Taking Cloaks to the Cleaners: A Case Study of Yelp v. Hadeed Carpet Cleaning Reveals the Need for Stronger Unmasking Standards

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Kristen Patrow

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Dedication

I dedicate this thesis to Allison Quinn, Aja Dykes, and James Dykes. You are not just my family, you are my biggest fans and I love you dearly.

Abstract

This thesis begins with a discussion of the U.S. Supreme Court's seminal defamation cases. A discussion of the historical protections for anonymous speech follows, providing a foundation for the discussion of anonymous speech online. This paper examines multiple cases to establish the judicial standards that courts have developed to determine whether to unmask the identity of anonymous commenters online. A case study of the recent Yelp decision follows, highlighting the incongruity with these various standards. Next, an in-depth examination of James Carey's models of communication and the theoretical justifications for protecting anonymous and harmful speech explains the need for a national unmasking standard. To conclude, the thesis proposes an unmasking law that comports with First Amendment protections of speech and societal interest in punishing harmful speakers for their misdeeds.

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I. INTRODUCTION

What happens when negative reviews appear to correspond with a drop in revenue? For Joe Hadeed, owner of Hadeed Carpet Cleaning, it meant it was time to sue the commenters who left the negative reviews of his business.[1] Over the course of a few weeks in 2012, a long sequence of negative reviews caused Hadeed's rating on the popular review site Yelp to plummet. According to Hadeed, following the string of unfavorable comments, business dropped by 30% and revenue dropped from $12 million in 2011 to $9.5 million in 2012, which caused Hadeed to lay off 80 workers and sell six trucks.[2]

Hadeed sued Yelp in July 2012, asserting his company had been defamed because the reviewing customers could not be matched to the company's records, which included "time, location, and sales data."[3] Yelp refused to hand over the identifying information of the commenters, but Virginia's trial and intermediate appellate courts agreed with Hadeed and held Yelp in contempt.[4] In January 2014, Yelp appealed to the Virginia Supreme Court, asserting that Hadeed had not adequately proved the statements were defamatory.[5]

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[1] Angus Loten, *Yelp Reviews Brew a Fight Over Free Speech vs. Fairness: Many Businesses Say Anonymity of Comments Is Unfair, Sue to Unmask Users*, WALL ST. J., (New York) Apr. 2, 2014, at A1, *available* at http://online.wsj.com/news/articles/SB10001424052702303847804579477633444768964.
[2] Jillian D'Onfro, *Yelp Is In Court Deal With Free Speech Issues Yet Again*, BUS. INSIDER, Apr. 4, 2014, *available* at http://www.businessinsider.com/yelp-free-speech-defamation-2014-4.
[3] *Id.*
[4] Loten, *supra* note 1.
[5] D'Onfro, *supra* note 2.

More and more frequently, businesses are claiming they need protection from false and defamatory postings, often referred to as "revenge reviews,"[6] on websites like Yelp. Yelp, on the other hand, claims the reviews are protected by the First Amendment and has hired a lobbyist[7] to support a federal Anti-SLAPP law.[8] Anti-SLAPP laws try to prevent powerful plaintiffs from filing unsubstantiated claims against detractors in an effort to silence their speech.[9] Plaintiffs may use costly court fees to threaten defendants with financial hardship when they disagree with the views that are expressed.[10]

Yelp launched in 2004 as a way for consumers "to connect with great local businesses."[11] It offers a review system that relies on patrons to rate establishments they frequent. Yelp is one of many online rating and reviewing sites, and it had 120 million unique visitors per month in the last three months of 2013.[12] The company states that most of its reviews praise good businesses, but that it encourages negative reviews as long as they are honest.[13] In its Terms of Use, Yelp asks reviewers to share their personal experiences and not those of a third party because the company remains

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[6] A revenge review is a blistering assessment written by a miffed customer or disgruntled former employee. Kim Arlington, *ACCC calls for regulation of user-generated restaurant reviews*, SYDNEY MORNING HERALD, Apr. 26, 2014, *available* at http://www.smh.com.au/national/accc-calls-for-regulation-of-usergenerated-restaurant-reviews-20140425-379py.html.

[7] Loten, *supra* note 1.

[8] A SLAPP suit, or a "Strategic Lawsuit Against Public Participation," seeks to punish those who speak out. George W. Pring, who coined the term, states that SLAPPS aim to punish speakers, "SLAPPs send a clear message: that there is a 'price' for speaking out politically. The price is a multimillion-dollar lawsuit and the expenses, lost resources, and emotional stress such litigation brings." George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 4-6 (1989).

[9] Kathryn W. Tate, *California's Anti-Slapp Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 LOY L.A. L. REV. 801, 802 (2000).

[10] Sean P. Trende, *Defamation, Anti-SLAPP Legislation, and the Blogosphere: New Solutions for an Old Problem*, 44 DUQ. L. REV. 607, 609 (2005-2006).

[11] Yelp.com, *About Us*, *available* at http://www.yelp.com/about.

[12] *Id.*

[13] Yelp.com, *User Reviews*, *available* at http://www.yelp.com/faq#what_is_yelp.

neutral in review disputes. Yelp asserts that it expects reviewers to "stand behind your review."[14]

In recent years, various claims for defamation against users of Yelp and similar websites have surfaced because business owners were not pleased with some of the reviews.[15] When a court finds that a reviewer was merely expressing an opinion rather than a false assertion of fact, the speech is generally protected because under the First Amendment, "there is no such thing as a false idea."[16] For example, in Minnesota, a man used various doctor-review websites to complain about the physician who treated his father.[17] In his suit, the doctor stated that these claims were defamatory, including a statement where the reviewer calls the doctor a "real tool."[18] The doctor did not win the case because the Minnesota Supreme Court determined that calling someone a "tool" was an expression of opinion and not a statement of fact.[19]

As mentioned earlier, many businesses revile Yelp and believe the website provides a breeding ground for unwarranted disparagement and harassment. Studies have shown that small businesses have more to gain from Yelp reviews, so it follows they likely also have more to lose.[20] Some small businesses have filed complaints with

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[14] Yelp.com, *Content Guidelines*, *available* at http://www.yelp.com/guidelines.
[15] Angus Loten, *Yelp's Deal With Yahoo Has Small Businesses Crying Foul: Entrepreneurs Complain That Years of Good Reviews Are Being Sent to the Trash*, WALL ST. J. Apr. 9, 2014, at B1, *available* at http://online.wsj.com/news/articles/SB10001424052702304819004579489451327998582.
[16] Gertz v. Welch, 418 U.S. 323, 339 (1974).
[17] McKee v. Laurion, 825 NW 2d 725, 728 (2013).
[18] *Id.* at 729.
[19] *Id.* at 733.
[20] Lee Schafer, Editorial, *Schafer: Yelp fosters suspicion among small businesses*, STAR TRIBUNE (Minneapolis), Apr. 16, 2014, *available* at http://www.startribune.com/business/255428021.html.

the Federal Trade Commission (FTC) asserting that Yelp's algorithm unfairly targets businesses who do not buy advertising by highlighting negative reviews.[21]

Of course, Yelp denies these claims and asserts that marketing personnel do not have access to the algorithm.[22] Yelp also notes that businesses are free to set up an account and "claim" their page.[23] Claiming a page allows an establishment to monitor its reviews and to dialogue with reviewers both publically and privately. Opening an account is an easy way for businesses to defend themselves against negative reviews on the very same platform that the negative reviews surface.[24] Businesses can also be proactive and ask satisfied regular patrons to review them on Yelp.[25]

Disgruntled business owners have little recourse against Yelp unless they can prove that the website itself is actively violating the law.[26] Though some businesses have tried to hurt Yelp by filing complaints with the FTC, unless they can prove that Yelp is contributing to unprotected speech, the businesses are out of luck.[27] Section 230 of the Communications Decency Act protects Yelp; the Good Samaritan provision immunizes interactive computer services who publish third-party content.[28] This means that businesses receiving negative reviews cannot hold Yelp legally liable for the comments.[29] Instead, the businesses must target the individual reviewers if they wish to

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[21] *Id.*
[22] *Id.*
[23] Yelp.com, *What is Yelp*, *available* at https://biz.yelp.com/support/what_is_yelp.
[24] Schafer, *supra* note 18.
[25] *Id.*
[26] Zeran v. American Online Inc., 129 F.3d 327 (1997).
[27] Fair Housing Coun., San Fernando v. Roommates.com, 521 F.3d 1157 (2008).
[28] 47 U.S.C. § 230.
[29] *Id.*

recover damages.[30] According to the Wall Street Journal, Yelp receives an average of six subpoenas a month, and many of them are linked to civil lawsuits.[31]

Hadeed Carpet Cleaning's lawsuit against Yelp sought to unmask a handful of anonymous reviewers whom the business sought to sue for defamation based on their disparaging comments.[32] Based on Virginia's unique unmasking law for anonymous speech online, the Virginia appellate court applied a six-part test and found that Hadeed was entitled to discover the identities of the commenters because the comments did not match up with Hadeed's business records.[33]

Though Yelp and other *amici* asked the court to apply more stringent tests used by other jurisdictions, the court declined to do so.[34] As of 2010, more than 20 courts have used a variety of unmasking standards across the nation.[35] Nearly all of these standards attempt to balance the First Amendment rights of speakers against the need for plaintiffs to uncover identities to remedy injury caused by defamatory speech online.[36] Many courts recognize that the law must balance the need to protect reputation with freedom of expression, but how to strike that balance is a subject of great debate.[37]

Some tests create a very low burden of proof for plaintiffs who wish to unmask anonymous speakers. In these instances, plaintiffs need only show they have a sincere

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[30] *Id.*
[31] Angus Loten, *Yelp Regularly Gets Subpoenas About Users FTC Says It Has Received 2,046 Complaints Since 2008*, WALL ST. J., Apr. 2, 2014, at A1, *available* at http://online.wsj.com/news/articles/SB10001424052702303847804579477644289822928.
[32] Yelp Inc. v. Hadeed Carpet Cleaning Inc., 2014 VA. APP. LEXIS 1 (2014).
[33] *Id.* at 35.
[34] *Id.* at 32.
[35] M. Mazzotta, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B. C. L. REV. 833, 846 (2010).
[36] Erik P. Lewis, *Unmasking "Anon12345": Applying an Appropriate Standard When Private Citizens Seek the Identity of Anonymous Defamation Defendants*, U. ILL. L. REV. 947, 948 (2009).
[37] *Id.* at 954.

motive for requesting the information.[38] Other tests make it more difficult for plaintiffs to unmask anonymous speakers, requiring that plaintiffs provide sufficient evidence to suggest they could prevail in court under current laws.[39] In the case of defamation, this often means proving actual harm.[40]

Anonymous online speech is difficult to temper because the Court has granted full First Amendment protection to speech on the Internet.[41] Though Congress attempted to restrict online speech, the U.S. Supreme Court has generally frowned upon regulation.[42] Cyberspace problems must employ remedial methods that do not restrict speech but instead rely on post-publication punishment.

Because the Internet is not geographically constrained, jurisdictional issues arise more frequently between parties who reside in different states.[43] The Internet allows someone who lives in New Jersey to comment on an individual or business in Florida. If New Jersey has a different unmasking standard than Florida, the legal dispute may be drawn out as the parties argue over which unmasking law should apply.[44] Varying unmasking standards are also likely to result in a chilling effect on speech,[45]

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[38] *Id.* at 957.
[39] 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, 111 (2012).
[40] Gertz, *supra* note 16 at 350.
[41] Reno v. ACLU, 521 US 844, 869-70 (1997).
[42] *Id.* at 882; Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004).
[43] Scott T. Jansen, *Oh What a Tangled Web…The Continuing Evolution of Personal Jurisdiction Derived from Internet-Based Contacts*, 71 MO. L. REV. 177, 178 (2006).
[44] *Id.* at 180-81.
[45] Talley v. California, 362 U.S. 60, 65 (1960).

meaning important information may not be communicated.[46] This raises significant First Amendment concerns.

In addition, it also raises certain Due Process issues under the Fourteenth Amendment.[47] "The fundamental principle of the Supreme Court's Due Process jurisprudence has been that the actor must be able to structure his primary conduct so as to avoid liability in a given jurisdiction."[48] Differing unmasking standards render it virtually impossible for users to "structure" their "conduct" to avoid unmasking.

The myriad tests and interpretations of the standards for unmasking anonymous speech muddle the law. A national unmasking standard would rectify a serious problem facing online speech today: when and how to go about unmasking anonymous commenters. A proper unmasking standard must justly weigh the competing interests between reputation and free speech. Though a national standard is gravely needed, a standard that is too lax in protecting First Amendment freedoms is a likely greater ill than foggy unmasking law because the right to anonymous speech, though not absolute, is fundamental to freedom of expression.[49] For example, it should not be seen as a right to harm another's reputation with false statements of fact. Therefore, courts must balance the societal interests in punishing those who engage in harmful speech against the First Amendment value of that speech.

Anonymous speech online raises a number of important questions that this thesis seeks to address:

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[46] Cass R. Sunstein, *Why Societies Need Dissent*, 70 (2d ed.2005).
[47] Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J. L. & TECH. 3, 26 (1997).
[48] *Id.* at 50.
[49] Talley, *supra* note 45 at 64-5.

RQ1: What roles does Dissent Theory play in informing an understanding of anonymous speech rights under the First Amendment?

RQ: Do current statutes and court-established tests for unmasking anonymous speakers comport with the First Amendment?

RQ3: What understanding can the transmission and ritual models of communication provide when thinking about anonymity, jurisdiction, and community standards?

To answer these questions, this thesis employs traditional legal research methods to study the First Amendment and related jurisprudence. In so doing, it endeavors to provide a much-needed analysis of proper First Amendment protections for anonymous speech in the online world by examining theoretical justifications for the protection of speech as well as the relationship between this theory and particular legal responses to anonymous speech.

Because many of the lawsuits involving anonymous commenters are based on disparaging speech that one party believes to be false, this thesis begins with a discussion of the U.S. Supreme Court's seminal defamation cases. A discussion of the historical protections for anonymous speech follows, providing a foundation for the discussion of anonymous speech online. This paper examines multiple cases to establish the judicial standards that courts have developed to determine whether to unmask the identity of anonymous commenters online. A case study of the recent Yelp decision follows, highlighting the incongruity with these various standards. Next, an in-depth examination of James Carey's models of communication and the theoretical

justifications for protecting anonymous and harmful speech explain the need for a national unmasking standard. To conclude, the thesis proposes an unmasking law that comports with First Amendment protections of speech and societal interest in punishing harmful speakers for their misdeeds.

II. FIRST AMENDMENT JURISPRUDENCE

Although the First Amendment posits, "Congress shall make no law … abridging the freedom of speech,"[50] the U.S. Supreme Court has repeatedly ruled that the First Amendment is not absolute.[51] The First Amendment protects speakers from government sanction of their speech, most notably in the form of protections against censorship.[52] However, the Court has been clear that certain categories of speech fall outside of First Amendment protection,[53] and it has established still other instances in which post-publication punishment is permissible.[54]

Although the Court considers defamation beyond the penumbra of First Amendment protection, modern jurisprudence has made clear that certain defamatory speech is not actionable.[55] The Court has applied differing standards[56] to grant "strategic protection to defamatory falsehood."[57] It has done so to "assure to the

[50] U.S. Const. amend. 1.
[51] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
[52] Near v. Minnesota 283 US 697, 712-713 (1931).
[53] The Court has found that certain kinds of speech do not warrant protection. Categories of condemned speech are: fighting words, Chaplinsky, *supra* note 54; defamation, New York Times v. Sullivan, 376 U.S. 254 (1964); true threats, Watts v. United States 394 U.S. 705 (1969); obscenity, Miller v. California 413 U.S. 15 (1973); and child pornography, New York v. Ferber 458 U.S. 747 (1982).
[54] Near, *supra* note 52 prohibited the prior restraint of speech, but plaintiffs are free to seek redress after publication. For example, in the case of defamation, plaintiffs may sue for libel to address the harms attached to defamatory publication, see Gertz *supra* note 16.
[55] New York Times v. Sullivan, 376 U.S. 254 (1964).
[56] Gertz, *supra* note 16 at 341-43.
[57] *Id.* at 342.

freedoms of speech and press that 'breathing space' essential to their fruitful exercise."[58]

Defamation and the First Amendment Protections for Speech

The concept of defamation came to the United States through the British common law. Though some versions of the tort, such as seditious libel, did not survive the founding of the nation,[59] American law has long endeavored to balance the First Amendment rights of speakers against the tangible harm that words can cause to one's reputation. Though the First Amendment does not fully protect defamatory speech, the law recognizes that claims of defamation may be used to silence and intimidate speakers. Because of this, American courts have been especially careful to guard speech, particularly when it concerns public officials and public figures.

In 1964, the U.S. Supreme Court constitutionalized the law of defamation in its landmark *New York Times v. Sullivan* decision.[60] There, the Court ruled that public officials could not recover damages in defamation lawsuits unless they showed that a defamatory statement was published with "actual malice."[61] The majority opinion, penned by Justice William Brennan, noted that historically the First Amendment stringently protected political speech because of its high value to democracy. He characterized the civil rights advertisement at issue in the case as, "[A]n expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that

[58] *Id.*
[59] James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal*, 29-30 (2d ed.1972).
[60] New York Times, *supra* note 55.
[61] *Id.* at 280.

protection by the falsity of some of its factual statements and by its alleged defamation of respondent."[62]

To bolster this argument, Justice Brennan pointed to *dicta* to show that mere falsity should not be enough to remove protection from speech: "The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'"[63] He also noted that to fully protect speech, some odious expression must be allowed to swim through society's waters without being pierced by the legal spear. If speech that is merely false or distasteful cannot escape legal sanction, citizens will hesitate to express their thoughts. Excessive self-editing would hamper the free flow of public debate because proving the absolute truth is often difficult.[64] Speech that criticizes a public official has political value and may influence their fitness for holding the office.[65] To balance the competing interests between reputational harm and First Amendment rights, the Court reasoned that public officials who sue for libel must prove the defendant acted with "actual malice,"[66] which it defined as knowledge of falsity or a reckless disregard for the truth.[67]

The *New York Times v. Sullivan* case provided a standard for public officials claiming defamation, but it did not address the level of fault that public figures or private citizens would be required to prove to succeed in a defamation lawsuit. In *Curtis Publishing Co. v. Butts*, the Court found that public figures should be held to the same

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[62] *Id.* at 271.
[63] *Id.* quoting N. A. A. C. P. v. Button, 371 U.S. 415, 445 (1963).
[64] *Id.* at 279.
[65] *Id.* at 284.
[66] *Id.* at 280.
[67] *Id.* at 280.

standard as *Sullivan*.[68] In *Gertz v. Welch*, the Court ruled that states are free to determine the level of appropriate fault that private citizens must prove so long as they could not succeed on a theory of strict liability.[69] The majority found that the balance of state interest was different as private individuals had more to lose from libelous speech, which made the state's interest in protection of reputation more compelling on two grounds.[70] First, public figures are less dependent on legal remedies because they have better access to "the channels of effective communication,"[71] which grant them an opportunity to refute defamatory speech.[72] Private figures have a much more limited access to counter-speech remedies, which means the government has a greater interest in granting them protection.[73] Second, public figures purposefully enter into the public eye.[74] Though First Amendment interests were still important, the Court noted:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.[75]

However, this more compelling state interest did not completely override constitutional protections for speakers. The Court limited the damages a plaintiff could gain without showing that the defendant had acted with "knowledge of falsity or reckless disregard for the truth."[76] In addition, the plaintiff who did not prove actual malice was only entitled to damages that would reimburse him for the injury and nothing more. The goal

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[68] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
[69] Gertz, supra note 16 at 347.
[70] *Id.* at 348.
[71] *Id.* at 344.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.* at 339.
[76] *Id.* at 349.

was to compensate private individuals for harms, including financial loss, reputational denigration, lowered community standing, humiliation, and mental anguish.[77]

Sullivan and its progeny show that dishonest speech is not necessarily legally actionable. In fact, the Court has recognized that false speech is entitled to some First Amendment protection.[78] It concedes that inaccuracy is a natural outgrowth of an exuberant and hearty democracy.[79] Therefore, the law shields some objectionable expression to avoid chilling speech; otherwise, well-intentioned citizens could silence themselves for fear of legal recourse for unintentional misstatements.[80] Post-publication punishment for limited categories of speech comports with the First Amendment.[81]

Harmful v. Distasteful Speech

Throughout its First Amendment jurisprudence, the Court has tried to distinguish between harmful speech and merely distasteful speech, protecting the latter but not the former. The Supreme Court has stated repeatedly that it will not create new categories of speech that fall outside First Amendment protection. Though the Court has recently had two opportunities to remove categories of speech from the penumbra of First Amendment protection, it has declined to do so. In *United States v. Stevens*,[82] the Court found a federal law criminalizing the knowing sale of animal crush videos infringed upon First Amendment rights.[83] Though the United States had a long history of prohibiting animal cruelty, the Court declined to extend that prohibition to mere

[77] *Id.* at 350.
[78] US v. Alvarez, 567 U.S. ___, 6 (2012).
[79] *Id.*; Gertz, *supra* note 16 at 340.
[80] *Id.* at 340-41.
[81] Alvarez, *supra* note 79 at 12.
[82] 559 U.S. 460 (2010).
[83] *Id.* at 1585.

depictions of abuse. Proscribing actual harm was much different than withdrawing protection from an entire category of speech.[84] Similarly, when California lawmakers attempted to ban the sale of violent video games to children, the Court found the law unconstitutional.[85] Though some content has been considered inappropriate for minors in the past, the Court ruled that violent videos did not meet the "harmful to minors" standard it had used in previous cases.[86] Just as the Court declined to circumscribe the sale of non-obscene animal crush videos, it declined to create an unprotected category of speech for violent video games.[87]

Protecting low value speech, such as violent video games and animal crush videos, has a long history in the Court. The Court has ruled that the First Amendment protects most hate speech, which many consider deplorable and low value, unless it rises to the level of fighting words. In *RAV v. City of Saint Paul*,[88] the Court found that though the law was created with "fighting words"[89] prohibitions in mind, the ordinance ended up proscribing the content of protected speech.[90] This sort of prohibition generally flies in the face of the First Amendment. Other categories of proscribable speech, including defamation, are exceptions because:

> [T]hese areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)— not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. (sic)[91]

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[84] *Id.*
[85] Brown v. Entertainment Merchant's Association, 564 U. S. ____, 4-5 (2011).
[86] *Id.* at 6.
[87] *Id.* at 7.
[88] 505 U.S. 377 (1992).
[89] *Id.* at 381.
[90] *Id.* at 391.
[91] *Id.* at 383-84.

The RAV Court noted that the ordinance showed governmental favoritism to communication of certain ideas over others: "Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics."[92]

Much of the online speech that people complain about is merely distasteful. Online commenters hate trolling[93] and flaming[94] but the First Amendment protects speech that is disruptive and derailing. Like the offline world, in cyberspace unless speech falls into one of the unprotected categories, it will not be regulated.[95] As a result, constitutional safeguards remain in place even for potentially damaging online speech.

III. ANONYMOUS SPEECH

The First Amendment often protects expression that may harm others, even when it is proffered anonymously. Repeatedly, the Court has found constitutional protection for anonymity even though the protection may shield mischievous and malicious speakers from retaliation. Throughout American history, anonymity has played a special role in society. The Framers relied on anonymity to exchange ideas. They used names like *Cato* and *Publius* to encourage the free flow of thought.[96]

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[92] *Id.* at 391.
[93] Judith Donath asserts the term "trolling" originated with fishing, "Trolling is where you set your fishing lines in the water and then slowly go back and forth dragging the bait and hoping for a bite. Trolling on the Net is the same concept - someone baits a post and then waits for the bite on the line and then enjoys the ensuing fight." Judith S. Donath, *Identity and deception in the virtual community*, in COMMUNITIES IN CYBERSPACE, 43 (1999).
[94] According to Joseph M. Kayany, there is an array of definitions of flaming, but in general, the term refers to, "an expression of hostile emotions directed at another person, as opposed to criticism that is directed at ideas and opinions." Joseph M. Kayany, *Contexts of Uninhibited Online Behavior: Flaming in Social Newsgroups on Usenet*, 49 J. AM. SOC. INFO. SCI. 1135, 1137 (1998).
[95] Reno, *supra* note 41 at 869-70.
[96] Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, CATO SUP. CT. REV.57, 59 (2002).

Cloaking their identities often meant the difference between contributing to political discourse and physical punishment, including whippings and the pillory.[97] According to Jonathan Turley, "Like the right to distribute thoughts, the right to anonymous thoughts is an essential component of free speech."[98]

As American culture has evolved, so has technology, which influences how speakers participate in anonymous expression.[99] To grasp how courts view and deal with free speech online, one must engage how the courts have traditionally understood protection of anonymous speech. Unearthing those principles garners a clearer understanding of how lower courts try to apply those values to anonymity on the Internet.

Anonymity in "Real Space"

In *National Association for the Advancement of Colored People v. State of Alabama*,[100] the Court addressed whether Alabama could require the National Association for the Advancement of Colored People (NAACP) to reveal the names and addresses of supporters without infringing on the due process protections of the 14th Amendment.[101] The case also dealt with First Amendment protection from compelled disclosure of identity and association.[102] The Court found that the NAACP could combat the disclosure of its members because revelation of such information could significantly and adversely affect the organization through "diminished financial

[97] Tally, *supra* note 49, at 64-5.
[98] *Id.* at 58.
[99] Helen Nissenbaum, *The Meaning of Anonymity in an Information Age*, 15 INFO. SOC'Y. 141 (1999).
[100] 357 U.S. 449 (1958).
[101] *Id.* at 451.
[102] *Id.* at 458.

support and membership"[103] Justice Harlan, writing for the majority, stated, "Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in-group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[104] Protection for members of groups who are not expressing popular views is especially important because history has shown that dissenting persons often face hardships for their beliefs.[105] Dissenters may be fired, threatened with violence, or fall victim to other hostile actions.[106] Thus, nonconformist expression garnered a significant amount of protection, a shield that Alabama had inadequately justified lowering.[107] The state's interest was not compelling enough to validate releasing the information when weighed against the toll it could take on members' constitutional rights.[108]

In 1960, the Supreme Court considered a Los Angeles ordinance that restricted the anonymous distribution of fliers. The law mandated that all handbills must include the name and address of the person who "printed, wrote, compiled or manufactured"[109] the product, as well as the name of the person who distributed it or the "true names and addresses of the owners, managers or agents of the person sponsoring said hand-bill."[110]

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[103] *Id.* at 459.
[104] *Id.* at 462.
[105] *Id.*
[106] *Id.* at 463.
[107] *Id.* at 465.
[108] *Id.* at 466.
[109] Talley, *supra* note 45 at 61.
[110] *Id.*

Manuel Talley was arrested for violating the ordinance and challenged its constitutionality.[111]

The Court had previously found that banning the distribution of literature was an unconstitutional form of censorship. Drawing on earlier precedent, the Court ruled the Los Angeles ordinance was not an exception because it encompassed protected speech.[112] Looking historically, the Court concluded, "Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes."[113] Prohibiting anonymity would restrict free speech because unpopular speakers were likely to silence themselves to avoid retaliation.[114] Judge Hugo Black wrote that "there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified,"[115] and this was one of those times.

In a concurring opinion, Justice John Marshall Harlan argued that the government must show a compelling interest to censor speech and that the overly broad speech ordinance could not support such a claim because Los Angeles was unable to demonstrate harm related to distribution handbills.[116] In his dissent, Justice Thomas Campbell Clark argued that the ordinance was enacted because someone asked the city council to "do something about these handbills and advertising matters which were false

[111] *Id.*
[112] *Id.* at 63-4.
[113] *Id.* at 65.
[114] *Id.* at 64-5.
[115] *Id.* at 65.
[116] *Id.* at 66-7.

or misleading."[117] Clark argued that by employing his standard[118] the Court would find that signing a name did not infringe on Talley's free speech rights.[119]

More than 30 years after the *Talley* Court ruled in support of anonymous speech, the Court would again address the issue in *McIntyre v. Ohio Elections Commission*,[120] There, the Court decided whether an Ohio law that prohibited the circulation of anonymous campaign materials contravened the First Amendment. Margaret McIntyre distributed fliers to people attending a public meeting at a middle school in which a tax levy was to be discussed. The literature conveyed McIntyre's disapproval of the levy. The leaflets contained no false or libelous content, and she had signed some of them.[121] Though McIntyre knew that her fliers did not adhere to the Ohio election laws, she appeared with more circulars at another meeting.[122]

The majority found that the First Amendment protected McIntyre's right to speak anonymously. Justice John Paul Stevens penned the majority opinion and argued that

> Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably

[117] *Id.* at 68.
[118] Justice Clark argued that the Court should weigh Talley's right to anonymous speech against the public interest in enforcing the ordinance. According to Clark, Talley had not asserted that proscribing anonymity would make him a target for social sanction, loss of employment, or physical threats which meant that the public's interest in enforcing the ordinance should outweigh Talley's right to anonymity. *Id.* at 69.
[119] *Id.*
[120] 514 U.S. 334 (1995).
[121] *Id.* at 337.
[122] *Id.* at 338.

> outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an 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.[123]

Justice Stevens linked anonymity with the highly protected category of political speech, reminding other jurists that the democratic process relies on, and protects, anonymous voting.[124]

Unlike the *Talley* ordinance, the Ohio law only applied to unsigned works that were designed to sway voters, rather than serving as a blanket prohibition on all anonymous speech. Ohio relied on cases that dealt with election process to argue that the law passed constitutional scrutiny.[125] Justice Stevens rejected the "ordinary election restriction"[126] balancing test. He argued that the law was a ban on the content of speech, which meant the Court had to use "exacting scrutiny"[127] to analyze the provision.[128] Indeed, the Court wrote that McIntyre's anonymous words – pure political speech – were at the core of First Amendment protection.[129] Though Ohio did have an interest in prohibiting harmful speech, Stevens argued that laws prohibiting dissemination of false and libelous speech during campaigns were a more effective way of addressing the harm.[130]

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[123] *Id.* at 341-42.
[124] *Id.* at 343.
[125] *Id.* at 341.
[126] *Id.* at 345.
[127] The Court here states that it should use exacting scrutiny to determine whether the Ohio law violates the First Amendment. This author stringently disagrees with that, as traditionally, content-based restrictions of free speech have demanded strict scrutiny. It is not clear why Justice Stevens argues that prohibiting speech is a content-based restriction on speech and then determines that the Court should use exacting scrutiny in the analysis of the law. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000).
[128] *Id.* at 345-46.
[129] *Id.* at 346.
[130] *Id.* at 349.

The *McIntyre* court found that the Constitution strenuously protected anonymous political speech because it is not a "pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority."[131] In Justice Scalia's dissent, he quibbled with the way Stevens framed the test. He argued that normally a strict scrutiny approach would find the law invalid, but the majority's hesitance to say that the state may never prohibit anonymous speech created a very unclear standard that would open the door to a lot of litigation and confusion in the future.[132]

Four years after *McIntyre,* the Court heard a case from Colorado after the state placed restrictions on electioneering practices. It required canvassers to be registered voters and wear an identifying badge that included their real name and whether they were paid or volunteer. Further, organizers of such initiatives needed to report the name and addresses of all paid canvassers along with the amount each was paid.[133]

The state argued the law helped the public identify and reprimand pollsters who misbehaved.[134] The Court ruled that forcing the circulators to wear name badges and listing their names and income was unconstitutional. Other disclosure requirements that did not infringe on free speech rights properly advanced the state's interest.[135]

> Through the disclosure requirements that remain in place, voters are informed of the source and amount of money spent by proponents to get a measure on the ballot; in other words, voters will be told "who has proposed [a measure]," and "who has provided funds for its circulation."… The added benefit of revealing the names of paid circulators and amounts paid to each circulator, the lower

[131] *Id.* at 357.
[132] *Id.* at 380-81.
[133] Buckley v. American Constitutional Law Foundation, 525 U.S. 182, 186 (1999).
[134] *Id.* at 198.
[135] *Id.* at 204-05.

> courts fairly determined from the record as a whole, is hardly apparent and has not been demonstrated.[136]

Similarly, in 2002, the Court considered an Ohio ordinance that required canvassers to obtain a permit before ringing doorbells. Canvassers were required to carry the permit with them and show it to anyone who asked to see it.[137] The Village of Stratton interpreted this ordinance to include Jehovah's Witnesses and their proselytization.[138]

The majority noted that the Court had historically struck down restrictions on door-to-door stumping.[139] Again, the Court was required to balance the First Amendment rights of would-be canvassers with the right of the government to protect citizens from fraud.[140] The majority found the ordinance did not pass First Amendment scrutiny because the law prohibited a broad category of speech, which included political and religious expression.[141] The village argued that the ordinance prevented fraud, crime, and invasion of resident privacy.[142] The Court found that the law was not only overbroad, but also ineffective because criminals could likely find another excuse to make house calls.[143]

IV. UNMASKING JURISPRUDENCE

Anonymity in Cyberspace

[136] *Id.* at 203.
[137] Watchtower Bible and Tract Society of New York v. Village of Stratton, 536 U.S. 150, 155-56 (2002).
[138] *Id.* at 157-58.
[139] *Id.* at 160-61.
[140] *Id*. at 162-63.
[141] *Id.* at 165.
[142] *Id.* at 164-65.
[143] *Id.* at 169.

Of course, in recent years, anonymous speech cases have increased because of the Internet.[144] The Court has ruled that speech in cyberspace garners traditional constitutional protection[145] because the potential to host a rich variety of speech is boundless.[146] However, Section 230 of the Communication Decency Act (CDA) serves to complicate litigation surrounding online anonymous speech. The CDA generally immunizes Internet Service Providers from liability for what third parties post.[147] Even websites that encourage harmful or offensive speech are often immune from legal sanction.[148] The law requires victims of harmful speech online sue the person who posted the content rather than the entity who hosted the content,[149] which can complicate defamation cases.

This section analyzes various anonymous online speech cases to illustrate the points of discord and consensus within various jurisdictions. Although the aim of this thesis is not to provide a complete history of unmasking cases, it instead strives to describe how the key elements of the major tests differ, which may threaten the constitutional protection of speech. Examining crucial pieces of the unmasking jurisprudence mosaic highlights where courts agree and diverge and in so doing, underscores the need for a nationwide unmasking standard.

Columbia Insurance v. SeesCandy.com: The Beginnings of Unmasking

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[144] Susanna Moore, *The Challenge of Internet Anonymity: Protecting John Doe on the Internet*, 26 J. MARSHALL J. COMPUTER & INFO. L. 469, 471-72 (2008-2009).
[145] Reno, *supra* note 41 at 870.
[146] *Id.* at 851-53.
[147] 47 U.S. Code § 230.
[148] Zeran, *supra* note 26 at 333.
[149] *Id.*

One of the first cases to deal with unmasking anonymous users involved a trademark and domain name dispute between Columbia Insurance Company, an organization that managed the trademarks of See's Candy Shops, and a person who registered the domain names "seescandy.com" and "seecandys.com."[150] Columbia could not determine who actually purchased the domains because the registration information and host of the web address switched multiple times.[151] The court noted that typically, to bring a claim against a party, the plaintiff would have to be able to identify the persons who executed the tortious deeds.[152]

However, the special nature of anonymity on the Internet led to the practice of allowing limited discovery. This enabled plaintiffs to learn the necessary details to serve the defendants.[153] However, the judge noted that

> Pre-service discovery is akin to the process used during criminal investigations to obtain warrants. The requirement that the government show probable cause is, in part, a protection against the misuse of ex parte procedures to invade the privacy of one who has done no wrong. A similar requirement is necessary here to prevent abuse of this extraordinary application of the discovery process and to ensure that plaintiff has standing to pursue an action against defendant.[154]

The necessity of unmasking potential infringers must be weighed against the ability to participate anonymously or pseudonymously online.[155] Judge D. Lowell Jensen wrote,

> This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate...People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can

[150] Columbia Insurance Company v. Seescandy.com, 185 F.R.D. 573, 577 (N.D. Cal. 1999).
[151] *Id.* at 575-76.
[152] *Id.* at 577.
[153] *Id.* at 577-78.
[154] *Id.* at 579-80
[155] *Id.* at 578.

> file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity.[156]

To balance these interests, Judge Jensen developed a test. It requires that plaintiffs specifically identify the defendant, act in good faith, be able to withstand a motion to dismiss, and include only a "limited number of persons or entities" to serve the discovery process.[157] Judge Jensen envisioned the motion to dismiss prong as a safeguard against compelling disclosure for cloaked speakers who do not engage in unlawful activities. He argued that to meet this standard a plaintiff must show "that an act giving rise to civil liability actually occurred and that the discovery is aimed at revealing specific identifying

features of the person or entity who committed that act."[158] The court allowed Columbia 14 days from the date of the order to submit a brief detailing pertinent information.[159] The *SeesCandy.com* case shows how the technological advancement of the Internet led to developments of special limited discovery methods to advance claims that involved anonymous defendants.[160]

Subpoena Dues Tectum to America Online: Jurisdiction Jumping

One year later, in 2000, the court addressed whether one jurisdiction can honor an order to perform discovery in another[161] when an anonymous publicly traded company (APTC) attempted to subpoena America Online Inc. (AOL) to identify a

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[156] *Id.*
[157] *Id.* at 578-80.
[158] *Id*. at 580.
[159] *Id.* at 580-81.
[160] *Id.* at 577-78.
[161] In re SUBPOENA DUCES TECUM TO AMERICA ONLINE, INC. WL. 1210372, 1 (Va.Cir.Ct. 2000).

handful of users.[162] The users allegedly published defamatory and confidential information about APTC.[163] APTC obtained an order from an Indiana court to perform discovery in Virginia, and asked a Virginia trial court to assist it by issuing a subpoena.[164] AOL was not willing to disclose the information in part because APTC sought to remain anonymous until the John Does were unmasked.[165] Indiana allowed APTC to stay anonymous. APTC asked Virginia to disregard AOL's claims and argued that the subpoena would not "unreasonably burden the John Does' free speech or privacy rights."[166]

The judge created a standard that would balance retribution for the ill-use of online anonymity and the constitutional right to participate in unidentified communication.[167] The court reviewed the allegedly defamatory comments to determine if APTC had a good faith basis for its claim.[168] The court designed the following test[169] to weigh the needs of the state against the rights of the speaker: the plaintiff must have a convincing and sincere claim that is actionable in the jurisdiction where the suit was filed and the identity of the anonymous speaker must be imperative to proceed with a

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[162] *Id.*
[163] *Id*.
[164] *Id.*
[165] *Id*.
[166] *Id*. at 2.
[167] *Id*.
[168] *Id.* at 8.
[169] The court found that a subpoena would be successful,

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

Id.

lawsuit.[170] The court reviewed the postings to determine whether APTC had a convincing "good faith" claim.[171]

After reviewing the posts and the pleadings, the court found that APTC had satisfied all three prongs of the test.[172] AOL argued that APTC's methods to identify the email addresses of the anonymous commenters were fallible which could result in unnecessary unmasking.[173] The court found that the compelling interest in unmasking the speakers warranted the "limited intrusion"[174] into the email holders' privacy even if they turned out not to have a legal obligation to APTC. The court denied AOL's motion to quash.[175]

Doe v.2TheMart.com: Sweeping v. Specific Unmasking Requests

Though the *APTC* court found that the plaintiff's interest in unmasking commenters justified the "limited intrusion" into anonymous speaker's privacy, one year later a federal district court in the Western District of Washington held that anonymous commenters must be tied to tortious speech to be identified.[176] In *Doe v. 2TheMart.com,*[177] 2TheMart.com issued a subpoena to a website that had message boards devoted to 2TheMart. The subpoena requested that the website turn over "all identifying information and documents including, but not limited to, computerized or computer stored records and logs, electronic mail (E-mail), and postings on your online

[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] Doe v. 2TheMart.com, 140 F. Supp. 2d 1088, 1095-096 (W.D.Wash. 2001).
[177] 140 F. Supp. 2d 1088 (W.D.Wash. 2001).

message boards"[178] of 23 posters. One Doe, who operated under the username "NoGuano," filed a motion to quash, asserting his or her First Amendment right to speak anonymously.

Judge Thomas S. Zilly recognized the First Amendment right to anonymity articulated in *McIntyre*.[179] The court also examined the *SeesCandy.com* and *America Online Inc*. cases and found that the unmasking standard used in both cases was not protective enough of free speech.[180] Judge Zilly constructed a new standard: the subpoena must be issued in good faith and not for unfitting use; the information sought relates to a core claim, the identifying information is directly and materially pertinent to the claim, and the information needed to proceed with or refute a claim is not available in any other way.[181]

Applying this test, the court found that, although 2TheMart did not seek the subpoena in bad faith, the broadness of the request would reveal a lot of information that was not germane to the lawsuit.[182] Perhaps most damning to the case was that the Doe defendant trying to quash the subpoena had never posted anything on the 2TheMart message board.[183] Instead, Doe had simply been in contact with other users who posted about 2TheMart.[184] The court determined that the information 2TheMart needed was

[178] *Id.* at 1090.
[179] *Id.* at 1093.
[180] *Id.* at 1095.
[181] *Id.*
[182] *Id.* at 1095-096.
[183] *Id.* at 1096.
[184] *Id.* at 1096-097.

otherwise available,[185] and that 2TheMart could proceed with its defense without unmasking the users. The court quashed the subpoena.[186]

Dendrite International v. Doe: Striking a Proper Balance

Perhaps the most relied upon standard for unmasking anonymous commenters arose out of a 2001 decision by a New Jersey appellate court. In *Dendrite International Inc. v. Doe No. 3,*[187] Dendrite brought a defamation action against commenters who posted on a Yahoo! bulletin board about the company.[188] Although 14 Does were originally named, the court focused on the unmasking of John Doe 3 because Dendrite asserted those statements were defamatory.[189]

Judge Robert A. Fall delivered the opinion of the court, and he argued that John Doe 3's comments must be examined in context. After the release of Dendrite's quarterly report,[190] various stock analysts and The Center for Financial Research and Analysis issued a report about Dendrite's changed "revenue recognition."[191] TheStreet.com also cautioned readers about the company's "red flags."[192] Then, users posted information about the articles on the message board[193] and John Doe 3 posted about Dendrite's revenue recognition. Dendrite publically refuted the claims made in the financial report.[194] Dendrite asserted that the statements Doe made were false, and

[185] *Id*. at 1097.
[186] *Id.*at 1098.
[187] 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).
[188] *Id.* at 760.
[189] *Id.*
[190] *Id.* at 762.
[191] *Id*.
[192] *Id.*
[193] *Id.*
[194] *Id.* at 762-63.

the company filed a complaint claiming that John Doe 3 misappropriated trade secrets and defamed the company.[195]

Judge Fall considered the context of the comments but also relied on analysis from *SeesCandy.com*[196] and *APTC*[197] to design a test that included notice, identification of exact allegedly defamatory statements, a *prima facie* cause of action that can withstand a motion to dismiss, evidence to support each cause of action, and, finally, a balance of the defendant's right to remain anonymous against the strength of the case.[198] Notice, as envisioned by the *Dendrite* court, required the plaintiff to take reasonable efforts to notify the anonymous user that he or she was the target of a subpoena.[199] Notice included writing a notification of pending discovery message in the same virtual venue the comments surfaced.[200] Proper notice also required plaintiffs to postpone action for a reasonable amount of time so "fictitiously-named defendants" could have the opportunity to oppose the unmasking of their identities.[201]

The court relied heavily on the *SeesCandy.com* case to explain the motion to dismiss standard. Typically, the motion to dismiss standard meant that New Jersey courts should allow plaintiffs to proceed if the "cause of action is 'suggested' by the facts."[202] However, the court relied on the *SeesCandy.com* case, which determined that

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[195] *Id.* at 763.
[196] *Id.* at 768.
[197] *Id*. at 771.
[198] *Id.* at 760-61.
[199] *Id.* at 760.
[200] *Id.*
[201] *Id.* at 760.
[202] *Id*. at 768 quoting Printing Mart–Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989) (citations omitted).

a more flexible interpretation of "motion to dismiss" was warranted.[203] The court adopted the *SeesCandy.com* definition of motion to dismiss, which held that a "plaintiff should establish *to the court's satisfaction* that plaintiff's suit against defendant could withstand a motion to dismiss" (sic)[204] and "that an act giving rise to civil liability actually occurred."[205] This tweaked definition served as a "flexible, non-technical, fact-sensitive mechanism"[206] that would help courts forfend using discovery as punishment.[207]

Courts could use this motion to dismiss standard to evaluate the evidence plaintiffs must present to support each element of their claim. The court must find that the evidence shows the claims seem true at first glance.[208] Finally, judges balance the strength of the case against the speaker's First Amendment right to anonymity.[209] To note the importance of anonymity online, the court compared the Internet to a "vast library" and a "sprawling mall" for readers and for publishers, which it referred to as "a worldwide audience of millions."[210] Dendrite submitted its trading records to the court as proof that John Doe's comments harmed its stock value. [211] The court did not find Dendrite's stock fluctuations compelling.[212] New Jersey law protects more personal rights to free speech than the First Amendment because the "…state right of free speech is protected not only from abridgment by government, but also from unreasonably

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[203] *Id.* at 770.
[204] *Id*. at 579 quoting Seescandy.com, 185 F.R.D. 573, 579 (N.D.Cal.1999).
[205] *Id.* at 580.
[206] Dendrite, *supra* note 187 at 771.
[207] *Id*.
[208] *Id.* at 760.
[209] *Id.* at 760-61.
[210] *Id.* at 761.
[211] *Id.* at 769.
[212] *Id.* at 772.

restrictive and oppressive conduct by private entities."[213] This heightened protection undergirded the court's decision that Dendrite could not unmask Doe 3 because it had not proved Doe's statements were harmful to the company.[214]

The Dendrite standard dealt with a company seeking identifying information, but traditionally courts have held public officials to different standards than private parties. *New York Times v. Sullivan* held that public officials must meet a higher burden of proof to successfully win a defamation claim.[215] In the next case, one state supreme court modified the Dendrite standard in a case involving public officials.

Cahill v. Doe: Simplifying the Balance for Public Officials

Four years later, the Supreme Court of Delaware tweaked the *Dendrite* standard after a town council member, Patrick Cahill, and his wife sued four anonymous online commenters of defamation and invasion of privacy.[216] The case focused on a John Doe who had posted two comments on a blog about Cahill. The first comment mentioned Cahill's integrity and sanity: "Anyone who has spent any amount of time with Cahill would be keenly aware of such character flaws, not to mention an obvious mental deterioration."[217] Doe's second comment stated, "Gahill [sic] is as paranoid as everyone in the town thinks he is."[218] Using a good faith standard similar to the one employed in the *SeesCandy.com* case, the superior court judge determined that Cahill could unmask the anonymous commenter.[219] Doe appealed.[220]

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[213] *Id.* at 766.
[214] *Id.* at 772.
[215] New York Times, *supra* note 55 at 280.
[216] Doe No. 1 v. Cahill, 884 A.2d 451, 454 (Del. 2005).
[217] *Id.*
[218] *Id.*
[219] *Id.* at 455.

Chief Justice Myron T. Steele, writing for the court, cited Doe's First Amendment right as an anonymous speaker engaging in political commentary and noted that online speech could serve important democratic functions. "Anonymous Internet speech in blogs or chat rooms in some instances can become the modern equivalent of political pamphleteering. As the United States Supreme Court recently noted, 'anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent.'"[221]As a city council person, Cahill was a public figure, who would have a lot to gain in unmasking speakers.[222]

The *Cahill* court found the good faith standard presented inadequate protection for anonymous speech.[223] The court also did away with the motion to dismiss standard. It argued that frivolous lawsuits could easily pass the motion to dismiss prong of a test when the defendant was not present to make counter arguments.[224] Instead, the court argued that a summary judgment standard was the most appropriate way to circumvent chilling speech [225] especially when the plaintiff was a public figure.[226] The summary judgement standard, as articulated by the Supreme Court in *Anderson v. Liberty Lobby Inc.*[227] is when courts consider "whether the evidence presents a sufficient disagreement

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[220] *Id.*
[221] *Id.* at 456 citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).
[222] *Id.* quoting Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L. J. 855, 890 (2000).
[223] *Id.* at 458.
[224] *Id.* at 459.
[225] *Id*.
[226] *Id*.
[227] 474 U.S 242 (1986).

to require submission to a jury or whether it is so one-sided that one party prevails as a matter of law."[228]

The court retained the notice prong of the *Dendrite* test, which included posting a message on the same space the comments were published. The court also preserved the waiting period embedded in the notice prong of the test.[229] However, the *Cahill* court eliminated the prong that required plaintiffs to provide the exact statements they thought were tortious.[230] It argued that plaintiffs must quote defamatory statements in their complaint to satisfy the summary judgement standard so the specific statement prong of the *Dendrite* test was redundant.[231] Further, Judge Steele argued that the summary judgement standard was the balance[232] and that including a separate balancing prong would needlessly complicate the unmasking test while not providing more protection to defendants.[233]

The *Cahill* standard, with two prongs, was much simpler than the *Dendrite* test. First, the plaintiff must make reasonable efforts to notify the anonymous defendant of the subpoena.[234] Second, the plaintiff must fulfill the summary judgement requirements.[235] When it applied this new two-prong test, the court found Cahill's

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[228] *Id.* at 250-51; According to legal scholars Charles E. Clark and Charles U. Samenow, "Under this procedure judgment may be entered summarily for the plaintiff in the more usual types of civil actions, on motion setting forth his demand and his belief that there is no defense to it, unless the defendant, by counter-affidavit, shows that the facts are in dispute." Charles E. Clark & Charles U. Samenow, *The Summary Judgement*, 38 YALE L. J. 423, 423 1928-1929.
[229] Cahill, *supra* note 224 at 460.
[230] *Id.* at 461.
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.*
[235] *Id.*

defamation claim lacking because a reasonable person would have assumed that the statements were Doe's opinion.[236]

Mobilisa v. Doe: One Unmasking Standard for All

In 2007, the Arizona Court of Appeals examined both the *Cahill* and *Dendrite* standards when deciding the first online anonymous speech case in the state. The CEO of Mobilisa used his business email address to send private emails to a woman with whom he had a "personal relationship."[237] Six days later a John Doe, using an email address hosted by a company called The Suggestion Box, sent a copy of that email to various people including Mobilisa management with the subject line "Is this the company you want to work for?"[238]

Mobilisa filed suit in Washington, listing 10 John Does as defendants in violation of two federal laws as well as common law trespass to chattels. Essentially, all the claims linked back to the central idea that the Does "accessed Mobilisa's protected computer systems and email accounts without or in excess of authorization."[239] The lower court used the *Cahill* standard and ultimately ruled that Mobilisa could obtain Doe's identifying information,[240] and the case was appealed.[241]

Mobilisa urged the appeals court to adopt a less stringent unmasking standard because Mobilisa's case dealt with "property-based claims for wrongful access to Mobilisa's email system and is not dependent on the nature of speech involved,"[242]

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[236] *Id.* at 464.
[237] Mobilisa Inc. v. Doe 1, 170 P.3d 712, 715 (Ariz. Ct. App. 2007).
[238] *Id.*
[239] *Id.* at 716.
[240] *Id*.
[241] *Id.*
[242] *Id.* at 719.

rather than purely expressive speech.[243] Rejecting that idea, the court stated, "Whether the claim is one for defamation or a property-based claim, the potential for chilling anonymous speech remains the same."[244] The court argued that adopting a different standard would encourage plaintiffs to make non-defamation claims to obtain the less rigorous standard, and that a single standard would ensure consistent rulings.[245]

The Arizona court agreed with the notice requirement in *Cahill* and *Dendrite,* which required the plaintiffs to notify the defendants of the discovery request and wait a reasonable amount of time before proceeding with the action.[246] It also embraced the summary judgement standard in *Cahill*, but stipulated that the court should only require plaintiffs to produce evidence that was within their grasp [247] or "all elements not dependent upon knowing the identity of the anonymous speaker."[248]

The court also adopted the balancing prong in the *Dendrite* case and weighed the party's case against the anonymous right to free speech.[249] Judge Ann A. Scott Timmer, writing for the majority, argued that a balance must consider the reason the First Amendment protects speakers, the type of speech involved, the speaker's expectation of privacy, the consequences of an unmasking, whether identifying the speaker is needed to advance the claim, and whether other discovery options are available.[250] After designing this standard, the court found that Mobilisa gave notice and

[243] *Id.*
[244] *Id.*
[245] *Id.*
[246] *Id.* at 721.
[247] *Id.* at 720.
[248] *Id.*
[249] *Id.*
[250] *Id.*

passed the summary judgement standard.[251] The lower court had not considered the balancing prong, so the court remanded the case, with instructions to rely on the new part of the test.[252]

The AutoAdmit.com case: When Anonymity Shields Harmful Speakers

By 2008, cases involving anonymous online speech had begun to make news, and the AutoAdmit.com case was no exception. There, two Jane Does who were law students at Yale issued a subpoena duces tecum to an ISP to obtain the IP address of users, including "AK47," who had posted comments on AutoAdmit.com, a law school admissions website. The plaintiffs argued they were the victims of "defamatory, threatening and harassing"[253] speech from various users. AK47 filed a motion to quash the subpoena, and became the key party to the case.

The first post about Jane Doe II appeared in January 2007, and it included a link to her picture and instructed users to "Rate this HUGE breasted cheerful big tit girl from YLS."[254] The posts about the women continued for months. As the posts multiplied, so did the vulgarity of the comments. Some posters said one of the women: fantasized about being raped by her father, enjoyed having sex while family members watched, encouraged others to punch her in the stomach while seven months pregnant, had a sexually transmitted disease, and had abused heroin. One poster wrote that he or she, "hope[d] she gets raped and dies."[255]

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[251] *Id.* at 723-33.
[252] *Id.* at 733.
[253] Doe I v. Individuals, 561 F.Supp.2d 249, 251 (D. Conn. 2008).
[254] *Id.*
[255] *Id.*

During the period in which these posts multiplied into the hundreds, AK47, a user known for posting problematic comments posted, "Alex Atkind, Stephen Reynolds, [Doe II], and me: GAY LOVERS."[256] Messages similar to those posted on AutoAdmit.com were also sent to faculty members and Doe II's future employer.[257] Once AK47 learned about the lawsuit, he further engaged in vitriolic speech against the women, posting things like "Women named Jill and Doe II should be raped" and starting a new topic titled, "Inflicting emotional distress on cheerful girls named [Doe II]." [258]

The federal trial court engaged a test to determine unmasking which included: notice, identification of actionable speech, specificity and alternative means to obtaining the information, centrality to the plaintiff's claim, the subpoenaed party's expectation of privacy at the time the content was posted, and whether the plaintiffs have "adequately showed" a *prima facie* claim against the defendant.[259] The notice requirement mirrored the standards adopted in *Dendrite* and *Cahill*, which required the party to attempt to notify the anonymous speaker of the subpoena.[260] Again, like the *Dendrite* test, the court determined that plaintiffs must supply evidence to support their claims, which meant submitting the exact statements that were allegedly tortious for review.[261] Drawing on the *SeesCandy.com* case for the third prong of the test, Judge Christopher F. Droney asserted that plaintiffs should seek relevant identifying information that is

[256] *Id.*
[257] *Id.*
[258] *Id.* at 252.
[259] *Id.* at 256.
[260] *Id.* at 254.
[261] *Id.* at 254-55.

imperative to advancing the claim.[262] The fourth prong considers the defendants' expectations of privacy when they wrote the comment.[263] The fifth prong also drew on *Dendrite*'s test, which required that claims satisfy each element of a *prima facie* claim.[264]

Judge Droney rejected the "good faith" standard saying it was not a stringent enough protection of speech.[265] He also quibbled with the motion to dismiss standard articulated in *Dendrite* and *SeesCandy.com*[266] and the summary judgment standard in *Cahill.*[267] He noted that the motion to dismiss standard was too confusing because separate jurisdictions had different motion to dismiss procedures and the summary judgment standard was too difficult to satisfy.[268] Judge Droney found the plaintiff had issued a legitimate subpoena and that AK47 should be unmasked as the statements he made were defamatory.[269]

Independent Newspapers v. Brodie: The Continuing Evolution of Dendrite and Cahill

In 2006, a number of anonymous commenters set out to besmirch the reputation of a local developer on the website of a local newspaper.[270] The comments suggested a local man, Zebulon J. Brodie, who also owned a Dunkin' Donuts, ran a "dirty and

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[262] *Id*. at 255.
[263] *Id.*
[264] *Id.* at 256.
[265] *Id.* at 255.
[266] *Id.*
[267] *Id.*
[268] *Id*. at 255-56.
[269] *Id*. at 257.
[270] Independent Newspapers Inc. v. Brodie, 966 A. 2d 432, 442, (Md. 2009).

unsanitary" pastry place[271] and let trash from the establishment leak into the waterway.[272] Users also accused him of "torching"[273] a historical home and having no "sense of decency."[274] Brodie argued that the statements were defamatory because they harmed his profession and employment.[275]

Maryland's highest court, the Court of Appeals, took the case to "sort out the record"[276] and guide lower courts in balancing defamation claims against anonymous speech rights.[277] The court modeled its standard after the *Dendrite* test, but opined that the "motion to dismiss"[278] and "good faith"[279] standards would be so low that they would,

> inhibit the use of the Internet as a marketplace of ideas, where boundaries for participation in public discourse melt away, and anyone with access to a computer can speak to an audience… With the Internet, users can bypass commercial publishers and editors "to speak to one another across the boundaries of divergent cultures,"… These concepts, not theoretical but practical, promote public discourse and must be guaranteed the protection of the First Amendment.[280]

On the other hand, the court noted that compelling plaintiffs to pass a summary judgment standard would be too protective of anonymity.[281] This overprotectiveness would "undermine personal accountability and the search for truth, by requiring claimants to essentially prove their case before even knowing who the commentator

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[271] *Id.*
[272] *Id.*
[273] *Id.* at 442.
[274] *Id.*
[275] *Id.*
[276] *Id.* at 447.
[277] *Id.* at 449.
[278] *Id.* at 451.
[279] *Id.*
[280] *Id.* at 456.
[281] *Id.*

was."[282] Instead, like the *AutoAdmit.com* court, the *Brodie* court argued that the plaintiff must establish a *prima facie* defamation claim.

The court split the test into five parts. The first two prongs encompass the notice standard articulated in *Dendrite*.[283] First, plaintiffs must make a reasonable attempt to notify speakers of the subpoena. Then, the party must wait a reasonable amount of time before pursuing action to allow defendants time to respond.[284] Third, like the prongs in both the *AutoAdmit.com* and *Dendrite* cases, the plaintiffs should identify the actionable statements.[285] Fourth, the court should determine whether there is a *prima facie* case against the anonymous posters[286] and, finally, courts should balance the strength of the *prima facie* case and the need for disclosure to advance the claim against the First Amendment right to remain anonymous.[287] Using this new test, the court found that Brodie's claims did not outweigh protection of speech.

As these cases show, courts have created numerous standards to try to balance constitutional rights and redress for harm. Though this list of cases is not an exhaustive list of every test ever used, it shows how lower courts are developing standards based on the facts before them. The *Dendrite* and *Cahill* cases articulate the most relied upon standards[288] but the two tests are so varied it is difficult to assert that one is the majority standard.[289] Some of the tests, such as the *Dendrite* and *Cahill* standards,[290] give proper

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[282] *Id*. at 457.
[283] *Id.* at 456.
[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] *Id.*
[288] Yelp, *supra* note 32 at 31.
[289] Mozzotta, *supra* note 35 at 846.
[290] Dendrite *supra* note 187 at 760-61; Cahill *supra* note 216 at 461.

weight to the First Amendment by requiring plaintiffs to provide significant factual evidence that their case could go to trial, while others, such as the "good faith" standard articulated in the *APTC* case,[291] give too much leeway to unmasking. As further analysis will show, the *Yelp* case was poorly decided because the Virginia statute inappropriately limits the power of the First Amendment.

V. CASE STUDY *YELP V. HADEED CARPET CLEANING*

Though the Supreme Court has regularly protected anonymity in traditional contexts, it has yet to squarely address the issue of anonymous speech online. The *Yelp v. Hadeed Carpet Cleaning Inc.*[292] case highlights the numerous challenges commonplace to cases that involve anonymous speech online. Courts around the country have applied various standards in cases seeking to unmask the identities of anonymous speakers.[293] As it stands, no single bright-line rule has developed to guide judges in the disposition of these cases. A thorough synopsis of the *Yelp* case unearths these conflicts and provides fertile ground to discuss First Amendment free speech issues.

When Hadeed filed its subpoena, it argued, "Determining whether or not Defendants were customers of Hadeed is centrally necessary for Hadeed to advance any defamation claim."[294] Hadeed asked Yelp to turn over information the company had about the anonymous commenters.[295] To rate businesses, users must register with Yelp and provide a valid email address. Yelp records the Internet Protocol (IP) address

[291] In re America Online Inc., *supra* note 161 at 8.
[292] 2014 VA. APP. LEXIS 1 (2014).
[293] Mazzotta, *supra* note 35 at 846.
[294] Yelp, *supra* note 32 at 39.
[295] *Id.*

attached to each post and stores the information in San Francisco.[296] Yelp is less stringent on other information; members are not required to use their real names or zip codes.[297]

Hadeed asserted that if the commenters were not actual customers, their statements were *per se* false and defamatory.[298] Yelp countered that the Virginia court had no jurisdiction over the website[299] and that its Terms of Service required all legal matters be handled in California.[300] However, the court found that Virginia did have jurisdiction over Yelp because it had a registered agent in the state. The court held that even if Yelp did not have a registered agent, Virginia would still have jurisdiction because Yelp directed electronic activity to Virginia.[301] Writing for the majority, Judge William G. Petty emphasized the website's Terms of Service and Content Guidelines (TOS), which held that users had to be customers of the business to post a review.[302] Judge Petty acknowledged that the First Amendment protects anonymous speech both online and offline:

> An Internet user does not shed his free speech rights at the log-in screen. The right to free speech is assiduously guarded in all mediums of expression, from the analog to the digital. The anonymous pamphleteer has the right to distribute literature without the looming specter of government interference. Similarly, the anonymous speaker has the right to express himself on the Internet without the fear that his veil of anonymity will be pierced for no other reason than because another person disagrees with him.[303]

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[296] *Id.*
[297] *Id.* at 3.
[298] *Id.* at 4-5.
[299] *Id.* at 6.
[300] *Id.* at 7.
[301] *Id.* at 40-1.
[302] *Id.* at 3.
[303] *Id.* at 11-2.

However, the judge was quick to point out that the First Amendment does not protect all anonymous speech. Anonymous speakers can be forcefully identified if "certain procedural safeguards are met."[304] The *Yelp* court argued that Virginia statute properly provided this procedural protection to cloaked expression.[305] According to the *Yelp* court, false anonymous speech garners a lower level of protection than truthful, political speech.[306]

The court acknowledged that Yelp posts are typically opinion, which means the First Amendment often protects them. However, if the posters were not customers then they posted "false statements of fact"[307] – exactly the kind of statements that can fall beyond the scope of First Amendment protection. The court did little to engage the content of the reviews to determine if they were defamatory. The contested reviews included:

> "Bob G." from Oakton allegedly relates how he was in a desperate need of emergency carpet cleaning and was ripped off. User "Chris H." from Washington reported that his precious rugs were shrunk. User "J8." from Falls Church reports that he was charged for work never performed. User "YB." from Fairfax reports that unauthorized work was performed and his rug was stained. One user, "Aris P." from Haddonfield, N.J. reports that the price was double the quote and that Hadeed was once bankrupt. Many of the negative reviews report that the price was double what was charged [sic].[308]

In Virginia, defamation law requires a plaintiff show that statements are both "false and defamatory" and meet three elements: publication, actionable statement, and requisite

[304] *Id.* at 12.
[305] *Id.* at 22.
[306] *Id.*
[307] *Id.* at 16.
[308] *Id.* at 36-7.

intent.[309] Libelous speech that causes bias against a profession is defamation *per se* according to Virginia law.[310]

To further complicate the case, Virginia had a unique unmasking law[311] that included six parts: 1) notice of the subpoena must be sent to the anonymous speaker through the ISP; 2) the comments are or could be tortious; 3) the plaintiff has a sincere belief that he or she is a victim of actionable speech; 4) "reasonable" efforts to identify the speaker were unsuccessful; 5) uncovering the speaker's identity is germane to the case; 6) there is no pending challenge to the legitimacy of the lawsuit; and finally, 7) the anonymous commenter likely has relevant information about the case.[312] The appeals court found that the trial court did not err in granting the subpoena *duces tecum*.[313]

Yelp argued that the court should apply a more stringent unmasking standard than what was outlined in the statute because the Virginia standard did not require the plaintiff to produce enough evidence to show that it had a valid claim before piercing the veil of anonymity.[314] The majority declined to implement a different standard.[315]

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[309] *Id.* at 15.
[310] *Id.* at 16-7.
[311] The court summarized Va. Code § 8.01-407.1(A)(1)(a)-(e) and (3):

> 1)he has given notice of the subpoena to the anonymous communicator via the Internet service provider (2)(a) communications made by the anonymous communicator are or may be tortious or illegal or (b) the plaintiff "has a legitimate, good faith basis to contend that such party is the victim of conduct actionable in the jurisdiction where the suit is filed," Code § 8.01-407.1(A)(1)(a); (3) other "reasonable efforts to identify the anonymous communicator have proven fruitless," Code § 8.01-407.1(A)(1)(b); (4) the identity of the anonymous communicator is important, is centrally needed to advance the claim, is related to the claim or defense, or is directly relevant to the claim or defense; (5) no motion challenging the viability of the lawsuit is pending; and (6) the entity to whom the subpoena is addressed likely has responsive information.

Id. at 26-7.
[312] *Id.*
[313] *Id.* at 33.
[314] *Id.* at 18.
[315] *Id.* at 29.

The court found that Hadeed met the second prong of the test as it had two options for satisfying this part of the standard: "the plaintiff can either show that the communications are or may be tortious or show that he has a 'legitimate, good faith basis' for his belief that the communications are tortious."[316] The court concluded that if the anonymous users were not actual customers then the reviews were *per se* defamatory.[317] In addition, because Hadeed tried to match up customer records with comments, the court found it had met it the "good faith" prong of the law.[318]

Similarly, the third prong of the test was satisfied because Hadeed looked through its records to match the reviews with customers. It requested Yelp's assistance only after it could not identify seven users.[319] Hadeed passed the fourth prong of the test because it needed the identities to advance its defamation claim: "Without the identity of the Doe defendants, Hadeed cannot move forward with its defamation lawsuit. There is no other option. The identity of the Doe defendants is not only important, it is necessary."[320] The court brushed over the fifth and sixth prongs of the test because Yelp did not contest them, and the social-networking website admitted that it did have the information Hadeed sought.[321]

In his dissent, Justice Haley concurred with the use of the Virginia unmasking standard.[322] However, he did not believe Hadeed had met the statute's requirements. He argued that to satisfy the second prong, the speech needed to be tortious. In this case,

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[316] *Id.* at 27-8.
[317] *Id.* at 34.
[318] *Id*. at 35.
[319] *Id.* at 38.
[320] *Id.* at 39.
[321] *Id.* at 39-40.
[322] *Id.* at 44-5.

the commenters needed to state false things about Hadeed; Hadeed did not claim that the statements were false but rather, that if the commenters were not customers the statements could be defamatory.[323] In addition to not meeting the second prong's first requirement, Justice Haley also found Hadeed's "reasonable efforts" to identify customers lacking.[324] The company admitted that it would only know whether the commenters were customers after they were unmasked.[325] Judge Haley argued that because Hadeed could not prove the reviewers were not customers, the users' anonymity should remain intact. Hadeed's claims were "…a self-serving argument - one that proceeds from a premise the argument is supposed to prove. If Hadeed were an individual, he would be attempting to 'lift himself by his own bootstraps.'"[326]

This argument, along with the failure to prove falsity, compelled Judge Haley to assert that the right to anonymity found in both the Constitution of the United States and the Virginia Constitution outweighed Hadeed's right to unmask the commenters.[327] "A business subject to critical commentary, commentary here not even claimed to be false in substance, should not be permitted to force the disclosure of the identity of anonymous commentators simply by alleging that those commentators may not be customers because they cannot identify them in their database."[328] Determining that Hadeed had not properly met the unmasking standards crafted by the state of Virginia, Judge Haley believed that the subpoena *duces tecum* should be quashed.[329]

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[323] *Id.*
[324] *Id.* at 46.
[325] *Id.*
[326] *Id.*
[327] *Id.* at 46-7.
[328] *Id.* at 47.
[329] *Id.*

Though Haley's dissent seems to support Yelp's claims, the majority did not agree with his views. Unmasking standards differ because courts disagree on how to balance the state's interests against the First Amendment protection of anonymous speech.[330] The Yelp case highlights how jurisdiction affects online unmasking claims. Low standards, such as the good faith showing of merit,[331] do not adequately protect speech. Differing standards lead to uneven protections for speech across the country, which may allow plaintiffs to use the unmasking process as a retribution for disfavored expression.[332] To that end, the work of communication scholar James Carey illustrates the importance of a national standard in anonymous speech cases involving the Internet.

VI. JAMES CAREY'S MODELS OF COMMUNICATION

James Carey's study of the ritual[333] and transmission[334] models of communication can assist in understanding the disruptive nature of the Internet. Although these models have different aims and methods, they are not necessarily mutually exclusive. The best societies engage both models.[335] The ritual model is the older model that focuses on the creation of meaning:

> communication is linked to terms such as 'sharing,' 'fellowship,' and 'the possession of a common faith.'… A ritual view of communication is directed not toward the extension of messages in space but toward the maintenance of society in time; not the act of imparting information but the representation of

[330] See Doe I v. Individuals, 561 F. Supp. 2d 249, 254–56 (D. Conn. 2008); Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001); Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578–80 (N.D. Cal. 1999); Mobilisa, Inc. v. Doe 1, 170 P.3d 712, 721 (Ariz. Ct. App. 2007); Doe No. 1 v. Cahill, 884 A.2d 451, 460–61 (Del. 2005); Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 457 (Md. 2009); Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 760–61 (N.J. Super. Ct. App. Div. 2001).
[331] Yelp, *supra* note 32 at 26.
[332] See Mobilisa, *supra* note 237 at, 720; Cahill, *supra* note 216 at 457; Dendrite, *supra* note 187 at 771.
[333] JAMES W. CAREY, *A Cultural Approach to Communication*, in COMMUNICATION AS CULTURE: ESSAYS ON MEDIA AND SOCIETY, 13, 15 (1989).
[334] *Id.*
[335] *Id.* at 21-2.

shared beliefs.[336]

Carey argues that scholars often overlook this ritual model because the transmission model links more closely with underlying American values and beliefs.[337]

Carey associates the transmission model with technology and distribution. "It is defined by terms such as 'imparting,' 'sending,' 'transmitting' or 'giving information to others.' It is formed from a metaphor of geography or transportation."[338] Transmission communication is rooted in the physical migration of people. A common use of communication through this model is to control space by spreading messages across vast distances at rapid speeds.[339] Initially, transmission was linked to transportation through physical movement: people carried written work through space and the pace of movement matched human movement.[340] This tradition remained until the development of the telegraph. Once the telegraph was developed, it split the embodiment from the message, which significantly enhanced portability.[341]

Carey asserts that both the ritual and transmission models are rooted in religion, but that each model deviates from the other in expressing this religious connection.[342] Transmission links to American ideals about communication, redemption, and establishing the kingdom of God, "The vast and, for the first time, democratic migration in space was above all an attempt to trade an old world for a new and represented the

[336] *Id*. at 15.
[337] *Id.* at 19.
[338] *Id.* at 15.
[339] *Id.* at 17.
[340] *Id.* at 16.
[341] *Id.* at 17.
[342] *Id.* at 18-9.

profound belief that movement in space could be in itself a redemptive act. It is a belief Americans have never quite escaped."[343]

Though the religious aspect of this model eventually died, the initial tie between religion and technology gave expansive communication models the utmost cultural standing.[344] For this reason, technology that empowers mass dissemination occupies a moral high ground in society.[345] Ritual communication expresses religion through communal access. It is not focused on religious instruction but religious meaning and the creation of holy spaces.[346]

Carey argues that ritual communication should be revered but acknowledges that both models are essential to the creation of a rich and diverse world.[347] Each model creates separate symbols, and symbols construct the world in which humans live.[348] How one perceives of and interacts with the world colors personal experiences. "Problems of communication are linked to problems of community,"[349] because communication consists of the daily activities of individual human lives. This constructed world needs constant repair to maintain order, and when a former authority is destroyed, an entirely new world must be created.[350]

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[343] *Id.* at 16.
[344] *Id.* at 19.
[345] *Id.* at 18.
[346] *Id.* at 18-9.
[347] *Id.* at 21-3.
[348] *Id.* at 33.
[349] *Id.*
[350] *Id.* at 30.

The tools that create this new world are symbols inherent in both models of communication.[351] This important duality is often lost on those who wish to view communication as one or the other:

> When we think about society, we are almost always coerced into seeing it as a network of power, administration, decision, and control—as a political order. Alternatively, we have seen society essentially as relations of property, production, and trade—an economic order. But social life is more than power and trade (and it is more than therapy as well). As Williams has argued it also includes the sharing of aesthetic experience, religious ideas, personal values and sentiments, and intellectual notions—a ritual order.[352]

Transmission models create social order and control, and ritual models create the social bonds and norms that make the human existence pleasurable.[353] Carey argued that communications scholars should engage how expression contributes to social order.[354] Perhaps because of this view, Carey did not agree with those who heralded technological advancement as the utopian cure for all of society's ills. He called the excited pronouncements of scholars who proclaimed that technology would overcome all obstacles to an equal and participatory society the "new manifest destiny."[355]

The Internet is neither a messiah nor a destroyer; it is merely a tool for communication. Carey correctly scrutinizes some of the utopian ideals that arose with the construction of the Internet. When the Internet first exhibited pervasive and innovative promise, many American scholars created utopian ideologies surrounding the technology. One significant moment in the conception of legal power on the Internet

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[351] *Id.* at 33-5.
[352] *Id.* at 34.
[353] JAMES W. CAREY, *Mass Communication and Cultural Studies*, in COMMUNICATION AS CULTURE: ESSAYS ON MEDIA AND SOCIETY, 37, 43 (1989).
[354] *Id.* at 43-4.
[355] JAMES W. CAREY, *The Mythos of the Electric Revolution*, in COMMUNICATION AS CULTURE: ESSAYS ON MEDIA AND SOCIETY, 113, 115 (1989).

was in 1996 when Grateful Dead lyricist John Perry Barlow published his *Declaration of Independence for the Internet*.[356] In the short essay, Barlow asserted that cyberspace was a place separate from the physical world and therefore beyond the reach of the arm of the law.[357] His essay, a response to the Telecommunications Act of 1996,[358] argued that legal authority is trussed to geography, and, because cyberspace adheres to no physical border, the law cannot influence the speech and conduct that occur in cyberspace.[359]

When Barlow penned this work, he envisioned cyberspace as a libertarian haven where people would be able to freely interact with one another and escape the confines of the physical world,[360] including embodiment:

> We are creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth…
> Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are all based on matter, and there is no matter here.
> Our identities have no bodies, so, unlike you, we cannot obtain order by physical coercion. We believe that from ethics, enlightened self-interest, and the commonweal, our governance will emerge. Our identities may be distributed across many of your jurisdictions. The only law that all our constituent cultures would generally recognize is the Golden Rule.[361]

Barlow's separation was a distinction between speech and action that First Amendment jurisprudence, at first blush, seems to support.[362] However, his work ignored the previous rulings of the Court that some speech can be proscribed even though the First

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[356] John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELECTRONIC FRONTIER FOUNDATION, Feb. 8 1996, *available* at https://projects.eff.org/~barlow/Declaration-Final.html.
[357] *Id.*
[358] *Id.*
[359] *Id.*
[360] *Id.*
[361] *Id.*
[362] Stevens, *supra* note 82 at 447.

Amendment shelters much discourse.[363] Barlow's sweeping description of a general freedom to express ideas is powerful, but it overlooked the nuances of human interaction.

Law professor Lawrence Lessig directly contradicted Barlow's libertarian ideology. Lessig emphasized that all interactions must happen through computers, which he believed to be key to regulating online interactions and spaces.[364] Using code, computers could be programed to regulate behavior very effectively.[365] Code could be used to create interactive opportunities; code could be used to create the world in which users engage. Code represented the architecture of the Internet; which meant that code was law.[366]

Lessig argued that two places exist: "the Internet," which is a place to do things like pay bills, write emails, and buy goods, and "cyberspace," which consists of spaces for online communities to create different ways of life.[367] Each community has a different set of rules and different goals: "Cyberspace is not one place. It is many places. And the character of these many places differ in ways that are fundamental."[368] For some, the idea that a computer-mediated community could exist was an odd idea.[369]

Electronic Frontier Foundation attorney Mike Godwin argued that scholars who promote the First Amendment must be comfortable with the idea of community in an

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[363] *Supra* note 56.
[364] Lawrence Lessig, *Code* 2.0, 5 (2d ed. 2006).
[365] *Id.*
[366] *Id.* at 67-8.
[367] *Id.* at 83.
[368] *Id.* at 84.
[369] *Id.*

intangible form. For Godwin, the intangible represents the very essence of the First Amendment:

> What we call the 'the First Amendment' is not something that depends on the scribbling of words on a piece of paper or parchment…The rules arise when the language, the history, and the underlying principles interact with the *material* world. The world of these abstract, virtual entities and the concrete, tangible, material world of cases and controversies are shaping each other constantly.[370]

In his book, Godwin predicted that libel and defamation suits would not be a major factor in cyberspace. Godwin argued that it would always be easier for someone to hit the "reply key" than to file a lawsuit.[371] However, as the previous section has shown, Godwin was wrong. People can and do sue for libel and defamation online. When courts have found that online statements were beyond constitutional protection, they have punished the speaker in much the same way they would in terrestrial speech cases.[372] Some scholars believe that online speech is actually more harmful than offline speech because it is more pervasive,[373] making it both "amplified and entrenched."[374] Prior to the Internet, compartmentalizing problematic speech was more feasible.[375] However, because online speech transcends social and geographic borders, victims of harmful speech cannot easily segregate harms that occur in cyberspace. Harmful speech and actions may leak into the everyday lives of the targets.[376]

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[370] Mike Godwin, *Cyber Rights: Defending Free Speech in the Digital Age*, 26-7 (2d ed. 2003).
[371] *Id.* at 90.
[372] Lyrissa Barnett Lidsky, *Where's the Harm?: Free Speech and the Regulation of Lies*, 65 WASH & LEE L. REV. 1091, 1094 (2008); Danielle Keats Citron, *Civil Rights in Our Information Age*, in THE OFFENSIVE INTERNET, 31, 36 (Saul Levmore & Martha C. Nussbaum eds., 2010).
[373] Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L., 224 (2011).
[374] *Id.* at 228.
[375] *Id.*
[376] *Id.*

This blurring of geographic boundaries has the potential to disrupt the legal system. The law historically depended on physical boundaries to impose restrictions on individual actors.[377] It is no mistake that such rules are often called "the law of the land."[378] If a speaker lived and worked in a particular county in a particular state, then he was subject to its laws.[379] As Lessig pointed out, problems of jurisdiction are not new, but the Internet has added an additional level of uncertainty to determining jurisdiction.[380] "Whenever anyone is in cyberspace, she is also here, in real space. Whenever one is subject to the norms of a cyberspace community, one is also living within a community in real space."[381]

Carey's work can help legal scholars understand this jurisdictional conundrum. Law, as a means of social control, fits into the transmission model. To regulate behavior, the law must be able to control its citizens in establishing and maintaining order.[382] If citizens are to continue submitting to the authority of the law, they must know in advance, what is permissible. As Justice George Sutherland stated in *Connally v. General Construction Company*,[383] "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[384]

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[377] *Id.* at 226.
[378] U.S. Const. art. 6.
[379] Lessig, *supra* note 372 at 292.
[380] *Id.* at 298.
[381] *Id*.
[382] Carey, *supra* note 241 at 31.
[383] 269 U.S. 385 (1926).
[384] *Id*. at 391.

Fair notice is an important part of circumventing vagueness; the Court has held that lack of fair warning may unjustly punish innocent citizens.[385] In First Amendment cases, the Court sanctions vagueness with particular fervor.[386] Laws regulating speech are often evaluated "on their face"[387] which is different from other challenges of vagueness, which hold that a plaintiff must prove that the law is unconstitutional "as applied to him and the circumstances of his case."[388] Law professor Paul A. Fruend, argues that such protection safeguards the public interest,

> In order not to chill conduct within the protection of the Constitution and having a genuine social utility, it may be necessary to throw the mantle of protection beyond the constitutional periphery, where the statute does not make the boundary clear. The public interest in freedom of expression may serve to invalidate an overbroad statute that casts a cloud on expression both within and without the constitutional boundary.[389]

Vagueness not only provides insufficient notice to guide an individual in his or her conduct, but it also inadequately guides judges and juries when making findings of fact.[390] If a statute fails to clearly articulate prohibited conduct, the law may chill

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[385] Winters v. New York, 333 U.S. 507, 509-10 (1948).
[386] In *Winters v. New York*, Justice Stanley F. Reed notes that the Court treats vague statutes that limit freedom of expression differently than other vague laws. Citing Omaechevarria v. Idaho, 246 U.S. 343; Waters-Pierce Oil Co. v. Texas, 212 U.S. 86; United States v. Petrillo, 332 U.S. 1; Gorin v. United States, 312 U.S. 19 in the majority opinion, Justice Reed argued that the Court treats First Amendment vagueness laws differently than other vague statutes,

> This Court goes far to uphold state statutes that deal with offenses, difficult to define, when they are not entwined with limitations on free expression. We have the same attitude toward federal statutes. Only a definite conviction by a majority of this Court that the conviction violates the Fourteenth Amendment justifies reversal of the court primarily charged with responsibility to protect persons from conviction under a vague state statute.

Id. at 517-18 (footnotes omitted).
[387] Thornhill v. Alabama, 310 U.S. 88, 97-8 (1940).
[388] Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 1950-1951.
[389] *Id.* at 540.
[390] *Id.* at 541.

speech.[391] Furthermore, the lack of precise legal guidelines decreases uniform application, which leaves room for arbitrary judicial decisions.[392]

The Internet's lack of geographic borders exacerbates the issues surrounding proper notice and chilling expression. As one scholar argues, "The proper 'community' for the purpose of the Internet should be one applicable to all users of the Internet"[393] as it applies to obscenity, so should a single unmasking standard should apply to all American users of the Internet.[394] Further interaction with James Carey's scholarship will unpack the importance of a national unmasking standard.

VII. ANALYSIS

Toward Ritual Order: A National Unmasking Standard

Further unpacking of Carey's arguments reveals that technological advancement in and of itself is not enough to create a ritual order. Carey examined the work of scholar Harold Innis to show that new mechanisms for communication do not always promise an idyllic society.[395] Carey argued that the dependence on the transmission model in the United States led to the lessening of importance, prestige, and the power of local

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[391] Paul H. Robinson, *Fair Notice and Fair Adjudication*, 2 U. PA. L. REV. 335, 365 (2005).
[392] *Id*. at 366.
[393] Erik G. Swenson, Redefining Community Standards in Light of the Geographic Limitlessness of the Internet: A Critique of United States v. Thomas, 82 MINN. L. REV. 855, 874 1997-1998.
[394] The author recognizes many of her arguments regarding jurisdiction and the rule of law also apply to national borders. There is much scholarly debate surrounding whether the Internet demolishes or bolsters national sovereignty. While further examination of international jurisdiction would prove to be an interesting area of analysis, it is beyond the scope of this paper. See, Jack Goldsmith & Tim Wu, *Who Controls The Internet? Illusions of a Borderless World* (2006); Henry H. Pritchet Jr., *The Internet as a Threat to Sovereignty? Thoughts on the Internet's Role in Strengthening National and Global Governance*, 5 IND. J. GLOBAL LEGAL STUD. 423 (1988); and Michael A. Geist, *Is There a There There - Toward Greater Certainty for Internet Jurisdiction* 16 BERK. TECH. L. J. 1345 (2001).
[395] JAMES W. CAREY, *Space, Times and Communication: A Tribute to Harold Innis*, in COMMUNICATION AS CULTURE: ESSAYS ON MEDIA AND SOCIETY, 142, 156 (1989).

control.[396] The technological advancements connected to transmission created "centralization of national authority through a uniform code of law"[397] among other things. The growth of transmission supportive structures created new thoughts and tools to think with: [398]

> changes in communication technology affected culture by altering the structure of interests (the things thought about) by changing the character of symbols (the things thought with), and by changing the nature of community (the arena in which thought developed)…In the realm of communities that were not in place but in space, mobile, connected over vast distances by appropriate symbols, forms, and interests.[399]

This renders previous separating factors, including geography and culture, much less powerful.[400] Citizens can cross physical and social boundaries to interact with one other easily via the Internet. This bypass of traditional confines forces people to rely on hyper-centralized systems of power, politics, and culture to bind them together.[401] To illustrate this point, Carey considered the telegraph and its relationship with the railroad to be the first transmission model that significantly altered language, knowledge, and "the very structures of awareness."[402] It loosened communication from the constraints of physical space, and it instead allowed communication to control physical space, such as market price and railroad shipments.[403]

Carey also explained how the telegraph created ritual order by melding the seemingly opposite goals of "the desire for peace, harmony, and self-sufficiency with

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[396] *Id.*
[397] *Id.* at 156.
[398] *Id.* at 156.
[399] *Id.* at 160.
[400] *Id.* at 162.
[401] *Id*.
[402] JAMES W. CAREY, *Technology and Ideology: The Case of the Telegraph*, in COMMUNICATION AS CULTURE: ESSAYS ON MEDIA AND SOCIETY, 201, 202 (1989).
[403] *Id.* at 203.

the wish for power, power profit and productivity."[404] It also changed the symbols in culture by requiring standardization of language so that people across the country could understand the information.[405]

The telegraph put everyone in the same communicative space. It made geography unimportant in the marketplace,[406] and it merged markets and prices.[407] The telegraph and the railroad birthed standardized time.[408] Before the railroad emerged, the sun marked time, and thus the time was different for every community. According to Carey, roughly every thirteen miles marked a minute of time difference.[409] As the railroad grew, the varying times caused confusion because passengers could not easily determine when a train would arrive or depart.[410] Ultimately, the United States changed to a standardized time which enabled better "coordination of activity and, therefore, effective social control."[411]

The power of the telegraph enabled standardized time by creating a method to communicate the standardizations,[412] but changes were also needed in the physical world to eliminate confusion and integrate the new technology into the everyday lives of citizens. Carey showed that the history of technological advancement demonstrates that transcending geographic borders, in and of itself, is not really a unique property of the Internet. Much like the telegraph and railroad propelled the need for standardized

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[404] *Id.* at 207.
[405] *Id.* at 210.
[406] *Id.* at 217.
[407] *Id.* at 219.
[408] *Id.* at 223.
[409] *Id.*
[410] *Id.* at 224.
[411] *Id.*
[412] *Id.* at 227.

time,[413] so too does the Internet propel the need for a national standard for unmasking anonymous speakers. Though the jurisdictional disputes would not be completely remedied by a nationwide test, as Carey's work explains, such standardization would provide a streamlined system that would contribute to social stability and reinforce the authority of law.[414]

Important Considerations for a Standardized Test

Lessig asserted that the best way to adapt the traditional law to the Internet is through translation. In the context of anonymous online speech, this thesis attempts to take "a current reading of the original Constitution that preserves its original meaning in the present context."[415] Just as judges should employ translation to decide cases that engage constitutional issues, this thesis engages seminal Supreme Court decisions on anonymous speech and attempts to translate those opinions into a test that courts can use to balance a defendant's right to speak anonymously online against a plaintiff's right to unmask the speaker. To create a well-balanced test, a basic understanding of why the First Amendment protects anonymous and distasteful speech is necessary. Understanding the justifications for protection of anonymity will aid translation.

Why the First Amendment Protects Anonymous Speech

Anonymous speech is protected because speakers may cloak themselves for productive purposes.[416] Although the nefarious uses of anonymous speech are realistic consequences of protecting speaker identity, the benefits of anonymity outweigh the

[413] *Id.* at 202.
[414] Carey, *supra* note 333 at 31.
[415] Lessig, *supra* note 364 at 160.
[416] Talley, *supra* note 45 at 65.

evils.[417] Legal scholar Victoria Ekstrand argues that citizens benefit from anonymity in seven ways: as convention, for safety, as rhetoric and identity, for gamemanship, to circumvent class and gender, to increase privacy, and to enhance generativity.[418] Convention uses anonymity to speak for and to a certain community; in this model anonymity fosters a sense of commonality and collectivity, which makes individual authorship less important. This sort of culture and use was much more common before the printing press.[419]

Safety, as the Court has recognized in *Talley* and in *McIntyre*, is an important reason to allow anonymous speech. The importance that anonymity played in the dissemination of literature spurred support for the American Revolution.[420] Anonymity protects the speaker from the various repercussions his or her disruptive speech may provoke.[421] Though modern Americans may not need to worry about the pillory, they still have much to fear when speaking their minds: public condemnation, reputation bashing, physical threats, and legal actions are viable consequences for contributing to unpopular discourse.[422] Safety as a positive use of cloaked speech directly links to another positive use: privacy. Just as anonymity ensures safety, so it protects the delicacies of private life from public speculation. Alcoholics Anonymous and protection

[417] McIntyre, *supra* note 120 at 350-51.
[418] Victoria Smith Ekstrand, *The Many Masks of Anonymity: Anonymity as Cultural Practice and Reflections in Case Law,* 18 J. TECH. L. & POL'Y 1, 7 (2013).
[419] *Id*.
[420] *Id.* at 8.
[421] *Id.* at 10.
[422] *Id.*

for whistleblowers are examples of how anonymity protects privacy for constructive reasons.[423]

Ekstrand linked rhetoric and identity because anonymity contributes to a speaker's ability to create a collective identity. Cloaking identity may allow a voice of dissent to carry more cachet because individual dissatisfactions are easier to dismiss than collective dissent.[424] Ekstrand argued that the Framers created a national identity by interacting anonymously because views become generalizable through the suppression of individuality.[425] Online communities today use anonymity in the same way; according to Ekstrand, "…through the use of code and hacking strategies, online coalitions such as Anonymous, create an online identity of resistance."[426]

This stripping of individual identity links to circumventing class and gender. Anonymity casts off the physical constraints of the world from words.[427] Cyberspace held promise to become a space where a true marketplace of ideas could exist.[428] Pieces of identity such as gender or socio-economic status do not attach themselves to anonymous expression on the Internet, which insulates speakers from prejudice and enables critique of an idea's merits rather than of the speaker.[429]

Some speakers may choose anonymity because it is fun. The gamemanship motivation delights in trickery and may use anonymity for personal promotion. For example, the author of *Gulliver's Travels*, Jonathan Swift, concealed his identity to

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[423] *Id.* at 20.
[424] *Id.* at 14.
[425] *Id.* at 15.
[426] *Id.*
[427] *Id.* at 19.
[428] Barlow, *supra* note at 357.
[429] Ekstrand, *supra* note 418 at 19.

generate audience speculation. The gossip created free publicity for his work. Once obscurity served its purpose, Swift revealed that he was the author. Ekstrand notes that print media audiences have less tolerance for gamemanship today, but online audiences are still tolerant of chicanery. [430]

Ekstrand also asserts that anonymity contributes to generativity. Generativity, as Johnathan Zittrain describes it, is an Internet-specific ability to "produce unanticipated change through unfiltered contribution from broad and varied audiences."[431] It is characterized by five elements:

> (1) how extensively a system or technology leverages a set of possible tasks; (2) how well it can be adapted to a range of tasks; (3) how easily new contributors can master it; (4) how accessible it is to those ready and able to build on it; and (5) how transferable any changes are to others—including (and perhaps especially) nonexperts.[432]

In the beginning of his book, Zittrain contrasted the iPhone with the Apple II (a personal computer). Although the iPhone was a beautifully designed innovation that blended music player and phone functions with Internet access, it did not have the same generative capabilities as the Apple II. [433] The Apple II was a "platform," which users could manipulate for various purposes. "It invited people to tinker with it."[434] The iPhone on the other hand did not allow people to alter the preprogrammed uses of the device.[435] Zittrain asserted that although the Apple II was a generative machine the iPhone was nothing more than an appliance.[436]

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[430] *Id.* at 18.
[431] Jonathan Zittrain, *The Future of the Internet and How to Stop It*, 70 (2008).
[432] *Id.* at 71.
[433] *Id.* at 1-2.
[434] *Id.* at 2.
[435] *Id.*
[436] *Id.* at 3.

Though Ekstrand noted that anonymity and generativity are linked, other scholars such as Bryan Choi, asserted that anonymity must be sacrificed to save generativity.[437] Choi argued that anonymity, by itself, has good and bad uses, and that the Internet, by itself, has noble and wicked uses, but online anonymity merged with ill intent can magnify injuries.[438] Thus, when anonymity is not constrained, generativity suffers.[439]

As Choi explains, generativity is a lot like anonymity "The more generative a technology is, the more dangerous it can be. By definition, the abuses of generativity cannot be separated from the benefits; the freedom to experiment required to produce good outcomes necessarily allows bad ones too."[440] Choi harnesses the reticence some judges display when they are analyzing online defamation cases.

The Internet may magnify the harms of anonymity. According to Ekstrand, anonymity can cause harm in three ways: through intimidation, insulation, and the incubation of crime and fraud.[441] Using anonymity to intimidate or to spread rumor and false speech links to the harms of defamation because anonymity shields defamers from accountability[442] and can facilitate wrongdoing.[443]

Though protection of anonymity means that some people will use a mask for destructive rather than constructive purposes, the Court has found that the benefits of

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[437] Bryan H. Choi, *The Anonymous Internet*, 72 MD. L. REV. 501, 506 (2013).
[438] *Id.* at 504-05.
[439] *Id.* at 506.
[440] *Id.* at 504-05.
[441] Ekstrand, *supra* at note 418 at 23-9.
[442] Watchtower, *supra* note 137 at 168-69.
[443] Ekstrand, *supra* note 418 at 27.

anonymity outweigh some of the costs.[444] For example, anonymous speech facilitates the dissemination of dissenting speech and ideas.[445] Imbedded in the First Amendment is the assumption that a healthy democracy fosters the growth of a wide variety of ideas in the public sphere, and, while some thorny weeds may grow beside the flowers, the mixing is necessary to cultivate democracy.[446] Though often First Amendment scholarship focuses on what the government can and cannot do, the First Amendment theory of dissent also recognizes that social norms are often as powerful as the law in regulating behavior.[447]

Why the First Amendment Protects Dissent

According to law professor Cass R. Sunstein, social pressure is just as effective as the law in regulating citizen behavior because it organically develops and induces pressure to conform to majority opinions and to social norms.[448] Sunstein asserts that two factors and three phenomena influence human behavior.[449] The first influencing factor is trust of sources such as authority figures and experts.[450] The second factor is desire for the high regard of others. These two factors lead to conformity, cascades, and polarization—the phenomena that directly discourage dissent.[451]

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[444] Watchtower, *supra* note 137 at 169.
[445] Sunstein, *supra* note 46 at 43.
[446] James Madison, *Report on the Virginia Resolutions*, Jan. 1800, *available* at http://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html.
[447] Talley, *supra* 45 at 65.
[448] Sunstein, *supra* note 46 at 11.
[449] *Id.* at 9-10.
[450] *Id.* at 9.
[451] *Id.* at 9-10.

The smaller and more familiar a group is, the higher the pressure to conform.[452] Reputational cascades occur when an individual chooses to agree with the majority to protect his high regard in a social circle.[453] Close-knit communities severely punish those who cause tension, which makes dissent less likely.[454] Reputational cascades are usually effective on the first handful of dissenters, but, as Sunstein notes, once dissent reaches a certain critical mass, the sheer volume of counter-speech deadens the sting to individual reputation.[455]

An informational cascade occurs when an individual no longer relies on personal opinions. [456] Instead, he or she depends on others to direct thoughts and actions. This can lead to popularized error.[457] Only through dissent are informational cascades circumvented.[458] The First Amendment grants this freedom, but social pressures still push against voicing the unpopular view; this is where anonymity, when used for the speaker's safety from social sanction, evades the trappings of cascades.[459]

Dissent increases tension and decreases the strength of social ties.[460] Though sometimes uncomfortable, dissent cultivates change by weakening these social bonds and disrupting social norms.[461] Protecting distasteful speech encourages debates, which hampers the flourishing of polarization, thereby counteracting the group's tendency to

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[452] *Id.* at 10.
[453] *Id.* at 79.
[454] *Id.*
[455] *Id.*
[456] *Id.* at 70.
[457] *Id.* at 64.
[458] *Id.*
[459] *Id.* at 70-1.
[460] *Id.* at 80.
[461] *Id.* at 80-1.

make extreme decisions.[462] Protection of dissent allows communities to "benefit from the courage or foolhardiness of those who dissent."[463]

Dissent benefits communities when it is intentional, critical, and public.[464] While these categories may seem straightforward, there is debate about how extreme dissent can be. Some scholars argue that harmful speech, like defamation, and even harmful acts can be dissent as long as the dissenter accepts the "rule of law," even if he or she does not agree with the punishment.[465] That is, "a dissenter may use the system of law to *change* the existing law…" (sic)[466] which proves that he or she both respects the rule of law and disagree with its current form.

Other scholars argue that if problematic speech crosses the threshold into unlawful action or into the unprotected areas of speech, it is not dissent. True dissent is public, intentional, critical, and does not cause harm.[467] This view squares with First Amendment jurisprudence: dissent, by definition, is sheltered because it does not fit into one of the categories considered outside constitutional protection. This is the fine line that judges must walk to determine what speech is protected and what speech is not.

A good standard must be clear enough to guide judges, while leaving room for judges to ponder "the precise facts in each situation"[468] and rule accordingly. Legal scholars have characterized this as the balance between ensuring public safety and

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[462] *Id.* at 112.
[463] *Id.* at 98.
[464] Ronald K. Collins & David M. Skrover, *On Dissent: Its Meaning in America*, 6-25 (2013).
[465] *Id.* at 80.
[466] *Id*.
[467] *Id.* at 58.
[468] *Id.* at 37.

fostering the search for truth.[469] According to legal scholar Thomas I. Emerson, this conflict must be encouraged because it must occur to create longer lasting consensus. It is necessary to allow citizens to "disagree with, arouse, antagonize and shock his fellow citizens and the government…such an arrangement is hardly likely to be self-operating. In its short-term effects it may indeed be highly volatile."[470]

The law provides a balance that validates and unifies the system. It must delay instant gratification to reap enduring gains. To be effective, legal rules must be clear and specific because "doubt or uncertainty negates the process."[471] At the same time, judges must create a "series of compromises"[472] that could hamper the clarity of law, unless grounded in a strong theory of the First Amendment values such as protection of dissent. To create clear standards, judges must have a clear conception of what the First Amendment protects and why freedom of speech is protected.[473] Legal scholar Steven H. Shriffin argues that justifications for protecting speech are rooted in a romantic understanding of the First Amendment that valued nonconformity above all else:

> They celebrated the courage of the nonconformist, the iconoclast, the dissenter. In urging self-reliance and independence of thought, in praising the heroism of those willing to speak out against the tide, they sided with the romantics—those willing to break out of classical forms. Their conception of democracy had little to do with voting and everything to do with American spirit. They sided with John Stewart Mill, in recognizing the ease of conformity. And, with Mill, they sponsored nonconformity.[474]

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[469] Alan Barth, *Prophets with Honor: Great Dissents and Great Dissenters in the Supreme Court*, 159 (1974).
[470] Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 27 (1966).
[471] *Id.* at 28.
[472] Steven H. Shriffin, *The First Amendment, Democracy and Romance*, 2 (2d ed. 1993).
[473] *Id.*
[474] *Id.* at 78.

Judges must not only consider the values underlying the rulings of each individual case but also, and perhaps most importantly, the underlying ideology to decode the prongs of tests that engage the tenuous balance demanded by First Amendment law.[475]

A Proper Unmasking Standard

The long string of cases outlined in this thesis also show that the First Amendment protection afforded anonymous speech should only be removed if the state has an overriding[476] or compelling[477] interest to do so. Historically, the Court has prohibited restrictions on speech simply deemed distasteful.[478] It is important to note that unmasking, though perhaps unavoidable in the Internet age, exceeds the normal post-publication punishment for defamation.[479]As Judge Jensen noted in *SeesCandy.com*, prior to the proliferation of the Internet, such discovery methods were limited to criminal investigations.[480] Furthermore, as one scholar explains, when the court unmasks a speaker it is "compelling the anonymous individual to speak his or her identity"[481] which interferes with the individual's freedom of speech. Therefore, an appropriate standard for unmasking speakers on the Internet must tip the balance in favor of the First Amendment.

Many of the current tests employed by courts have similar standards that require notice, merits, and identifying statements. However, not all of the tests are created

[475] McIntyre, *supra* note120 at 347.
[476] *Id.* at 347.
[477] 2TheMart.com, *supra* note 176 at 1095.
[478] Near, *supra* note 52 at 718.
[479] Stephanie Barclay, *Defamation and John Does: Increased Protections and Relaxed Standing Requirements for Anonymous Internet Speech*, BYU. L. REV. 1309, 1314 (2010).
[480] SeesCandy.com, supra note 150 at 579.
[481] Barclay, supra note 479 at 1309.

equal. Tests such as the Virginia statute used in *Yelp v. Hadeed Carpet Cleaning*[482] tip the scales in the plaintiff's favor. The good faith standard merely requires a plaintiff to show that a cause of action may exist to justify the unmasking of a defendant.[483] An appropriate standard must require that the speech be outside First Amendment protection before removing the speaker's cloak of anonymity. Of course, merely considering the speech itself is not enough. Judges must also examine the context in which speech occurs[484] to design standards that appropriately weigh competing interests.[485]

Therefore, a proper national would mirror the *Dendrite* standard with one important modification to the burden of proof. The first prong, notice, gives anonymous speakers time to contest the subpoena should they wish to do so. The *Dendrite* court considered notice served if the plaintiff posted the information on the same medium the anonymous speaker used, "For example, if the message at issue was sent via email, the requesting party must make the notification via a response to the email or separate email to the anonymous sender's address."[486] Further, plaintiffs must wait a substantial amount of time before moving forward, which gives the defendant an opportunity to file a motion to quash.[487]

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[482] 2014 VA. APP LEXIS 1 (2014).
[483] Mallory Allen, *Ninth Circuit Unmasks Anonymous Internet Users and Lowers The Bar for Disclosure of Online Speakers*, WASH. J. L. TECH & ARTS 75, 82 (2011-2012).
[484] Dendrite, *supra* note 187 at 140.
[485] Mobilisa, *supra* note 237 at 111.
[486] Mobilisa, *supra* note 237 at 110-11.
[487] *Id.* at 955.

Second, the standard should require that the plaintiff identify the exact statements that he or she claim are tortious in context.[488] Again, because unmasking goes beyond traditional punishment for defamation,[489] and because the First Amendment protects anonymity,[490] courts must ensure statements do not warrant constitutional protection before unmasking speakers. This prong gives courts a chance to determine whether the words are actionable (assertions of fact) or opinion by considering the context.

Third, plaintiffs must show that they have a legitimate claim. This prong ensures that courts only revoke anonymous speech rights if claims against the speakers are substantial. It will help prevent plaintiffs from using discovery as retribution. Plaintiffs should use the court system to obtain lawful remedy and not to "…harass, intimidate, or retaliate."[491]

Fourth, plaintiffs must support each cause of action with convincing evidence of harm.[492] In a defamation case, the court must consider whether plaintiffs are public figures or private figures. If the court determines that the party is a private figure, then

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[488] Dendrite, *supra* note 187; According to Lyrissa Barnett Lidsky context is key in discerning whether online speech is actionable,

> The difficulty for courts is that it is not always easy to discern whether a statement is defamatory. Calling a company a 'scam' might be defamatory or it might be mere hyperbole; it all comes down to context. Thus, resourceful plaintiffs can file (or threaten to file) for libel almost any time they encounter harsh criticism online. If a mere allegation of libel, without more, is enough to force the unmasking of the alleged defamer, the First Amendment right to speak anonymously is largely meaningless.

Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?,* 50 B.C. L. REV. 1373, 1376 (2009).

[489] Barclay, *supra* note 478 at 1314.

[490] Talley, *supra* note 45 at 64-5.

[491] Allen, *supra* note 481 at 84.

[492] Dendrite, *supra* note 187 at 141.

the plaintiff must create *prima facie* case and withstand a motion to dismiss.[493] If the court determines the party is a public figure, then the plaintiff must satisfy the summary judgment standard, such as the one in *Cahill*,[494] to warrant unmasking. This two-tier approach properly considers defamation jurisprudence, which has determined that public figures[495] must meet a higher burden of proof to win defamation cases.[496]

If discovery is not linked to a lawsuit, where the plaintiff must prove actual malice the original *Dendrite* prong applies. The plaintiff must make a *prima facie* showing that withstands a motion to dismiss. This standard may not be as stringent a protection as the summary judgment standard in *Cahill*,[497] but it is the right choice for a test that evaluates a variety of claims. As the *AutoAdmit.com* case shows, online anonymity can shield wrongdoers whose actions warrant unmasking.[498] The *prima facie*/motion to dismiss prong, coupled with the balancing prong of the *Dendrite* test, allows judges to weigh the competing interests in each case.

Finally, the balancing prong allows judges to compare the defendant's right to remain anonymous against the strength of the case.[499] This prong is important because not all cases have the same set of facts. In the case of defamation, public officials[500] and

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[493] *Id.*
[494] Cahill, *supra* note 216 at 459.
[495] Companies, for the purposes of this test, should be considered public figures by the court. Companies often have the advantages that *Gertz v. Welch* outlines public figures have when combating defamation. Companies have access to channels of communication that can counter the harmful claims and have thrust themselves into the public eye. Gertz, *supra* note 16 at 344.
[496] New York Times, *supra* note 55 at 279-80.
[497] Cahill, *supra* note 216 at 459.
[498] AutoAdmit.com, *supra* 253 note at 257.
[499] Dendrite, *supra* note 187 at 142.
[500] New York Times, *supra* note 55 at 280.

public figures have a different burden of proof than private plaintiffs.[501] Furthermore, the First Amendment may not protect defamation when statements are made with actual malice[502] but political speech traditionally enjoys the highest level of First Amendment protection.[503] This part of the test allows judges to consider other important factors that may apply to the case such as the consequences of an unmasking, whether identifying the speaker is needed to advance the claim, and whether other discovery options are available.[504] In *Yelp,* Hadeed would have failed to meet *Dendrite* test because it did not argue that the comments were themselves false statements of fact. Instead, it argued that if the users were not customers, then the posts were likely defamatory.[505] There, the comments were not considered on their own merits.

VIII. CONCLUSION

A proposed national test solidifies First Amendment protection for anonymous speech online by considering the context and content of speech. Implementing a uniform test for unmasking anonymous commenters would provide legal stability that is not dependent upon technology but instead looks to the core principles that support free expression. Anonymity, in itself, is not always harmful either online or off-line,[506] and it should continue to enjoy robust constitutional protection.[507] The Court has recognized that cloaking has productive uses and may be used to fruitfully counter majority's

[501] Gertz, *supra* note 16 at 347.
[502] *Id.* at 342.
[503] McIntyre, *supra* note 120 at 346.
[504] Mobilisa, *supra* note 237 at 720.
[505] Yelp, *supra* note 32 at 16.
[506] Ekstrand, *supra* note 418 at 7.
[507] Talley, *supra* note 45 at 64; Dendrite *supra* note at 148-49.

views.[508] Dissent theory shows the important role anonymity plays in the democratic process,[509] a role that has many societal benefits.[510]

A national test would also alleviate some of the current jurisdictional issues that arise when courts address speech on the Internet. Tests that do not properly weigh the importance of protecting masked speakers place First Amendment rights in peril and also impede the due process of law. The ruling in *Yelp v. Hadeed* shows that some unmasking standards currently in use currently tip the balance in favor of plaintiffs.

Of course, the right to anonymity is not absolute, and courts can rescind anonymity if it insulates those who utter words beyond the scope of First Amendment protections.[511] Appropriate tests must balance the needs of society against the individual's constitutional right to anonymity. A national unmasking standard, such as the one outlined above, would help ensure that courts correctly strike this balance in future cases.

[508] Talley, *supra* note 45, at 64-5.
[509] Sunstein, *supra* note 46 at 70-1.
[510] Collins & Skrover, *supra* note 464 at 6-25.
[511] Yelp, *supr*a note 32 at 12.

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