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# Towards a Workable Paradigm for Regulating Internet Speech

Brian Stephen Davis

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# TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

## I. Introduction

On a recent visit to our nation's capital my friends and I visited the Thomas Jefferson Memorial because it was the last of the "well-known" landmarks in Washington D.C. we had not visited. The architecture was stunning and we had the luxury of a beautiful spring day, but what I did not expect was a quote from Thomas Jefferson that I believe holds true in the course of this paper. Written on the wall and staring me right in the face as if placed solely for the day I was to arrive with this paper in mind:

"I am not an advocate for frequent changes in laws and constitutions. But law and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors."<sup>1</sup>

The quote will echo the sentiments throughout the paper: accountability is essential to the civility of people posting on the internet to ensure individuals cannot hide behind the cloak of the first amendment with the ever-growing influence of social media and reader-comment sections on the internet.

The amount of vitriol and offensive comments individuals are allowed to post on the internet is an issue that needs to be curbed before regulating these comments becomes impossible because of the quantity of the comments. For example, on April 29, 2013, Jason Collins became the first active athlete to be openly gay by coming out in article written in Sports Illustrated.<sup>2</sup>

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<sup>1</sup> Thomas Jefferson on July 12, 1816.

<sup>2</sup> Jason Collins & Franz Lidz, *Why NBA Center Jason Collins is Coming Out Now*, Sports Illustrated, April 29, 2013, <http://sportsillustrated.cnn.com/magazine/news/20130429/jason-collins-gay-nba-player/>.

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

The article's message and impact garnered positive reactions from many athletes, journalists and fans across the country.<sup>3</sup> However, Sports Illustrated closed the comment section on the article within hours because of harsh, over-the-top comments concerning homosexuality and comments that had nothing to do with homosexuality. A common theme in the comments were "f\*ck faggots," "Jason Collins sucked d\*ck on every team he has played for so it's no surprise he actually sucks d\*ck," and "Obama calling Jason Collins=conspiracy for same-sex marriage."<sup>4</sup>

In *Abrams v. United States*, Justice Holmes declared in his dissent:

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."<sup>5</sup>

The marketplace of ideas Holmes described in *Abrams* is not furthered by the comments described above in the Collins' piece. The comments are not intended for thought-provoking argument and debate on the topic of homosexuality, but instead used as hate speech against an individual who courageously opened himself up to the world.

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<sup>3</sup> Tim Reynolds, *Mostly Positive Reaction to Jason Collins' Coming Out as Gay*, ABC News, April 30, 2013, <http://abclocal.go.com/wabc/story?section=news/sports&id=9084611>. See also Steve Singiser, *Sports World Reacts to Jason Collins in a (Mostly) Positive Way*, Daily Kos, April 29, 2013, <http://www.dailykos.com/story/2013/04/30/1205767/-Sports-world-reacts-to-Jason-Collins-in-a-mostly-positive-way>.

<sup>4</sup> Sports Illustrated, as of April 30, 2013, has neglected to comment on closing their comment sections. One can assume they anticipated backlash, but at some point it became too much.

<sup>5</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919).

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

In contrast, the problem arises whether Sports Illustrated had the right to censor speech when they encourage anonymous posting.<sup>6</sup> Jonathan Rauch would tell us that we cannot limit speech that we find offensive and still attempt to live in a liberal society because the costs of living in a liberal society is accepting the necessary costs of free speech.<sup>7</sup> The idea of anonymity on the internet matters not to Rauch, but rather the comments themselves and allowing them to be said because those comments are necessary costs of a liberal society.<sup>8</sup> Anonymity curbs that belief because people do not have a problem censoring comments made by a ghost. The topic of anonymity and accountability is the first step that needs to be addressed concerning speech on the internet because true ownership of a comment puts a face and name to the comment. Repressing a comment with an owner becomes futile because that person is accountable for their beliefs and, as Rauch said, a harmful statement is the price we pay to live in a liberal society.<sup>9</sup>

The idea behind this paper started with a website dating back to 2007, my sophomore year at Villanova University, called Juicy Campus.<sup>10</sup> The website allowed for anonymous college students to post gossip and rumors about students without any repercussions.<sup>11</sup> A close friend of mine was personally affected by these comments and I was confused, and even now, how the website could hide behind the cloak of the first amendment when this young woman's

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<sup>6</sup> Sports Illustrated, like many websites, requires the following when signing up to comment on their site: username, password, email address. No name, date of birth, home address, or phone number is required to post on Sports Illustrated.

<sup>7</sup> Jonathan Rauch, *Kindly Inquisitors* (1993).

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Juicy campus ceased operation on February 5, 2009.

<sup>11</sup> Juicy Campus' own page stated: "There is no way for someone using the site to find out who you are. And we at Juicy Campus are not keeping track of who you are or what you post. In fact, we prefer not to know who you are. We like to think that famous people like Justin Timberlake and Beyonce are using our site. We love them ..."

Sunny Hostin, *Online Campus Gossips Won't Show Their Face*, CNN, April 11, 2008, <http://www.cnn.com/2008/CRIME/03/17/sunny.juicy/index.html>.

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

life was being ruined day-by-day. Students were calling her a “whore”, “slut”, “dumb as shit”, and much, much worse that go well beyond the scope of human decency. People took her beauty and charm to mean that she was promiscuous, and used her appearance to suggest that she got into school because “of her breasts and not her brains.” Neither of these sentiments was close to the truth, but my friend wore a hoodie and sweatpants for the next month, pulling her hoodie over her head as not to be seen and did not leave her room except for class. Anonymous posting had turned this girl’s life into a nightmare, but Juicy Campus could hind behind the Communications Decency Act of 1996<sup>12</sup> and the First Amendment.<sup>13</sup>

The First Amendment was never intended to destroy an individual’s life, but rather to give individuals the right to speak their mind to make a change for the betterment of society. The betterment of society allows for individuals to discuss their opinions openly and refresh the marketplace of ideas. Instead, the anonymity of the internet and the more general decline in civility have yielded on the internet a Wild West of irresponsible expression well beyond the framers’ intent. The time to end anonymity on the internet is approaching because individuals have abused their freedom of speech. If people wish to speak their mind on an issue then putting their name to the comment and being held accountable is the next step in the internet age. The private sites would have the responsibility of mandating actual identities to post on their

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<sup>12</sup> 47 U.S.C.A. § 230 (2006).

<sup>13</sup> The CNN article discussed above described an incident with a female college freshman: “She told me that when she read the posts, she felt like she had been kicked in the stomach. She called her parents in the middle of the night crying. She has lost weight, has trouble sleeping, and has become suspicious of those around her. She told me that it has ruined her freshman year -- and will likely taint her entire college experience.” Sunny Hostin, *Online Campus Gossips Won’t Show Their Face*, CNN, April 11, 2008, <http://www.cnn.com/2008/CRIME/03/17/sunny.juicy/index.html>.

## **TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH**

website.<sup>14</sup> Much is needed to regulate appropriately, starting with an overhaul of the Communications Decency Act of 1996 (“the Act”). Specifically, the cloak websites hide behind in the presence of attempts to curtail dialogue on reader-comment sections is Section 230 of the Act. The reform of the Act is needed because the Act’s drafters would be surprised to see how the statute has been used as a shield by mean-spirited actors intending on decimating their various targets. The Act was enacted in the early stages of the internet and no one could foresee the magnitude the internet would play in the everyday lives of the citizens of the United States. The combination of the end of anonymity and a reform of the Act will cause huge ripple effects in ensuring overdue accountability on the internet.

### **II. The Devastation Wrought on the Internet in the Name of Free Speech**

The way people communicate and interact has evolved drastically over the last twenty years. Twenty years ago a person “beeped” a friend and that friend would find a payphone or landline to call their friend. People sat around their offices or homes and called into radio shows on their landlines to express their happiness or anger over central issues in their life. A person would spend time on a handwritten note to send into a company to voice their displeasure over a product. The idea of instant communication was only possible in movies set in the future with flying cars and hover boards.

Fast-forward to 2013 and the way we communicate is quick and easy. If we want to get in touch with a friend, a quick text or phone call with a cell phone takes seconds. The president makes a speech and people are live-tweeting their analysis and opinions within seconds of the words echoing from the screen. An internet manhunt can be conducted from photos and video of the Boston Marathon bombing suspects because everyone is connected online. Our society is

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<sup>14</sup> The general premise being the internet is not a right but a privilege that one can lose if they are untruthful in their identity.

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

connected like no other time in history. However, our connection has spawned consequences of a sizeable magnitude. Our ability to have our voices heard anonymously over the internet and our messages to reach thousands of people daily is creating an uncivilized marketplace of ideas. Civil debate and discussions are aplenty over the vast landscape of the internet, but the anonymous civil discourse is starting to overshadow all the good of an anonymous public debate. If people wish to speak their mind on an issue then putting their name to the comment and being held accountable is the next step in the internet age.

### *a. Background of Anonymity*

The people of the United States have used anonymity long before the internet and for the betterment of society. For example, Kelly Stavnes in [Anonymity Protection Versus Subpoena Compliance: What Media Companies Should Consider When Defending User Comments Online](#), described the history of anonymity in the United States:

“Anonymity and pseudonymity helped shape U.S. history and policy. Anonymous pamphlets, leaflets, and other publications influenced U.S. leaders during the development of the Constitution. For example, the Federalist papers, penned under the pseudonym ‘Publius’ by Alexander Hamilton, James Madison, and John Jay, bolstered support for what would become the Bill of Rights. The modern Supreme Court reaffirmed its commitment to anonymity in 1995 with *McIntyre v. Ohio Elections Commission*. The Court struck down an Ohio statute prohibiting distribution of anonymous campaign literature, saying: ‘An author generally is free to decide whether . . . to disclose his or her true identity . . . . The interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.’ Scholar Dan Solove argues that anonymity is essential to free speech, because speaking behind a veil allows people to promote unconventional ideas, offer solutions to problems, and spur social change. Solove also argues that

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

identity protection permits people to express potentially unpopular ideas without damaging their reputation or fearing retaliation. ”<sup>15</sup>

I would tend to agree with these sentiments because ideas can be furthered greatly when someone feels free to say anything they want on a subject. However, when anonymity becomes a problem is when those same people who feel free to say anything they wish without fear of their reputation being tarnished and those comments become less about expanding upon an idea or furthering a cause, but rather focus on personal attacks towards an individual. This is truly a Catch-22 because allowing anonymity can lead to great discussion and cordial discourse, but that same anonymity can come back to bite you in the same argument if you anger someone to the point where they stop caring about feelings and say anything they please.

### *b. Description of Internet Comment Sections*

A person can go onto almost any website that features articles and have the ability to comment and give input on the articles. A person then makes an account on the website that will allow them to post comments on the articles. The account is a two-way street because the website gains more viewers for advertising dollars and the individual is afforded the right to express their feelings on any of the various topics discussed on the website. The original intention one can assume was to gain feedback and gain knowledge for what is connecting with the readers and how the writers can better relate to their viewership. However, over time the feedback has turned from constructive criticism and cordial discussion to fiery insults and racist, sexist, despicable comments.<sup>16</sup>

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<sup>15</sup> Kelly E. Stavnes, Anonymity Protection Versus Subpoena Compliance: What Media Companies Should Consider When Defending User Comments Online, 36 J. Corp. L. 697, 699-700 (2011).

<sup>16</sup> I understand that most comments are appropriate, but the percentage of comments that are over-the-top *can* (not all the time) make the experience not worth the hassle of free speech,

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

### *c. Pros and Cons of Anonymity*

Ms. Stavnes makes a very good case when it comes to the pros and cons to the situation and I would like to give her brief analysis on the pros and cons before I delve into the situation.

She described the pros of anonymity as follows:

“Some find no problem with--and support sweeping rights for--anonymity online. One such proponent is Mike Godwin, former staff counsel for the Electronic Frontier Foundation. He believes people fear the Internet because of its negative potential for defamation and offensive content and, therefore, ignore its advantages. Godwin maintains that the Internet provides a ‘myriad [of] benefits,’ such as liberation, equalizing individuals, and promoting the sharing of ideas, and that people must be able to speak freely to maximize the Web's potential. Godwin states that online forums emulate ‘a town hall meeting, albeit one in which everyone has a chance to speak, no one is shouted down, and everyone has time to develop and explain his or her ideas.’ Godwin fears that ‘governments and other large, established institutions, acting out of fear of both social instability and their own loss of control, [will] institute repressive measures that limit or destroy the full democratic potential of this new medium.’”<sup>17</sup>

In addition, a study in 2011 concluded that 83 percent of participants felt strongly or somewhat agreed that anonymity promotes a livelier and passionate discussion.<sup>18</sup> Further, the same study concluded that 94 percent of participants said anonymity gives them more courage to discuss an idea they might not have otherwise.<sup>19</sup>

In contrast, Ms. Stavnes outlines the cons to anonymity as follows:

“Conversely, many find that ‘[n]ews websites from across the country struggle to maintain civility in their online comments forums. . . . [G]iven their anonymous nature and anything-goes ethos, these forums can sometimes feel as ungovernable as the tribal lands of Pakistan.’ One scholar says the ability to use a

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especially (as stated numerous times) when an individual’s life is affected deeply by the comments.

<sup>17</sup> *Id.* at 701.

<sup>18</sup> Jack Rosenberry, *Users Support Online Anonymity Despite Increasing Negativity*, Newspaper Res. J., Spring 2011.

<sup>19</sup> *Id.*

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

pseudonym emboldens many to say what they never would if the public knew their identities. John Hatcher, a journalism professor at the University of Minnesota Duluth, advocates for complete disclosure of identities online. He believes that divulging identities allows readers to assess the credibility of the source while also holding that source accountable. Hatcher argues that technological advances have ‘lower [ed] . . . ethical standards,’ and that online message boards do not host the idyllic discourse envisioned. As a result, he calls for readers to ‘raise [the] community standard well above the minimum requirements set by law,’ believing this will ease the prevalence of ‘meanspirited, divisive and cowardly rants published by people who would not, you hope, want their names connected to these ideas.’<sup>20</sup>

Further, anonymity has increased the amount of internet-based legal claims in the internet’s short life.<sup>21</sup> Anonymity on the internet has spawned legal claims concerning harassment, invasion of privacy, emotional distress, and defamation.<sup>22</sup> Newspapers and bloggers have been subpoenaed to identify the identities of their anonymous comment posters.<sup>23</sup> The lack of accountability can outweigh all the good things anonymity allows.<sup>24</sup>

### *d. Recent Examples of Internet Comment Sections*

Millions of articles are posted on the internet each year for individuals to post comments and share their ideologies with the world. The basic daily conversations will inevitably discuss an article or blog post someone read online. Opinions will be formed on the topics and people do not have a problem in expressing those opinions to their friends and family throughout the

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<sup>20</sup> Kelly E. Stavnes, Anonymity Protection Versus Subpoena Compliance: What Media Companies Should Consider When Defending User Comments Online, at 701-702.

<sup>21</sup> Jason M. Shepard, Anonymity, Disclosure and First Amendment Balancing in the Internet Era: Developments in Libel, Copyright and Election Speech, 15 Yale J. L. & Tech. 92, 96 (2013).

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Shepard continues to describe the negative role of anonymity: “As Judge Jeffrey S. White said in a case involving the controversial WikiLeaks website, “We live in an age when people can do some good things and people can do some terrible things without accountability necessarily in a court of law.” Anonymity can shield individuals from being accountable for their speech; it can hinder the investigation and prosecution of crimes and civil wrongs; it has the potential to undermine government authority and security; and it can undermine business interests and e-commerce.” Id.

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

day. The internet comment sections and message boards should mimic the real life conversations people have with each other daily. Below are articles and topics that best illustrate the idea of anonymity on the internet becoming a way of the past and adding accountability to the speech.

The first example is an article from *The Daily Beast* written by Jesse Singal. The opening below the header describes the situation at hand: “Online news outlets realized long ago you can have an open commenting space or you can have intelligent conversations—but you can’t have both.”<sup>25</sup> The article gives specific examples from a recent Arizona immigration law article and the comments that are made by individuals on the site.<sup>26</sup> In addition, the article discusses the study of online behavior when individuals feel they are free to write as they please when it is anonymous.<sup>27</sup> The good news is most large news sites are requiring individuals to post

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<sup>25</sup> Jesse Singal, *Most Comments are Horrible—Sites Look for Ways to Make Them Better*, *The Daily Beast*, July 16, 2012, <http://www.thedailybeast.com/articles/2012/07/16/most-comments-are-horrible-sites-look-for-ways-to-make-them-better.html>.

<sup>26</sup> Example from the article: “IN AZ when I see an illegal i bump into his car, call the cops and watc wahts happens lol,” wrote “Come Out and playSB1070.” *Id.* I know this example is not aimed at any specific individual and would not cause someone extreme emotional distress, but does it need to sit there on the site without being deleted? There is zero social value or “new ideas” being gained by people seeing this comment. Anonymity allows for this individual to get away with this comment, but if accountability and their name were on there, that person could be punished by way of his tarnished reputation. I do not mind that comment being made if their name is attached to the words as their “owner” because that person understands the consequences of their actions. I want to make sure I am being clear that my position is not to censor speech on the internet, but rather censor *anonymous* speech on the internet.

<sup>27</sup> “Academic research into online civility backs this up. Kate Kennski, a political-communications researcher at the University of Arizona, is currently studying online behavior in discussion settings. She and her colleagues are still early in their research, but she did say that they’ve found that 15 to 20 percent of all online comments contain some form of name-calling. The level of vitriol varies from site to site, which buttresses the idea that social norms greatly impact online discourse. ‘Different communities as well as different boards do establish their own norms,’ Kennski said. ‘People, *when they are anonymous, don’t feel the same level of responsibility for their actions,*’ Kennski said. ‘*And when you know that your words can come back as a direct reflection of you, as something that can be carried around, you may decide to temper your comments in some way.*’” (emphasis added) *Id.*

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

an identity by connecting with their Facebook profile to provide for accountability.<sup>28</sup> The article further discusses how NPR’s website has begun to police comment sections.<sup>29</sup> NPR’s website now puts every new user on an initial probation where all comments made in the beginning of their registration to the website are checked by a moderator.<sup>30</sup> Once the individuals comments are checked by the moderator and deemed acceptable they can post as they wish, but if a user continuously has comments flagged they will be put back on the initial probation.<sup>31</sup> The concept behind this innovation is to create a community on the NPR website and prohibit “trolls” from reducing the comment boards to nothing, but vitriol.<sup>32</sup> Further, *The New York Times* employs numerous moderators on their online website and has a similar policy to NPR’s censorship.<sup>33</sup> The *Times* aims for relevancy to the topic at hand and no name calling to ensure there is a cordial dialogue and thought-provoking analysis from individuals.<sup>34</sup> A blogger from *The Daily Beast*, Andrew Sullivan, has never had a comment section because when he began blogging he did not want to suffer from the consequences of a commenter landing him into a libel lawsuit, and while

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<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> The exact idea from NPR’s product manager for social media tools, Kate Myers, “is to weed out vitriolic drive-by commenters—people who are often referred to NPR by an outside link and who show up at an article just to cause trouble. ‘They’re not part of our regular, consistent community,’ Myers said. ‘We make those calculations and make those balances every time we talk about making changes,’ she said. ‘Because we really are committed and believe in the idea of the free and open community. But we know that we want to have these sometimes conflicting goals of encouraging a safe space for people to comment and to have a civil discourse.’” Id.

<sup>33</sup> *Times* has three full-time and ten part-time moderators on the website. Id.

<sup>34</sup> Without moderators, [full-time moderator Erin] Wright said, things would get ugly fast. “The stuff that we reject is pretty virulent,” she said. “People try to get the most disgusting comments through us.” Bassegy Etim, the *Times*’ community manager, said his driving philosophy is that “when you’re coming to the *Times*, what you’re coming for is urbane and literate content, and there’s no reason for comments to be held to a lower standard than that.” “If your comment is incoherent, we don’t approve it,” he added. “If you use all caps we don’t approve that. If your comment is clearly just trolling we don’t approve that either.” Id.

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

this fear was ignorant, Sullivan has continued to shun comment sections even with financial incentives to change that idea.<sup>35</sup> In sum, this article gives an outstanding perspective on how large news outlets have decided to moderate the anonymity of posting and moderate actual content that would offend people. The moderation of these sites is concerning because on the NPR website only 70% of the comments are being allowed to get through to the comment sections.<sup>36</sup> The number is troubling because I am sure a certain percentage of that 30% are thought-provoking, but NPR may not want people to see these comments because it could be against their mission or the article's purpose. Opposing beliefs should be shared for the best possible discussion to take place. I would trust many of those comments being blocked are of the vitriol kind, but the gray area exists of blocking comments that NPR chooses they do not like because it is an opposing viewpoint to their end game. Once again, this paper is to shine light on the problem of anonymity and accountability, not to shun thought-provoking unpopular opinions.

Another recent change is what YouTube has done in respect to their comment sections.<sup>37</sup>

For those not aware, YouTube has traditionally had the worst comment sections on the internet.<sup>38</sup>

The commenters were bad enough that a website was created to openly mock the commenters

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<sup>35</sup> “Instead, Sullivan encourages an ongoing civil conversation his own way: by posting and responding to readers’ emails—particularly those that take him to task for this or that—in essence moderating a conversation that occurs not in a comments section, but on the blog itself...But don’t his readers get annoyed at not having a comments section? Three years ago or so he put it to a vote. ‘Our readers voted 2-to-1 against comments.’” Id.

<sup>36</sup> Id.

<sup>37</sup> Ryan Tate, *YouTube is Developing a Secret Weapon Against the Internet’s Worst Commenters*, Wired, June 29, 2012, <http://www.wired.com/business/2012/06/youtube-commenters/>.

<sup>38</sup> “Meme harvester BuzzFeed called YouTube ‘a comment disaster on an unprecedented scale’ with ‘the worst commenters on the internet;’ online entrepreneur (and Wired contributor) Andy Baio called them ‘historically pretty bad;’ and the online comic XKCD in 2006 imagined the moon landing being broadcast — and moronically heckled — on YouTube. ‘The internet has always had loud dumb people,’ XKCD illustrator Randall Munroe wrote in an accompanying caption, ‘but I’ve never seen anything quite as bad as the people who comment on YouTube videos.’” Id.

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

and software was created in response to filter out the comments.<sup>39</sup> The site recently made changes by adding a feature where only the highly rated comments were shown under the videos, and an individual would have to make an effort to find the nasty comments under the videos.<sup>40</sup> The site has the opportunity to reach a broad audience because of the artistic videos on display and copious amount of entertainment, but the feedback individuals may want on their videos is never realized because of the backlash most commenters receive from anonymous individuals.<sup>41</sup>

Further, the article suggests the protocols discussed throughout the paper to make anonymity extinct and make people accountable for the comments they make on the internet. The article discusses, because YouTube is owned by Google, individuals signing into their “Google+” identity to comment on the videos.<sup>42</sup> As a Plan B, the article suggests users link their Facebook’s to their accounts for accountability.<sup>43</sup> Anonymity is the crutch individuals are using to get their point across. They are not fearful of repercussions because the comforts of a computer screen and keyboard with no accountability allows for an individual to get away with any comment they deem sufficient. Those comments will never grow a conversation or make a person think about a new idea, but rather stops the conversation and pushes the conversation into a waste of time. Accountability is the new frontier of the internet and a time will come when individuals start to accept it as the norm and not hide behind anonymity and the First Amendment.

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<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> “YouTube comments are a potentially fantastic engagement point that is unfortunately the most common go-to example for trolls,” says Huffington Post community manager Justin Isaf. “These are real people who are opening themselves to what is often ridicule and overt abuse. How many people would put themselves out there again after reading comments that belittle, insult, malign or otherwise hurt them? It’s a loss of an amazing opportunity.” Id.

<sup>42</sup> “As a general rule, people are far less likely to troll under their real name.” Id.

<sup>43</sup> Id.

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

The biggest social media service in the world, Facebook, recently commented that to end cyberbullying you have to stop people from doing anything anonymously on the internet.<sup>44</sup> Facebook requires all members to provide their real names and e-mail addresses to verify their identity.<sup>45</sup> This does not stop individuals from providing fake identities or spam, but for purposes of curbing cyberbullying it is effective.<sup>46</sup> The article links to a quote from former Google CEO Eric Schmidt where he calls anonymity “dangerous.”<sup>47</sup>

Lastly, I wanted to use an article as an example of what happens when an individual is identified as the “owner” of their comments and the backlash that should result because of their stupidity.<sup>48</sup> The article is a movie review from *The New York Observer* where writer Rex Reed gives his opinion on the movie “Identity Thief”. In the article, he discusses actress Melissa McCarthy’s appearance, but says nothing about her performance.<sup>49</sup> In the article, Reed describes McCarthy as “cacophonous, tractor-sized,” playing “a screeching, humongous creep,” and a “female hippo.”<sup>50</sup> He goes on to describe her as “a gimmick comedian who has devoted her short career to being obese and obnoxious with equal success.”<sup>51</sup> While I do not condone his comments in the slightest, there could be an argument made that his latter comments are at least

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<sup>44</sup> Bianca Bosker, *Facebook’s Randi Zuckerberg: Anonymity Online “Has to Go Away”*, The Huffington Post, July 27, 2011, [http://www.huffingtonpost.com/2011/07/27/randi-zuckerberg-anonymity-online\\_n\\_910892.html](http://www.huffingtonpost.com/2011/07/27/randi-zuckerberg-anonymity-online_n_910892.html).

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> “The only way to manage this is true transparency and no anonymity,” Schmidt said. “In a world of asynchronous threats, it is too dangerous for there not to be some way to identify you. We need a [verified] name service for people. Governments will demand it.” Id.

<sup>48</sup> This is not a comment from an article, but rather an article itself. I want to show the backlash that can occur when someone puts their name on something that encourages name calling and ridicule instead of growing the market place of ideas.

<sup>49</sup> Rex Reed, *Declined: In Identity Thief, Bateman’s Bankable Billing Can’t Lift This Flick Out of the Red*, The New York Observer, February 5, 2013, <http://observer.com/2013/02/declined-in-identity-thief-batemans-bankable-billing-cant-lift-this-flick-out-of-the-red/>.

<sup>50</sup> Id.

<sup>51</sup> Id.

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

attempting to create a discussion over her career, but that is still a stretch. The first few comments about her weight would not evolve into a thought-provoking discussion and none of us would believe they provide any positive social commentary. However, as stated in the footnote below, this article is being used to illustrate the consequences of writing something idiotic and stupid because of the backlash that arrived shortly after the article. Numerous actors came to the defense of McCarthy and the comment sections of the articles flooded with defense of McCarthy.<sup>52</sup> The idea that one can hide behind their screen without repercussions and “troll” on individuals is eliminated when a person is the owner of those comments. Rex Reed learned the hard way that everything you write on the internet is forever stamped on the imprint of the inter-web. I understand this is an article and not a comment section, but it echoes my sentiments of owning your words on the internet. Reed has every right behind the First Amendment to discuss his feelings on McCarthy and the movie itself, but putting his name to the words makes him understand that the First Amendment only protects your words and not your reputation.

To conclude the section on internet comment sections I would like to continue the goal of this paper and the recognition that anonymity is the worst form of First Amendment values. The idea of anonymity works in democracy, but not on the internet. The ability for people to feel free to say what they feel is all well and good, but not when the words are floating around the internet with no true ownership. The standard for internet accountability starts and stops with an ownership of the words being sent across the internet. The comment sections on articles are meant to provide insight to the writer and allow individuals the opportunity to engage in a liberating discussion about the topic at-hand. When people are allowed to spew vitriol, whether it racist or sexist or homophobic remarks, the internet becomes a cesspool of comments that

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<sup>52</sup> Id.

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

serve no purpose but to make people feel worse about themselves and to feel worse for society as a whole that people feel it's necessary to degrade strangers for having an opinion. Free-thinkers and opinions shaped this country and will continue to shape this country, but the lack of control on internet comment sections and accountability for the actions of people on them will only hurt society in the long run. People should feel free to say what they want concerning issues and until accountability is everywhere on the internet we will be held back to move past these inane issues.

### III. Towards Meaningful Reform

The cloak that websites hide behind in the presence of attempts to curtail dialogue on reader-comment sections and the internet is Section 230 of the Act.<sup>53</sup> The Act became effective on October 21, 1998, which corresponds to the beginning stages of the internet age.<sup>54</sup> The Act was enacted in response to the ever-growing landscape of the internet and Congress wanted the internet to flourish with minimal government regulation.<sup>55</sup> Further, Congress found the policy of the United States in 1998 was to ensure the safety of information over the internet with families in mind and to maximize the utilization of internet technology.<sup>56</sup> In addition, Congress provided

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<sup>53</sup> 47 U.S.C.A. § 230 (2006).

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

<sup>55</sup> Congress found the following: “(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens. (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops. (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity. (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation. (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.” 47 U.S.C.A. § 230(a) (2006).

<sup>56</sup> The Act described the policy of the United States was, “(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

immunity to websites from third-parties who published information on their websites by not treating the websites as the actual publishers of the material and protecting the websites if they edited content they deemed “obscene” or “extremely harassing.”<sup>57</sup>

The law is perhaps a victim of the sort of optimism that accompanied the inception of on-line communication. The beginning of the on-line communication internet era was built around chat rooms and e-mail. A chat room was something new and never seen before because you could talk to a vast amount of people across the world. Any regulation of the internet at the commencement of the internet age, in hindsight, would look to be out-of-touch because of the rapid growth of the internet. No one could have expected the strides the internet would take in the last fifteen years since the Act was enacted. Technology changes almost monthly and only people who work in the tech industry can foresee the next technological change around the

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(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation; (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.” 47 U.S.C.A. §230(b) (2006).

<sup>57</sup> Congress enabled, “Protection for ‘[G]ood [S]amaritan’ blocking and screening of offensive material[:]

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).” 47 U.S.C.A. § 230(c) (2006).

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

corner. Lawmakers are at a great disadvantage because without a great staff that understands the ever-changing technology landscape any legislation may be a step behind upon enactment.

The Act has approached a fork in the road where the continued original use of the law, as enacted in 1998, may not benefit our current society and our knowledgeable of the internet. A complete overhaul of the law is needed to ensure, to paraphrase Jefferson, that it advances to keep pace with the times. The time period we live in has become the “Wild West” on the internet and changes to the law is needed for us to again become a more civilized society; a civil society where anonymous vile remarks are not common place.

### *a. Shortcomings of Section 230 of the Act*

The shortcomings arise when looking at §230(c) of the Act because (a) and (b), while outdated, discuss the policy behind the Act. Essentially, websites would face liability for not blocking enough content or for blocking too much content.<sup>58</sup> The Act creates a dilemma for websites to possibly be too proactive or too nonchalant overseeing the content on their websites. Unfortunately, §230 lacks a Supreme Court case to follow and leaves the interpretation of the statute to the lower courts.<sup>59</sup>

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<sup>58</sup> Ryan French, Picking Up the Pieces: Finding Unity After the Communications Decency Act Section 230 Jurisprudential Clash, 72 La. L. Rev. 443, 450 (2012).

<sup>59</sup> One of the leading cases in interpretation of the Act is *Zeran v. AOL, Inc.* where the court held that “the distributor classification is merely one subset of the broad common law notion of a publisher. More importantly, the court noted that Congress passed § 230 specifically to prevent websites from avoiding attempts to screen content. The *Zeran* court concluded that distributor liability threatened this congressional goal because the prospect of liability for knowledge might discourage websites from allowing themselves to become aware of offensive content.” *Id.* at 453. In contrast, the Ninth Circuit in *Fair Housing Council v. Roommates.com* held: “In determining the applicability of § 230 immunity, the court did not hesitate to recognize the website's users, who indicate their discriminatory preferences, as content providers. However, the court went a step further by also characterizing Roommates.com as a content provider. By leaving its users with only discriminatory alternatives, it had thus contributed to the development of discriminatory content and was outside the scope of § 230 immunity. This interpretation is potentially in conflict with a literal reading of the *Zeran* holding, which precludes all ‘liability for

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

### *b. How to Reform Section 230 of the Act*

A reform of the Act will be a balancing act of holding websites accountable for the remarks posted on their website while at the same time guaranteeing speech with a true owner of the words is not censored. The goal is to change the landscape of internet postings, not overnight, but gradually to provide accountability for internet users.

The first step of the reform is the language used in §230(a) and (b) of the Act to reflect the current internet age. The language used in the current Act, while still pertinent in some respect, describes the beginning of the internet age more than the internet in 2013. The Act's language in these sections should reflect the ever-growing social media portion of the internet and place a greater focus on promoting the marketplace of ideas with thought-provoking, verified user-generated content. The policy behind the new Act should enable future generations to observe how society adapted to the ever-changing technological landscape and how adaptation can provide a better social discourse.

The most important step of the reform is shaping §230(c) to mirror the policy behind the new Act. The immunity would stand for websites that require a verified-user account because the user will be held accountable for their own words and actions on those sites, including possible defamation and libel suits if the user crosses a line they wish to cross. However, the websites who insist on allowing anonymous posting and not conducting a simple background check will lose the immunity that §230(c) currently provides them. The website would be held responsible in legal suits as if they were the individual who published the original comments because failing to regulate the identity of a user and failing to regulate the users defamatory or libelous comments make the website on par regarding culpability. A middle ground approach of

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information that originates with third parties.' Thus, if a website encourages or induces illegal content, it may still be considered a de facto content provider." *Id.* at 456.

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

allowing anonymous speech, but providing a user's IP address with a court order would raise too many questions concerning censorship of speech and under what circumstances the court could order the IP address to be released to the court.<sup>60</sup>

Opponents of the reform would suggest anonymous postings are crucial for whistle blowers, victims of sexual assault, and individuals who are afraid to speak their mind openly because of the repercussions of their words. Many individuals believe internet anonymous speech is akin to the beginning of our history with *The Federalist Papers* and the pseudonyms used by authors for centuries. However, the latter anonymous speech forms are literary propaganda. The reformation of the Act is not prohibiting anonymous speech, but removing the immunity for websites who do not regulate defamatory or libelous speech. The goal of the reformation is to provide accountability on the internet for all comments. Anonymous posting under the reformation of the Act is allowed, but the consequences would mirror the real world where defamatory and libelous statements are illegal. The websites would gradually realize the opportunity for civilized conversation and accountability far outweighs the consequences of continuous legal claims. Freedom of expression is our greatest right in society, and the preservation of that expression makes the United States different than most countries. Anonymity can threaten the benefits of that expression because the world is a scary place without fear of consequences. Accountability is the only answer to the threat of anonymity.

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<sup>60</sup> In *Cyber Civil Rights*, Danielle Keats Citron discussed this approach. She stated, “[f]irst, it should require website operators to configure their sites to collect and retain visitors' IP addresses. In other words, the standard of care should demand ‘traceable anonymity.’ This would allow posters to comment anonymously to the outside world but permit their identity to be traced in the event they engage in unlawful behavior. Requiring traceable anonymity is hardly a burdensome step: some blogs already deny access to anonymous posters. Traceable anonymity would not betray our commitment to anonymous speech if site operators and ISPs refuse to reveal a poster's identity unless a court order demanded it. This would protect individuals for whom anonymity is most crucial, such as victims of domestic violence and political dissidents.” Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61, 123 (2009).

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

### *c. The End of Anonymity*

The approach to end anonymity is a shared effort between the websites and state mandated legislation to accomplish the goal of promoting accountability on the internet. Federal legislation in our current era will be tougher to pass, thus leaving it to the states is easier. The policy reasons behind ending anonymity are numerous. George Freeman, a lawyer for the *New York Times*, believes anonymous posting on the internet is not akin to anonymous sources used by newspapers and does not fall within the immunity of §230(c).<sup>61</sup> Freeman reasoned “anonymous posters have not asked journalists to promise to protect their identities before providing information, nor has a journalist vetted the poster's comments.”<sup>62</sup> Further, another scholar believed taking away anonymity provides the victim of cyberbullying recourse against the person and acts as a deterrent against cyberbullying.<sup>63</sup> As stated above, anonymity has led to legal claims involving harassment, emotional distress, and defamation.<sup>64</sup> Anonymous speech is better used and protected in the real world democracy settings for propaganda, news sources and authors writing under a pseudonym. Anonymous speech was given a twenty year window on the internet, and the need for accountability should close that window.

### *i. Private Solutions: Site-Mandated*

The trend of ending anonymity has begun on many stages of the internet. For example, the articles above discussed the *New York Times*, NPR, and YouTube attempting to curtail the problem of anonymity by employing their own tactics. Three different solutions are proposed in

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<sup>61</sup> William H. Freivogel, Does the Communications Decency Act Foster Indecency?, 16 Comm. L. & Pol'y 17, 42 (2011)

<sup>62</sup> Id.

<sup>63</sup> “Paul Ehrlich suggested stripping the poster of anonymity-- a solution that would provide the victim with recourse against the perpetrator, serve as a deterrent to irresponsible posts and avoid chilling innocent speech.” Id.

<sup>64</sup> Jason M. Shepard, Anonymity, Disclosure and First Amendment Balancing in the Internet Era: Developments in Libel, Copyright and Election Speech, 15 Yale J. L. & Tech. 92, 96 (2013).

## **TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH**

this paper: 1) a minimal billing for users, 2) providing their driver's license number, and 3) standard background check.

First, the minimal billing strategy for users to post and comment on a website is rarely used because of the cost deterrent to individuals. Millions of websites online allow free commenting and losing web traffic daily would hurt advertising costs for the website if the cost of posting is too high. However, this solution would only employ a one-time payment under \$1.00 for a yearly right to post on a website. The site would verify an individual's identity with their billing information and credit card information. The personal information will remain confidential with the website, and that person can freely post on the website using their own identity.

The opponents of the minimal billing solution will argue the solution deters individuals on smaller sites to continue posting and could restrain positive discussion on those sites. However, the goal is to end anonymity gradually and not overnight. A larger website will not be affected by this strategy because many individuals have a daily routine of websites and the solution would be a trickle-down effect from the larger websites to the smaller websites. Further, some individuals do not own credit cards and it could be viewed as a deterrent for the less fortunate to speak. A cash payment would be insufficient because no identity check can occur without the billing information. An individual without a credit card would send a money order to the website because a money order requires identification prior to sending. The minimal billing solution is the least likely of the three solutions because employing every website to charge a fee would be difficult.

Second, a website requiring the individual to provide their driver's license number is another solution. A driver's license number is easily verified by the website and will be kept

## **TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH**

confidential from the other users. The user could then post on the website using their own identity and be held accountable for their posts and comments. A driver's license number, if hacked, provides that individual with minimal opportunities to steal it because without identification the hacker would gain nothing from the knowledge of an individual's driver's license number.

Opponents of the driver's license approach would be nervous to give their number because it's a unique piece of personal information. If stolen, the thief could only learn your full name, date of birth, address and physical appearance, but not use the actual license. A one-time breach of the confidential information would be a big deterrent to the individuals on the website and could put an end to the driver's license approach. However, the driver's license approach is the easiest to identify a user's identity. The websites would have to weigh the two scenarios based on their website security. The driver's license solution is more likely to occur than the minimal billing solution because of the free posting and commenting, but still unlikely because of the negative image of asking for a unique piece of personal information.

Third, the standard background check model would be the most efficient and safest way for an individual to post online using their own identity. An individual would provide their name and address to the website for the right to post and comment using their own identity. The information would be held confidentially by the website. In response, the website would attempt to match the IP address to the background information. If the IP address does not match the information then the user cannot post on the website until their identity is verified. The verification is simple because websites have the IP addresses of every user on their site.

Opponents would point to individuals who can scramble IP addresses and provide faulty names to post on the site. A risk of some users slipping through the cracks is inevitable, but the

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

goal of internet accountability and using their own identity will be met for the vast majority. The users who are unable to provide a valid IP address will not gain access to the website and individuals who provide faulty names will be denied access to posting on the website. Posting will be free and individuals can post anything they want, but will be held responsible for their comments and actions just as in the real world. The standard background check is the most likely solution to work because it is the least invasive of the three and is the most efficient to check a person's true identity with minimal personal information.

The end of anonymity does not mean an end to free speech on the internet because the content itself is not being suppressed. The regulation of anonymous speech is justified because of the current "Wild West" landscape of the internet and the lack of accountability of our actions. The internet is used as an escape from the real world by providing individuals the right to post defamatory and libelous statements about any citizen. However, these solutions curb the loopholes, and by providing accountability it eliminates the distinction between internet and real world conversations.

### *ii. State Mandated Solution*

The proper legislation for ending anonymity is ensuring an individual is held responsible for their post and comments on the internet. In 2011, the New York legislature proposed a bill called the "Internet Protection Act" to combat anonymity.<sup>65</sup> The bill provided a 48-hour window to the individual who posted the offensive anonymous material to attach their name to the

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<sup>65</sup>Jason M. Shepard & Genelle Belmas, Anonymity, Disclosure and First Amendment Balancing in the Internet Era: Developments in Libel, Copyright, and Election Speech, 15 Yale J. L. & Tech. 92, 97 (2013). *See* S.6779, 2011-2012 Gen. Assemb., Reg. Sess. (N.Y. 2012) ("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.").

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

comment.<sup>66</sup> The individual would have to confirm their IP address, name and address were accurate.<sup>67</sup> The bill's policy was to provide recourse for victim's of anonymous posting.<sup>68</sup> The bill allowed the anonymous offensive material to stay on the website if the user agreed to put their name on the post.<sup>69</sup> The bill is currently in committee.<sup>70</sup>

The bill introduced in New York is the exact type of state mandated legislation needed to combat anonymity on the internet. The bill calls for accountability of the user's posts and comments, but does not restrict their right to free speech if they agree to post their name on the post. A simple request to the website administrator to take down the anonymous posting is the only criteria the bill proposes to combat anonymous speech. The bill does not talk about content, but only anonymous speech and the need for accountability.

### *d. The Likely Court Challenges*

In McIntyre v. Ohio Election Com'n, the Supreme Court held an Ohio statute unconstitutional prohibiting anonymous pamphlets.<sup>71</sup> In Talley v. California, the Supreme Court

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<sup>66</sup> S.6779, 2011-2012 Gen. Assemb., Reg. Sess. (N.Y. 2012).

<sup>67</sup> Id.

<sup>68</sup> The bill's justification: "Bullies are notorious for harassing and/or threatening their victims face-to-face. However, modern technology now allows this behavior to occur anonymously, from just about anywhere - at any time. Using electronic communications devices, cyber bullies can post damaging comments about a person on a website, while remaining anonymous and difficult to trace. While cyber bullying is often committed by or against children, it is by no means confined to children. Anonymous postings on the internet not only can harm the persons or businesses being directly victimized, but they also hurt the public in general. When anonymous posters hide behind the inter[net] to facilitate a crime such as harassment[;] or as a vehicle for defamation, innocent men, women and children are openly victimized, and the public is intentionally misled. This legislation simply provides a means for the victim of an anonymous posting on a website to request that such post be removed, unless the anonymous poster is willing to attach his or her name to it." Id.

<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> The Court held, "it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357, (1995).

## TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH

held a California statute was unconstitutional for prohibiting anonymous printed speech.<sup>72</sup> However, the Supreme Court has never ruled or protected anonymous speech on the internet. The Court would likely discuss the history of anonymous speech and the impact it's had on society, but the impact on anonymous printed speech has been political speech and not vitriolic posting on the internet. As Justice Scalia dissented in McIntyre, "to strike down the Ohio law in its general application-and similar laws of 49 other States and the Federal Government-on the ground that all anonymous communication is in our society traditionally sacrosanct, seems to me a distortion of the past that will lead to a coarsening of the future."<sup>73</sup> The progress of the internet in the last eighteen years since McIntyre should show the Court the difference in the two mediums. The content of the speech on the internet is not being restricted, thus content-based speech will not be at issue if heard by the Court. The only change is accountability of the individual saying the speech. That accountability could only be reputation of the individual, but it is a step in the right direction for free speech on the internet.

### IV. Conclusion

Anonymity on the internet for too long has gone unregulated and it allowed for the current "Wild West"-era of the internet where anyone can post scathing remarks towards anyone anonymously. The end of anonymity and reform of the Act will progress the internet into the next stages of technological advancement. The changes are already occurring on large internet platforms, i.e. *New York Times*, NPR and YouTube, and the gradual change of eliminating anonymous posting will create a civil discourse similar to our daily real world conversations

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<sup>72</sup> The Court reasoned, "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." Talley v. California, 362 U.S. 60, 64 (1960).

<sup>73</sup> McIntyre, 514 U.S. at 385.

## **TOWARDS A WORKABLE PARADIGM FOR REGULATING INTERNET SPEECH**

occurring around the country. The speech will remain on the websites because of the freedom of expression and First Amendment protection, but the elimination of anonymity provides much needed accountability. The overarching goal of accountability can be accomplished with the help of the private sites and state legislature, but the first step starts with society in general learning again what it means to be accountable for their free speech. To quote Jefferson, “law and institutions must go hand in hand with the progress of the human mind.”<sup>74</sup>

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<sup>74</sup> Thomas Jefferson on July 12, 1816.