

5-1-2013

# Examining Anonymous Internet Speech: Why the Pols Cannot Control the Trolls

Christopher Joseph Baione

Follow this and additional works at: [https://scholarship.shu.edu/student\\_scholarship](https://scholarship.shu.edu/student_scholarship)

---

## Recommended Citation

Baione, Christopher Joseph, "Examining Anonymous Internet Speech: Why the Pols Cannot Control the Trolls" (2013). *Law School Student Scholarship*. 179.

[https://scholarship.shu.edu/student\\_scholarship/179](https://scholarship.shu.edu/student_scholarship/179)

# EXAMINING ANONYMOUS INTERNET SPEECH: WHY THE POLS CANNOT CONTROL THE TROLLS

## INTRODUCTION

“Man is least himself when he talks in his own person. Give him a mask and he will tell you the truth.”<sup>1</sup> The late-Victorian author Oscar Wilde chose these words to describe how William Shakespeare did not speak in his own person, but instead used fictional characters like Romeo and Hamlet to reveal his true unabashed nature to the world.<sup>2</sup> Shakespeare, in wearing his character’s controversial personas as a guise, protected himself from a potentially disapproving society who may have stigmatized him for personally possessing aberrant and unpopular thoughts.<sup>3</sup>

In the 400 years that have passed since Shakespeare penned his final masterwork<sup>4</sup>, human nature has largely remained static as technology has advanced at the most rapid pace in the history of our species.<sup>5</sup> People still instantly understand and can directly relate to Shakespeare’s

---

<sup>1</sup> OSCAR WILDE, JULES BARBEY D'AUREVILLY & LADY WILDE, *INTENTIONS: THE DECAY OF LYING; PEN, PENCIL, AND POISON; THE CRITIC AS ARTIST* 185 (Lamb Publ'g Co. 1909) ("Man is least himself when he talks in his own person. Give him a mask and he will tell you the truth.").

<sup>2</sup> *Id.* at 184-185

<sup>3</sup> For example, many critics argue that Shakespeare’s female characters possessed controversial traits that were traditionally reserved for male roles, such as intelligence, cunning, and strength. ANNA BROWNELL JAMESON, *SHAKESPEARE'S FEMALE CHARACTERS: AN APPENDIX TO SHAKESPEARE'S DRAMATIC WORKS* 14 (2nd ed. Bielefeld: Velhagen & Klasing 1843).

<sup>4</sup> *The Two Noble Kinsmen*, William Shakespeare’s final work, was completed 401 years ago in 1614. Stanley Wells, *The Chronology of Shakespeare’s Works*, PENGUIN SHAKESPEARE, <http://www.penguinclassics.co.uk/static/cs/uk/10/minisites/shakespeare/readmore/chronology.html>.

<sup>5</sup> “The paradigm shift rate (i.e., the overall rate of technical progress) is currently doubling (approximately) every decade; that is, paradigm shift times are halving every decade (and the rate of acceleration is itself growing exponentially). So, the technological progress in the twenty-first century will be equivalent to what would require (in the linear view) on the order of 200 centuries.” Raymond Kurzweil, *The Law of Accelerating Returns*, KURZWEIL ACCELERATING INTELLIGENCE (Mar. 7, 2001), <http://www.kurzweilai.net/the-law-of-accelerating-returns>.

characters even as they read about them on featherweight, wireless, handheld, voice and touch activated, internet-connected devices.<sup>6</sup> Had Romeo first met Juliet on Twitter instead of at the Capulet's masquerade, the lovers' fatal attraction would still persist.<sup>7</sup>

The quantum leaps made in technological advances during the Information Age have granted nearly every man, woman, and child in the civilized world a voice that can spread around the planet at the speed of light.<sup>8</sup> Yet humans remain limited by societal rules and boundaries preventing or discouraging them from exposing their innermost thoughts and beliefs to others. It would not bode well for a law student to openly advocate the use of illegal drugs. A politician's career may be short-lived if he divulges his penchant for binge drinking and casual sex. And a schoolteacher expressing outrage over her school district's grading policy may find herself tutoring from home. The overbearing pressures of societal norms preclude most citizens from expressing their true selves.

As Oscar Wilde suggests, people reveal their true thoughts when cloaked in unrecognizable disguises. In the modern era, such a disguise most commonly exists as a username on the Internet. By using an anonymous username, pressure to withhold one's true

---

<sup>6</sup> A Pew Research Center study concluded that 93% of e-book readers do so using handheld devices. Lee Rainie, Kathryn Zickuhr, Kristen Purcell, Mary Madden and Joanna Brenner, *The rise of e-reading*, PEW INTERNET (Apr. 4, 2012), <http://libraries.pewinternet.org/2012/04/04/the-rise-of-e-reading/#fn-419-3>.

<sup>7</sup> In Shakespeare's tragic romance *Romeo and Juliet*, Romeo and Juliet, both wearing masks, meet at a masquerade party. Juliet does not learn Romeo is the son of her family's arch-nemesis, Montague, until after she falls in love. The lovers' decision to marry ends with their untimely deaths. This analogy only works under the assumption that Romeo used a pseudonym, like the mask in the story, in courting Juliet via Twitter to initially hide his identity as a Montague. It can be inferred from the story that Juliet would probably have avoided Romeo if she had known he was of the Montague clan before submitting to his affections. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* 25 (Dr. Otto Fiebig ed., Leipzig: G. Græbner 1859).

<sup>8</sup> Approximately 34.3% of the world's population are internet users. *World Internet Usage and Population Statistics*, INTERNET WORLD STATS, <http://www.internetworldstats.com> (last visited Nov. 23, 2012).

feelings is eliminated.<sup>9</sup> This is a major contributing factor to the ever increasing universe of social networks and internet communities.

Anonymous and pseudonymous speech is flourishing on the Internet. Almost every major website and social network requires a username, and most do not prohibit the use of pseudonyms. Some websites, such as Reddit.com, actually encourage the use of pseudonyms or one time use “throwaway accounts.”<sup>10</sup> The website 4chan.org allows users to post without supplying any username, and creates a random combination of letters to identify the poster.<sup>11</sup> The primary exceptions are Facebook.com and LinkedIn.com, where staff actively monitors and bans users who are suspected of using fake names.<sup>12</sup>

Many internet users contribute to multiple websites. Someone might share vacation photos with family and friends using her real name on Facebook, make business connections on LinkedIn, argue her political views under a pseudonym on Reddit, and then post funny pictures anonymously on 4chan, all within the same day. This behavior is mirrored in real life, where the average American must wear different “masks” depending on context. In the course of one day, a woman might discuss holiday plans with her family at breakfast, pitch a multimillion dollar deal to a client at work, talk politics with a custodian on the elevator, and then share a funny joke

---

<sup>9</sup> Throughout this article, term “anonymous” will be used to refer to both anonymous and pseudonymous speech. The words anonymous and pseudonymous will refer to speech by an author whose identity is unknown, whether or not that identity capable of being traced.

<sup>10</sup> These are one time use accounts used for the sole purpose of posting a particularly sensitive or embarrassing comment. Some are even used to avoid prosecution for admitting to past or current illegal activities.

<sup>11</sup> From 4chan.org’s frequently asked questions section: “To post as ‘Anonymous’, simply do not fill in the [Name] field when submitting content. Information such as your personal IP address is viewable only to the administrators, and is not made publicly available.” 4CHAN, <http://www.4chan.org/faq> (last visited 11/24/12).

<sup>12</sup> Facebook’s official policy states, “Facebook is a community where people connect and share using their real identities. When everyone uses their real first and last names, people can know who they're connecting with. This helps keep our community safe.” Help Center, FACEBOOK, <http://www.facebook.com/help/292517374180078> (last visited 11/24/12).

with a friend on the train ride home. Each of these situations, embarked on in a single day, requires the woman to change her behavior and manner of speaking to adapt to the unique requirements of each situation. Unlike the internet, however, everything the woman in this example says during the course of the day is not discoverable by anyone using a search engine. The internet also allows her to do new things that she would never express in any real life situation. Therefore, pseudonyms must be used to facilitate the various situations to protect her privacy and allow her to express herself truthfully to each audience.

Anonymous speech on the Internet can be tremendously beneficial to our society, but with it comes opposition and a host of other problems. Besides facilitating the dissemination of speech, anonymity also facilitates criminal or tortious activity. Defamation, harassment, incitement, and hate speech are just some of the negative consequences of allowing anonymity on the Internet. Criminals, tortfeasors, and trolls<sup>13</sup> use the power of anonymity as a tool to perpetrate their wrongdoing in the same manner a ski mask is used in a bank robbery. Similarly, the same mask that protects an innocent skier from the cold mountain air can be used to facilitate robberies or far more serious crimes.

However, the potentially sinister use of ski masks does not warrant complete prohibition. Society finds a balance between the positive and negative uses of this identity concealer. Minimal regulations may be passed to limit when and where a ski mask should be used<sup>14</sup>, but

---

<sup>13</sup> The average troll falls into a gray area between criminals and tortfeasors. Hiding behind anonymity, they typically harass or annoy others using the Internet. A troll's activities can range from simple tomfoolery to hurtful bullying. "In Internet slang, a troll is someone who posts inflammatory, extraneous, or off-topic messages in an online community, such as a forum, chat room, or blog, with the primary intent of provoking readers into an emotional response or of otherwise disrupting normal on-topic discussion. Troll (Definition), WIKIPEDIA, [http://en.wikipedia.org/wiki/Troll\\_\(Internet\)#cite\\_note-1](http://en.wikipedia.org/wiki/Troll_(Internet)#cite_note-1), (last visited 11/20/12).

<sup>14</sup> States such as New York have anti-mask laws that give police the authority to arrest masked citizens. N.Y. Penal Law § 240.35(4) (McKinney).

ultimately they are a necessary and beneficial tool that cannot be prohibited. Anonymous internet speech is analogous to a ski mask. It is a naturally neutral tool that can be used for either the betterment or detriment of mankind. This paper will argue that the benefits of anonymous speech strongly outweigh any negatives and must maintain the full protections afforded to it by the Constitution. To fully appreciate the importance of anonymous speech, one must first be familiarized with the history of anonymous speech in America.

## HISTORY OF ANONYMOUS SPEECH IN AMERICA

Anonymous speech in America dates back to the year the country was founded. On January, 10, 1776, a few months prior to signing of the Declaration of Independence, *Common Sense*, a pamphlet advocating the overthrow of British rule, was first published.<sup>15</sup> Historians refer to it as “the most incendiary and popular pamphlet of the entire revolutionary era” and attribute its author, Thomas Paine, with having tremendous influence on the success of the American Revolution by persuading the colonists to immediately revolt.<sup>16</sup>

It was common at the time for political writers to remain anonymous to protect either side from retribution if their argument failed. *Common Sense* was first published anonymously under the pseudonym “an Englishman.”<sup>17</sup> Paine intended to remain anonymous but was outraged when his publisher chose “an Englishman” as his pseudonym.<sup>18</sup> In the next edition, which he

---

<sup>15</sup> GORDON S. WOOD, *THE AMERICAN REVOLUTION: A HISTORY* 55-56 (2002).

<sup>16</sup> *Id.* at 55

<sup>17</sup> THOMAS PAINE, *COMMON SENSE* 28 (Isaac Kramnick ed., Penguin 1986).

<sup>18</sup> *Id.*

self-published, Paine chose to add an “e” to the end of his original surname “Pain” to add a minimal layer of protection to his true identity and dispel rumors that John Adams, Paine’s ideological nemesis, was the true author.<sup>19</sup> Paine’s treasonable political rhetoric could have resulted in his execution and his initial decision to write anonymously may have prevented that. Had Paine been silenced, even his enemy John Adams agreed that “without the pen of the author of Common Sense, the sword of Washington would have been raised in vain.”<sup>20</sup>

After the Revolutionary War, Americans decided that the Articles of Confederation were unsatisfactory and needed to be revised.<sup>21</sup> In 1787, a group of delegates led by George Washington were assembled at the Philadelphia Convention to rectify the Articles.<sup>22</sup> After much debate, the delegates decided that revising the Articles was insufficient and a completely new form of government was needed.<sup>23</sup> On September 17, 1787, the delegates signed the United States Constitution.<sup>24</sup> For the Constitution to become law, it had to be ratified by a minimum of 9 of the 13 states.<sup>25</sup> This was a difficult process, as many Americans vehemently opposed the new system of government.<sup>26</sup> A crucial debate regarding America’s future was sparked.

Key proponents of the Constitution - Alexander Hamilton, James Madison, and John Jay - decided to engage in the public debate and refute critics of the Constitution arguing their

---

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

<sup>20</sup> George F. Smith, *Thomas Paine, Liberty’s Hated Torchbearer*, LUDWIG VAN MISES INSTITUTE (Jun. 8, 2010), <http://mises.org/daily/4438>.

<sup>21</sup> *The Federalist Papers*, CONSTITUTIONAL RIGHTS FOUNDATION, <http://www.crf-usa.org/foundations-of-our-constitution/the-federalist-papers.html>

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

stance.<sup>27</sup> The result was a collection of 85 essays known as *The Federalist Papers*, published in New York under the collective pseudonym: “Publius.”<sup>28</sup> The efforts of Publius had a significant and immediate impact on the debate, ultimately leading to the ratification of the Constitution and the creation of America’s current form of government.<sup>29</sup>

Matthew J. Franck, a law professor and legal author, commented on the benefits derived by using the Publius pseudonym:

[W]riting under a pseudonym did not, *in itself*, do anyone any harm, and...such concealment 'is not necessarily a cowardly or sinister act.' As the original Publius argued in *Federalist* No. 1, keeping one's identity concealed can force readers to focus on the quality of your arguments, rather than on personalities. It's harder to get *ad hominem* about a writer you can't identify. So a pseudonym can serve a good purpose in public discourse.<sup>30</sup>

Unlike Thomas Paine, the authors of *The Federalist Papers* had no reason to fear persecution for their writings. However, the use of Publius strengthened their argument by forcing readers to focus on the message’s content. Those who held disdain for the authors were unable to let their animosity and emotions cloud their judgment regarding the quality of the ideas contained within the essays. Had their identities been known, their message would have been interpreted as self-serving and biased since two of them, Hamilton and Madison, were part of The Philadelphia Convention.<sup>31</sup>

*Common Sense* and *The Federalist Papers* illustrate that anonymity can function as a powerful and important tool to progress mankind. Anonymity prevents speakers from falling

---

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Michael Gaynor, *Why "Publius" authored the Federalist Papers*, RENEW AMERICA, <http://www.renewamerica.com/columns/gaynor/090628> (Jun. 28, 2009)

<sup>31</sup> *Id.*

victim to *ad hominem* attacks. It allows unpopular viewpoints to enter the marketplace of ideas by removing the possibility of public backlash. And it prevents the majority from dominating the minority.

There are many other beneficial uses of anonymity in addition to the above rationales. Another example is the means in which anonymous speech aids persecuted groups. In the nineteenth century, female authors faced intense gender bias in the literary world. In order to be taken more seriously, many chose to adopt masculine or genderless pen names. Charlotte Brontë wrote the romantic classic, *Jane Eyre*, using the gender-neutral name “Currer Bell.” In regards to why her and his sisters used genderless pen names, Brontë stated:

Averse to personal publicity, we veiled our own names under those of Currer, Ellis and Acton Bell; the ambiguous choice being dictated by a sort of conscientious scruple at assuming Christian names positively masculine, while we did not like to declare ourselves women, because — without at that time suspecting that our mode of writing and thinking was not what is called 'feminine' — we had a vague impression that authoresses are liable to be looked on with prejudice; we had noticed how critics sometimes use for their chastisement the weapon of personality, and for their reward, a flattery, which is not true praise.<sup>32</sup>

Brontë’s fear of being prejudged proved true. As speculation grew that Currer Bell was actually a woman, her formally acclaimed writings were criticized as suffering from “coarse” writing and inappropriate themes.<sup>33</sup> Even today, female authors still feel the need to use masculine or gender-neutral pen names. The most notable modern example is J.K. Rowling, author of the wildly successful *Harry Potter* series and the first person to become a billionaire from writing

---

<sup>32</sup> ADRIAN ROOM, *DICTIONARY OF PSEUDONYMS* 54 (2010).

<sup>33</sup> LUCASTA MILLER, *THE BRONTE MYTH* 17 (2005).

books. It was the idea of her Joanne Rowling's publisher to use the pseudonym in fear that boys would not read a book written by a woman.<sup>34</sup>

Anonymity has enabled authors to write some of our culture's most popular works of literature without fear of hostilities, or reputational harm due to transgression of genre. Stephen King, the famed horror writer, chose to write under the pen name Richard Bachman to circumvent publishing norms that limited him to one new book per year.<sup>35</sup> At the time, it was common belief that flooding the market with books from the same author would oversaturate the market and decrease demand.<sup>36</sup> Romance writer, Eleanor Marie Robertson wrote as Nora Roberts because she initially assumed all writers used pen names.<sup>37</sup> After her romance novels became wildly successful she chose to use the pseudonym J. D. Robb to write mysteries. This enabled her to stray from her original genre and attract a completely new fanbase.<sup>38</sup> The modern music industry is awash with rappers using fictitious names. They rap about murdering people, evading taxes, and selling massive quantities of drugs, yet they live law-abiding lives. Instead of being persecuted for the content of their songs, they are helmed as fine artists, granted million dollar contracts, and given awards. Use of pseudonyms has enabled artists like former corrections officer William Leonard Roberts II (known by the pseudonym "Rick Ross") to adopt a fictional criminal lifestyle in his music and sell millions of albums worldwide.

---

<sup>34</sup> J.K. ROWLING, [http://www.jkrowling.com/en\\_US/#/timeline/pen-name](http://www.jkrowling.com/en_US/#/timeline/pen-name) (last visited 11/24/12).

<sup>35</sup> STEPHEN KING, <http://www.stephenking.com/faq.html> (last visited 11/25/12).

<sup>36</sup> *Id.*

<sup>37</sup> *Meet the Author*, BARNES & NOBLE, <http://www.barnesandnoble.com/writers/writerdetails.asp?z=y&cid=881767#interview> (last visited 11/25/12).

<sup>38</sup> *Id.*

## ADVENT OF ANONYMOUS INTERNET SPEECH

Since the first email was sent over 40 years ago in 1971, it has been possible to anonymously communicate through the Internet.<sup>39</sup> In 1995, internet service providers (“ISPs”) such as America Online, CompuServe, and Prodigy began offering nationwide dial-up internet service. Users “logged on” to the Internet using a phone-line connected modem. “Screen names,” as they were commonly called, were aliases used to identify users to each other on their respective internet service providers. From behind their anonymous screen names, millions of Americans began to communicate via websites, email, instant messaging, and chatrooms for the very first time. The freedom of creating imaginary screen names enabled users to adopt entirely new online personas. “Unlike real space, cyberspace reveals no self-authenticating facts about identity.”<sup>40</sup>

Today, there are limitless methods to transmit anonymous messages using the Internet. Users are no longer limited to interaction with those who share the same ISP. New social networks are springing up every day, each serving millions of users.<sup>41</sup> Anonymity reigns supreme as only a minority (such as Facebook.com and LinkedIn.com) requires use of a real name as opposed to a screen name.

Some of the most popular ways of communicating anonymously online include: Internet Relay Chat (“IRC”), email, instant messaging, message boards, forums, blogging, social networking, and gaming. Anonymity is king at sites such as Reddit, 4chan.org, Twitter, Imgur,

---

<sup>39</sup> *Wave New World*, TIME MAGAZINE 48, (Oct. 19, 2009)

<sup>40</sup> Lawrence Lessig, CODE AND OTHER LAWS OF CYBERSPACE 33 (1999)

<sup>41</sup> It is predicted that there will be 1.43 billion social network users by the end of 2012. *Facebook Helps Get One in Five People Worldwide Socializing on Online Networks*, EMARKETER, <http://www.emarketer.com/Article.aspx?R=1008903#XLt3d0OK6FXe8FTI.99> (Mar. 15, 2012).

Tumblr.com, Youtube, Instagram and Secondlife.<sup>42</sup> Each site thrives on user generated content, such as photos, comments, links to news articles and websites. Much of the content is created and shared by anonymous users and enjoyed by billions of people across the Earth.

There is a darker side to anonymous internet speech as well. Problems begin to arise as the quantity of anonymous speech on the Internet skyrockets. The ease of communicating anonymously creates opportunities for sinister and nefarious uses. Anonymous internet speech facilitates and shields speakers from liability arising from malfeasance. Common torts committed anonymously include fraud, invasion of privacy, copyright infringement, trade secret misappropriation, and defamation. Common crimes include hacking, identity theft, menacing, harassment, stalking, and incitement. Trolls, defined *supra*, are constantly teeming on the verge of crossing legal boundaries, even arousing the ire of mainstream media. Most trolls simply annoy or bother people and some are even entertaining. But others use their anonymity to truly hurt others. For instance, there are many examples of trolls harassing the families of suicide victims or parents of murdered children.<sup>43</sup>

In October of 2012, the notorious Reddit contributor and internet troll known as “violentacrez” was exposed and a media frenzy ensued.<sup>44</sup> Computer programmer Michael Brutsch appeared on CNN’s “360 With Andersen Cooper” and was badgered for his controversial posts to “subreddits” such as “Jailbait,” a home for sexualized photos of underage

---

<sup>42</sup> Each website on this list do not require the use of “real names” and a quick browse through them will reveal that most users use pseudonyms.

<sup>43</sup> A recent example is the story of Canadian teenage suicide victim Amanda Todd. Websites and Facebook pages memorializing her death were attack by trolls leaving hateful messages such as “[Todd] got what she deserved.” <http://www.mapleridgenews.com/news/174492961.html>

<sup>44</sup> DAVID FITZPATRICK, DREW GRIFFIN, *Man behind 'Jailbait' posts exposed, loses job*, <http://www.cnn.com/2012/10/18/us/internet-troll-apology/index.html>, (Oct. 19, 2012).

girls, and “PicsOfDeadKids,” the content of which is self-explanatory.<sup>45</sup> He is also the author of many racist and misogynistic rants.<sup>46</sup> Brutsch has not been charged with committing any crimes but has been made an extreme example of the darker side of anonymous posting.

As opposition from governments in the form of regulation grows, one of the major questions that must first be answered is: Does the First Amendment, which protects freedom of speech, apply to the Internet?

## S U P R E M E C O U R T J U R I S P R U D E N C E

The Supreme Court has made clear that anonymous speech is protected by the First Amendment. The two main cases governing anonymity of speech are *McIntyre v. Ohio Elections Commission* and *McConnell v. FEC*. These decisions offer somewhat conflicting viewpoints on the virtues and dangers of anonymous speech. The Court held in favor of anonymous speech in *McIntyre v. Ohio*, holding that citizens cannot be punished for pseudonymous publication of handbills concerning a ballot initiative.<sup>47</sup> Conversely, in *McConnell v. FEC*, the Court limited anonymous speech by holding that citizens may not anonymously purchase television advertisements to advocate for or against a candidate for federal office.<sup>48</sup>

---

<sup>45</sup> *Id.*

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

<sup>47</sup> 514 U.S. 334 (1995).

<sup>48</sup> 540 U.S. 93 (2003).

The leading case concerning the issue of anonymous speech is *McIntyre v. Ohio Elections Commission*.<sup>49</sup> A woman named Margaret McIntyre was fined \$100 for violating an Ohio statute outlawing the distribution of pamphlets promoting a ballot issue unless it contained the “name and residence” of the person “who issues, makes, or is responsible” for such pamphlets.<sup>50</sup> McIntyre’s handbills opposing a school tax referendum were signed anonymously by “CONCERNED PARENTS AND TAXPAYERS.”<sup>51</sup> The Ohio Supreme Court held that the “state interest in providing voters to whom message was directed with mechanism by which they could better evaluate its validity” and the “statute’s role in identifying those engaging in fraud, libel, or false advertising” outweighed the speaker’s burden to provide accurate identification.<sup>52</sup>

The Supreme Court reversed the decision of the Ohio Supreme Court. Chief Justice Rehnquist and Justice Scalia were the sole dissenters. The majority opinion, written by Justice Stevens, employed “exacting scrutiny” to hold that the decision to remain anonymous is protected by the First Amendment.<sup>53</sup>

The Court, citing *Talley v. California*, justified its holding by first pointing to history: “Anonymous pamphlets, leaflets, brochures and even books have played an important role in the

---

<sup>49</sup> 514 U.S. 334 (1995). There are three other Supreme Court cases directly concerning anonymous speech. In *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), the Court struck down an ordinance prohibiting door-to-door canvassing by Jehovah’s witnesses. The statute was deemed overbroad and not narrowly tailored to the stated interests of preventing crime and protecting privacy. *Id.* at 168-69. The Court cited language from *McIntyre* claiming the statute would have a “pernicious effect” because it “necessarily results in a surrender of anonymity.” *Id.* at 165. See also *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999) (striking down a state statute requiring people distributing petitions dealing with issue referenda to wear ID badges) and *Talley v. California*, 362 U.S. 60, 80 (1960). In *Talley*, a flat ban on all anonymous handbilling was struck down for not being narrowly tailored. This was the first case to declare that the protection of anonymous speech was embodied in the First Amendment. *Id.*

<sup>50</sup> 514 U.S. at 338.

<sup>51</sup> *Id.* at 337.

<sup>52</sup> *Id.* at 339.

<sup>53</sup> *Id.* at 342.

progress of mankind.”<sup>54</sup> The Court points to positive reasoning behind a speaker’s decision to remain anonymous, such as “economic or official retaliation,” “concern about social ostracism,” and the “desire to preserve as much of one’s privacy as possible.”<sup>55</sup> The Court found that the public interest in allowing anonymous works to enter the marketplace of ideas “unquestionably outweighs” any identification requirements.<sup>56</sup> The Court went on to say “anonymous pamphleteering is an honorable tradition of advocacy and of dissent” and concluded that “[a]nonymity is a shield from the tyranny of the majority.”<sup>57</sup>

The Court also argued that anonymous speech must be protected under a personal autonomy rationale, claiming that requiring identity disclosure is a content-based restriction on free speech. The Court felt that the decision to remain anonymous is no different from other editorial decisions and is part of the message’s content. “[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.”<sup>58</sup>

Content-based restrictions on speech must survive strict scrutiny, requiring a showing that the statute be “narrowly tailored to serve a compelling state interest.”<sup>59</sup> The Court found Ohio’s stated interests did not justify the broad identity disclosure requirement. In disagreement with Ohio, the Court found that prevention of fraud and libel, and the need to “provid[e] the

---

<sup>54</sup> *Id.* at 341 (citing *Talley v. California*, 362 U.S. at 64).

<sup>55</sup> *Id.* at 341-342.

<sup>56</sup> *Id.* at 342.

<sup>57</sup> *Id.* at 357.

<sup>58</sup> *Id.* at 342.

<sup>59</sup> *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990).

electorate with relevant information” were not compelling state interests.<sup>60</sup> Further, the Court felt that the statute was not narrowly tailored as the state interests could be protected more effectively through direct prohibitions on fraud and libel.<sup>61</sup>

The Supreme Court decision in *McIntyre* cemented a unprecedented and generalized right to speak anonymously into the First Amendment.<sup>62</sup> However, Justice Scalia’s dissent in *McIntyre*, together with the *McConnell* decision, makes clear that this right may be far from absolute. Scalia’s reasoning primarily rests on his belief that the special circumstance of the electoral process’ integrity justifies the burden of disclosing the author’s name. Scalia argues that the Ohio disclosure requirement “forbids the expression of no idea, but merely requires identification of the speaker when the idea is uttered in the electoral context. It is at the periphery of the First Amendment...”<sup>63</sup> Scalia’s dissent suggests he would only allow disclosure requirements in the electoral context, distinguishing the case from the flat ban on *all* anonymous handbilling in *Talley*.<sup>64</sup> Yet by refusing to characterize the choice to remain anonymous as an idea, and therefore not content, Scalia is leaving the door open for anonymous speech to be held to a lesser form of judicial scrutiny.

Anonymous speech suffered a setback in *McConnell v. FEC*, leaving many questions unanswered. In 2002, the constitutionality of the Bipartisan Campaign Reform Act of 2002 (“BCRA”) was challenged by a group of plaintiffs led by then–Senate Majority Whip Mitch

---

<sup>60</sup> 514 U.S. at 335.

<sup>61</sup> *Id.* at 249.

<sup>62</sup> *Id.* at 380.

<sup>63</sup> *Id.* at 378.

<sup>64</sup> *Id.* at 379.

McConnell.<sup>65</sup> The BCRA's primary purpose was to reform campaign finance regulations by closing existing loopholes in the Federal Election Campaign Act ("FECA").<sup>66</sup> Although much of *McConnell* was overruled by the 2010 decision of *Citizens United v. FEC*, the disclosure requirements discussed here were upheld.<sup>67</sup>

The relevant portion of the BCRA contains an extensive disclosure requirement forcing sponsors of all "electioneering communications" to identify themselves to the public.<sup>68</sup> Electioneering communications are defined as: "broadcast, cable, or satellite communication[s]" that refer to a candidate for federal office in the 60 days prior to the general election or the 30 days prior to the primary.<sup>69</sup> Under the BCRA, electioneering communications funded by anyone other than a candidate must include a disclaimer that "(sponsor's name) is responsible for the content of this advertising."<sup>70</sup> Further requirements include the need to display the disclaimer for at least four seconds in a "clearly readable manner" and state that the communication "is not authorized by any candidate or candidate's committee."<sup>71</sup>

The *McConnell* majority, in an opinion by Chief Justice Rehnquist, upheld the BCRA's disclosure requirements. The Court, without expressly overruling it, decided to "back away" from the principles announced in the *McIntyre* decision.<sup>72</sup> One of the main concerns of the Court was the manner in which sponsors chose pseudonyms that "[hid] themselves from the scrutiny of

---

<sup>65</sup> Pub. L. No. 107-155, 116 Stat. 81. The Act is also known as the "McCain-Feingold Act," in reference to the bill's primary sponsors, Senators John McCain and Russ Feingold.

<sup>66</sup> 540 U.S. at 123.

<sup>67</sup> 558 U.S. at 914.

<sup>68</sup> 2 U.S.C.A. Sec. 434(f)(3)(A)(i) (Supp. 2003).

<sup>69</sup> *Id.*

<sup>70</sup> 2 U.S.C. § 441d(d)(2).

<sup>71</sup> *Id.*

<sup>72</sup> 540 U.S. at 275.

the voting public.”<sup>73</sup> The Court, in reference to the misleading names used by organizations issue advertisements stated:

Because FECA's disclosure requirements did not apply to so-called issue ads, sponsors of such ads often used misleading names to conceal their identity. “Citizens for Better Medicare,” for instance, was not a grassroots organization of citizens, as its name might suggest, but was instead a platform for an association of drug manufacturers.<sup>22</sup> And “Republicans for Clean Air,” which ran ads in the 2000 Republican Presidential primary, was actually an organization consisting of just two individuals—brothers who together spent \$25 million on ads supporting their favored candidate.<sup>74</sup>

The Court felt that the misleading titles of the pseudonymous sponsors, in suggesting wide support for the ad’s content, impaired the public’s ability “to make informed choices in the political marketplace.”<sup>75</sup>

Scalia, dissenting in *McIntyre*, would have to agree that these issue ads are markedly similar to Margaret McIntyre’s pamphlet, signed “CONCERNED PARENTS AND TAXPAYERS.” However, the *McConnell* court attempted makes a distinction. The Court found an important difference in the fact that Margaret McIntyre’s pamphlet was made in support of a *ballot referendum* whereas the issue ads in *McConnell* were made in support of a *candidate election*. Justice Thomas found little difference between the two in his dissent, writing “The revelation of one's political expenditures for independent communications about candidates can be just as revealing as the revelation of one's name on a pamphlet for a noncandidate election.”<sup>76</sup>

---

<sup>73</sup> *Id.* at 197.

<sup>74</sup> *Id.* at 128.

<sup>75</sup> *Id.* at 197.

<sup>76</sup> *Id.* at 276.

Read together, the cases of *McIntyre* and *McConnell* exhibit tension within the Supreme Court as to the extent anonymous speech should be protected under the First Amendment. *McIntyre* tends to characterize anonymous speech as content, affording it the highest protection. However, *McConnell* sidesteps this reasoning by holding that anonymous speech is somewhat dangerous to the public, at least in the specific context of issue ads.

*McIntyre* takes a much broader approach to anonymous speech than *McConnell*. *McIntyre* delves into the historical origins of anonymous and pseudonymous speech in America, lauding its benefits to the “progress of mankind.”<sup>77</sup> The *McConnell* majority, notably refusing to use the word “anonymous” in its analysis and referring only to “disclosure requirements,” keeps its reasoning strictly within the bounds of political speech in a candidate election.<sup>78</sup> *McConnell* can and should be read as a narrow exception to *McIntyre*’s general rule that anonymous speech is historically and presently protected under the First Amendment. *McConnell* also opens up the door for other restrictions on anonymous speech, ensuring that *McIntyre* cannot be interpreted as establishing anonymous speech as an absolute right.

Now that anonymous speech has been established as a protected (but restricted) First Amendment right, it must be analyzed in relation to the realm of cyberspace. The seminal *Reno v. ACLU* decision paved the way for anonymous speech in cyberspace by granting the highest level of First Amendment protection to the Internet.<sup>79</sup> The *Reno* case is a landmark decision in Internet history.

---

<sup>77</sup> 514 U.S. at 341 (citing *Talley v. California*, 362 U.S. at 64).

<sup>78</sup> 540 U.S. at 128.

<sup>79</sup> 521 U.S. 844 (1997).

In striking down major provisions of the Communications Decency Act (“CDA”), this unanimous decision made clear that the First Amendment applies the same to the Internet as it does to print media.<sup>80</sup> The CDA was a criminal statute that placed content-based restrictions on free speech. It outlawed “indecent” and “patently offensive” speech and imposed a penalty of fines and up to two years in prison for each violating act.<sup>81</sup> This would mean that books such as the *Catcher in the Rye* and *Ulysses* and recordings such as George Carlin’s “7 Dirty Words,” while enjoying full First Amendment protection in print form would be barred from the Internet.<sup>82</sup>

The Court appeared awestruck and enamored by the immense communicative power of the Internet, describing it as a “dynamic, multifaceted category of communication.”<sup>83</sup> The Court lauded some major features of the Internet including chat rooms, where “any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.”<sup>84</sup> The Court agreed with the District Court’s famous statement that “the content on the Internet is as diverse as human thought.”<sup>85</sup>

---

<sup>80</sup> Print media (along with in-person communication) is traditionally the most protected form of communication. The Internet, unlike radio and broadcast television, is not susceptible to invasiveness and spectrum scarcity, which the Supreme Court used as key reasoning in its decisions authorizing regulation of them. see, e.g., *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622. “Communications over the Internet do not ‘invade’ an individual’s home or appear on one’s computer screen unbidden” and “the Internet can hardly be considered a “scarce” expressive commodity.” 521 U.S. at 869.

<sup>81</sup> 47 U.S.C. § 223(a) (1994 ed., Supp. II).

<sup>82</sup> CENTER FOR DEMOCRACY & TECHNOLOGY, <https://www.cdt.org/grandchild/cda>, (last visited 11/29/12).

<sup>83</sup> *Id.* at 870.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* This statement is frequently cited by Courts and the public alike in characterizing the Internet.

Justice Stevens, writing for the Court, concluded that the CDA chills speech considerably and “places an unacceptably heavy burden on protected speech.”<sup>86</sup> Since the CDA functioned as a content-based restriction on free speech, the Court applied strict scrutiny. The Court found the governmental interest in protecting minors from objectionable content was sufficiently compelling.<sup>87</sup> However, the CDA was not narrowly tailored as the government could not adequately explain why a less restrictive provision would not be as effective as the CDA.<sup>88</sup> The statute was deemed overbroad as well.<sup>89</sup> It swept in too much free speech as the terms “indecent” and “patently offensive” essentially sidestepped the *Miller* obscenity test and banned “large amounts of nonpornographic material with serious educational or other value.”<sup>90</sup>

The *Reno* and *McIntyre* decisions provide a framework for analyzing anonymous speech in cyberspace. Although *McIntyre* dealt with a different form of media, *Reno* made clear that internet speech should be analyzed in the same manner as printed speech. There is a general (but sturdy) protection on anonymous speech as per *McIntyre*, and internet speech enjoys the highest level of First Amendment protection as per *Reno*. Reading both cases together, it becomes clear that anonymous speech on the Internet is a valid and protected form of communication. Absent the very narrow exceptions the Court has carved out for political speech in *McConnell*, anonymous speech in cyberspace must be analyzed using the strict scrutiny analysis.

---

<sup>86</sup> 521 U.S. at 882.

<sup>87</sup> *Id.* at 875. The Court agreed that the governmental interest in protecting minors from adult content is compelling but “regardless of the strength of the government’s interest’ in protecting children, ‘[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.’ (citing *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60).

<sup>88</sup> *Id.* at 879. The Court suggested “tagging” content as unsuitable for minors would be an example of a less restrictive provision.

<sup>89</sup> *Id.* at 876.

<sup>90</sup> *Id.* at 877.

The right is far from unlimited, however, and the same free speech exceptions such as defamation, libel, incitement, hate speech, and child pornography will apply to anonymous Internet speech. The main concern was that the Court would create a similar exception for regulating anonymous Internet speech. The technology is relatively new and it is uniquely simple to cause harm anonymously on the Internet. The Internet's ski mask is only a few clicks and keystrokes away from any malicious user. However, the Court has carefully and correctly balanced the supposed risks of anonymous Internet speech against its benefits.

## **STATES' ATTEMPT TO BAN ANONYMOUS INTERNET SPEECH**

Despite the fact that the Supreme Court has clearly established the right of anonymous internet speech by affording it the same protections as printed speech, some States are still drafting laws in attempt to prohibit it.<sup>91</sup> Many lawmakers in New York State are inexplicably pushing for a clearly unconstitutional ban on all forms of anonymous internet postings.<sup>92</sup> The bill is known as the "Internet Protection Act"<sup>93</sup> and is sponsored by State Senator Thomas O'Mara and co-sponsored by two Assemblymen, Dean Murray and Peter Lopez.<sup>94</sup> In total, twenty-three

---

<sup>91</sup> Arizona Bill 2549 and New York Bill S06779 both seek to criminalize speech protected by the First Amendment.

<sup>92</sup> Text of Bill S06779, NEW YORK STATE ASSEMBLY, [http://assembly.state.ny.us/leg/?default\\_fld&bn=S06779&term=2011&Text=Y](http://assembly.state.ny.us/leg/?default_fld&bn=S06779&term=2011&Text=Y), (last visited 11/28/12).

<sup>93</sup> AMANDA VERETTE, *Bill would eliminate derogatory, anonymous web posts*, LEGISLATIVE GAZETTE, <http://www.legislativegazette.com/Articles-Top-Stories-c-2012-05-14-81688.113122-Bill-would-eliminate-derogatory-anonymous-web-posts.html>, (May 14, 2012).

<sup>94</sup> Republican Assemblyman James Conte was also a co-sponsor of the bill, but has since passed away. CELESTE KATZ, *Long Island Assemblyman James Conte Dies After Battle With T-Cell Lymphoma*, NEW YORK DAILY NEWS, <http://www.nydailynews.com/blogs/dailypolitics/2012/10/long-island-assemblyman-james-conte-dies-after-battle-with-t-cell-lymphoma> (Oct. 16, 2012).

of the forty-nine New York Assembly Republicans, plus one Independent and one Democrat support the bill.<sup>95</sup> Prior to reading the bill, it should be assumed that all of these lawmakers have passed or at least taken Constitutional Law class in law school.

The text of the Internet Protection Act begins by defining the term “anonymous internet poster.” The term is defined as “ANY INDIVIDUAL WHO POSTS A MESSAGE ON A WEBSITE INCLUDING SOCIAL NETWORKS, BLOGS, FORUMS, MESSAGE BOARDS OR ANY OTHER DISCUSSION SITE WHERE PEOPLE CAN HOLD CONVERSATIONS IN THE FORM OF POSTED MESSAGES.”<sup>96</sup> This definition is extremely broad and encompasses all types of speech contained in millions of New York webpages, even though it appears to be limited to discussion based websites or portions thereof. It is unclear if the bill includes pseudonymous speech but its sweeping broad language suggests that it does. The bill’s primary requirement is 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.**<sup>97</sup>

The bill functions as a means of censoring any anonymous comments simply because the author chooses not to reveal himself.

---

<sup>95</sup> EUGENE VOLOKH, *Nearly Half the New York Assembly Republicans: Require Deletion of Anonymous Comments Whenever Anyone Complains*, VOLOKH CONSPIRACY, <http://www.volokh.com/2012/05/03/nearly-half-the-new-york-assembly-republicans-require-deletion-of-anonymous-comments-when-ever-anyone-complains/#contact>, (May 3, 2012).

<sup>96</sup> Text of Bill S06779.

<sup>97</sup> *Id.* (emphasis added).

The bill remains in the proposal state and has not been voted upon yet, but it appears to be clearly unconstitutional based on Supreme Court jurisprudence. As this bill concerns the Internet, *Reno* directs that it should be analyzed under the same First Amendment doctrine that applies to print media. *McIntyre* and *Talley*,<sup>98</sup> the seminal anonymous speech cases, command that restrictions on anonymous speech are content-based and as such must be analyzed using strict scrutiny, requiring the statute to be narrowly tailored to achieve a compelling government interest.<sup>99</sup>

The government interest, as stated by sponsoring legislator, James Conte, is to curtail “mean-spirited and baseless political attacks” and “turn the spotlight on cyberbullies by forcing them to reveal their identity.”<sup>100</sup> Political attacks, no matter how baseless or mean-spirited they may be, are thoroughly protected by the First Amendment.<sup>101</sup> Therefore, this is an invalid interest. The interest in protecting citizens from cyberbullies has a greater chance of being

---

<sup>98</sup> As established *supra*, anonymous speech has only been limited in the context of election campaigns. See *McConnell*.

<sup>99</sup> 514 U.S. at 339.

<sup>100</sup> EUGENE VOLOKH, *Nearly Half the New York Assembly Republicans: Require Deletion of Anonymous Comments Whenever Anyone Complains*, VOLOKH CONSPIRACY, <http://www.volokh.com/2012/05/03/nearly-half-the-new-york-assembly-republicans-require-deletion-of-anonymous-comments-when-ever-anyone-complains/#contact>, (May 3, 2012).

<sup>101</sup> This reasoning tends to point toward defamation, an unprotected category of speech. However, “mean-spirited and baseless political attacks” do not rise to level of defamation pursuant to First Amendment caselaw. The Supreme Court held in *New York Times v. Sullivan* that defamatory speech referring to a public official requires a showing of “ ‘actual malice’ — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” 376 U.S. 254, 270 (1964). The word “baseless” is vague and insufficient. Furthermore, “mean-spirited” political attacks are protected by the First Amendment. “[D]ebate on public issues should be uninhibited, robust, and wide-open, and that it may well include **vehement, caustic, and sometimes unpleasantly sharp** attacks on government and public officials.” *Id.* at 269 (emphasis added).

recognized as compelling since cyberbullying has become a serious problem and can cause real emotional harm to victims of all ages.<sup>102</sup>

The next step of the analysis is to determine whether the statute is narrowly tailored to achieve said purpose. For one, the word “cyberbullying” is not defined or even mentioned within the statute. The statute applies to all speech, regardless of the content or whether it amounts to cyberbullying. The law would simply apply whenever someone requests a comment to be removed for whatever reason. For this reason, it can be said the statute is in no way narrowly tailored.

The “Internet Protection Act” would also likely fail an overbreadth challenge. A statute is deemed facially overbroad when it sweeps in too much protected speech. The doctrine attempts to avoid a “chilling effect”<sup>103</sup> on protected speech. The Supreme Court reasoned that “the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted.”<sup>104</sup> The overbreadth doctrine requires that “there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections.”

Assuming, *arguendo*, that the Internet Protection Act only targets speech the Court recognizes as unprotected, it’s language would infringe upon an abundance of protected speech. For example, not only would an anonymous cyberbully need to reveal his home address or have his comment removed, a person with the username “BostonFan4Life” praising the Red Sox

---

<sup>102</sup> SAMEER HINDUJA, PH.D., JUSTIN W. PATCHIN, PH.D., *Cyberbullying Identification, Prevention, and Response*, CYBERBULLYING RESEARCH CENTER, [http://cyberbullying.us/Cyberbullying\\_Identification\\_Prevention\\_Response\\_Fact\\_Sheet.pdf](http://cyberbullying.us/Cyberbullying_Identification_Prevention_Response_Fact_Sheet.pdf), (last visited 11/30/12).

<sup>103</sup> Protected speech is “chilled” when it is suppressed by fear of penalization.

<sup>104</sup> *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 2916, 37 L. Ed. 2d 830 (1973)

pitching staff could potentially face the same outcome. And website administrators who refuse a takedown notice could face criminal penalties. As a result, the statute would “significantly compromise First Amendment protections” and “chill” speech by dissuading anonymous users from posting at all. What if BostonFan4Life actually lives in New York City and would not like if his neighbors knew he was secretly a fan of the New York Yankee’s arch-nemesis? Faced with a decision like that, it is very likely he would simply refuse to contribute his thoughts to the marketplace of ideas.

The efforts of some States to restrict or ban anonymous speech are directly contrary to Supreme Court First Amendment jurisprudence and doctrine. The Internet Protection Act, if passed, is not only overbroad but it would directly conflict with *McIntyre*. Twenty-five New York State lawmakers either disagree or possess no knowledge of *McIntyre*, *Talley*, or *Reno*. A breadth of fresh air can be found in states like California, where state lawmakers have actually proposed and enacted legislation protecting anonymous Internet speech.

## STATE PROTECTIONS OF ANONYMOUS INTERNET SPEECH

Although anonymous internet speech is to be treated identically to printed communication, the unique and revolutionary nature of Internet communication poses new problems for anonymous speech, particularly concerning defamation. One of the most common and problematic areas for anonymous internet speech is defamation lawsuits. The typical case begins with an allegedly defamatory anonymous posting about a person or company. The defamed party will then petition the court to subpoena the Internet Service Provider to unmask

the poster. Since defamation is unprotected speech, courts can properly order an anonymous poster to be unmasked if a prima facie defamation action is presented. The allegedly defamatory poster, aside from being exposed to the public, will also have to defend against a potentially costly civil suit.

The relative ease of acquiring a poster's identity using the court system has led some deep pocketed plaintiffs to start frivolous defamation lawsuits to chill internet speech and punish critics. This type of suit is known as a "cyberSLAPP."<sup>105</sup> Once hit with a SLAPP, defendants exercising their First Amendment rights are faced with unwanted exposure and expensive litigation. Instead of paying legal fees, many opt to simply delete their posts. Other users may fear lawsuits and remain silent or tone down their criticisms. Both courts and state legislatures have recognized the negative effects of cyberSLAPP lawsuits and have taken measures against them.

In *Dendrite v. Doe*, the New Jersey Superior Court created a set of guidelines intended to protect internet speakers from SLAPPs.<sup>106</sup> Dendrite International Inc., a New Jersey pharmaceutical company, alleging defamation, sought the identities of several anonymous authors of Yahoo message board posts.<sup>107</sup> The court set forth the following guidelines to trial courts faced the decision of whether to compel the disclosure of an anonymous poster's identity:

---

<sup>105</sup> GEORGE PRING, *SLAPPS: Strategic Litigation Against Public Participation*, 7 Pace Envtl. L. Rev. 3, 4 (1989). Professor George Pring created the acronym "SLAPP," which stands for "strategic litigation against public participation." *Id.* SLAPP suits are actions brought "to stop citizens from exercising their political rights or to punish them for having done so." *Id.* at 5-6. The term "cyber" is added to refer to Internet SLAPP suits. The typical "cyberSLAPP" is a suit brought to punish anonymous online criticism or deter others from doing so. *Id.*

<sup>106</sup> *Dendrite Int'l, Inc. v. Doe No. 3*, 342 N.J. Super. 134 (App. Div. 2001).

<sup>107</sup> *Id.*

- (1) The plaintiff must make good faith efforts to notify the poster and give the poster a reasonable opportunity to respond;
- (2) The plaintiff must specifically identify the poster's allegedly actionable statements;
- (3) The complaint must set forth a prima facie cause of action;
- (4) The plaintiff must support each element of the claim with sufficient evidence; and
- (5) The court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity.<sup>108</sup>

In buttressing the summary judgment standard, the *Dendrite* guidelines set a high, but not impossible, bar for plaintiffs to overcome in a defamation case. In particular, guideline (5) provides a strong protection for anonymous posters by affording courts additional leeway to decline to compel disclosure by performing a subjective balancing test.

The State of California is especially protective of anonymous speech. California legislators have enacted an anti-SLAPP statute, section 425.16 of the California Civil Procedure Code.<sup>109</sup> The statute is implemented at the inception of a SLAPP case and primarily functions by freezing discovery and permitting a special motion to strike.<sup>110</sup> The law applies to all SLAPP cases, not just cyberSLAPP. However, California has also enacted special legislation to aid internet defendants in cyberSLAPP cases. Code of Civil Procedure section 1987.2, enacted in 2008, provides that a person who successfully challenges a subpoena arising from a lawsuit in another state based on exercise of free speech rights on the Internet is entitled to recover his or her attorney fees.<sup>111</sup>

---

<sup>108</sup> *Id.* at 141.

<sup>109</sup> CAL. CIV. PROC. CODE § 425.16 (West Supp. 2000).

<sup>110</sup> *Id.* § 425.16(a), (g).

<sup>111</sup> CAL. CIV. PROC. CODE § 1987.2 (West Supp. 2000).

## CONCLUSION

Anonymous internet speech allows the uninhibited expression of ideas to reach a worldwide audience. This expression, as in reality, ranges from critical to criminal and from bothersome to brilliant. Malfeasance perpetrated by anonymous internet users does cause actual harm to society. But burdening the greatest communicative tool in world history for the sake of preventing such harm will greatly diminish the Internet's power. In the Information Age, where a Google search can reveal more than a detective in the pre-Internet days ever could, a need to be anonymous in certain situations arises.

Freedom to speak one's mind cannot be reserved to the political pundits on television or the multi-millionaires and celebrities who have nothing to lose. The average American needs a soap box to speak from without fear of being ostracized by their peers, expelled by their principal, or fired by their employer. Sometimes they simply need a way to entertain themselves by acting out fictional personalities or expressing taboo desires. These needs are currently protected by the First Amendment and should remain so for the betterment of society.

“Thence comes it that my name receives a brand,  
And almost thence my nature is subdued  
To what it works in, like the dyer's hand.”<sup>112</sup>

William Shakespeare explains how a person's name becomes a brand that is permanently stained onto them like dye. The Internet cleans away the dye and allows the dyer to freely participate in any niche of society.

---

<sup>112</sup> WILLIAM SHAKESPEARE, *Sonnets (London 1609)*, in *THE RIVERSIDE SHAKESPEARE*, 1839 (1998).