1190.

[264] *Id.* at 1192; *see also* Solove, *supra* note 141, at 1197.

[265] *See supra* Part I.B.1.

[266] Malloy, *supra* note 66, at 1190–91.

[267] *Id.* at 1191–92.

4. 2TheMart Test

Courts have recognized that a different standard should apply for obtaining the identity of a commenter when he is sought as a witness rather than as a defendant, but have not delineated the distinction.[268] In *Doe v. 2TheMart.com, Inc.*, the Western District of Washington established a test for granting subpoenas to identify potential witnesses.[269] Under this test, the plaintiff must clearly show that (1) the subpoena was issued in good faith, (2) the information sought related to a core claim or defense, (3) the information is directly and materially relevant to that claim or defense, and (4) such information cannot be obtained from other sources.[270] Given that this holding applies only to witness disclosure, this standard has not received much attention from other courts or academics.[271]

B. Legislative Proposals Seeking To Restrict Anonymous Online Speech

The issue of anonymous online speech has received significant media attention[272] that has motivated state legislatures to propose legislation that would ban or restrict anonymous online commenting.[273] Virginia, the only state that has passed legislation that addresses the standard for disclosing the identity of an anonymous commenter, has adopted the good-faith test.[274]

However, this section will focus on legislative proposals from Georgia, California, New Jersey, and New York that sought to ban or limit anonymous speech rights.

Georgia was the first state that sought to enact legislation restricting the use of false identities online. In 1996, it passed Act 1029, which made it unlawful for "any person . . . [to] knowingly . . . transmit any data through a computer network . . . if such data uses any individual name, trade name, registered trademark, logo, legal or official seal, or copyrighted symbol to falsely identify

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[268] *See* Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001) ("The standard for disclosing the identity of a non-party *witness* must be higher than that articulated in *Seescandy.Com* and *America Online, Inc.*"); *see also* Sedersten v. Taylor, No. 09-3031-CV-S-GAF, 2009 WL 4802567, at *2 (W.D. Mo. Dec. 9, 2009); Enterline v. Pocono Med. Ctr., 751 F. Supp. 2d 782, 787 (M.D. Pa. 2008).

[269] *See 2TheMart.com*, 140 F. Supp. 2d at 1095.

[270] *Id.*

[271] *See Enterline*, 751 F. Supp. 2d at 787 (applying the *2TheMart* test because it was the one advocated for by the plaintiff); *Sedersten*, 2009 WL 4802567, at *2 (applying the *2TheMart* test without discussion); *see also* Kissinger & Larsen, *supra* note 257, at 21.

[272] *See, e.g.*, Sara Gates, *Anonymous Comment Ban: Internet Protection Act Threatens Online Anonymity for New York-Based Websites*, HUFFINGTON POST (May 24, 2012, 7:17 PM), http://www.huffingtonpost.com/2012/05/24/anonymous-comment-ban-legislation-new-york_n_1543033.html; Chris Hannay, *Tory MP Says Government Should Do Something About Anonymous Online Comments*, GLOBE & MAIL (Oct. 26, 2012, 1:44 PM), http://www.theglobeandmail.com/news/politics/ottawa-notebook/tory-mp-says-government-should-do- something-about-anonymous-online-comments/article4683094/.

[273] *See, e.g.*, A.B. 1143, 2003 Leg., Reg. Sess. (Cal. 2003); A.B. 1327, 212th Leg., 1st Sess. (N.J. 2006); A.B. 8688, 2012 Leg., 235th Sess. (N.Y. 2012).

[274] *See* VA. CODE ANN. § 8.01-407.1 (2012); *see also supra* Part III.A.1. California also considered passing a bill that would establish a standard for discovery requests for the identity of an anonymous online commenter. *See* A.B. 1143. After passing in the Assembly, the state senate did not take any further action on the Bill. *Complete Bill History*, *supra* note 12.

the person."[275] The American Civil Liberties Union (ACLU) challenged the Act in court, arguing that it was unconstitutional under the First Amendment because it created an impermissible content-based restriction and limited individuals' right to speak anonymously.[276] A district court found that the ACLU would be likely to prevail in its challenge to the law and therefore granted a preliminary injunction prohibiting enforcement of the Act.[277] Although Georgia state courts have not yet addressed the constitutionality of this Act, in practice, it has not been used to restrict or regulate anonymous online speech.[278]

Ten years later, the New Jersey legislature introduced a bill that would have required an operator of a computer service or an ISP to "establish and maintain reasonable procedures to enable any person to request and obtain disclosure of the legal name and address of an information content provider [i.e., speaker] who posts false or defamatory information about the person on a public forum website."[279] Any person who is damaged as a result of false or defamatory written messages may sue an ISP that fails to comply with this provision for compensatory and punitive damages.[280] However, the bill did not define the circumstances under which it would be "reasonable" for an ISP to disclose a commenter's identity. The New Jersey bill was withdrawn in February of 2007 and no subsequent legislation has been proposed thus far.[281]

In March 2012, the New York State legislature proposed the Internet Protection Act,[282] which takes a similar approach as New Jersey to address anonymous online commenting. The bill's purpose, based on statements by sponsoring legislators, is to lower the incidence of cyberbullying.[283] The original version of the bill in the state assembly and the current version being considered by the state senate require that:

> A web site administrator upon request shall remove any comments posted on his or her web site by an anonymous poster unless such anonymous poster agrees to attach his or her name to the post and confirms that his or her IP address, legal name, and home address are accurate. All web site administrators shall have a contact number or e-mail address posted for such removal requests, clearly visible in any sections where comments are posted.[284]

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[275] GA. CODE ANN. § 16-9-93.1(a) (West 2012), *invalidated by* White v. Baker, 696 F. Supp. 2d 1289 (N.D. Ga. 2010).

[276] ACLU of Ga. v. Miller, 977 F. Supp. 1228, 1230–31 (N.D. Ga. 1997).

[277] *Id.* at 1234–35 ("[T]he Court concludes that plaintiffs are likely to succeed on their claim that the act is void for vagueness, overbroad, and not narrowly tailored to promote a compelling state interest.").

[278] *See generally* Donald J. Karl, Note, *State Regulation of Anonymous Internet Use After* ACLU of Georgia v. Miller, 30 ARIZ. ST. L.J. 513 (1998).

[279] A.B. 1327, 212th Leg., 1st Sess. (N.J. 2006).

[280] *Id.*

[281] *Bill Information*, N.J. LEGISLATURE, http://www.njleg.state.nj.us/Default .asp, (last visited Apr. 19, 2013) (on the "Bill Search" sidebar, search for Bill Number A1327 in Legislative Term 2006–2007; then click the hyperlink for Bill A1327).

[282] S.B. 6779, 2011 Leg., 235th Sess. (N.Y. 2012) (introduced March 21, 2012).

[283] Chenda Ngak, *New York Lawmakers Propose Ban on Anonymous Online Comments*, CBS NEWS (May 24, 2012, 11:46 AM), http://www.cbsnews.com/8301-501465_162-57440895-501465/new-york-lawmakers-propose-ban-on-anonymous-online-comments/ (quoting the bill's sponsors' statements that the bill's purpose was to combat cyberbullying).

[284] S.B. 6779.

After receiving significant public hostility toward the bill,[285] the State Assembly revised the bill to allow only targets of anonymous posters to request that the comments be removed, and to require web site administrators to "make a good faith effort to determine that comments regarding a victim are factually based . . . and not opinions."[286]

The New York and New Jersey proposals are somewhat analogous to the notice and take-down provisions under the Digital Millennium Copyright Act (DMCA).[287] The DMCA shields ISPs from liability if, after being notified by the copyright holder of the infringing nature of the work, they remove the material from their websites.[288] Although the New Jersey and New York proposals operate differently, they also create incentives for ISPs to remove certain material from their websites. Some commentators have advocated for imposing more liability on ISPs as a way to address the problems of online defamation.[289] They argue that notice and take-down procedures are the most efficient and cost-effective mechanisms to regulate defamatory online speech.[290] However, it is unclear whether such procedures can be adequately designed to restrict defamatory speech, while continuing to protect legitimate free speech interests of online speakers.[291]

Other states have sought to limit the anonymous speech rights of a narrower category of speakers, namely convicted sex offenders. In 2012, California passed Proposition 35,[292] which, among other things, requires convicted sex offenders to register "[a] list of any and all Internet identifiers established or used by the person"[293] and "[a] list of any and all Internet service providers used by the person" with the Department of Justice.[294]

This law will effectively abolish the right to anonymous speech for convicted sex offenders.[295] The ACLU and the Electronic Frontier Foundation filed a lawsuit the day after California voted to approve Proposition 35.[296] The Northern District Court of California granted plaintiff's motion for a prelimi-

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[285] *See, e.g.*, Eugene Volokh, *Nearly Half the New York Assembly Republicans: Require Deletion of Anonymous Comments Whenever Anyone Complains*, VOLOKH CONSPIRACY (May 3, 2012, 11:54 PM), http://www.volokh.com/2012/05/03/nearly-half-the-new-york-assembly-republicans-require-deletion-of-anonymous-comments-whenever-anyone-complains/ (arguing that the bill is unconstitutional); *see also* Gates, *supra* note 271.

[286] A.B. 8688, 2012 Leg., 235th Sess. (N.Y. 2012) (revised July 23, 2012).

[287] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 and 28 U.S.C.).

[288] *See* 17 U.S.C. § 512(c)(1) (2006).

[289] *Cf.* Ryan King, *Online Defamation: Bringing the Communications Decency Act of 1996 in Line with Sound Public Policy*, 2003 DUKE L. & TECH. REV. 24, ¶ 11 (2003); 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, 239 (2008).

[290] Miller, *supra* note 288, at 239.

[291] *See infra* Part IV.B.

[292] Californians Against Sexual Exploitation Act, 2012 Cal. Legis. Serv. Prop. 35, § 12 (West) (to be codified at CAL. PENAL CODE § 290.015(a)(4) (West 2013)).

[293] *Id.*

[294] *Id.*

[295] *Cf. id.* § 13 (defining "internet identifier" broadly to include any online persona or identity that an individual may create).

[296] *See* Complaint, Doe v. Harris, No. C12-5713 (N.D. Cal. filed Nov. 7, 2012), *available at* https://www.eff.org/cases/doe-v-harris.

nary injunction, but it has not yet ruled on the constitutionality of the Proposition.[297] The State filed an appeal with the Ninth Circuit Court of Appeals on February 12, 2013.[298]

The Ninth Circuit may be guided by legal developments in Georgia. The Georgia state legislature passed a law that also required convicted sex offenders to register information about their online identity.[299] However, the Northern District of Georgia declared the law unconstitutional because the statute was vague and not narrowly tailored to accomplish a legitimate state interest.[300]

IV. CREATING A COMPREHENSIVE LEGAL STANDARD

Judicial subpoena standards and legislative regulations restricting anonymous speech approach the issue of anonymous speech from different angles. Subpoena standards allow judges to make individualized determinations based on the particular facts of the case, but this leads to the patchwork of approaches that courts have so far taken.[301] Such discordant standards create uncertainty regarding individuals' speech rights as speakers' rights will be affected both by the underlying action and applicable law. In contrast, legislative standards may create more uniformity, but the legislature may impose categorical restrictions on a narrow type of speech, such as defamation or fighting words.[302] If the legislature wants to establish broader content-based speech regulations, those regulations must be narrowly tailored to serve a compelling state interest to be deemed constitutionally permissible.[303] Part IV.A analyzes the aforementioned judicial standards and concludes that the government should adopt the *Cahill* standard, which requires plaintiffs to meet a summary judgment standard before obtaining disclosure. Part IV.B discusses how the legislature should expand the legal rights for victims of defamation and online harms to balance the protection of anonymous speech with the problems it may cause.

[297] *See* Doe v. Harris, No. C12-5713 TEH, 2013 U.S. Dist. LEXIS 5428 (N.D. Cal. Jan. 11, 2013).

[298] *See Doe v. Harris*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/cases/doe-v-harris (last visited Apr. 19, 2013); *John Doe, et al. v. Kamala Harri*, JUSTIA DOCKETS AND FILINGS, http://dockets.justia.com/docket/circuit-courts/ca9/13-15267/ (last visited Apr. 19, 2013) (referring to *Doe v. Harris*). For the appellant's opening brief, see Opening Brief of the Defendant-Appellant, Doe v. Harris, No. 15263 (9th Cir. Apr. 10, 2013), *available at* https://www.eff.org/sites/default/files/filenode/states_opening_brief.pdf. At the time of this writing, the Plaintiff-Appellees have not yet filed their briefs.

[299] GA. CODE ANN. § 42-1-12(a)(16)(K) (West 2008), *invalidated by* White v. Baker, 696 F. Supp. 2d 1289 (N.D. Ga. 2010).

300 *Baker*, 696 F. Supp. 2d at 1309–12.

[301] *See supra* Part III.A.

[302] *See supra* notes 18–23 and accompanying text.

[303] *See supra* notes 29–30 and accompanying text.

A. Subpoena Disclosure Standard

In reality, anonymous online commenting does not reflect the historical notion that anonymous speech promotes democratic principles by allowing freedom of participation as envisaged in *Talley* and *McIntyre*.[304] Yet, many of the justifications for restricting anonymous speech used in *Buckley* and *Citizens United*—such as protecting the integrity of the political process and providing citizens with the information they need to make informed political decisions[305] — are not present to the same extent in anonymous online speech.[306] Because anonymous online speech "is, on average, *less* valuable than nonanonymous speech,"[307] it should be afforded an intermediate degree of protection when parties seek to identify these speakers. The standard that best accomplishes this aim is the summary judgment test established by the Delaware Supreme Court in *Cahill*.[308] The *Cahill* standard should be adopted because it offers the highest level of protection for anonymous speakers and thus advances speakers' free speech rights, is the most straightforward to apply, and is preferable to the alternative tests.[309]

Cahill requires plaintiffs to meet a high burden—proving a prima facie case or meeting a summary judgment standard—before they can discover an anonymous speakers' identity, thereby affording the greatest level of protection for anonymous speakers.[310] It is important to protect anonymous speakers' rights to avoid creating a chilling effect on online speech.[311]

Under a marketplace of ideas theory for free speech rights, various ideas will compete and the truth will ultimately prevail.[312] Although some critics argue that speech on the internet has a higher potential for causing injury,[313] it is important to note the context of speech when determining whether injury will result. For example, readers are less likely to trust the veracity of a college gossip website than that of a reputable website.[314] Thus, the mere existence of speech will not necessarily cause injury.

Anonymous speech rights also help promote the truth-seeking function of free speech protections by allowing individuals to disclose information without fear of reprisal.[315] If the disclosure standard is too low, it will allow individuals or critics to obtain a speaker's identity for the purpose of

[304] *See supra* notes 104–05, 114 and accompanying text.

[305] *See supra* Part I.C.2.

[306] *See supra* note 146 and accompanying text.

[307] *See* Lidsky & Cotter, *supra* note 149, at 1559; *see also supra* notes 161–63, 169–72 and accompanying text.

[308] *See supra* Part III.A.3.

[309] For a discussion of the *Cahill* standard, see *supra* notes 239–44 and accompanying text.

[310] *See supra* notes 239–40 and accompanying text.

[311] *See supra* Part II.A.

[312] *See supra* note 138 and accompanying text. *But see* Scot Wilson, *Corporate Criticism on the Internet: The Fine Line Between Anonymous Speech and Cybersmear*, 29 PEPP. L. REV. 533, 540–42 (2002) (arguing that the "free marketplace" interpretation of anonymous online speech is limited because of the difficulty in drawing a line between lawful and defamatory speech).

[313] *See* Malloy, *supra* note 66, at 1190; *see also supra* notes 169–72 and accompanying text.

[314] *See supra* notes 64–66 and accompanying text.

[315] *See supra* Part II.A.

harassment or intimidation.[316] Statistically, plaintiffs are unlikely to prevail in a defamation suit and most John Doe subpoenas are sought by corporate plaintiffs trying to silence their critics.[317] To prevent needless disclosure of an anonymous speaker's identity, courts should not require disclosure unless there is sufficient evidence to suggest that the plaintiff will win on the merits of the case. Otherwise, speakers may be wary of making statements if they believe that the message can be traced back to them, creating a chilling effect on speech.[318] This type of scenario may arise in situations where an employee wants to reveal information about his employer that may be of important public interest, but fears employer retaliation.[319]

The *Cahill* summary judgment test better protects anonymous speech, because it is more straightforward and easier to apply than *Dendrite*'s multifactored balancing test.[320] The fifth prong of the balancing test in *Dendrite*, which seeks to balance the protections of speech and its potential harm, is redundant because the same balancing is inherent in the summary judgment test.[321] Additionally, the balancing test creates ambiguity, which makes it more difficult for plaintiffs to raise meritorious claims, because plaintiffs will be unsure when they have a valid legal claim.[322] Uncertainty in outcome may deter some plaintiffs from litigating their cases, thereby preventing them from accessing justice and allowing speakers to continue making potentially defamatory comments. The summary judgment standard includes an inherent balancing test because it permits disclosure only when a plaintiff has a viable legal claim.[323]

The summary judgment test may protect less speech than a balancing test because it does not protect speakers when the speaker's interest in maintaining anonymity exceeds the plaintiff's interest in pursuing a viable legal claim. However, the summary judgment standard is preferable, because a balancing test would grant anonymous online speakers greater speech protections than they would have in other speech contexts.[324]

The summary judgment test is also preferable to the good-faith standard, because the good-faith standard is too easily satisfied, allowing disclosure even in situations where the speaker may have an important anonymity interest.[325] The good-faith standard gives plaintiffs an incentive to file suits to discover the identity of the commenter even if the plaintiff lacks a legal claim.[326] This standard essentially deprives defendants from saying anything derogatory about another person, because such comments would likely be sufficient to create a "good-faith" belief that the speech is action-

[316] *See supra* notes 192–93 and accompanying text.

[317] *See* Moore, *supra* note 184, at 470–71.

[318] *See supra* notes 149–55 and accompanying text.

[319] *See supra* note 149 and accompanying text.

[320] *See supra* notes 255–56 and accompanying text.

[321] Recent Cases, *Maryland Court of Appeals Sets Out Process Required Before Court May Compel Identification of Anonymous Internet Defendants*, 123 HARV. L. REV. 1011, 1014–15 (2010) [hereinafter *Anonymous Internet Defenders*].

[322] *See supra* notes 234–35 and accompanying text.

[323] *See supra* notes 239–40 and accompanying text.

[324] *See Anonymous Internet Defenders*, *supra* note 320, at 1015.

[325] *See supra* notes 212–14 and accompanying text.

[326] *See supra* note 213 and accompanying text.

able. Yet, the Supreme Court has held that speech cannot be restricted merely because it may be offensive.[327] Thus, the good-faith test fails to afford anonymous speakers adequate protection. The good-faith standard comes from an early case addressing online anonymity but has not received much traction, with modern courts instead choosing to adopt a balancing test or summary judgment standard.[328]

Professor Susanna Moore argues that the *Cahill* standard is too demanding because it is impossible for plaintiffs to prove malice without knowing the identity of the defendant.[329] Professor Moore, however, fails to note that the *Cahill* standard only requires the plaintiff to prove the elements that are within their control and thus would not be required to prove malice to obtain the subpoena.[330] Yet, this provision leads others to criticize *Cahill* for purportedly adopting a procedural approach while relaxing certain requirements, thereby confusing potential litigants.[331] This argument is technical and does not address the merits of the *Cahill* test. As a practical matter, it would be impossible for the plaintiff to provide all the evidence necessary to support his claim without knowing the defendant's identity. In choosing among the various standards, requiring the plaintiff to provide as much evidence as possible—as the *Cahill* standard requires—is the next best alternative to ensure that the litigation is not frivolous or being raised for malicious purposes.

Some critics of the *Cahill* test argue instead that *Dendrite*'s notice requirement, which requires plaintiffs to notify the speaker of the pendency of the subpoena request, provides greater protection for anonymous speakers because it allows them to defend themselves.[332] Professor Moore, in particular, argues that it is fairer to place the burden on the plaintiff than on the ISP, because the plaintiff has a greater interest in the litigation and thus is more likely to give notice than a disinterested party.[333] These commentators, however, provide no reason that the notice requirement cannot be applied to the summary judgment standard.[334] In *Cahill*, the court specifically included a notice requirement, thereby demonstrating that a notice requirement can be adopted without changing the nature of the standard.[335]

Despite the criticism of the summary judgment standard, it remains the best standard for protecting anonymous online speech. Some individuals may abuse their anonymity rights,[336] but lowering the standard for disclosure is unlikely to have a significant impact unless the speaker can be

[327] *See supra* note 34 and accompanying text.

[328] Calvert et al., *supra* note 148, at 40; *see supra* Part III.A.2–3.

[329] *See* Moore, *supra* note 184, at 481.

[330] *See supra* notes 241–44 and accompanying text.

[331] *See supra* note 261 and accompanying text, *see also* Kissinger & Larsen, *supra* note 257, at 18–19.

[332] *See* Lidsky & Cotter, *supra* note 149, at 1598; Moore, *supra* note 184, at 483.

[333] *See* Moore, *supra* note 184, at 438–84 ("ISPs cannot be expected to carry the burden of notification on behalf of their users without a clear mandate or incentive to do so.").

[334] *Cf. id.* (recognizing that the *Cahill* standard also includes a notice requirement but failing to explain why the *Dendrite* standard is better with respect to the notice requirement).

[335] *See Doe v. Cahill*, 884 A.2d 451, 460 (Del. 2005) (retaining the notification prong of the *Dendrite* standard).

[336] *See supra* Part II.B.

subjected to legal sanctions to deter future misconduct. Thus, courts should adopt the summary judgment standard for deciding when to reveal an anonymous speaker's identity.

Additionally, states should adopt a summary judgment standard to permit the disclosure of an anonymous speaker's identity regardless of the underlying dispute. The Ninth Circuit and Professor Clay Calvert argue that the standard for disclosing the identity of the speaker should depend upon the nature of the underlying litigation.[337] However, the summary judgment standard inherently accounts for the nature of the underlying suit by allowing discovery only when the plaintiff provides evidence to prove wrongdoing by the speaker.[338] Imposing different standards for various types of speech, while preferable in theory, would create problems in practice by creating uncertainty in an area of the law that should be clear.[339]

B. Legislative Responses

The government should not seek to ban anonymous online speech because, despite those who would abuse the right, anonymous online speech serves many legitimate interests. Since most legislation that restricts the right likely will be found unconstitutional,[340] legislatures should instead regulate anonymous online commenting indirectly by redefining the set of harms for which individuals may seek redress.[341]

Individual states should not try to address the problems associated with anonymous online commenting by imposing restrictions or bans on such speech, because any law they adopt would likely create a dormant commerce clause problem.[342] If one state tries to regulate the internet, it would create jurisdictional problems because the legislation would inherently implicate activity in other states.[343] Even national regulation of anonymous speech may be legally problematic because of its international implications.[344]

Legislatures should not seek to create a take-down procedure analogous to those for copyright infringement under the DMCA, because there is an inherent difference between the values that

[337] *See In re* Anonymous Online Speakers, 661 F.3d 1168, 1177 (9th Cir. 2011) ("[W]e suggest that the nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes."); Calvert et al., *supra* note 148, at 47–48.

[338] *See supra* notes 250–51 and accompanying text.

[339] *See supra* note 44 and accompanying text.

[340] *See supra* Part I.A.

[341] *See supra* Part I.B.

[342] The Dormant Commerce Clause problem occurs when one state's laws or regulations implicate activity in other states and is problematic because it may lead to protectionist regulation by the states and undermine the national market. *See* Brown-Forman Distillers Corp. v. N.Y. Liquor Auth., 476 U.S. 573, 580 (1986).

[343] *See, e.g.*, Kenneth D. Bassinger, Note, *Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy*, 32 GA. L. REV. 889 (1998); James E. Gaylord, Note, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 52 VAND. L. REV. 1095 (1999); Ari Lanin, Note, *Who Controls the Internet? States' Rights and the Reawakening of the Dormant Commerce Clause*, 73 S. CAL. L. REV. 1423 (2000).

[344] *See* John Rothschild, *Protecting the Digital Consumer: The Limits of Cyberspace Utopianism*, 74 IND. L.J. 893 (1999).

underlie free speech and those that support copyright law.[345] Copyright laws are meant to protect the economic interests of those who produce expressive works.[346] In contrast, the First Amendment protects the freedom of expression.[347] Although removal of content may restrict some speech, the Supreme Court has rejected First Amendment challenges in copyright infringement cases.[348] It is reasonable for courts to err on the side of restricting the dissemination of infringing material, because the interest of the copyright owner may be lost if it is not enforced in a timely manner. However, the First Amendment is meant to protect expression, and that right would be undermined if ISPs or website administrators were required to remove speech.[349]

Moreover, determining copyright infringement is an objective assessment that the ISP can resolve, while speech regulation is more subjective and harder to define. Anonymous online speech includes a broader range of speech, much of which the government cannot restrict.[350] An ISP or website administrator could not be expected to reasonably know whether speech may be restricted, which is likely to result in an overregulation of speech. Additionally, unfamiliarity with the legal standard for permissible speech regulation could cause unequal application of the law, because each website administrator could adopt different standards for take-downs.[351]

Further, the determination would be subject to the individual biases of the website administrator. This unequal application of a statute would prevent the creation of clear standards, which, in turn, is likely to deter protected speech.

The proposed bill from New York illustrates other constitutional defects of laws that seek to limit anonymous speech through the use of take-down procedures because both versions of the bill are vague, overbroad and underinclusive.[352] The proposed laws are vague because they fail to put speakers on notice of what speech is protected and to provide guidelines for when website administrators should remove speech.[353] Although the Assembly version is more specific and instructs administrators to "make a good faith effort to determine that comments regarding a victim are factually based,"[354] it fails to explain what actions are required for a good-faith effort.[355] Furthermore, both versions of the bill are underinclusive because by addressing only instances of anonymous at-

[345] *See supra* Part II.A (discussing the values underlying free speech protection).

[346] *Cf.* Kevin M. Lemley, *The Innovative Medium Defense: A Doctrine To Promote the Multiple Goals of Copyright in the Wake of Advancing Digital Technologies*, 110 PENN ST. L. REV. 111, 134 (2005) ("[C]opyright law promotes the public interest by providing authors with economic incentives to create new works of authorship . . . .").

[347] *See supra* notes 141, 149 and accompanying text.

[348] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555–56 (1985).

[349] *See supra* notes 153–55 and accompanying text.

[350] *See supra* Part I.A.

[351] *See supra* note 42 and accompanying text.

[352] *See supra* notes 40–44, 283–85 and accompanying text.

[353] *See supra* notes 40–42, 283–85 and accompanying text.

[354] A.B. 8688, 2012 Leg., 235th Sess. (N.Y. 2012) (revised July 23, 2012).

[355] The ambiguity caused by this good-faith standard would be analogous to the problems caused by Virginia's good-faith standard for granting a disclosure subpoena. *See supra* notes 213–14 and accompanying text.

tacks, they fail to address instances of cyberbullying—the bill's stated purpose—that are conducted publicly or through identifiable social media profiles.[356]

The New York proposal that the state senate is considering is content neutral, because it requires an administrator to remove all anonymous comments upon request, without regard to the content of the speech.[357]

Thus, the regulation would be subject to intermediate scrutiny, requiring that the law be substantially related to an important governmental interest.[358] While the bill's goal of combating cyberbullying is an important government interest,[359] the law is not substantially related to that aim because it restricts nonbullying speech.[360] The law is unconstitutionally overbroad because it may result in the restriction of speech that is otherwise constitutionally permissible.[361] Instead, the legislature should adopt a different solution that is more narrowly tailored to achieve the law's ends without infringing upon First Amendment rights.[362]

Online speech falls into many categories, each subject to its own standard of scrutiny.[363] Thus, any legislation seeking to regulate anonymous online speech would need to differentiate between the various types of speech.[364]

The New York State Assembly, perhaps realizing this, revised the bill to limit its application to defamatory speech.[365] This proposal, however, is content based because it requires website administrators to remove comments upon request based on the speaker's message.[366] As such, the law is subject to strict scrutiny and must be narrowly tailored to serve a compelling government interest.[367] Even assuming that the government's interest in ending defamatory online speech is compelling for the purposes of the First Amendment, the regulation is likely unconstitutional because it is overbroad.[368] Governments may regulate defamatory speech because the reputational interest of the target of the speech exceeds the speaker's interest in the speaker (which is low, because such

[356] *See supra* note 284 and accompanying text.

[357] *See supra* notes 35–39 and accompanying text.

[358] *See supra* notes 35–36 and accompanying text.

[359] *See supra* note 281 and accompanying text.

[360] *See supra* notes 282–84 and accompanying text.

[361] Lidsky & Cotter, *supra* note 149, at 1590–93 (discussing the standards that states should use when seeking to regulate anonymous online speech).

[362] *See, e.g.*, Andrew B. Carrabis & Seth D. Haimovitch, *Cyberbullying: Adaptation from the Old School Sandlot to the 21st Century World Wide Web—The Court System and Technology Law's Race To Keep Pace*, 16 J. TECH. L. & POL'Y 143 (2011); Jamie Wolf, Note, *The Playground Bully Has Gone Digital: The Dangers of Cyberbullying, the First Amendment Implications, and the Necessary Responses*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 575 (2012).

[363] *See supra* Part I.A.

[364] Martin, *supra* note 54, at 1240–41.

[365] *See supra* note 285 and accompanying text.

[366] *See supra* notes 29–34, 285 and accompanying text.

[367] *See supra* note 30 and accompanying text.

[368] *See supra* notes 43–44 and accompanying text.

speech is oftentimes an issue of private, rather than public, concern).[369] The government, however, may not regulate speech merely because it is offensive or distasteful.[370]

The New York bill essentially requires website administrators to remove postings upon the request of the target of the speech, which is likely to result in the removal of speech that, while offensive, fails to meet the specific legal requirements for defamation.[371]

Given the constitutional difficulties in shaping legislation to restrict anonymous online speech, the legislature should seek alternative solutions to address the issue of cyberbullying and other forms of harmful online speech.

CONCLUSION

The right to free speech, including the right to anonymous speech, is a fundamental right guaranteed by the Constitution. Though the government may restrict certain forms of speech through regulation, and other types of speech by imposing civil liability for harmful speech, those regulations and restrictions must be justified based on the severity of the limitation being imposed.[372] As more speech is disseminated through the internet, the government must find a way to balance the interest of speakers with that of individuals who may be harmed by defamatory or hateful speech. Courts have adopted various standards for granting subpoena requests to allow discovery of anonymous speakers' identities. Appellate courts should adopt the summary judgment standard, because it best protects individuals' speech rights without making it impossible for plaintiffs to seek redress for their injuries.

Despite their concern for the potential harms arising from anonymous online speech, legislatures should not seek to ban anonymous speech. Instead, they should redefine defamation in an online context to account for the differences between online speech and other traditional mediums of speech. This would expand the remedies available to potential victims of harmful speech and allow them to bring suit when the interests of the victims exceed the free speech interests of the speaker.

[369] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 343–44 (1974) (applying a different standard for defamation of public persons from that of private individuals).

[370] *See supra* note 34 and accompanying text.

[371] *See supra* Part I.B.1.

[372] *See supra* Part I.A.