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Victoria Smith Ekstrand

ARTICLES

THE MANY MASKS OF ANON: ANONYMITY AS CULTURAL PRACTICE AND REFLECTIONS IN CASE LAW

Victoria Smith Ekstrand[*]

AutoAdmit, an online forum that advertises itself as "the most prestigious law school discussion board in the world,"[1] is a website where law school students can anonymously swap horror stories about professors, employers, each other, and the bar. It is also a site that is

* The author is an assistant professor at the University of North Carolina—Chapel Hill in the School of Journalism and Mass Communication. She was previously an associate professor at Bowling Green State University in the School of Media and Communication and held an affiliate appointment in BGSU's Department of American Culture Studies (ACS). The author wishes to thank her ACS colleagues and BGSU's Institute for the Study of Culture and Society, which provided initial support for this research. She also wishes to thank Bryan Choi at Yale's Information Society Project for his valuable input.

1. AUTOADMIT, http://www.autoadmit.com (last visited Feb. 1, 2013).

read and followed by prospective legal employers.[2] In 2007, about two dozen anonymous posters, some using pseudonyms such as "Cheese Eating Surrender Monkey," "Pauliewalnuts," and "Sleazy Z," exchanged sexually degrading comments in a discussion about two female Yale Law School students.[3] In a widely publicized action, the students, Heide Iravani and Brittan Heller, sued for defamation in the U.S. District Court in Hartford and sought to reveal the identities of the posters to bring their suit.[4] One of the women claimed that she lost a legal internship because of the postings.[5]

The case was settled out of court in October 2009.[6] The terms of the settlement were confidential.[7] Court records and media accounts indicate that the women identified and settled with eight or nine of the anonymous posters.[8]

This AutoAdmit dispute represents a growing litany of cases in which anonymous online speakers face legal action.[9] David N. Rosen, a New Haven attorney who represented the women, told *The Hartford Courant* that his clients' success in tracking down reckless Internet posters who hide behind a veil of anonymity could lead to more self-policing among posters.[10] When plaintiffs want to sue anonymous online speakers, they engage the help of the Internet Service Provider (ISP), who tracks the Internet address of the anonymous or pseudonymous poster and provides the plaintiff with an opportunity to sue. "That knowledge could lead to greater accountability when the posters know they can be outed and held responsible for what they

2. Amir Efrati, *Students File Suit Against Ex-AutoAdmit Director, Others*, WALL ST. J.L. BLOG (Aug. 12, 2007), http://blogs.wsj.com/law/2007/06/12/students-file-suit-against-autoadmit-director-others.

3. *Id.*; Complaint, at 1, 4–15, 18, Doe I v. Individuals, 561 F. Supp. 2d 249 (D. Conn. 2008) (No. 307cv909 (CFD)) [hereinafter Complaint]. In one exchange, a poster wrote that one of the women has "huge fake tits and is universally hated." *Id.* The other woman was described in a posting as a "stupid bitch" who had herpes. *Id.*; *see also Ex-Yale Students Settle Internet AutoAdmit Defamation Lawsuit*, POGOWASRIGHT.ORG, http://www.pogowasriht.org/?p=4706 (last visited Feb. 18, 2013) [hereinafter *Ex-Yale Students*].

4. *Ex-Yale Students*, *supra* note 3; Complaint, *supra* note 3.

5. Complaint, *supra* note 3, at 6. Both women sued as Doe I and Doe II to protect their identities as they filed their case while they were students at Yale Law School. *See id.* at 2. Because of this, it is not clear from the complaint which woman lost her legal internship.

6. *Ex-Yale Students*, *supra* note 3.

7. *Id.*

8. Edmund H. Mahony, *Web-Post Suit Settled*, HARTFORD COURANT (Oct. 22, 2009), http://articles.courant.com/2009-10-22/news/autoadmit1022.art_1_law-students-law-school-message-board (last visited Apr. 8, 2013).

9. Debra Cassens Weiss, *Two Yale Law Grads Settle Defamation Suit Against Once-Anonymous Online Critics*, INTERNET L. (Oct. 22, 2009), http://www.abajournal.com/news/article/two_yale_law_grads_settle_defamation_suit_against_once_anonymous_online_cri/ (last visited Apr. 8, 2013).

10. *Id.*

write," Rosen told the newspaper.[11] But anonymous speech online proliferates. Courts involved in such cases look not only at the nature of and harm caused by the speech but the specific circumstances that led to the use of anonymity.[12]

While this Article is interested in the law of anonymous speech generally, it is more interested in how and whether courts acknowledge and comprehend the complexity of anonymous speech actions, particularly in online contexts. However, because courts will grapple with online anonymous speech cases now and in the future, they will be compelled to take their cues from larger and still-developing social norms regarding online speech and the developing social norms for speaking anonymously online. Exactly what kind of online anonymous speech should be allowed to retain its mask is, in many ways, only now being worked out, both in the courts and in society overall.

Solers, Inc. v. Doe,[13] points more clearly toward these dilemmas. In *Solers*, an anonymous tipster used an online forum run by the Software & Information Industry Association (SIIA) to tell the software industry that Solers, a defense contractor company, was pirating software.[14] The SIIA is a trade group for software and information businesses.[15] Solers denied that it was using pirated software, and the software association did not pursue the accusation by the anonymous poster.[16] Solers sued the association for the poster's name so that it could pursue a separate action against the poster for defamation and tortious interference, but the SIIA refused to reveal it.[17] The case was appealed to the United States Court of Appeals for the District of Columbia in August 2009.[18] The court ruled for the SIIA and prevented the outing of the anonymous online defendant.[19] It combined several lower court decisions to create a new test for the unmasking of anonymous online defendants.[20]

The *Solers* court was careful to note the significant and longstanding

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11. Mahony, *supra* note 8.
12. *See* Doe v. Reed, 130 S. Ct. 2811 (2010).
13. Solers, Inc. v. Doe, 977 A.2d 941, 945 (D.C. App. 2009).
14. *Id.* at 945.
15. *Id.* at 944.
16. *Id.*
17. *Id.* at 945–46.
18. *See generally id.* at 946–47.
19. *Id.* at 948–49.
20. *Id.* at 948. The D.C. Circuit Court test requires the court to (1) ensure the plaintiff has adequately pleaded the elements of a defamation claim, (2) require reasonable efforts to notify the anonymous defendant that the complaint has been filed, and the subpoena has been served, (3) delay further action for a reasonable time to allow the defendant an opportunity to file a motion to quash, (4) require the plaintiff to proffer evidence creating a genuine issue of material fact on each element of the claim that is within its control, and (5) determine that the information sought is important to enable the plaintiff to proceed with the lawsuit.

traditions and protections for anonymous speech in U.S. law. It cited one of the leading U.S. Supreme Court decisions on anonymous speech, *McIntyre v. Ohio Elections Commission*,[21] an Ohio case that was heard by the U.S. Supreme Court in 1995. In this case, the Court wrote, "Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable *tradition* of advocacy and dissent."[22]

It is those traditions that inform this Article because those longstanding cultural practices are likely to influence judicial opinion in the future. Thus, this Article seeks to unpack the cultural motivations for anonymous speech in an effort to understand why speakers seek the mask of anonymity and what benefits and drawbacks accrue to such a dialogic. The Article also examines court opinions to consider how and whether the law should reflect cultural practice and developing social norms. Following in the tradition of the legal realists and more recent "second wave" critical legal scholars, it makes the assumption, as did Justice Oliver Wendell Holmes did in 1881, "[t]he life of the law has not been logic: it has been experience."[23] The goal of this Article is to enhance the debate about the scope of protections for anonymous speech in the digital age.

As such, this approach benefits from an interdisciplinary study of the law. The research is largely a product of two investigative methods. First, the approach reflects an interdisciplinary investigation of the literature on anonymous speech, primarily in the fields of literature studies, political science, history, psychology, and communication. This literature offers a reflection of society's direct engagement with anonymous speech, offering "real world" examples of such discourse in practice. Secondly, the Article reflects a close reading of three U.S. Supreme Court cases on anonymous speech, *McIntyre v. Ohio Election Commission*,[24] *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*,[25] and *Doe v. Reed*.[26] The U.S. Supreme Court Justices in these cases identify motivations for anonymous speech and the conditions under which it is likely to receive protection. These cases represent a starting point for discussion about how and whether the Court recognizes the multitude of anonymous speech practices.

Part I operationalizes how communication scholars and others define anonymous speech and its consequences, and serves as a basis for

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21. *See* McIntyre v. Ohio Elections Comm'ns, 514 U.S. 344 (1995).

22. *Id.* at 357 (emphasis added).

23. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).

24. *McIntyre*, 514 U.S. at 344.

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

26. Doe v. Reed, 130 S. Ct. 2811 (2010).

thinking about the role of anonymous speech in law. Parts II and III use the interdisciplinary literature to address the origins and longstanding traditions of anonymous speech and identifies the motivations for engaging in such practices. Part IV examines three U.S. Supreme Court decisions to address whether and how the law reflects those cultural practices identified in the literature. Part V concludes with a discussion about the gap between cultural and legal practice regarding anonymity, particularly in online contexts.

I. DEFINITIONS

How does society think about anonymous speech? How do courts define it? Precise definitions of anonymous speech receive more attention from scholars than they do in case law. Communications and literature scholars address the issues in terms of speakers, receivers, tradition, and effect.

One of the leading models for thinking about anonymous speech is offered by communications scholars Stephen Rains and Craig Scott. They offer both distinguishing definitions in their model on anonymous communication and some important concepts about how anonymity operates in communication practice. Rains and Scott define anonymity as "the degree to which receivers perceive the message's source as unknown or unspecified."[27] In these cases, the message is either signed "anonymous" or is not signed at all. Pseudonymity, according to Rains and Scott, represents some form of partial anonymity in which the sender might use an alternative identification.[28] The receiver, in these cases, has some idea of the author's identity or intentions. In the *AutoAdmit* case, for example, the pseudonym "Sleazy Z" offered clues about the motivation or mindset of the speaker, albeit a vulgar signal to the victim of the message, or perhaps a signal that would arouse the interest of others inclined toward such crude or offensive talk.

The Rains and Scott model focuses on the receiver end of anonymous communication because of the obvious tension anonymity can create for receivers and because most discussions of anonymous speech are usually focused on the sender. Three components of their model include: (1) the perceived anonymity of the source; (2) the receiver's desire to learn the source's identity; and (3) the receiver's potential ability to identify the source:

> The degree to which a receiver perceives a source to be

27. Stephen A. Rains & Craig R. Scott, *To Identify or Not To Identify: A Theoretical Model of Receiver Responses to Anonymous Communication*, 17 COMM. THEORY 64 (2007).

28. *Id.*

> anonymous is proposed to impact his or her motivation and potential ability to identify the source. The receiver's potential ability to identify the source and his or her motivation to do so are proposed to mutually influence one another. Together, a receiver's motivation and potential ability to identify the source influence his or her efforts to identify or anonymize the source, and, ultimately, his or her perceptions of the source, message and communication medium.[29]

Rains and Scott also discuss how anonymity is generally unpleasant for receivers. When we do not know who is talking to us, we tend to find the message unpleasant. Most receivers seek to reduce the unknown in communication. This theory is known as uncertainty reduction theory or URT.[30] URT posits that anonymous speech creates tension that is unpleasant enough to take action to reduce the uncertainty. This tension is at the core of this Article because the law is ultimately interested in reducing or mediating conflict and eliminating that tension.

Receivers who are the targets of anonymous online speech use the law as a tool to reduce uncertainty. This, in turn, can reduce the tension suggested by the theory. In legal terms, reducing uncertainty may be a path toward equity, a means of balancing the power of the anonymous speaker in the marketplace of ideas with that of his receiver. Receivers may be more motivated than in the past to unmask anonymous speakers, and seek the law's help in doing so, because of the widespread negative impact such messages can have in online forums, such as in the *AutoAdmit* case. They may also be more motivated to sue because of the participation of ISPs in the unmasking process and the technological capability of ISPs to pinpoint the identities of anonymous speakers online. But challengers to anonymous speech face some rather longstanding cultural practices that embrace anonymity.

Furthermore, online communication adds a new variable in thinking about the definition and practice of anonymous speech. Scholars who study online speech talk about the "online disinhibition effect," the effect that some people self-disclose or act out *more frequently or intensely online than they do in standard communication practice.*[31] Thus, not only is anonymous speech different than standard speech in general, it also acts differently online. Some people are more open and generous in such spaces; others are rude, harsh and threatening.[32]

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29. *Id.* at 82.

30. *Id.* at 64.

31. John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAV. 321–26 (2004) (emphasis added).

32. *Id.* at 321.

Scholars point toward the "dissociative anonymity" of cyberspace as one factor in such escalating and different behaviors.[33] They also point toward the "invisibility" of online environments as giving people the courage to "go places and do things they otherwise wouldn't."[34] Scholarship that distinguishes anonymous speech from other kinds of traditional communicative practices would suggest that online anonymous speech is not a singular construct. It also suggests that the law must consider the complexity of communicative practices implicit in an online expressive act of anonymity.

II. "BENEFICIAL" MOTIVATIONS FOR ANONYMOUS SPEECH

To understand the legal response to anonymous speech and to the interests of receivers affected by anonymous online speech, it is useful to think about how anonymous speech has existed in culture over time. When and why do speakers choose to be anonymous? Has that changed and why? An interdisciplinary examination of the literature reveals seven beneficial motivations to engage anonymous speech. While this list is not mutually exclusive or complete, it demonstrates the beneficial motivations of anonymous speech.

While these categories are distinct, in many instances, they are related and overlap. In addition, the label of "beneficial motivations" for anonymous speech is arguable. A person may speak to another anonymously because the person may fear for their safety or reputation (a beneficial motivation); but the other person may find the anonymity less than admirable and view the speaker as unaccountable (a harmful motivation) for not identifying himself. Nonetheless, the beneficial motivations identified in this Part are ones most often identified in the interdisciplinary literature.

A. *Anonymity as Convention*

Historically, anonymous speech has been viewed by scholars in literature studies as a convention—a tactical writing choice—on the part of the author in the crafting of his message. Marcy North from Pennsylvania State University writes that the convention of anonymous writing is normally associated with the medieval period, before the advent of print culture.[35] More than 800 known authors published anonymously between 1475 and 1640.[36] But North and others are now

33. *Id.* at 322.

34. *Id.*

35. MARCY NORTH, THE ANONYMOUS RENAISSANCE 2 (2003).

36. *Id.*

discovering that anonymity flourished well into the new print culture:

> Anonymity not only survived, it flourished in the modern period, coexisting with naming and other methods of text presentation to offer authors and book producers an intriguing variety of conventions with which to introduce and frame the literature they produced. . . . Pseudonyms, ambiguous initials, and the names of institutions or sponsoring groups gave anonymity a textuality that allowed it to compete with the author's name for popularity and marketability. Some texts were the products of communal authorship . . . . Certain conventions of anonymity left visible spaces in the texts where an author's name could have been placed, while others created a kind of figurative space made legible by the reader's expectations. Anonymity's many variations in the early modern books and manuscripts speak to its popularity and usefulness and also to the fact that it formed a coherent enough set of conventions to allow authors and book producers to borrow, compare, conflate and make surprisingly fine distinctions among its forms and potential meanings.[37]

The rise of print culture, of course, changed the writer's connection to his work, or so the traditional tale of the demise of oral culture claims. The individual and profitability of the book trade emerged with that new culture. Virginia Woolf was one to lament that loss:

> Anonymity was a great possession. It gave the early writing an impersonality, a generality. It gave us the ballads; it gave us the songs. It allowed us to know nothing of the writer; and so to concentrate upon his song Anon had great privileges. He was not responsible. He was not self conscious. He can borrow. He can repeat. He can say what everyone feels. No one tries to stamp his own name, to discover his own experience, in his work. He keeps at a distance from the present moment.[38]

But as North reminds us, anonymity did not die with the printing press. In some cases it flourished well into the 1850s as a literary device. However, after the middle of the nineteenth century the convention lost steam, due in part to the rapid growth of periodical journalism and the journalistic practice of attaching bylines to stories. Dallas Liddle and Oscar Maurer write that mid-nineteenth century journalists debated at some length the change to bylined writing.[39]

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37. *Id.* at 3.

38. *Id.* at 1.

39. Dallas Liddle, *Salesmen, Sportsmen, Mentors: Anonymity and Mid-Victorian Theories of*

Supporters of continued anonymity in journalism argued that the practice sustained larger societal values and vested the writer with "corporate authority" and the "role of instructor and guide to the reader."[40] Opponents argued that anonymity was "inimical to the free and fair working of the market" because it "hid information relevant information" about the product's value and "gave writers and editors an incentive to produce inferior work."[41] Thus, byline supporters believed the practice would foster greater responsibility for journalistic texts. Indeed, the byline supporters won their argument. For much of the twentieth century, anonymous texts were much less common in either the periodical press or the book trade.

What did grow in that era was the discussion about the use of the author's name in relation to his work. Emboldened by twentieth century philosophers Michel Foucault and Roland Barthes, the study of the author's relationship to his text revealed our tendency to idealize and romanticize the author and his writing.[42] Roland Barthes emphasized the role of the reader in creating the text's meaning, making the author's name, whether present or not, less significant.[43] In his famous essay, *The Death of the Author*, Barthes argued that the act of writing replaced the author and despite his name the author became distinct from his text.[44]

Conversely, Michel Foucault argued that the author's name was primarily a function of discourse and a means of categorizing text.[45] It is a sign, implicit with all kinds of meanings for the reader, before the reader has even read a single page. In that light, it is not surprising that an entire literary scholarship emerged devoted to the unmasking and categorizing of anonymous authors over history. Arguably, this effort was to cast legitimacy over historically anonymous text. Halkett and Laing's *Dictionary of the Anonymous and Pseudonymous Literature of Great Britain since 1850* is just one result of that desire to link author and text and cast legitimacy.[46]

While the works of Barthes and Foucault are known for challenging the notion of the original genius in authorship, their arguments also reinforced the notion of anonymity as "the original state and natural

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Journalism, 41 VICTORIAN STUD. 33 (1997).

40. *Id.*

41. *Id.*

42. Roland Barthes, *The Death of the Author*, *available at* http://www.tbook.constantvzw.org/wp-content/death_authorbarthes.pdf.

43. *Id.*

44. *Id.*

45. Michel Foucault, *What Is An Author?*, *in* LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 123 (Donald F. Bouchard ed., 1977).

46. SAMUEL HALKETT & JOHN LAING, A DICTIONARY OF ANONYMOUS AND PSEUDONYMOUS PUBLICATIONS IN THE ENGLISH LANGUAGE (John Horden et al. eds., 1980).

characteristic of all writing."[47] North aptly points out that as writers, we are more likely to ask "to remain anonymous" rather than "to become anonymous."[48] In literature studies, we have, at the core, a rather strong commitment to anonymity as a precondition of writing, until the moment an author makes a conscious choice to reveal his identity. Online anonymity might be thought of as such a preconditioned state since it is not quite authorship because it is yet, not quite published. The state is still a product of the mind that has not yet attached, but exists in circulation.

Today, anonymity as a convention is an accepted practice on social media forums in which readers anonymously comment on articles and blogs or post comments in social media forums, such as Twitter, from masked accounts. The convention, in some ways, has been reborn with the ease and brevity of online communication, in which much of our identities can be disguised or hidden quickly and easily.

B. *Anonymity for Safety*

Safety is the most often cited justification for anonymous speech. This argument for anonymity focuses on the content of the message and its possible adverse effect on the author. In these instances, the message is often deemed critical to circulate, but so controversial that having the author's name attached would put the author in some kind of danger, either a physical threat or a serious threat to one's reputation.

As Justice Thomas wrote in his concurring opinion in *McIntyre v. Ohio Elections Commissions*,[49] the many newspapers and pamphlets the Framers produced during the Revolutionary Era demonstrate the remarkable extent to which the Framers relied on anonymity for safety. According to Eran Shalev, the total number of pen names used during the Revolutionary Era and the early republic is unclear, but some believe it was "beyond counting."[50] One scholar suggested that between 1789 and 1809, no fewer than 6 presidents, 15 cabinet members, 20 senators, and 34 congressmen published political writing either unsigned or under pen names.[51] To ensure their safety from British authorities, the leaders of the struggle for independence adopted names such as *Common Sense*, *A Farmer*, *A True Patriot*, and *Cato*.

With the atrocities of the Star Chamber in England not far from their

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47. NORTH, *supra* note 35, at 37.

48. *Id.* at 38.

49. McIntyre v. Ohio Elections Comm'ns, 514 U.S. 344, 359 (1995).

50. Eran Shalev, *Ancient Masks, American Fathers: Classical Pseudonyms During the American Revolution and Early Republic*, 23 J. EARLY REPUBLIC 151–72, 157 (2003).

51. Notes and Comments, *The Constitutional Right to Anonymity: Free Speech Disclosure and the Devil*, 70 YALE L.J. 1084, 1085 (1961).

minds, Americans were careful when challenging or publishing unfavorable works about the government.[52] Both King Henry VIII and Queen Elizabeth required that every published work carry the name of the printer and the author.[53] In a well-known example, printer John Twyn was hanged, drawn, and quartered in 1663 for publishing an anonymous tract.[54] He refused to reveal the name of the author at his trial.[55] The work, titled "A Treatise on the Execution of Justice," argued that the crown was accountable to the people.[56]

This history certainly influenced the colonial experience. Colonialists took their chances, knowing that anonymous texts also were often highly persuasive. Robert Ellis Smith writes: "The leaders of colonies in North America knew that anonymous writings were essential to bring about social change. Therefore, they found it a necessity to mask their political writings in anonymity, to prevent recriminations."[57] Similarly, Saul Cornell wrote, "Pseudonyms were essential in the Post-Revolutionary society . . . since many had not yet cast off habits learned under monarchy."[58]

Despite the recognition the Founders receive today for their work in the *Federalist Papers*, the authors were unpopular political figures during the controversial ratification process.[59] James Madison,

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52. In 1776, Congress encouraged all the states to pass legislation to prevent Americans from being "deceived and drawn into erroneous opinion." *Journals of Continental Congress*, 4:18, Jan. 2, 1776, http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit (jc0047). According to Edwin Emery and Michael Emery, "Printers were found to be in contempt by their own colonial legislatures or governors' councils." *See* EDWIN EMERY & MICHAEL EMERY, THE PRESS AND AMERICA: AN INTERPRETIVE HISTORY OF THE MASS MEDIA 58 (1984). Further, Harold L. Nelson and Dwight L. Teeter stated, "It was the elected Assembly, or lower house of the colonial legislature, that was the most successful and most active force in official control of Eighteenth Century colonial printers [sic]." *See* HAROLD L. NELSON & DWIGHT L. TEETER, LAW OF MASS COMMUNICATIONS: FREEDOM AND CONTROL OF PRINT AND BROADCAST MEDIA 24 (1973).

53. *See* JOHN MULLAN, ANONYMITY: A SECRET HISTORY OF ENGLISH LITERATURE 143 (2007).

54. *Id.* at 138.

55. *Id.*

56. *Id.*

57. ROBERT ELLIS SMITH, BEN FRANKLIN'S WEB SITE: PRIVACY AND CURIOSITY FROM PLYMOUTH ROCK TO THE INTERNET 41 (2000).

58. SAUL CORNELL, THE OTHER FOUNDERS 105 (1999).

59. Quentin P. Taylor and Douglass Adair recognized the significant contributions Madison, Hamilton, and Jay were able to make to the debate surrounding the ratification of the Constitution by using the pseudonym *Publius*. Taylor asserted, "The cloak of anonymity was fortuitous, for it allowed Hamilton and Madison (who had signed the Constitution) to speak to the merits of ratification without the charge of special pleading . . . . 'Publius,' their pseudonymous author, was acting as more than a mere publicist. In the process of trumpeting the virtues of the proposed Constitution (and defending it from its detractors), he also explained its inner workings and identified the likely effects of its adoption." THE ESSENTIAL FEDERALIST

Alexander Hamilton, and John Jay adopted the pen name *Publius* as a result of that unpopularity. According to Douglas Adair, "[i]t was especially advisable, however, in the case of *The Federalist* [to use a pseudonym]. Madison had little personal prestige in New York, where in fact, as a Virginian he was viewed as a 'foreigner.' The same was true of Jay's and Hamilton's positions in the Old Dominion."[60] *Publius* allowed Madison, Hamilton, and Jay to safely espouse their views about the Constitution in states where they would have received less than warm receptions if their true identities had been revealed.

Those who challenged the current or proposed form of government risked retaliation. Anti-Federalist Cato Uticensis's first essay clearly exemplified this fear: "I am summing up the courage to question the merits of the Federal Constitution."[61] In a letter to the *Connecticut Courant*, Anti-Federalist The Landholder explained his pseudonymity:

> To censure a man for an opinion in which he declares himself honest, and in a matter of which all men have a right to judge, is highly injurious; at the same time, when the opinions even of honorable men are submitted to the people, a tribunal before which the meanest citizen hath a right to speak, they must abide the consequence of public stricture.[62]

A Farmer and Planter wrote, "[s]hould a writer dare to publish a piece against [the Constitution], he is immediately abused and vilified."[63] Thus, pseudonyms protected authors, especially minorities, from public retribution and direct attacks on their characters.[64] Anti-

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25 (Quentin P. Taylor ed., 1998). Further, Adair stated, "With 'Publius' systematic analysis of the document at hand, the Constitutionalist leaders were able to arrange the order of debate beforehand, to coach specific speakers to talk to the various parts of the Constitution, and generally organize and manage its defense in a systematic way." Douglass Adair, *The Authorship of the Disputed Federalist Papers: Part II*, 3 WM. & MARY Q. 235, 236 n.3 (1994). Supporting Madison, Hamilton, and Jay's reason for using the pseudonym *Publius*, historian Albert Furtwangler warned, "If it should somehow become known that Hamilton and Madison were the authors behind Publius, further questions might arise about interpretations from their hands." Albert Furtwangler, *Strategies of Candor in the Federalist*, 14 EARLY AM. LITERATURE 96, 98 (1979).

60. Adair, *supra* note 59, at 236 n.4.

61. Cato Uticensis, Untitled (1787), *reprinted in* THE COMPLETE ANTI-FEDERALIST 119 (Herbert J. Storing, ed., 2008) [hereinafter THE COMPLETE ANTI-FEDERALIST].

62. The Landholder, IV (1787), *in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 150 (Paul Leicenter Ford ed., 1981).

63. A Farmer and Planter, *in* THE COMPLETE ANTI-FEDERALIST, *supra* note 61, at 74.

64. However, Norman L. Rosenberg stated "political insiders" could discover the identity of the authors by their "stylistic 'signatures' or learn the identity of popular correspondents from their own sources." NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 59 (1986).

Federalist Philadelphiensis wrote that revealing one's identity was a dangerous act: "Will a man, for his own sake – or if he has friends, family and endearing connections in life, still more for their sake; venture to expose his interest, his property, and perhaps his life, to the mercy of a revengeful, and probably a powerful party?"[65]

Today, anonymity still offers safety but for different matters than that of which occupied the colonists. In *John Doe 1 v. Reed*,[66] which is discussed in more detail in Part IV, the petitioners argued their safety was threatened by disclosure of their names as contributors to a group looking to reverse a state domestic partnerships law in Washington.[67] "Every angry homosexual in the world, I am telling you, was sending hate mail," Larry Stickney told *USA Today* in March 2009: "I am still harassed and harangued. I can only describe how they operate as total war. I've been at this stuff for a while, but I was emotionally paralyzed."[68]

In U.S. journalism, there are still vigorous debates about protecting the safety of anonymous sources, particularly when journalists grant anonymity to government whistleblowers. Among the more well-known examples are Bob Woodward and Carl Bernstein's protection of FBI agent Mark Felt, better known as "Deep Throat" in the Watergate saga. More recent examples include James Risen and Eric Lichtblau's 2005 story in the *New York Times* on the weaknesses of FISA after 9/11 in a front-page article titled "Bush Lets U.S. Spy on Callers Without Courts."[69] In that story, nearly a dozen current and former officials talked to Risen and Lichtblau about National Security Agency abuses, and President Bush called for an investigation into the anonymous sources by the Justice Department.[70]

The online "group" Anonymous, which regularly launches D-DOS (denial of service) attacks against government and corporate sites with which it disagrees, hides its identity with the use of code and anonymizing servers.[71] Anonymous commonly uses that strategy to

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65. Philadelphiensis, (No. 8), *in* THE COMPLETE ANTI-FEDERALIST, *supra* note 61, at 125. For a complete discussion of the colonists' thoughts about anonymity leading up to the ratification, see Victoria Smith Ekstrand & Cassandra Imfeld Jeyaram, *Our Founding Anonymity: Anonymous Speech During the Constitutional Debate*, 28 AM. JOURNALISM 35 (2011).

66. Doe v. Reed, 586 F.3d 671 (9th Cir. 2009).

67. *Id.* at 675.

68. Joan Biskupic, *High Court Mulls Speech Rights and Much More*, USA TODAY (Mar. 30, 2010), http://www.usatoday.com/news/washington/judicial/2010-03-30-freespe ech_N.htm.

69. NORMAN PEARLSTINE, OFF THE RECORD: THE PRESS, THE GOVERNMENT AND THE WAR OVER ANONYMOUS SOURCES 199–200 (2007).

70. *Id.*

71. Helen Walters, *Peeking Behind the Curtain at Anonymous: Gabriella Coleman at TEDGlobal*, TED (June 27, 2012, 8:19 AM), http://blog.ted.com/2012/06/27/peeking-behind-

escape arrest, but the members themselves would argue their actions are or should be a means of protectable political protest against government power.[72]

While not the same convention it was during the Revolutionary War and ratification eras, anonymity still serves to shield speakers from public, private, or official backlash. Backlash can take the form of public condemnation and reputation bashing, physical threats, and legal action. Safety can still be an issue. The successful use of anonymity in the persuasive articles of the *Federalist Papers*, among other publications, is a compelling and romantic narrative against which opponents to anonymous speech must struggle.

C. *Anonymity as Rhetoric and Identity*

Writing as *Publius*, Madison, Hamilton, and Jay wished not only to protect themselves and their reputations but also to persuade solely on the basis of their arguments, devoid from any bias a reader might attach to their identities. Anonymity granted *Publius* a chance at persuasion that might not otherwise be attainable with some readers.

Anonymous revolutionary and early republic writers identified with the classics as a way to connect with certain virtues and political viewpoints:

> Federalists, unsurprisingly, made use of some of the more dynamic ancients—such as Caesar and Mark Anthony—for cheering the kind of strong national government they endorsed, while Republicans used personae who made political sense for promoting their cause such as Cato and Brutus, the defenders of the Roman republic. Yet Federalists also used names such as Publius and Fabius, two eminent Romans who easily could have embodied anti-imperial notions, while Republicans summoned ancients such as Agrippa, the powerful deputy of Augustus, the first of the Roman emperors.[73]

The colonists used the ancients to identify with those struggles and sought to strengthen their arguments through them. Eran Shalev writes that such "performances" emboldened the colonialists' common cause:

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the-curtain-at-anonymous-gabriella-coleman-at-tedglobal-2012/.

72. *Id.*; *see also* Molly Sauter, *LOIC Will Tear Us Apart, The Impact of Tool Design and Media Portrayals in the Success of Activist DDOS Actions*, BERKMAN CENTER FOR INTERNET & SOCIETY (Jan. 29, 2013), *available at* http://cyber.law.harvard.edu/events/luncheon/2013/01/sauter (last visited Apr. 8, 2013).

73. Shalev, *supra* note 50, at 164.

> Appealing to the classics helped Americans express their hopes, desires, and fears; their particular use of language and history throws much light on the American imagination . . . . On a surface level [pseudonyms] were used as rhetorical devices to gain the high ground in political debates. At a deeper level, they proposed a meta-explanation of American society in terms of antiquity. The deliberation of republican ideology through classical guises facilitated the articulation of tensions, setting in motion the crystallization of the ideology and sentiment modern scholarship calls Nationalism.[74]

Benjamin Franklin suggested using anonymous and pseudonymous writings because they would "render the discontents general . . . and not the fiction of a few demagogues."[75] Thus, the choice of classic pseudonyms by these writers helped to construct a common national identity based on the teaching of the ancients. In this sense, these writings put the power of national identity in print. Michael Warner, a Professor at Yale University, labeled this a "principle of negativity."[76] This principle credits colonial print culture as critical to the formation of a collective American identity, thus "negating" the individual.[77]

Today, online anonymous speakers attempt to create Warner-like collective identities by advancing causes and issues that affect online communities and those that run them. Molly Sauter at MIT has argued that through the use of code and hacking strategies, online coalitions such as Anonymous, create an online identity of resistance.[78]

Other examples are found in Second Life, a virtual world website in which users create three-dimensional avatars, which are online representations of something or someone.[79] In Second Life, the avatars appear in cartoon form. Such avatars sometimes represent "real" users, but not always. Avatars may represent pseudonymous or anonymous identities, which are fictitious identities. Once created, as Lawrence Lessig points out, avatars interact:

> The things people do there are highly varied. Some simply get together and gab: they appear (in a format they elect, with qualities they choose and biographies they have written) in a

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74. *Id.* at 153.

75. *Id.* at 58; *see also* Ekstrand & Jeyaram, *supra* note 65, at 35 (identifying six reasons for the use of anonymous speech by ratification writers).

76. MICHAEL WARNER, THE LETTERS OF THE REPUBLIC 42 (1990)

77. *Id.*

78. *See* Sauter, *supra* note 72.

79. MARK STEPHEN MEADOWS, I, AVATAR: THE CULTURE AND CONSEQUENCES OF HAVING A SECOND LIFE 36–37 (2007).

> virtual room and type messages to each other. Or they walk around . . . and talk to people. My friend Rick does this as a cat – a male cat, he insists. As a male cat, Rick parades around this space and talks to anyone who's interested.[80]

Mark Stephen Meadows, in *I, Avatar: The Culture and Consequences of Having a Second Life*, describes avatars as "identity containers" in which users are more inclined to reveal themselves and to reveal what they "want, dislike and think."[81] "Most users, when they build their avatar, arrive at an alternate, less protected version of themselves. . . . We put these masks on, entered our virtual worlds, and had the feeling that 'all is under control.'"[82] Meadows points out that such control is illusory in Second Life, but the point is that these cybermasks provide modern opportunities for anonymous or pseudonymous identity creation and manipulation.[83] While Anonymous and Second Life are games for many, they are also locations where political speech about the government can and does take place, all of which impacts the discussion on legal protections for anonymous online speech.

The rhetorical power of anonymous speech is significant and the history of the nation's founding is intimately tied to that strength. *The Federalist Papers*, in particular, is a powerful narrative against which plaintiffs looking to unmask anonymous defendants must battle.

D. *Anonymity as Gamesmanship*

Often times, anonymity is simply fun. Jonathan Swift, the author of *Gulliver's Travels*, published that book anonymously, in part to encourage conversation about his identity as the author and to create interest in the book. Swift and others, including Daniel Defoe, Alexander Pope and Edmund Spenser, engaged in elaborate schemes, at first, to hide their identity and promote their publications, only to reveal their identities and celebrate them later.[84] John Mullan writes that Swift's scheme, an elaborate ruse with his printer, was common to seventeenth and eighteenth century writers looking to garner attention:

> Follow in any detail the use of anonymity by literary writers – satirists poets, dramatists and novelists – and you will find that only rarely is final concealment the aim. . . . Indeed, we will often

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80. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 11 (1999).
81. MEADOWS, *supra* note 79, at 36–37.
82. *Id.*
83. *Id.*
84. *See generally* MULLAN, *supra* note 53.

> find that the elaborateness of measures taken to preserve an incognito tells us nothing of any true desire to remain unknown. The lengths to which a writer might go to keep the public, or sometimes, the publisher, or occasionally the writer's own friends or family, guessing about the authorship of a work is not in itself evidence of the author's modesty, or shamefacedness, or fear. Being guessed at might be a writer's ambition. Provoking curiosity and conjecture – highlighting the very question of authorship – can often be the calculated effect of authorial reticence.[85]

Marcy North concurs:

> Print readers also interpreted anonymity as a signature of literary and social ambition – as an author's means to garner patronage or career opportunities, to exercise influence over readers, or paradoxically, to make his or her name . . . authors frequently counted on being found out, which gave the reader of this sort of anonymity the important function of "recognizing" the author.[86]

Mullan agrees that recognizing the author afforded a degree of social capital to the reader and made him belong to a "select group":

> Inside knowledge, especially of the court, allowed special kinds of devilry in the late seventeenth and early eighteenth centuries. A distinct genre of mocking and revealing works called "secret histories" flourished. They relied a great deal on the mystery, or pseudo-mystery, of their authorship. Such accounts were "secret" because they came from an insider, revealing what was supposed to be concealed. Naturally, such an author had to stay hidden, though the sense of risk was largely manufactured.[87]

Today, such textual frolic rings familiar in the online landscapes of the Second Life avatars where fun is paramount.[88] It is also seen daily in the numbers of fake Twitter accounts in which posters use a fake username to parody public figures and their lives.[89] One site that offered awards in 2013 for the best fake/parody Twitter account commented

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85. MULLAN, *supra* note 53, at 20.

86. NORTH, *supra* note 35, at 99.

87. MULLAN, *supra* note 53, at 231.

88. MEADOWS, *supra* note 79, at 26–27.

89. Jeff John Roberts, *3 Fake Twitter Accounts that Told Real Election Night Stories*, GIGAOM (Nov. 7, 2012), http://gigaom.com/2012/11/07/3-fake-twitter-accounts-that-told-real-election-night-stories/.

that such social media spoofs are to be commended "for the way they connect with us through social (media)."[90] Sauter's work reveals that online resistance coalitions link their work to the gaming world, in which D-DOS attacks are often built off popular online games.[91] In "Operation Last Resort," Anonymous targeted several government websites in the wake of the death of online activist Aaron Swartz, who had faced criminal prosecution for copyright infringement.[92] "Operation Last Resort" replaced those sites with the video game Asteroids.[93]

But such fun and games are not always well-received. Anonymous' Operation Payback, a D-DOS scheme that had characteristics of a video game but took down several sites in the wake of the Wikileaks scandal, became a target of government investigation and ultimately resulted in the arrest of sixteen hackers.[94] Even in offline contexts, such "gaming" is often frowned upon.

Joe Klein of Newsweek published *Primary Colors* in 1996 with much fanfare, initially concealing his identity as the author.[95] The book was a satire of the Clinton Administration and the former president's private affairs and public political aspirations. It could, of course, be said that Klein published anonymously to protect his identity from official retribution from the Clintons. But the more cynical view was that the amount of attention by creating speculation about the author paid off handsomely for Random House and Klein at a time of declining book sales.

When the pressure grew too great, Klein held a press conference to confess. Dressed in disguise at the public gathering, he clearly thought the affair was amusing. The response, however, was indignation. Klein was criticized and vilified by the journalistic culture that holds its bylines sacred. The *New York Times* wrote that Klein violated a "fundamental contract between journalists, serious publications and their readers" and labeled the practice as "corrupt."[96]

The rules of the "game" of anonymous speech have certainly changed from Swift's time. Readers of modern print media are less

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90. *The #FakeAccount Shorty Award*, SHORTY AWARDS, *available at* http://shortyawards.com/category/fakeaccount.

91. Sauter, *supra* note 72.

92. Violet Blue, *Feds Stumbling After Anonymous Launches 'Operation Last Resort,'* ZDNET (Jan. 30, 2013), http://www.zdnet.com/feds-stumbling-after-anonymous-launches-operation-last-resort-7000010541/.

93. *Id.*

94. Somini Sengupta, *16 Arrested as FBI Hits the Hacking Group Anonymous*, N.Y. TIMES, July 20, 2011, at B2.

95. Jon Swaine, *Joe Klein: The Man Behind Primary Colors*, TELEGRAPH, (Jan. 5, 2011), http://www.telegraph.co.uk/news/worldnews/us-politics/8240441/Joe-Klein-the-man-behind-Primary-Colors.html.

96. Editorial, *The Color of Mendacity*, N.Y. TIMES, July 19, 1996, at A26.

likely to grant print authors permission to "play" with their identity and hence, their accountability. But online readers allow and arguably accept more discretion in the fun anonymity provides. Fake Twitter accounts litter the landscape with parody and silliness. Anonymous and the groups surrounding it prevail, despite government investigations. Social norms may have shifted far enough to reveal the anger of message receivers who are duped by message senders in the traditional print context, such as in the Joe Klein case. But online readers appear more apt to tolerate and withstand such amusement.

E. *Anonymity as Class and Gender*

Historically, anonymity was a necessity for female writers such as Jane Austen and Charlotte Bronte. John Mullan writes that about two-thirds of the more than 150 publications by female writers between 1750 and 1811 were anonymously published novels.[97] Publishing anonymously upheld virtues of modesty for female writers of the period. Some published pseudonymously as "By A Lady" or "The Distressed Wife."[98] Some would publish as the author of their previous title (*i.e.*, Austen published as the "Author of Sense and Sensibility"). Sometimes, this modesty was false and done in part to protect the lives these authors wanted to chronicle in their characters.[99]

Charlotte Bronte was perhaps more decidedly feminist in her stance to be anonymous, publishing pseudonymously as Currer Bell. Bronte wrote that critics who wished to know her identity should know her as only a writer: "I am neither Man nor Woman – I come before you as Author only -- It is the sole standard by which you have a right to judge me. The sole ground on which I accept your judgment."[100]

Even for men, revealing their identities could threaten their social status. Mullan writes that it was often considered ungentlemanly for a man to publish under his own name.[101] Those men who published anonymously during the Revolutionary War and the debate over ratification, which included presidents and members of the Congress, risked their elite status if they attached their names to their writings.[102] It could also be argued that anonymity was a choice by these men to acknowledge the opportunity for common men to be involved in the affairs of their country. They themselves were the first generation to

97. MULLAN, *supra* note 53, at 57.

98. *Id.*

99. *Id.* at 64.

100. *Id.* at 96

101. *Id.* at 53.

102. *See generally* CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT 51 (1994).

pursue the American dream and attain their class:

> Of the ninety-nine men who signed the Declaration of Independence or were members of the Constitutional Convention, only eight are known to have had fathers who attended college. George Washington and Benjamin Franklin did not attend college at all. Although most of the founders were wealthy by the 1760s, the snobbish courtiers who surrounded the royal governors treated these "upstarts" with disdain. . . . . Revolutionary leaders sought to replace a society dominated by an aristocracy of birth with a society led by an aristocracy of merit.[103]

Thus, anonymity served as a tool that transcended class in colonial America. Modern online examples of gender and class transcendence in anonymous and pseudonymous communication are plentiful. Sauter has recently argued that online political resistance groups like Anonymous are making hacking tools available to those traditionally outside of hacker culture, widening the margins of those who can engage in forms of online political resistance.[104] Second Life is replete with men creating female avatars and females creating male characters.[105] There, real-life plumbers mix with students who mix with business people, minimizing real-life class distinctions. Even in more "serious" online forums, anonymous posters engage in comments and discussions with writers from other social spheres. Fake Twitter accounts for celebrities and other public figures attempt to transcend class with humor and amusement. Disguising class and gender roles in communication arguably opens up increased avenues for participation to those normally shut out of certain public spheres.

F. *Anonymity as Privacy*

Anonymity is also a shield that protects the unwilling from exposure. Here, too, there are numerous literary examples, particularly those who have published under pen names. Lewis Carroll, the author of *Alice in Wonderland*, was known for his reticence in public. "My constant aim," he wrote, "is to remain, personally, unknown to the world."[106] Alfred Tennyson's famous poem "In Memoriam" was initially published

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103. *Id.*

104. Sauter, *supra* note 72.

105. LESSIG, *supra* note 80; Max Burns, *The Power of Real-World Gender Roles in Second Life*, PIXELS & POL'Y (Nov. 2, 2009), http://www.pixelsandpolicy.com/pixels_and_policy/2009/11/female-avatars.html.

106. MULLAN, *supra* note 53, at 42.

without his name.[107] The grief for his friend in Tennyson's case was apparently so great that, to publish it required the withdrawal of his name, he told friends. In this case, "it is as if the making public of what was once private requires the author's withdrawal," writes John Mullan.[108]

Certainly, that ethos is at work on the Internet today, particularly in spaces where the discussion of one's family and health are the focus. Numerous "Mommy bloggers" and Facebook users, while revealing specific and intimate details of their family's doings, will post anonymously and/or mask the names of their children and family members, arguably, in an effort to protect their privacy.[109] Sites devoted to health education and the experiences of individuals and families with various health issues also commonly offer spaces for anonymous "private" discussion. The use and proliferation of those sites offers safe and convenient spaces for the exchange of sensitive health information.[110]

While online searchers seek private spaces to share their concerns and woes, privacy in the offline world is increasingly a rare phenomenon. Georgetown Law Professor Jonathan Turley has written extensively on the growth of surveillance technology in both public and private brick-and-mortar settings.[111] Cameras are now commonplace in all our daily comings and goings, making anonymity a more difficult proposition.[112] Online anonymous communication has remained something of a refuge in a world that increasingly watches our movements. Turley reminds us that in the offline world:

> [T]he expectation of anonymity has eroded under the same pressures as the expectation of privacy. The one exception has proven to be the Internet where anonymous communications are one of the great draws of users. . . . The Internet is the one major development that runs against the trend toward greater control and surveillance over communications.[113]

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107. *Id.* at 280.

108. *Id.*

109. *See* JUNIUS AND PIPPI TAKE THE CAKE BLOG, http://juniandpip.blogspot.com/ (last visited Feb. 24, 2013).

110. Janet M. Morahan-Martin, *How Internet Users Find, Evaluate, and Use Online Health Information: A Cross-Cultural Review*, 7 CYBERPSYCHOLOGY & BEHAV. 497–98 (2004).

111. Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, 2002 CATO SUP. CT. REV. 57 (2002).

112. *Id.* at 74.

113. *Id.* at 74–77.

G. *The Spontaneity and "Generativity" of Anonymity*

Finally, the choice for anonymity in speech is sometimes about spontaneity and what Jonathan Zittrain calls "generativity."[114] Where online spontaneity might be a type of sudden and unexpected interpersonal exchange or creation, Zittrain's "generativity" speaks to the capacity of the Internet to "produce unanticipated change through unfiltered contributions from broad and varied audiences."[115] The concepts are interrelated; the concept of spontaneity speaks to speech acts specifically, whereas generativity addresses the conditions the Internet presents to make such spontaneous expression possible.

Jonathan Turley writes that spontaneous speech is a barometer of free speech rights in a society and is often the least appreciated kind of speech.[116] This is the speech that engages online hacker resistance as much as it lights up the drivel found on some social media outlets:

> The degree to which an individual feels free to speak in a spontaneous and unrehearsed manner is a good measure of a society's success in protecting the expression of ideas. Moreover, spontaneous speech is the most genuine. It is the type of speech that occurs between neighbors. It is the type of speech involved in the first-time expression of political views. It is the impulse to suddenly speak out on a question of personal importance. Spontaneous speech is often anonymous. . . . It is this spontaneous speech that may be the greatest bulwark against government abuse – petty and grand. It is the ability of a citizen to mount a one-person campaign that guarantees that contemporary debates are not controlled extensively by the institutional press or the political system.[117]

While some (or much) of this brand of speech may indeed be interpersonal blather and performance, there are also tremendous opportunities in such spur-of-the-moment communication for collaboration and creation. Such communications creates an opportunity, in part, to contribute to the marketplace of ideas and more directly to the public domain, feeding the creation of other new ideas. Thus, the new "engine of free expression" may be in this kind of spontaneous communication. But there are dangers and problems with such anonymous unplanned and unprompted communication. As Bryan Choi warns, "while generativity creates the capacity for abuse,

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114. JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET 70 (2008).
115. *Id.*
116. Turley, *supra* note 111, at 76.
117. *Id.*

anonymity allows it to be committed with impunity. . . . As long as anonymity remains inviolate, generativity will be the loser."[118] Choi argues that if we are to maximize generativity, the anonymity of the Internet must be curbed.[119]

III. "HARMFUL" MOTIVATIONS FOR ANONYMOUS SPEECH

Not all motives for anonymous speech are sincere or benign. While some of the most enduring narratives favoring the protection of anonymous speech suggest a romantic tale of political patriots engaged in the worthy cause, not all anonymous speech leads to such productive ends and may indeed be illegal. The opportunities for using anonymous online postings in a sudden public fit of rage, destruction, rumor-mongering, defamation, fraud, or jealousy are more numerous today than they have ever been before. Such motivations are obviously fraught with legal implications.

The injury to plaintiffs is arguably greater online than offline, but that distinction may be a function of shifting social norms more than it is hard fact. While online messages have the potential to reach more readers than those distributed by traditional means, there are also more messages to be lost or missed in the online flood of text. Secondly, online messages are searchable, creating a traceable deluge of search results that expose the receiver to even greater possible harm. Finally, online messages, though possible to delete, can live on in cached form and in other captured modes. Part III briefly explores both harmful motivations for anonymous speech and the potential for greater injury as a result of these important changes in digital communication. Like the beneficial motivations, these categories also overlap and share common characteristics.

A. *Anonymity as Intimidation*

As the *AutoAdmit* case suggests, the opportunity for anonymously fostering rumor, innuendo, and falsehoods online is greater than ever. The practical result was a defamation complaint, in which the plaintiffs argued the false statements damaged the women's reputations.[120] While U.S. libel law generously allows for rumors and falsehoods, the law offers remedies to message-receivers who are the targets of messages that are both false and injurious to reputation, particularly if the private

118. Bryan H. Choi, *The Anonymous Internet*, 72 MD. L. REV. 501, 506 (2013).
119. *Id.*
120. Complaint, *supra* note 3, at 7, 8, 50.

posters act with negligence.[121] The *AutoAdmit* settlement would suggest that the women likely had a convincing defamation case, and the posters obviously chose to settle rather than take their chances in court.[122]

U.S. libel law can be a significant roadblock for anonymous online speakers with a desire to spread false rumors and lies. But that is not deterring online speakers, as a growing stack of recent defamation suits indicate.[123] The University of North Carolina Media Law Resource Center revealed a 216% increase in libel lawsuits against bloggers between 2006 and 2009, and the Harvard Berkman Center for Internet and Society recorded more than 280 civil lawsuits that had been filed between 1998 and 2008 against bloggers and other online publishers, many of which were defamation suits.[124]

Typical of those defendants using anonymity to intimidate was a 2009 case in which a mother in Chicago filed suit against several students who posted a fake Facebook profile about her son that was seen by more than 580 "friends."[125] The students operated the profile anonymously but were later identified, presumably with help from Facebook administrators, for the lawsuit.[126] The fake profile contained the son's cell phone number, along with obscenities and statements describing homosexual acts.[127] The mother sued on behalf of her son for defamation and intentional infliction of emotional distress.[128]

Online resistance coalitions such as Anonymous also demonstrate disinhibition in their exchanges on social media and internet relay chats as they prepare to launch D-DOS attacks or are in the process of launching such schemes. Much of Anonymous' intimidating discourse is an outgrowth of its well-known mantra: "We Are Anonymous. We are Legion. We do not forgive. We do not forget. Expect us."[129] In

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121. David S. Ardia, *Bloggers and Other Online Publishers Face Increasing Legal Threats*, POYNTER, (Sept. 22, 2008), http://www.poynter.org/latest-news/top-stories/91639/bloggers-and-other-online-publishers-face-increasing-legal-threats/.

122. *See Ex-Yale Students*, *supra* note 3.

123. David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, *available at* http://medialaw.unc.edu/wp-content/uploads/2013/02/Ardia-Freedom-of-Speech-Defamation-And-Injunctions-2.14.13.pdf.

124. *Id.* at 7–8.

125. William Lee, *Woman Sues Over Fake Facebook Profile of Son*, CHICAGO BREAKING NEWS (Sept. 24, 2009), http://www.chicagobreakingnews.com/2009/09/woman-sues-over-fake-facebook-profile-of-son.html; Ki Mae Heussner, *Teens Sued for Fake Facebook Profile*, ABC NEWS (Sept. 29, 2009), http://abcnews.go.com/Technology/AheadoftheCurve/teens-sued-fake-facebook-profile/story?id=8702282&page=3.

126. Lee, *supra* note 125.

127. *Id.*

128. *Id.*

129. *See* Scott S., *We Are Anonymous. We are Legion, Anonymity & Online Identity*, YALE L. & TECH. (Nov. 9, 2009), http:// www.yalelawtech.org/anonymity-online-identity/we-are-anonymous-we-are-legion/.

various other press releases on their site, Anonymous has announced "This time there will be change, or there will be chaos," and

> It's time to start Ops against the corrupt media that lies to The People, every chance they get. Time for Ops against the police, who beat The People without remorse or punishment. We need Ops against the politicians that selfishly covet their self-interests and vote against The People's desires.[130]

Given the response of the U.S. government and others to Anonymous and its offshoots, many clearly view the groups' speech as threatening and in violation of the law.

B. *Anonymity as Insulation and Concealment*

Some anonymous speakers seek to reduce scrutiny of their statements. Indeed, the desire to evade accountability is one of the stronger arguments against protecting anonymous speech. Anonymity allows speakers to enter the marketplace of ideas without a stake in the outcome or in the quality of the communication. In this way, anonymity insulates and conceals.

During the colonial era, anonymous pamphleteers were known for attacking each other for remaining concealed. *Aristides*, a Federalist, criticized an Anti-Federalist, *A Farmer*, for hiding behind a pseudonym and challenged him to disclose his identity.[131] *Aristides* questioned the motivations of authors who did *not* reveal their identities.[132] In his attack on *A Farmer*, *Aristides* wrote, "He that prefers a secret corner, for dealing forth his objections, and expositions, should be heard with caution and distrust."[133]

In the 1850s, journalists vigorously debated accountability problems with anonymous writers, which ultimately led to more widespread use of bylines in periodical publications.[134] For journalists and their editors, the use of bylines was linked to better business practice and to better value and accountability in journalism:

> With the elimination of anonymity . . . each writer would have a

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130. *Id.*

131. Alexander Contee Hanson, *Remarks on the Proposed Plan of a Federal Government, reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 254 (Paul Leicester Ford ed., 1968) (1888).

132. *Id.*; Aristide, *Remarks on the Proposed Plan of a Federal Government, in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 131, at 254.

133. Aristide, *supra* note 132, *in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 131, at 254.

134. Liddle, *supra* note 39, at 33.

> personal stake in the quality of his written products, and the writer's competitive self-interest could then be trusted to improve the quality of those products. Even journalists who are dutiful and honest under the present system would probably do better work with the wholesome incentive of economic self-interest added.[135]

Justices in anonymous speech cases before the U.S. Supreme Court have often raised the problem of accountability. In *Talley v. State of California*,[136] a 1960 Supreme Court case in which the Court first directly articulated protections for anonymous speech, Justices Clark, Frankfurter, and Whittaker took issue with the majority's ruling that a Los Angeles ordinance prohibiting the distribution of anonymous handbills was unconstitutional. In his dissent, Justice Clark framed the issue of accountability as one of responsibility:

> Is Talley's anonymous handbill, designed to destroy the business of a commercial establishment, passed out at its very front door, and attacking its then lawful commercial practices, more comportable with First Amendment freedoms? I think not. Before we may expect international responsibility among nations, might not it be well to require individual responsibility at home? Los Angeles' ordinance does no more.[137]

In his dissent in *McIntyre v. Ohio Elections Commission*, Justice Scalia was even more direct about the harm: "I can imagine no reason why an anonymous leaflet is any more honorable, as a general matter, than an anonymous phone call or an anonymous letter. It facilitates wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity."[138]

More recently in *John Doe No. 1 v. Reed*,[139] the Court upheld a Washington state statute that compelled disclosure of the names of those who had supported a referendum petition to repeal a state law that expanded the rights and responsibilities of same-sex domestic partners.[140] Justice Roberts noted the importance of disclosure in this particular instance of governance: "Public disclosure thus helps ensure that the only signatures counted are those that should be, and that the

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135. *Id.* at 48.

136. 362 U.S. 60 (1960).

137. *Id.* at 68 (Clark, J., dissenting).

138. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 385 (1995) (Scalia, J., dissenting).

139. Doe v. Reed, 130 S. Ct. 2811 (2012).

140. *Id.*

only referenda placed on the ballot are those that garner enough valid signatures. Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot."[141]

Justice Scalia, in his concurrence was even more insistent about the dangers of anonymity and the importance of transparency: "I do not look forward to a society, which thanks to the Supreme Court, campaigns anonymously (McIntyre) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave."[142]

C. *Anonymity as Crime or Fraud*

At its worst, anonymity can facilitate crime. Indeed, in "real space," nearly all masked criminals trespassing a home, business or public building operate on the promise of remaining unknown and escaping punishment for their deeds. Historical examples include Jack the Ripper or Ted Kaczynski, the Unabomber. More recently, Anonymous has drawn attention as a diffuse group of sometimes wayward hackers who disrupt online sites, transactions and communication in attempts to draw attention to different political controversies.

In "Operation Payback," Anonymous coordinated D-DOS attacks at the online operations of Paypal and Mastercard for blocking supporters of Julian Assange and Wikileaks from contributing money to Assange's defense.[143] Gabriella Coleman, who has written extensively about Anonymous, says the group employs pranking, trickery, deceit and defilement to carry out its causes.[144] Anonymous, she says, dramatizes "the importance of anonymity and privacy in an era when both are rapidly eroding. Given that vast databases track us, given the vast explosion of surveillance, there's something enchanting, mesmerizing and at a minimum thought-provoking about Anonymous' interventions."[145] Still, Coleman acknowledges the illegality of their methods,[146] and authorities have over the past few years arrested hackers affiliated with the movement.

Anonymity as fraud can appear as identity theft, appropriation or misrepresentation. Examples can be found in both online and offline contexts. While fake Twitter accounts can be forms of amusing parody,

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141. *Id.* at 2820.
142. *Id.* at 2837 (Scalia, J., concurring).
143. Walters, *supra* note 71.
144. *Id.*
145. *Id.*
146. *Id.*

they can also confuse and mislead. They also may violate Twitter's terms of service. Companies such as Conventry First and individuals such as St. Louis Cardinals manager Anthony La Russa, entertainer Britney Spears, Great Britain's former Foreign Secretary David Miliband, the Dalai Lama and even the Queen of England have pursued or publicly considered legal action against individuals who created fake accounts in their names.[147]

In a combination of both online and offline fraud, a conservative journalist used a pseudonym to gain access to the White House Press Room during the George W. Bush administration. Jeff Gannon, whose real name is James Dale Guckert, began covering the White House in February 2003 for GOPUSA. He later worked for a website called Talon, which Gannon told the *Washington Post* was launched by GOPUSA as "a marketing consideration to separate the news division from something that could be viewed as partisan."[148] Regardless, fellow White House journalists became suspicious of Gannon's "softball questioning" of President Bush and began investigating his background. Gannon and White House press officials came under public scrutiny for Gannon's lack of journalistic credentials. Gannon resigned from Talon in 2005, but the incident was largely reported as an attempt by Bush insiders to fraudulently represent the views of the conservative right using pseudo-journalist public relations tactics.

Justice William Rehnquist, while serving as chief justice of the U.S. Supreme Court, was particularly concerned about anonymity as a veil for crime and fraud. In his dissent in the *Watchtower Bible* case, Rehnquist wrote of his concern for the safety of Stratton, Ohio residents who relied on a local ordinance requiring door-to-door canvassers to first register with the mayor's office and reveal their identities.[149] Rehnquist was convinced the dangers of anonymous door-to-door canvassing were all too real:

> A recent double murder in Hanover, New Hampshire, a town of approximately 7,500 that would appear tranquil to most Americans but would probably seem like a bustling town of Dartmouth College students to Stratton residents, illustrates these dangers. Two teenagers murdered a married couple of Dartmouth

147. Aislinn Laing, *Twitter Cracks Down on Fake Accounts Amid Legal Threats*, TELEGRAPH (Sept. 20, 2009), http://www.telegraph.co.uk/technology/twitter/6211014/Twitter-cra cks-down-on-fake-accounts-amid-legal-threats.html.

148. Howard Kurtz, *Online Reporter Quits After Liberals' Expose*, WASH. POST, Feb. 10, 2005, at C04, *available at* http://www.washingtonpost.com/wp-dyn/articles/A12640-2005 Feb9.html.

149. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 172 (2002).

> College professors, Half and Susanne Zantop, in the Zantop's home. Investigators have concluded, based on the confession of one of the teenagers, that the teenagers went door-to-door intent on stealing access numbers to bank debit cards and then killing their owners. Their *modus operandi* was to tell residents that they were conducting an environmental survey for school. They canvassed a few homes where no one answered. At another, the resident did not allow them in to conduct the "survey." They were allowed into the Zantop home. After conducting the phony environmental survey, they stabbed the Zantops to death.[150]

The dissent by Justices Rehnquist and Scalia in the *McIntyre* case also touched on the problem of anonymous fraud, in that case fraud associated with electioneering. In requiring campaign literature to reveal the name of its producer, the state of Ohio was simply protecting the electoral process, an important state objective, Justice Scalia wrote:

> I am sure, however, that (1) a person who is required to put his name to a document is much less likely to lie than one who can lie anonymously, and (2) the distributor of a leaflet which is unlawful because it is anonymous runs much more risk of immediate detection and punishment than the distributor of a leaflet which is unlawful because it is false. Thus, people will be more likely to observe a signing requirement than a naked "no falsity" requirement; and, having observed that requirement, will then be significantly less likely to lie in what they have signed.[151]

Here, the safety of ordinary residents and the integrity of the electoral process are proffered as values that supersede any longstanding practices of protections for anonymous communication.

IV. ANONYMOUS SPEECH AND THE LAW

This Article has so far explored the different justifications for assuming the veil of anonymity in communication. Some motivations have ultimately led toward obviously good ends: a new Constitution for a new nation, an enjoyable game for avid readers, a chance at defining one's identity. At the other end of the spectrum, anonymity has enabled deception—to commit fraud in a press office, to disrupt Internet communication, to sexually intimidate young women. The question that

150. *Id.* (Rehnquist, J., dissenting).

151. McIntyre v. Ohio Elections Comm'ns, 514 U.S. 344, 382 (1995) (Scalia, J., dissenting).

remains, then, is whether and how the law has reflected this expressive activity in practice. In other words, does U.S. law recognize the range and scope of anonymous speech as it has existed practically in communication? Should it? To begin to address these questions, Part IV will look at three U.S. Supreme Court cases on the question of protections for anonymous speech and will begin to address whether and how the courts understand the complexity of anonymous discourse.

A. McIntyre v. Ohio Elections Commission

In *McIntyre*, Mrs. McIntyre of Westerville, Ohio, was a local resident concerned about the growth of government. In 1988, she distributed leaflets opposing a proposed levy to those attending a public meeting at a local middle school.[152] She made copies and stood outside the school to hand out the leaflets. Some of the copies were signed "concerned parents and taxpayers."[153]

An official of the school district who saw Mrs. McIntyre distribute the handbills advised her that the unsigned leaflets did not conform to Ohio election law.[154] Indeed they did not. Ohio election law required such handbills to be signed with the author's name and address.[155] When the levy failed twice and then finally passed in November 1988, school district officials sued Mrs. McIntyre for violating state election law. She was fined $100 by the Ohio State Election Commission. Losing at the lower court levels, Mrs. McIntyre appealed to the U.S. Supreme Court, which addressed the question about whether and to what extent the First Amendment's protection of anonymity encompassed leaflets intended to influence the electoral process.

The 7-2 decision for Mrs. McIntyre offered resounding protection for anonymous political speech. The Court found the state election statute to be overly broad. While recognizing Ohio's interest in preventing electoral fraud, the Court said Ohio failed to show cause for requiring disclosure of Mrs. McIntyre's identity. In ruling for Mrs. McIntyre, the Court recognized five out of the seven beneficial motivations for anonymous speech discussed.[156] In *McIntyre*, the Court addressed anonymity as *convention, safety, rhetorical power, social*

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152. *Id.* at 337.

153. *Id.*

154. *Id.* at 338.

155. A complete reprinting of the statute appears in the opinion. *Id.* at 338. The statute required the name and residence of any person writing, printing, posting, or distributing a notice, placard, dodger, advertisement, sample ballot or any other form of publication designed to influence voters in an election.

156. The seven beneficial motivations noted by the Court are the same as those discussed in Part II.

class, and *privacy*.

In considering issues of *safety*, the Court wrote: "Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent. Anonymity is a shield from the tyranny of the majority."[157] In addressing the issues of *convention, social class*, and *privacy*, the Court acknowledged:

> Great works of literature have frequently been produced by authors writing under assumed names. 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* . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.[158]

The Court also recognized the *rhetorical power* often implicit in anonymous speech:

> On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," the most effective advocates have sometimes opted for anonymity.[159]

Obviously missing from the Court's list was the desire to have *fun* with anonymity and to offer *spontaneity*. Given the nature of concerns regarding electoral fraud and electioneering in the Ohio case, it is not surprising that the Court failed to mention these possibilities. In "real" space, these motivations are less of a concern. But in virtual space, fun and spontaneity are often significant motivations for anonymity—and here, are left unaddressed by *McIntyre*.

Overall, the scope of First Amendment protection for anonymous

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157. *Id.* at 357.

158. *Id.* at 341–42 (emphasis added).

159. *Id.* at 342–43.

speech in *McIntyre* is clear, but limited. The Court writes: "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."[160] Indeed Justice Ginsberg's concurrence articulates that while in this instance Mrs. McIntyre was protected from having to reveal her name: "We do not thereby hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity."[161] This would suggest that the Court recognizes that anonymity is not absolute and is context-dependent.

B. Watchtower Bible v. Village of Stratton

In *Watchtower Bible*, the Supreme Court had to decide whether a local village regulation requiring door-to-door canvassers to give their name to the mayor's office was an unconstitutional restriction on their speech rights. Specifically, the Court was asked to address whether registering with the mayor's office to obtain a permit violated the canvasser's right to anonymous speech.

In an 8-1 decision, the Court upheld the rights of Jehovah Witnesses to knock on doors in Stratton, Ohio, without a permit. The Village of Stratton argued that the local law was written in an effort to protect the elderly and others from fraud and theft. The Court was unconvinced by the danger to Stratton residents. It cited the age-old practice and tradition of hand distribution of religious tracts, a tradition that the Court had protected in other Jehovah Witnesses cases. The Court also wrote that the local law implicated the anonymity interests of the religious canvassers when they had to register with the mayor's office.

In *Watchtower Bible*, the Court identified four beneficial motivations for the canvassers. These included *safety, social class, privacy concerns*, and interestingly, *spontaneity*. The Court in *Watchtower* cited *McIntyre* in recognizing that 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."[162] But it goes one step further, as Jonathan Turley points out, in recognizing a societal value in spontaneous speech:

> [T]here is a significant amount of spontaneous speech that is effectively banned by the ordinance. A person who made a decision on a holiday or a weekend to take an active part in a

160. *Id.* at 342 (emphasis added).

161. *Id.* at 358 (Ainsberg, J., concurring).

162. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 166 (2002).

> political campaign could not begin to pass out handbills until after he or she obtained the required permit. Even a spontaneous decision to go across the street and urge a neighbor to vote against the mayor could not lawfully be implemented without first obtaining the mayor's permission.[163]

In oral arguments, Justice O'Connor reinforced this point by asking Abraham Cantor, counsel for the Village of Stratton, to comment on whether such an ordinance required a trick-or-treater or a neighbor looking to borrow a cup of sugar to register with the mayor.[164] Justice O'Connor's inquiry led to laughter in the courtroom.[165] This is exactly the kind of traditional and spontaneous speech that we seek in our interpersonal encounters.

Missing from the *Watchtower* case were discussions about the *conventions* associated with anonymity, the *rhetorical power* and *identity creation* derived from anonymity and the *fun* associated with anonymity. Given that the case was about door-to-door religious canvassers, it is surprising that these motivations were not addressed. But like *McIntyre*, this case did not, understandably, offer a discussion about some of the motivations for anonymous speech more commonly seen online. However, the discussion about spontaneity in this case may offer future courts some help in evaluating the motivations of an online anonymous speaker.

C. Doe v. Reed

While not directly concerned with "pure" anonymous speech, the petitioners in *Doe v. Reed*[166] sought a preliminary injunction to stop the state of Washington from releasing the names of petition-signers of a ballot referendum to repeal a state law that expanded the rights and responsibilities of state-registered domestic partners, including same-sex domestic partners. The petitioners challenged the constitutionality of disclosure provisions in such statutes and were concerned such a release would subject them to "a reasonable probability" of "threats, harassment, and reprisals," particularly from the gay community and their supporters.[167]

In an 8-1 decision, the Court held that Washington's disclosure requirements for such petitions were sufficiently important to the state's

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163. *Id.* at 167.

164. Watchtower Bible v. Village of Stratton, oral argument transcript, *available at* http://www.oyez.org/cases/2000-2009/2001/2001_00_1737/.

165. *Id.*

166. 130 S. Ct. 2811 (2012).

167. *Id.* at 2816.

interest in protecting the electoral process and withstood First Amendment scrutiny. However, the Court left open the possibility that the petitioners might succeed in district court on a narrower challenge regarding the plaintiffs' concerns that they would face threats, harassment and reprisals from this specific disclosure. In the decision, the Court identified the strong state interest in combatting *fraud* and promoting transparency in the election process: "The State's interest is particularly strong with respect to efforts to root out fraud, which not only may produce fraudulent outcomes, but has a systemic effect as well: It 'drives honest citizens out of the democratic process and breeds distrust of our government.'"[168]

Some members of the Court also noted the *convention* of disclosure, rather than concealment, in the referendum process:

> Public disclosure of the identity of petition signers, which is the rule in the overwhelming majority of States that use initiatives and referenda, advances States' vital interests in "preserving the integrity of the electoral process, preventing corruption, and sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government."[169]

Interestingly, *Reed* appeared to re-engage the Court in a debate about the reach of *McIntyre*'s protections for anonymous speech, though such a debate was far from central to the outcome in *Reed.* In his concurrence, Justice Scalia appeared to cast the *Reed* debate as one of a right to anonymous speech and warned the Court not to make the same mistakes it made in *McIntyre.*[170] Justice Stevens, in his concurrence, warned that no such "freewheeling right" existed in *McIntyre* and questioned Scalia's approach to the case.[171] *Reed* casts some doubt on how the Court actually frames protections for anonymous speech.

Gender also played a role in *Reed*, though not one related to the legal issues in the case or one explicit in the decision. Disclosure of those who signed the petition protesting the expansion of domestic partner rights in Washington pitted a pro-marriage group against a strong consortium of gay rights proponents. Gender, as it relates to sexual orientation and preferences in this case, was a strong backdrop to an argument for supporting anonymity for the petitioners.

Like *McIntyre*, however, the facts in *Reed* did not give rise to a discussion about anonymity as rhetoric, identity, gamesmanship or spontaneity, although it is interesting to consider the act of signing a

168. *Id.* at 2819.
169. *Id.* at 2828.
170. *Id.* at 2831 (Scalia, J., concurring).
171. *Id.* at 2847 n.4 (Stevens, J., concurring).

petition, particularly an online petition, as a spontaneous act of expression. Again, this is not surprising, but it does leave open many questions about the differences between anonymous discourse in offline contexts versus online contexts—and whether those differences should or can be acknowledged legally.

V. DISCUSSION AND CONCLUSION

Online anonymity as a cultural practice is a string of complementary and sometimes conflicting dialogics, reflecting some similar but also very different motivations for acting anonymously in the offline world. The effects of disinhibition on online discourse are significant and worthy to note; they fundamentally change our discourse behavior in online contexts and enhance both access to anonymous acts and our tendencies to perform anonymously online. While many of our motivations for acting anonymously are the same in both worlds, there is increased emphasis on gamesmanship and spontaneity online that courts have yet to address. Some of that gamesmanship and spontaneity may contain political speech undertones worthy of First Amendment protection.

To date, the U.S. Supreme Court has not had occasion to consider all of the possible beneficial motivations for anonymous speech, particularly those that are valuable to online speakers such as gamesmanship, creating or imagining alternate identities, and speaking spontaneously. However, the Court is very likely to consider anonymous speech that is motivated by fear for one's safety, social class, or privacy. The *Watchtower* case's discussion of the value of spontaneous speech has the potential to influence the debates about the tests for First Amendment law, which are very focused on the content and "purity" of the speech, more toward issues of timing and context. The timing, context, and speed of speech online is gaining in cultural value, and it will be interesting to watch whether and how courts will acknowledge this in cases involving anonymous online speech in the future.

The tales of the Founding Fathers and the *Federalist Papers* also serve as a compelling narrative against which plaintiffs must wage a major uphill battle in any anonymous speech cases dealing with purely political speech. It will continue to be extraordinarily difficult for courts in anonymous online speech cases to ignore the power of this compelling historical account. After all, none of us are here without *Publius*.

Additionally, the long history of anonymity as a convention in literature suggests it is a critical tool in the creation of cultural content,

which in turn feeds the First Amendment's concern for an open and vibrant marketplace of ideas. In this way, anonymity can be viewed as a precondition for crafting culture, a particular concern for online free speech and free culture advocates. Examples of this abound on the Internet. For example, musicians who share their work on the Web often build and borrow on the work of others online, without either party being fully identified to the other. In essence, these creators are, at first collaboration, often unknown to each other. That, of course, may change as an online collaboration continues, but anonymity or pseudonymity online is advancing opportunities to connect creators.

Finally, as *McIntyre* and *Watchtower Bible* demonstrate, the Court has offered significant protections to anonymous speech, but *Reed* would suggest that the Court is not entirely in agreement about the extent of those protections or whether we label them a "right" per se. Justice Thomas is correct when he argues that the Court has not answered the question directly about whether the First Amendment was intended to protect anonymous speech or not. To date, the Court has delicately danced around addressing this question and has not engaged in a detailed discussion about the differing motivations for anonymity and how and whether those impact the extent of anonymous speech rights.

In the end, questions remain about how long the traditional motivations for anonymous speech can carry the argument in support of it. The law largely still sees anonymous speech as a singular construct, but may benefit from seeing and detailing anonymity as a set of practices. Anon, as he appears online, is a wearer of many masks. While the Court has said that the Internet is like the town crier or the town pamphleteer of centuries before,[172] the nature and practice of public discourse online has changed rapidly in the past decade. We are wise to have doubts about how well-equipped either the public or the courts are in resisting the pressure to reduce uncertainty about anonymous online speakers. Revisiting and reconsidering the cultural values we have assigned to anonymity in discourse is a valuable exercise in thinking about what rights to consider assigning anonymous speech going forward.

172. *See* Reno v. ACLU, 521 U.S. 844 (1997).