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# Anonymity as a Legal Right: Where and Why It Matters

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**ANONYMITY AS A LEGAL RIGHT: WHERE AND WHY IT MATTERS**

*By Jason A. Martin\* and Anthony L. Fargo\*\**

*This Article examines the legal status of the right to communicate political and social ideas and criticism anonymously online. As an inherently borderless platform for communication, the Internet has generated new methods for sharing information on issues of public importance among citizens who may be thousands of miles apart. Yet governments around the world continue to take markedly different approaches toward the regulation of anonymous online expression and the identification of online users, which has resulted in a patchwork approach.*

*This Article provides a more comprehensive understanding of the differences in international legal standards surrounding such communication and what should be done to resolve those discrepancies. This Article also examines looming issues involving anonymity in an international context and offers suggestions for building greater global cohesion around a legally recognized right to anonymity in online expression.*

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## I. INTRODUCTION

The practice of communicating anonymously, either by hiding one's name completely or using a false name, has a long tradition in literary, journalistic, and political circles. But the idea that hiding one's identity while publishing should be a legally enforceable right has a more recent pedigree. The establishment of that right has been complicated by the Internet, which makes anonymity easier to achieve and harder to defeat.<sup>1</sup>

For example, in the United States, the right to be anonymous is well established, but limited.<sup>2</sup> The Supreme Court has tied the right to be anonymous to the First Amendment rights to freedom of expression and association.<sup>3</sup> However, the Court has also upheld laws requiring people or corporations to disclose their identities in certain situations, such as when they have donated money to a political candidate.<sup>4</sup>

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<sup>1</sup> Editor's note: This Article analyzes issues of law and policy regarding instances of anonymous communication and expression online. While literature in this area often also addresses related legal issues such as facial recognition software or surveillance of persons in public or private places, those aspects are beyond the scope of this analysis. See generally Jacquelyn Burkell, *Anonymity in Behavioural Research: Not Being Unnamed, But Being Unknown*, 3 UNIV. OF OTTAWA L. & TECH. J. 189 (2006) (summarizing empirical social science literature regarding the relationship of anonymity and technology).

<sup>2</sup> See *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 166–67 (2002) (striking down village's requirement that door-to-door distributors of religious material had to register with city officials); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–43 (1995) (reversing misdemeanor conviction of woman who distributed unsigned fliers opposing school bond issue); *Talley v. California*, 362 U.S. 60, 64 (1960) (striking down city ordinance that required handbills to identify sponsors); *Bates v. City of Little Rock*, 361 U.S. 516, 525–27 (1960) (striking down requirement that civil rights group identify its local members to city officials); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463–64 (1958) (striking down court order that would have required civil rights organization to release its membership list).

<sup>3</sup> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I; see cases cited *supra* note 2.

<sup>4</sup> See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366–71 (2010) (upholding disclaimer and disclosure requirements for corporations

With regard to online communication, Congress has given Internet Service Providers (“ISPs”) and other providers of interactive computer services a large degree of immunity from civil liability for the actions of their users.<sup>5</sup> Although ISPs generally cannot be considered publishers of user-generated material,<sup>6</sup> the users can be held liable for defamation, invasion of privacy, and copyright infringement—if those they have allegedly harmed know who they are. This conundrum has led American courts to devise tests to determine when ISPs must release identifying information about their users. These tests often vary depending upon whether the speech is “high value” (about political and social issues) or “low value” (sharing copyrighted material without permission).<sup>7</sup>

In other parts of the world, governmental attitudes about a right to express oneself anonymously, online or offline, run a wide gamut. A review of recent events provides a snapshot. In August 2012, the Constitutional Court of South Korea declared unconstitutional a 2007 law that required Internet users to identify themselves before they could post comments on the most popular

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sponsoring advertising or other speech favoring or opposing a political candidate).

<sup>5</sup> See 47 U.S.C. § 230(c) (2012) (“[N]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

<sup>6</sup> RESTATEMENT (SECOND) OF TORTS § 578 (1977) (“Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.”). 47 U.S.C. § 230 was approved after a New York state court and a federal court in New York came to different conclusions about the liability of ISPs for user-generated content. *Compare* *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135, 143 (S.D.N.Y. 1991) (finding that an ISP is not liable in defamation cases for user-produced content on a bulletin board the ISP exercises no editorial control over) *with* *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at \*10 (N.Y. Sup. Ct. May 24, 1995) (holding that an ISP is liable for content on a bulletin board if the ISP advertised that it planned to control the content of bulletin boards).

<sup>7</sup> See Jason A. Martin, Mark R. Caramanica & Anthony L. Fargo, *Anonymous Speakers and Confidential Sources: Using Shield Laws When They Overlap Online*, 16 COMM. L. & POL’Y 89, 102–03 (2011).

Korean websites.<sup>8</sup> The court held that the law violated the right to free speech in South Korea's constitution.<sup>9</sup> In January 2013, a German state agency went so far as to fine Mark Zuckerberg, the founder of the social media site Facebook, €20,000 because the site did not allow users to set up accounts under pseudonyms,<sup>10</sup> though a German court later ruled in Facebook's favor.<sup>11</sup>

Other nations have taken a more restrictive approach to online anonymity. In December 2012, China announced that it had adopted a policy requiring all web users to register their real names with ISPs, which some activists feared would stifle political dissent in that one-party, authoritarian country.<sup>12</sup> Vietnam appears to have adopted a similar policy in 2012.<sup>13</sup> Russia passed a law in 2014 that requires bloggers who have more than 3,000 daily readers to register with a government agency and publish their names and contact information.<sup>14</sup> In 2014, the Supreme Court of the Philippines upheld most provisions of a 2012 cybercrime law<sup>15</sup> that

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<sup>8</sup> Choe Sang-Hun, *South Korean Court Rejects Online Name Verification Law*, N.Y. TIMES, Aug. 24, 2012, at A8.

<sup>9</sup> *Id.*

<sup>10</sup> Louise Osborne, *German State Fights Facebook Over Alleged Privacy Violations*, GUARDIAN (Jan. 4, 2013, 10:53 EST), <http://www.guardian.co.uk/world/2013/jan/04/facebook-germany-data-protection>.

<sup>11</sup> Hayley Tsukayama, *Facebook Wins Germany Lawsuit on Naming Policy #thecircuit*, WASH. POST BLOG (Feb. 15, 2013, 12:40 PM), [http://www.washingtonpost.com/blogs/post-tech/post/facebook-wins-germany-lawsuit-on-naming-policy-thecircuit/2013/02/15/5c6d19ee-778c-11e2-aa12-e6cfd31106b\\_blog.html](http://www.washingtonpost.com/blogs/post-tech/post/facebook-wins-germany-lawsuit-on-naming-policy-thecircuit/2013/02/15/5c6d19ee-778c-11e2-aa12-e6cfd31106b_blog.html).

<sup>12</sup> Philippa Warr, *China Cracks Down on Internet Anonymity*, WIRED.CO.UK, (Dec. 28, 2012), <http://www.wired.com/news/archive/2012-12/28/china-internet-registration>.

<sup>13</sup> See *Vietnam Internet Restrictions Come Into Effect*, BBC NEWS, (Sept. 1, 2013, 7:52 ET), <http://www.bbc.co.uk/news/world-asia-23920541>; see also Simon Roughneen, *In Vietnam, Draconian Decree Would Clamp Down on Blogs, Online Speech*, MEDIASHIFT (Feb. 11, 2013), <http://www.pbs.org/mediashift/2013/02in-vietnam-draconian-decree-would-clamp-down-on-blogs-online-speech042.html>.

<sup>14</sup> Michael Birnbaum, *Russian Blogger Law Puts New Restrictions on Internet Freedoms*, WASH. POST (July 31, 2014), [http://www.washingtonpost.com/world/russian-blogger-law-puts-new-restrictions-on-internet-freedoms/2014/07/31/42a05924-a931-459f-acd2-6d08598c375b\\_story.html](http://www.washingtonpost.com/world/russian-blogger-law-puts-new-restrictions-on-internet-freedoms/2014/07/31/42a05924-a931-459f-acd2-6d08598c375b_story.html).

<sup>15</sup> An Act Defining Cybercrime, Providing for the Prevention, Investigation, Suppression and the Imposition of Penalties Therefor and for Other Purposes,

activists feared would criminalize anonymous criticism of the government and public officials.<sup>16</sup>

As an inherently borderless platform for communication, the Internet has generated new methods for sharing information on issues of public importance among citizens who may be thousands of miles apart.<sup>17</sup> Yet governments continue to take markedly different approaches toward the regulation of anonymous online expression and the identification of online users. Some of these countries' restrictive attitudes toward a legal right of online anonymity threaten democratic exchanges and have created new legal dilemmas for balancing societal interests and individual rights.<sup>18</sup> As a result, greater insight is needed into how the disparity in approaches may threaten the civil and human rights of communication of citizens worldwide.

This Article examines the legal status of the right to express oneself anonymously from a global perspective, focusing primarily on the use of anonymous speech to communicate political and social ideas and criticism. Furthermore, this Article seeks to produce a more comprehensive understanding of the differences in international legal standards surrounding such communication and what could be done to resolve those discrepancies.<sup>19</sup> This Article

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Rep. Act. 10175 (Sept. 12, 2012) (Phil.), *available at* <http://www.gov.ph/2012/09/12republic-act-no-10175/>.

<sup>16</sup> *Disini v. Sec'y of Justice*, G.R. No. 203335, at \*23 (S.C. Feb. 18, 2014) (Phil.), *available at* <http://www.bayan.ph/wp-content/uploads/downloads/2014/07/Joint-Motion-for-Partial-Reconsideration-Bayan-and-BM.pdf>; *see also* Jillian C. York, *A Dark Day for the Philippines as Government Passes Cybercrime Act*, ELECTRONIC FRONTIER FOUND. (OCT. 3, 2012), <https://www.eff.org/deeplinks/2012/10/dark-day-philippines-government-passes-cybercrime-act>.

<sup>17</sup> *See generally* Lee Tien, *Who's Afraid of Anonymous Speech?* McIntyre and the Internet, 75 OR. L. REV. 117 (1996).

<sup>18</sup> *See* Rob Kling, Ya-ching Lee, Al Teich & Mark S. Frankel, *Assessing Anonymous Communication on the Internet: Policy Deliberations*, 15 INFO. SOC'Y 79, 82 (1999).

<sup>19</sup> For discussions focusing on the tension between anonymous speech and intellectual property law, *see* Lyrissa B. Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1559–77 (2006–2007); Maureen Daly, *Is There a Right to Anonymity? The Legal Situation at the European Union Level and the National Level in Selected Countries*, 11 WORLD DATA PROT. REP. (BNA) 24 (Nov. 21, 2012). *See also*

begins in Part II with an examination of the evolution of anonymous publishing from a literary practice to a political-speech practice both in the United Kingdom and in the United States. The practice became a constitutional issue in the United States in the 1950s during the turbulent “Red Scare” and civil rights eras. Part III examines the development of the right to be anonymous in the United States as the Internet became the dominant means of communication. Part IV shifts focus from the American experience of legally-recognized anonymity rights to the approaches other nations have taken in an effort to balance the desire for anonymity in political speech with other important societal interests, such as preventing crime and protecting reputations. Part V analyzes the complex nature of online anonymity rights, examining looming issues involving anonymity in an international context, and the Article concludes by offering suggestions for building greater global cohesion around a legally recognized right to anonymity in online expression.

## II. ORIGINS OF ANONYMITY

The practice of publishing anonymously or pseudonymously has a long history in the arts, particularly in literature and journalistic or political writing. Historians have noted that the practice of using pseudonyms goes back to biblical times.<sup>20</sup> One popular style of writing in Greek literature in the first and second centuries A.D. was the epistolary story, in which stories were told in the form of letters to or from real and fictional heroes or other famous persons.<sup>21</sup> Musicians who wrote ecclesiastical music for the Catholic Church in thirteenth century France were frequently uncredited, although secular compositions were more likely to

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Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377 (2005) (detailing the relationship between intellectual property and pseudonymous publication).

<sup>20</sup> See, e.g., ERAN SHALEV, *ROME REBORN ON WESTERN SHORES: HISTORICAL IMAGINATION AND THE CREATION OF THE AMERICAN REPUBLIC* 154 (2009) (noting the use of pseudonyms in biblical times and canonical writings).

<sup>21</sup> PATRICIA A. ROSENMEYER, *ANCIENT EPISTOLARY FICTIONS: THE LETTER IN GREEK LITERATURE* 193–96 (2001).



carry their writers' names.<sup>22</sup> One literary historian has estimated that more than 800 authors published anonymously in England between 1475 and 1640, not including others who wrote under pseudonyms or whose real identities remain unknown.<sup>23</sup> Another British literary historian, James Raven, has noted that more than 80 percent of all novels published in England from 1750 to 1790 were published anonymously or under a pseudonym.<sup>24</sup>

The motives attributed to the use of anonymity and pseudonymity vary. Literary historian John Mullan identified eight motives for authors masking their identities: mischief, modesty, women being men, men being women, danger, reviewing, mockery and devilry, and confession.<sup>25</sup> Along similar lines, American scholar Victoria Smith Ekstrand recently enumerated both good and bad motives that lead people to speak or publish anonymously.<sup>26</sup> Beneficial motives for anonymity include convention, safety, using anonymity as a rhetorical device or to identify with famous historical figures, gamesmanship with readers or publishers, using anonymity to disguise class status or gender, and privacy.<sup>27</sup> Harmful motivations include intimidation, insulation, concealment, crime, and fraud.<sup>28</sup>

What extent, if any, the law played in authors' decisions to publish anonymously or pseudonymously prior to the twentieth century is debatable. Scholars disagree about whether Greek epistolary writers wrote under the names of heroic historical figures in order to deceive readers or to honor the heroic figures by

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<sup>22</sup> RICHARD TARUSKIN & CHRISTOPHER H. GIBBS, *THE OXFORD HISTORY OF WESTERN MUSIC* 72 (Coll. ed. 2013).

<sup>23</sup> MARCY L. NORTH, *THE ANONYMOUS RENAISSANCE: CULTURES OF DISCRETION IN TUDOR-STUART ENGLAND* 3 (2003).

<sup>24</sup> James Raven, *The Anonymous Novel in Britain and Ireland, 1750–1830*, in *THE FACES OF ANONYMITY: ANONYMOUS AND PSEUDONYMOUS PUBLICATION FROM THE SIXTEENTH TO THE TWENTIETH CENTURY* 143 (Robert J. Griffin, ed., 2003).

<sup>25</sup> JOHN MULLAN, *ANONYMITY: A SECRET HISTORY OF ENGLISH LITERATURE* (2007).

<sup>26</sup> Victoria Smith Ekstrand, *The Many Masks of Anon: Anonymity As Cultural Practice and Reflections in Case Law*, 18 J. TECH. L. & POL'Y 1 (2013).

<sup>27</sup> *Id.* at 7–21.

<sup>28</sup> *Id.* at 23–29.

keeping their stories alive.<sup>29</sup> Censorship of unpopular views certainly played a part in the decisions of some authors to hide their identities, but the extent of this is unclear. For example, given official antipathy to Catholicism during Elizabeth I's reign in England, it is not surprising that more than one-third of the Catholic books published in England during her reign were published anonymously.<sup>30</sup> But literary historian Marcy North has noted that Catholics and Protestants publicly debated the use of anonymity in publishing by referring more to custom and morality than danger, drawing parallels in defending or criticizing anonymous publishing to traditional literary roles and genres such as "libel, satire, devotional literature, Divine Scripture, and institutional publication."<sup>31</sup> In contrast, historian Eran Shalev has argued that censorship was the primary factor in writers' decisions to use fake names or no names in seventeenth and eighteenth century Europe. "In the political culture of the *ancien régime*," he wrote, "the government considered heretical any set of ideas that competed with those it held. Political debate existed more easily under forms of mediation that would not expose writers to the severity of the censor."<sup>32</sup>

Once official censorship ended in England in the 1690s, however, anonymity did not. Some literary historians have argued that the end of official government censorship in England opened up the market for literature but also created a need for copyright law to provide protection for authors no longer shielded by the Licensing Act of 1662.<sup>33</sup> Authors came to be viewed as creators of unique materials that were their intellectual property, giving them incentives to identify themselves to the market in order to capitalize on their reputations and protect their property.<sup>34</sup> However, other critics have noted that it was never necessary for

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<sup>29</sup> ROSENMEYER, *supra* note 21, at 195–96.

<sup>30</sup> NORTH, *supra* note 23, at 117.

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

<sup>32</sup> SHALEV, *supra* note 20, at 154–55.

<sup>33</sup> Janet Wright Starnes & Barbara Howard Traister, *Introduction*, in *ANONYMITY IN EARLY MODERN ENGLISH: WHAT'S IN A NAME?* 6 (Janet Wright Starnes & Barbara Howard Traister eds., 2011).

<sup>34</sup> *Id.*

authors to publicly identify themselves in order to protect their property rights, just as authors who did identify themselves sometimes sold their copyrights to publishers or gave them to friends or debt holders.<sup>35</sup> Copyright disputes in England arose even after the passage of a copyright law in 1709<sup>36</sup> as it was common practice for authors to sell their copyrights to publishers, who sometimes profited disproportionately at the expense of the authors.<sup>37</sup>

The uses and purposes of anonymity might have been particularly complex for female authors both before and after commodities—including books—became a focus of British life and advertising's importance grew as a means of selling those commodities.<sup>38</sup> Paula Feldman has argued that, although female poets in the Romantic era rarely published anonymously, “aristocratic, wealthy, or particularly well-connected women” often preferred to remain anonymous to protect their social statuses from the damage that would be done if they appeared to be “in trade.”<sup>39</sup> In the Victorian era, women were sometimes torn between a desire “to achieve fame, influence literary culture, and attain economic self-sufficiency” by publishing under their own names and the societal confines of what were considered proper topics for women.<sup>40</sup> The convention of anonymous publication in periodical journalism gave women a kind of cover, allowing them to write about traditionally “masculine” topics without inviting scorn and undue scrutiny.<sup>41</sup>

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<sup>35</sup> Robert J. Griffin, *Introduction*, in *THE FACES OF ANONYMITY: ANONYMOUS AND PSEUDONYMOUS PUBLICATION FROM THE SIXTEENTH TO THE TWENTIETH CENTURY*, *supra* note 24, at 4–5.

<sup>36</sup> 8 Ann. c. 21 (1709).

<sup>37</sup> *AUTHORSHIP, COMMERCE AND THE PUBLIC: SCENES OF WRITING, 1750–1850* 10 (E.J. Clery, Caroline Franklin & Peter Garside eds., 2002).

<sup>38</sup> See THOMAS RICHARDS, *THE COMMODITY CULTURE OF VICTORIAN ENGLAND: ADVERTISING AND SPECTACLE, 1851–1914* 205–48 (1990).

<sup>39</sup> Paula R. Feldman, *Women Poets and Anonymity in the Romantic Era*, in *AUTHORSHIP, COMMERCE AND THE PUBLIC: SCENES OF WRITING, 1750–1850*, *supra* note 37, at 44.

<sup>40</sup> ALEXIS EASLEY, *FIRST-PERSON ANONYMOUS: WOMEN WRITERS AND VICTORIAN PRINT MEDIA, 1830–1870* 1 (2004).

<sup>41</sup> *Id.*

A more direct link between law and anonymity is evident in debates about and within the nascent periodical journalism of early eighteenth century England. Concerned about the political content of newspapers and other periodicals and their popularity among the non-ruling classes, Queen Anne sent a message to Parliament in 1712 expressing her displeasure with “how great licence [sic] is taken in publishing false and scandalous Libels, such as are a Reproach to any Government. This Evil seems to be too Strong for the Laws now in force; it is therefore recommended to you to find a Remedy equal to the Mischief.”<sup>42</sup> Proposals for heeding the Queen’s call included returning to the old censorship system, requiring registration of printing presses, and requiring that the names of authors and publishers be printed on the title pages of all pamphlets.<sup>43</sup> An unsigned broadside of the time recommended that the government appoint a register who would enter the title of every “paper, pamphlet, or book” published along with the names and addresses of all authors, printers, and booksellers.<sup>44</sup> In 1712, writer and politician John Asgill published a pamphlet calling for the press to be required to identify the authors of all published material.<sup>45</sup> While Asgill noted there were many good reasons not to restrain the press, he also said it had been used too often for “licentiousness.”<sup>46</sup> “As the Press is now used, it is a Paper Inquisition; by which any Man may be arraign’d, judg’d, and condemn’d (ay, and broad Hints given for his Execution too) without ever knowing his Accusers.”<sup>47</sup>

Parliament chose not to return to the old licensing system, however, or to require newspapers, pamphlets, and other

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<sup>42</sup> WILLIAM PITTIS, *THE HISTORY OF THE PROCEEDINGS OF THE SECOND SESSION OF THIS PRESENT PARLIAMENT 21–22 (1712)*, reprinted in 4 *CENSORSHIP AND THE PRESS, 1580–1720*, at 194–95 (Mark Goldie & Geoff Kemp, eds. of vol. 4; Kemp & James McElligott, gen. eds., 2009).

<sup>43</sup> J. A. DOWNIE, *ROBERT HARLEY AND THE PRESS: PROPAGANDA AND PUBLIC OPINION IN THE AGE OF SWIFT AND DEFOE* 150 (1979).

<sup>44</sup> Anonymous, *A Certain and Necessary Method of Regulating the Press* (1712) (copy available from authors on request).

<sup>45</sup> John Asgill, *An Essay for the Press* (1712) (copy available from authors by request).

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

<sup>47</sup> *Id.* at 7.

periodicals and books to identify their authors.<sup>48</sup> Historian J. A. Downie has posited that the Queen and Parliament decided that it would be counter-productive to directly restrain publishing when the ruling party was just beginning to understand how to use the press as a propaganda weapon.<sup>49</sup> For whatever reason, Parliament chose instead to add newspapers and other published materials to the list of goods to be taxed under a bill that came to be known as the Stamp Act of 1712.<sup>50</sup> The intent apparently was to restrain the press and reduce its audience indirectly by driving up the price per copy.<sup>51</sup> Although publishers of newspapers and other periodicals were later required to register their names and places of business with government officials,<sup>52</sup> no act requiring publishers to identify authors ever passed.

The practice of publishing anonymously, both in literature and journalism, remained the norm in England until the mid- to late nineteenth century. John Delane, editor of the *Times* of London for nearly four decades in the mid-1800s, assumed that position at the age of 23 after previous editor Thomas Barnes and his assistant, Francis Bacon, died within months of each other. "Such was the passion for anonymity" at the *Times* that when Barnes died in May 1841, "no memoir of his valuable services appeared in the paper."<sup>53</sup> Delane apparently also adhered strongly to the policy of publishing without naming authors. In 1863, during a rare public controversy over the *Times*' policy, Delane published a letter addressed to Richard Cobden, a Member of Parliament ("MP"), after Cobden accused the *Times* of misrepresenting his and a fellow MP's

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<sup>48</sup> DOWNIE, *supra* note 43, at 148.

<sup>49</sup> *Id.* at 148–60. Downie credits Robert Harley, the Earl of Oxford and the queen's most trusted minister, for persuading both Queen Anne and Parliament to take a more speech-protective stance. *Id.*

<sup>50</sup> 1712, 10 Ann. c. 19 (Eng.).

<sup>51</sup> See HENRY RICHARD FOX BOURNE, 1 ENGLISH NEWSPAPERS: CHAPTERS IN THE HISTORY OF JOURNALISM 80–81 (Routledge ed. 1998, 1887); see also DOWNIE, *supra* note 43, at 157.

<sup>52</sup> An Act for the More Effectual Suppression of Societies Established for Seditious and Treasonable Practices, and for Better Preventing Treasonable and Seditious Practices, 1799, 39 Geo. 3, c. 79, § 23 (Eng.).

<sup>53</sup> 1 ARTHUR IRWIN DASENT, JOHN THADEUS DELANE, EDITOR OF THE TIMES: HIS LIFE AND CORRESPONDENCE 25 (1908).

position on laws governing the distribution of English land.<sup>54</sup> Delane wrote that laws governing the ownership and transfer of land were “public questions, which are best discussed, not between Mr. COBDEN and Mr. DELANE, but as it has always been the practice of the English Press to discuss them—anonymously.”<sup>55</sup> Delane went on to defend the practice of anonymous publication:

That practice was not invented by me; it will not be destroyed by yourself. It has approved itself to the judgment of all, whether statesmen or publicists, who have appreciated the freedom and independence of the Press, and I believe it to be essential to the interests, not only of the Press, but of the public.<sup>56</sup>

By 1863, however, the practice of anonymous publishing in newspapers and other periodicals was coming under attack both on philosophical and practical grounds. Shortly after the Cobden-Delane exchange, William Hargreaves, a London physician and essayist, noted that Delane and his predecessors had often linked anonymous publication to the freedom and independence of the British press.<sup>57</sup> But Hargreaves questioned whether the mask of anonymity at the *Times* was intended to protect its freedom or hide its connections to the government. He noted that Delane often socialized with government officials and that several *Times* writers had in recent years been appointed to government jobs.<sup>58</sup> One historian recently suggested that the *Times* under Delane expressed “lofty ideals” about freedom and independence of the press but did not, and could not, live up to them.<sup>59</sup> “Readers of the *Times* valued it for being at the heart of the

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<sup>54</sup> *Id.* at (2) 81–88.

<sup>55</sup> *Id.* at 89 (quoting letter in the *Times* on Dec. 11, 1863).

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

<sup>57</sup> William Hargreaves, *Is the Anonymous System a Security for the Purity and Independence of the Press?* 18 (1864) (“The reader has now before him the arguments with which the *Times* vindicates the principle of anonymous journalism—anonymous alike to the Government and to the public—as absolutely indispensable to its independence, purity, and safety.”).

<sup>58</sup> *Id.* at 19–24.

<sup>59</sup> LAURENCE FENTON, PALMERSTON AND THE TIMES: FOREIGN POLICY, THE PRESS AND PUBLIC OPINION IN MID-VICTORIAN BRITAIN 162 (2013).

political world, but a corollary of this achievement was that it could never be truly independent.”<sup>60</sup>

In 1867, John Morley, editor of the *Fortnightly Review*, argued that in a time when debate about public policy was becoming increasingly strident, it was important that journalists be made responsible for what they wrote.<sup>61</sup> Journalists who took part in debates must “give the strongest possible guarantee that they mean exactly what they profess to mean, neither more nor less, and that they are ready to stand by it,” he wrote.<sup>62</sup> Morley continued, “[E]verybody will agree that no journalist ought deliberately to write a word which he would feel disgraced by owning, however unwilling he might be actually to avow it on special grounds. Granting this much, in what way would signing his name affect what he wrote?”<sup>63</sup> The notion that a journalist could only work effectively to influence public opinion if he wrote anonymously, Morley argued, was “absolutely untenable, and the present anonymous system is far from working so well practically as to justify the continued neglect of a sound and unmistakable principle.”<sup>64</sup>

*Fortnightly Review* was among the many periodicals launched after 1850 that either announced that they would publish only signed articles or did so without publicly stating their policies; as a result of this growing acceptance, established journals, reviews, and magazines soon followed suit.<sup>65</sup> But unsigned articles did not disappear from the English press; by 1904, writers would sign or initial many of their newspaper articles, but not the lead articles in most papers.<sup>66</sup> Anonymous writers lost the chance to be famous

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<sup>60</sup> *Id.*

<sup>61</sup> See John Morley, *Anonymous Journalism*, 8 FORTNIGHTLY REVIEW 287 (1867).

<sup>62</sup> *Id.* at 288.

<sup>63</sup> *Id.* at 289.

<sup>64</sup> *Id.* at 292.

<sup>65</sup> Kelly J. Mays, *The Disease of Reading and Victorian Periodicals*, in LITERATURE IN THE MARKETPLACE: NINETEENTH-CENTURY BRITISH PUBLISHING AND READING PRACTICES 168 (John O. Jordan and Robert L. Patten, eds., 1995).

<sup>66</sup> FREDERICK MOY THOMAS, FIFTY YEARS OF FLEET STREET: BEING THE LIFE AND RECOLLECTIONS OF SIR JOHN R. ROBINSON 219–20 (1st ed. 1904).

under their real names for what they wrote, but they also avoided being subject to unpleasant reactions, such as being visited by unhappy and potentially violent readers or being “imprisoned in the Clock Tower.”<sup>67</sup> Sir John R. Robinson of the London *Daily Times*, another prominent figure of nineteenth century journalism, favored the tradition of anonymity and wrote in his diary in 1877 that a former opponent of the tradition had come around to his way of thinking.<sup>68</sup> After running into the other man at dinner, Robinson wrote that the man told him that periodicals that identified their writers too often “look out for big names, not for good articles, and a few big men sell their names.”<sup>69</sup>

The debate about journalistic anonymity continued through much of the late nineteenth century. One aspect of the debate concerned whether anonymity increased or decreased the influence of the press on government and the public. On one hand, anonymity kept writers from improving their fortunes by selling their names and also opened the door to irresponsible journalism; on the other hand, journalism was not considered by many to be a reputable profession, so anonymity also protected writers from the stigma of the business.<sup>70</sup> One historian questioned the argument that anonymity added to a publication’s influence, noting that while “a political rumour could well gain in authority if it appeared anonymously in *The Times*,” it was also true that “an article on the Vatican Decrees in the *Nineteenth Century* gained in interest as well as authority if it was signed by Cardinal [Henry] Manning.”<sup>71</sup> The effect of requiring authors to sign their articles, another historian has argued, “was to transfer authority from the corporate text to the individual contributor and thus to understand authority as properly the outgrowth of individual personality and competence.”<sup>72</sup>

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<sup>67</sup> *Id.* at 220.

<sup>68</sup> *Id.* at 222.

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

<sup>70</sup> See ALAN J. LEE, *THE ORIGINS OF THE POPULAR PRESS IN ENGLAND, 1855–1914*, 107–08 (1976).

<sup>71</sup> LUCY BROWN, *VICTORIAN NEWS AND NEWSPAPERS* 108 (1985).

<sup>72</sup> Mays, *supra* note 65, at 168.



The debate over anonymity in eighteenth and nineteenth century England suggests that those who argued strenuously for the continuation of the custom saw challenges to it as a threat to journalistic independence from government interference. Supporters of anonymity believed that the press was only truly free to serve its function as a “Fourth Estate” and provide a check on government power if it was free from censorship and interference from government.<sup>73</sup> Critics of the practice might not have disputed this idea, but would have instead argued that a free press was also free to change its traditions to better serve the public welfare.

Anonymity was also common in American newspapers well into the nineteenth century, although the practice did not spur the type of vigorous debate seen in England. Newspapers were often associated with their editors and owners until they were corporatized in the late nineteenth and early twentieth century.<sup>74</sup> The byline on newspaper stories did not become common until the Civil War, when journalists began signing their names to dispatches partly to stem misinformation and partly because of government edicts to control rumors.<sup>75</sup>

In the realm of political speech, anonymous and pseudonymous publishing was common in the colonial period in the United States through the Revolutionary War and beyond. Opponents of British rule during the pre-war period often wrote anonymously or under pseudonyms to avoid arrest or, depending upon the pseudonym used, to rouse like-minded citizens. For example, Thomas Paine, famous for his essay *Common Sense*, also wrote under the names “Humanus” and “The Forester.”<sup>76</sup> Many other colonial period and

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<sup>73</sup> See, e.g., Tom O'Malley, *Labour and the 1947–49 Royal Commission on the Press*, in *A JOURNALISM READER* 127–28 (Michael Bromley and O'Malley, eds., 1997) (noting development of a liberal theory of press freedom in the nineteenth century).

<sup>74</sup> See, e.g., FRANK LUTHER MOTT, *AMERICAN JOURNALISM* 444–45 (3d ed. 1962) (describing the end of the “personal journalism” era in the late nineteenth century).

<sup>75</sup> Ford Risley, *Birth of the Byline*, N.Y. TIMES (Apr. 22, 2013), <http://opinionator.blogs.nytimes.com/2013/04/22/birth-of-the-byline/?ref=opinion>.

<sup>76</sup> Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y 113, 167–68 (2008).

wartime essays and tracts on all sides of the political spectrum were published under false names or with no names.<sup>77</sup> After the United States gained its independence from England and began organizing its government, newspaper essays by Alexander Hamilton, John Jay, and James Madison, collectively known as the Federalist Papers, helped persuade Americans to ratify the Constitution. All eighty-five essays were signed "Publius."<sup>78</sup> Opponents of the Constitution also wrote essays, often signed with names such as "Centinel," "A Federal Farmer," "Brutus," and "Agrippa."<sup>79</sup>

Historian Eran Shalev has argued that the selection of pseudonyms had significance beyond attempts to escape censorship or other reprisals, particularly after Americans gained independence from Great Britain.<sup>80</sup> Americans in the late eighteenth century considered anonymous or pseudonymous publication to be the norm in political discourse and might have even preferred it to signed texts.<sup>81</sup> The choice of pseudonyms shifted post-Revolution from descriptive ("The Forrester") to the use of names of famous Greeks and Romans ("Publius," "Agrippa").<sup>82</sup> This was an attempt, Shalev argued, to tie early American republican ideals to ancient authorities who were considered credible.<sup>83</sup> "Appeal to the ancients and to their political science . . . and history supplied much needed trustworthiness, positioning the emblems of the past as guardians, validating pamphlets and pamphleteers by their mere presence."<sup>84</sup>

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<sup>77</sup> See generally LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* (1985) (recounting numerous examples of pre-independence American publishers using pseudonyms).

<sup>78</sup> See *THE FEDERALIST* (Isaac Kramnick ed., 1987).

<sup>79</sup> *THE ANTI-FEDERALIST: WRITINGS BY OPPONENTS OF THE CONSTITUTION* (Herbert J. Storing, ed. 1985).

<sup>80</sup> See SHALEV, *supra* note 20, at 151–87.

<sup>81</sup> *Id.* at 156.

<sup>82</sup> *Id.* at 158.

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

<sup>84</sup> *Id.* at 160. The dichotomous nature of pseudonym use was not a strictly American practice, however. Letter writers to colonial West African newspapers in the late nineteenth and early twentieth centuries also employed pseudonyms that either described their conditions ("Tired") or appropriated well-known

Despite the long Anglo-American tradition of anonymous publishing, the idea that one has a constitutionally-protected right to be anonymous while engaging in speech-related activities is a relatively new concept in the United States. The Supreme Court did not consider the idea of anonymity as a right until the 1950s, when the Court determined that the Constitution<sup>85</sup> guarantees a limited right to be anonymous. First, the Court determined that the National Association for the Advancement of Colored People (“NAACP”) in Alabama did not have to obey a court order to reveal its membership list.<sup>86</sup> Because membership in the NAACP, a civil rights organization, was controversial and potentially dangerous in the South at that time, the Court said that forcing the NAACP to reveal its members likely would force many of them to leave the organization, thus interfering with their First Amendment right to freely assemble and their Fourteenth Amendment right to due process.<sup>87</sup> In *Bates v. City of Little Rock*<sup>88</sup> in 1960, the Court ruled along the same lines in striking down city ordinances in Arkansas that also would have required the NAACP to name its local members.<sup>89</sup> A similar ruling in *Louisiana ex rel. Gremillion v. NAACP*<sup>90</sup> in 1961 struck down laws that required the NAACP to name all officers and members in the state of Louisiana and show that no national or local officers belonged to “subversive” organizations.<sup>91</sup> In *Gibson v. Florida Legislative Investigation*

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names (“Jim Crow”). See Stephanie Newell, *Something to Hide? Anonymity and Pseudonyms in the Colonial West African Press*, 45 J. COMMONWEALTH LITERATURE 9 (2010).

<sup>85</sup> “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

<sup>86</sup> *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466–67 (1958).

<sup>87</sup> “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .” U.S. CONST. amend. XIV, § 1.

<sup>88</sup> 361 U.S. 516 (1960).

<sup>89</sup> *Id.* at 527.

<sup>90</sup> 366 U.S. 293 (1961).

<sup>91</sup> *Id.* at 293.

*Commission*<sup>92</sup> in 1963, the Court also reversed a contempt citation against an NAACP official who refused to reveal the names of the organization's members to a legislative committee in Florida.<sup>93</sup>

The Court has not suggested that the right to be anonymous is an absolute, however. Its jurisprudence regarding the right to assemble or associate privately was particularly inconsistent during the "Red Scare" era, when the Court had to wrestle with whether people should have to disclose membership in the Communist Party or similar organizations in order to hold or obtain government jobs or benefits, or when asked by congressional and legislative investigating committees.<sup>94</sup>

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<sup>92</sup> 372 U.S. 539 (1963).

<sup>93</sup> *Id.* at 558. For a discussion of the Supreme Court's jurisprudence on the right to assemble or associate with others and its link to anonymity, see Minjeong Kim, *The Right to Anonymous Association in Cyberspace: US Legal Protection for Anonymity in Name, in Face, and in Action*, 7 SCRIPTED 51 (2010).

<sup>94</sup> See, e.g., *Baird v. State Bar of Ariz.*, 401 U.S. 1, 20–22 (1971) (ruling that a state could not force someone to answer questions about membership in controversial groups as a condition of being licensed to practice law); *DeGregory v. Attorney Gen. of N.H.*, 383 U.S. 825, 828–30 (1966) (overturning contempt conviction of man who declined to answer questions about alleged Communist Party membership ten years prior to state "anti-subversion" investigation); *Braden v. United States*, 365 U.S. 431, 437–38 (1961) (upholding contempt conviction of a man who refused to testify to congressional committee about his membership in the Communist Party); *Wilkinson v. United States*, 365 U.S. 399, 414–15 (1961) (same as *Braden*); *Shelton v. Tucker*, 364 U.S. 479, 480–81 (1960) (striking down Arkansas laws that required public school teachers to report all memberships each year to have their licenses to teach renewed); *Barenblatt v. United States*, 360 U.S. 109, 111–13 (1959) (upholding contempt citation against former college teacher who refused to answer questions of congressional committee about his alleged membership in the Communist Party); *Sweezy v. New Hampshire*, 354 U.S. 234, 249–53 (1957) (overturning contempt citation against college lecturer who refused to answer questions about his membership in a controversial political party); *Watkins v. United States*, 354 U.S. 178, 214–15 (1957) (reversing contempt conviction of a labor union officer who refused to answer questions about associates who might have had ties to the Communist Party); *Amer. Comm'n Ass'n v. Douds*, 339 U.S. 382, 414–15 (1950) (upholding law requiring union officers to affirm that they were not members of the Communist Party before the union could be allowed to seek the right to represent workers).

The Court has also tied the right to be anonymous to the right to free speech and a free press, known collectively as the right to free expression. In *Talley v. California*<sup>95</sup> in 1960, the Court struck down a Los Angeles ordinance that barred the distribution of unsigned handbills in the city.<sup>96</sup> The plaintiffs had distributed a handbill calling for boycotts of businesses that discriminated against racial minorities.<sup>97</sup> The Court declared the ordinance unconstitutional on its face, concluding that the restriction hampered citizens' ability to express their views on political questions.<sup>98</sup>

The Court's most unequivocal statement of support for the right to publish anonymously came in 1995, in the case *McIntyre v. Ohio Elections Commission*.<sup>99</sup> In that case, an Ohio woman who distributed handbills opposing a local school funding referendum was fined \$100 for violating an Ohio law prohibiting anonymous election-related communication.<sup>100</sup> In reversing the conviction, the Court said that the woman's handbills represented the "essence of First Amendment expression" because of their political nature.<sup>101</sup> In a concurring opinion, Justice Thomas surveyed the history of anonymous pamphlets and essays in the United States and concluded that the First Amendment was designed specifically to protect anonymous publishing on political matters.<sup>102</sup>

Another Ohio law also failed the Court's litmus test for protecting anonymous speech in 2002. In *Watchtower Bible and Tract Society v. Village of Stratton*,<sup>103</sup> the Court struck down an ordinance that required persons distributing materials door-to-door to first register with village officials.<sup>104</sup> Although the village's intent was to curtail crime and protect residents' privacy, the Court

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<sup>95</sup> 362 U.S. 60 (1960).

<sup>96</sup> *Id.* at 63–66.

<sup>97</sup> *Id.* at 61.

<sup>98</sup> *Id.* at 65–66.

<sup>99</sup> 514 U.S. 334 (1995).

<sup>100</sup> *Id.* at 337–38.

<sup>101</sup> *Id.* at 347.

<sup>102</sup> *Id.* at 367–69 (Thomas, J., concurring).

<sup>103</sup> 536 U.S. 150 (2002).

<sup>104</sup> *Id.* at 150.

said that the effect of the law would be to silence unpopular or controversial groups who would likely choose to be silent rather than identify themselves to government officials, such as the Jehovah's Witnesses who filed the suit.<sup>105</sup>

In contrast to its jurisprudence on anonymity and freedom of association, the Court has been more consistent in recognizing limits to the right to anonymous political expression. In 2010, for example, the Court upheld a federal law requiring sponsors of election-related broadcasts to identify themselves through a statement in the advertisements.<sup>106</sup> In 2011, the Court refused to hear the appeal of a lower court decision that upheld a state law making petitions to have referendum issues placed on election ballots, including the signatures of signers, matters of public record.<sup>107</sup>

### III. ANONYMITY AS A LEGAL ISSUE EVOLVES IN THE U.S.

More people adopt the Internet as a tool of expression and knowledge every day. At the same time, societies continue to struggle to balance freedoms and individual rights in the online communication environment. Issues of anonymous expression online particularly complicate matters of legal process.

Psychologists have noted that communicating anonymously can have a disinhibiting effect on the communicator, freeing that person from societal and individual limitations on expressing her thoughts.<sup>108</sup> Along similar lines, psychologists have also noted that anonymity creates a deindividuation effect<sup>109</sup> marked by a decrease in self-control and a greater willingness to engage in anti-social

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<sup>105</sup> *Id.* at 167.

<sup>106</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 367 (2010).

<sup>107</sup> *Doe v. Reed*, 132 S. Ct. 449, 449 (2011).

<sup>108</sup> See, e.g., John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAVIOR 321 (2004).

<sup>109</sup> Deindividuation is described as a "state of alienation, reduced inhibition, and lack of self-awareness," in which a person's "sense of identity is overwhelmed by that of the group." Diane Rowland, *Gripping, Bitching and Speaking Your Mind: Defamation and Free Expression on the Internet*, 110 PENN ST. L. REV. 519, 530 (2006).

behavior.<sup>110</sup> There is some disagreement about whether anonymity on the Internet exacerbates deindividuation or has roughly the same effect as losing oneself in a crowd of people in the physical world.<sup>111</sup> There is also disagreement about whether anonymity in online settings automatically leads to anti-social behavior or whether it has both positive and negative attributes depending upon the context.<sup>112</sup>

In the context of free speech, it is easy to identify positive and negative aspects of any disinhibiting or deindividuating effect that online anonymity may have. On the positive side, anonymity could democratize the market for valuable political and social commentary by lowering barriers for unpopular, marginalized, or shy speakers. This could help realize the ideal posited by famed scholar Alexander Meiklejohn in the mid-twentieth century. Meiklejohn, in comparing the American polity to a New England-style town meeting, argued that the purpose of such a meeting was to aid voters in gathering information so that they could make wise decisions.<sup>113</sup> Therefore, no viewpoint that could enhance voters' wisdom should be declared out of bounds just because it was unpopular or contrary to the status quo.<sup>114</sup> The Supreme Court's characterization of the Internet as a distinctly democratic medium in a 1997 decision striking down an anti-indecency law can be seen as a tacit acknowledgment of the medium's ability to break down barriers that keep speakers from fully participating in self-government.<sup>115</sup>

Much of what passes for discourse on the Internet is not as high-minded as Meiklejohn would have preferred, of course. Legal scholar Saul Levmore has compared the Internet to a bathroom wall where a "juvenile" is better protected from unpleasant

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<sup>110</sup> See *id.* at 531–33 (summarizing studies of deindividuation).

<sup>111</sup> *Id.* at 533.

<sup>112</sup> *Id.* at 533–34.

<sup>113</sup> ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25–26 (1948).

<sup>114</sup> *Id.* at 26.

<sup>115</sup> See *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

consequences for his message than in the physical space.<sup>116</sup> The Internet is preferable to the wall, he writes, because “anonymity is more assured, it has the potential to reach a larger audience, it keeps messages alive, and it is searchable by interested parties who can then reproduce what they like for further publication.”<sup>117</sup> Others have criticized protections for online anonymity as potential threats to the further development of the Internet as a source of human innovation.<sup>118</sup>

Further complicating matters is the fact that the anonymous nature of Internet communication may be illusory. Legal scholar Daniel Solove has noted that true anonymity online, while possible with some effort, is usually unobtainable.<sup>119</sup> Usually, the best one can hope for is traceable anonymity because each computer portal has a unique Internet Protocol (IP) address, which is logged on each website the computer visits. Anonymizing services can help people erase their Internet fingerprints, but few people take advantage of such services, and they are not fool-proof.<sup>120</sup>

As a result, in countries with liberalized media systems, online anonymity issues often concern how speech rights are balanced against other individual rights within the context of this conditional anonymity. In the United States, online anonymity has surfaced as a legal issue in two key areas. First, state legislatures and courts have tried to assess when and how to extend journalist’s privilege and shield law protection of confidential news sources to bloggers, news websites, and other mass communicators in the digital world. Second, within the context of defamation lawsuits, courts have developed speech-protective standards requiring a *prima facie*

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<sup>116</sup> Saul Levmore, *The Internet’s Anonymity Problem*, in *THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION* 53 (Saul Levmore & Martha C. Nussbaum, eds., 2010).

<sup>117</sup> *Id.*

<sup>118</sup> See Bryan H. Choi, *The Anonymous Internet*, 72 MD. L. REV. 501, 501–02 (2013) (arguing that the generative vitality of the Internet is incompatible with a right to online anonymity and encouraging regulators to constrain anonymity as a lesser liberty interest than encouraging the adaption of the Internet to perform new, unanticipated uses for mankind).

<sup>119</sup> DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 146–47 (2007).

<sup>120</sup> *Id.* at 147.



showing of evidence and different variations of a summary judgment-balancing test to protect the right to communicate anonymously.

#### A. *Anonymous Sources and Journalists*

American courts have long held that citizens have a qualified First Amendment right to engage in speech anonymously and to protect their own identities.<sup>121</sup> However, the Supreme Court has never recognized constitutional protection for journalists to keep their anonymous sources confidential, although lower federal courts have done so.<sup>122</sup> Anonymous sources have been protected at the state level largely by statutory law.<sup>123</sup>

The lone Supreme Court case on the matter resulted in a lack of explicit constitutional protection for the right of journalists to protect their sources' anonymity. In *Branzburg v. Hayes*,<sup>124</sup> three reporters contended that journalists have a constitutional right to conceal the identities of their sources, even in the face of subpoenas from properly convened grand juries.<sup>125</sup> The Court rejected this contention by a five to four vote.<sup>126</sup> Although the Court was not willing to recognize a constitutional privilege, it acknowledged that Congress is free to create a federal statutory journalist's privilege and that state legislatures are free to do the same.<sup>127</sup> The Court also left open the possibility of constitutional protection for reporters in limited situations.<sup>128</sup> Since *Branzburg*,

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<sup>121</sup> See *supra* notes 86–97 and accompanying text.

<sup>122</sup> See *infra* notes 124–30 and accompanying text.

<sup>123</sup> See *infra* notes 131–42 and accompanying text.

<sup>124</sup> 408 U.S. 665 (1972).

<sup>125</sup> *Id.* at 679.

<sup>126</sup> *Id.* at 665.

<sup>127</sup> *Id.* at 706–09. The majority said that grand jury investigations conducted in bad faith or purely for the purpose of disrupting reporter-source relationships would raise different First Amendment issues and would not be tolerated. *Id.*

<sup>128</sup> *Id.* A concurrence by Justice Lewis Powell emphasized the limited nature of the Court's holding and added that remedies existed if journalists believed they were being called before a grand jury investigation conducted in bad faith. *Id.* at 710 (Powell, J., concurring). A dissent written by Justice Potter Stewart, joined by two others, favored a qualified constitutional privilege based on an assessment of the relevance of the information, the least restrictive means for

most federal appellate courts have recognized some measure of protection for the anonymity of sources when journalists are subpoenaed in criminal or civil cases,<sup>129</sup> with the notable exceptions of the Sixth and Seventh Circuits.<sup>130</sup>

By 2014, forty-one states had established some form of legal protection for the confidential sources of journalists. Thirty-eight states and the District of Columbia have adopted statutory privileges protecting journalists from compelled disclosure,<sup>131</sup>

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acquiring the information, and demonstration of a compelling and overriding government interest. *Id.* at 743 (Stewart, J., dissenting). A fourth dissenter, Justice William O. Douglas, wrote separately to argue for a virtually absolute privilege. *Id.* at 711–25 (Douglas, J., dissenting).

<sup>129</sup> See, e.g., *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (criminal case); *LaRouche v. NBC*, 780 F.2d 1134, 1139 (4th Cir. 1986) (civil case); *Zerilli v. Smith*, 656 F.2d 705, 707 (D.C. Cir. 1981) (civil case); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596 (1st Cir. 1980) (libel case); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 724 (5th Cir. 1980) (libel case); *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979) (civil case); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977) (civil case); *Farr v. Pitchess*, 522 F.2d 464, 468 (9th Cir. 1975) (grand jury).

<sup>130</sup> *McKevitt v. Pallasch*, 339 F.3d 530, 534–35 (7th Cir. 2003) (stating that there was no privilege in federal law for non-confidential information and expressing doubt that such a privilege protected confidential material as well); *In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987) (stating that no journalist's privilege existed in federal law after *Branzburg*).

<sup>131</sup> ALA. CODE § 12-21-142 (2014); ALASKA STAT. §§ 09.25.300 to 09.25.390 (2013); ARIZ. REV. STAT. ANN. § 12-2237 (2014); ARK. CODE ANN. § 16-85-510 (2014); CAL. EVID. CODE § 1070 (West 2014); COLO. REV. STAT. § 13-90-119 (2014); CONN. GEN. STAT. § 52-146t (2014); DEL. CODE ANN. tit. 10, §§ 4320 to 4326 (2014); D.C. CODE §§ 16-4701 to 16-4704 (2014); FLA. STAT. § 90.5015 (2014); GA. CODE ANN. § 24-9-30 (2014); HAW. REV. STAT. ANN. § 33-621 (2008); 735 ILL. COMP. STAT. §§ 5/8-901 to 5/8-909 (2014); IND. CODE §§ 34-46-4-1 to 34-46-4-2 (2014); KAN. STAT. ANN. §§ 60-480 to 60-485 (2012); KY. REV. STAT. ANN. § 421.100 (LexisNexis 2014); LA. REV. STAT. ANN. §§ 45:1451 to 45:1459 (2013); ME. REV. STAT. tit. 16, § 61 (2014); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (LexisNexis 2014); MICH. COMP. LAWS ANN. § 767.5a (West 2014); MINN. STAT. §§ 595.021 to 595.025 (2013); MONT. CODE ANN. §§ 26-1-901 to 26-1-903 (2013); NEB. REV. STAT. §§ 20-144 to 20-147 (2014); NEV. REV. STAT. § 49.275 (2013); N.J. STAT. ANN. §§ 2A:84A-21 to 2A:84A-21.13 (West 2014); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2014); N.C. GEN. STAT. § 8-53.11 (2013); N.D. CENT. CODE § 31-01-06.2 (2013); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (LexisNexis 2014); OKLA. STAT. tit. 12, § 2506 (2014); OR. REV. STAT. §§ 44.510 to 44.540 (2013); 42 PA. CONS. STAT.

although the Hawaii shield law failed to win renewal and expired in June 2013.<sup>132</sup> Similarly, the highest courts in New Mexico and Utah have adopted evidence rules that work in roughly the same way as statutes because they apply to all courts in the state judicial system.<sup>133</sup> Finally, California is the only state whose constitution includes an explicit privilege for journalists.<sup>134</sup>

State shield statutes vary widely in how specifically they define who qualifies for protection, but few directly address the relationship of journalists and anonymous sources in an online context.<sup>135</sup> Only a handful of state shield laws use the terms “Internet,” “digital,” or “online.” Arkansas’s shield law includes protection for an “Internet news source,”<sup>136</sup> Texas’s law mentions an “internet company or provider,”<sup>137</sup> and Washington state’s law refers to news organizations that disseminate news via the “internet.”<sup>138</sup> Hawaii’s expired statute protected those

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ANN. § 5942 (West 2014); R.I. GEN. LAWS §§ 9-19.1-1 to 9-19.1-3 (2013); S.C. CODE ANN. § 19-11-100 (2013); TENN. CODE ANN. § 24-1-208 (2014); TEX. CIV. PRAC. & REM. CODE ANN. §§ 22.021 to 22.027 (West 2013); TEX. CODE CRIM. PROC. art. 38.11 § 1(3) (West 2013); WASH. REV. CODE § 5.68.010 (2014); W.VA. CODE § 57-3-10 (2014); WIS. STAT. § 885.14 (2013).

<sup>132</sup> Jack Komperda, *Hawaii Shield Law Will Expire After Lawmakers Unable to Reconcile Competing Bills*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (May 3, 2013), available at <http://rcfp.org/browse-media-law-resources/news/hawaii-shield-law-will-expire-after-lawmakers-unable-reconcile-compe>.

<sup>133</sup> N.M. RULES ANN. § 11-514 (2012); UTAH R. EVID. 509 (2014).

<sup>134</sup> CAL. CONST. art. I, § 2.

<sup>135</sup> For one comprehensive example, Texas criminal and civil codes define a “news medium” as “a newspaper, magazine or periodical, book publisher, news agency, wire service, radio or television station or network, cable, satellite, or other transmission system or carrier or channel, or a channel or programming service for a station, network, system, or carrier, or an audio or audiovisual production company or Internet company or provider, or the parent, subsidiary, division, or affiliate of that entity, that disseminates news or information to the public by any means, including: print; television; radio; photographic; mechanical; electronic; and other means, known or unknown, that are accessible to the public.” TEX. CODE CRIM. PROC. art. 38.11 § 1(3) (West 2013); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 22.021(3) (West 2013) (using identical language to define “news medium”).

<sup>136</sup> ARK. CODE ANN. § 16-85-510 (2014).

<sup>137</sup> TEX. CODE CRIM. PROC. art. 38.11 § 1(3) (West 2013).

<sup>138</sup> WASH. REV. CODE ANN. § 5.68.010(5)(a) (West 2014).

“professionally associated with any newspaper or magazine or any digital version thereof.”<sup>139</sup> The Kansas shield statute covers those employed by “an online journal in the regular business of newsgathering and disseminating news or information to the public.”<sup>140</sup> In six other states, shield laws contain phrases that suggest protection for journalists in non-traditional media, including online media.<sup>141</sup> Seven shield laws do not attempt to define which specific types of news media are eligible for protection.<sup>142</sup>

The lack of explicit legislative recognition of digital newsgathering and the absence of detailed awareness of how people communicate online, including through conditional anonymity, has created legal challenges for determining how shield laws apply to the digital environment. Since 2006, federal and state courts have produced conflicting rulings on whether online journalists qualify to protect their anonymous sources. Statutory shield protection has been upheld for news websites in California<sup>143</sup> and Illinois,<sup>144</sup> while common law privilege has been invoked successfully for a news blog in New Hampshire.<sup>145</sup> In

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<sup>139</sup> HAW. REV. STAT. § 33-621(a) (2008).

<sup>140</sup> KAN. STAT. ANN. § 60-480(a)(2) (2013).

<sup>141</sup> See CONN. GEN. STAT. § 52-146t(a)(2)(A) (2014) (“any other means or medium”); MD. ANN. CODE, CTS. & JUD. PROC. § 9-112(a)(9) (LexisNexis 2014) (“Any printed, photographic, mechanical, or electronic means of disseminating news and information to the public”); OKLA. STAT. ANN. tit. 12, § 2506(A)(7) (West 2014) (“other news service”); S.C. CODE ANN. § 19-11-100(A) (2013) (“other medium”); UTAH R. EVID. 509(a)(1) (2014) (“other organization”); WIS. STAT. § 885.14(1)(a) (2013) (“other medium”).

<sup>142</sup> See DEL. CODE ANN. tit. 10, §§ 4320–4326 (2014); ME. REV. STAT. tit. 16, § 61 (2014); MINN. STAT. §§ 595.021–.025 (2013); N.C. GEN. STAT. § 8-53.11 (2013); N.D. CENT. CODE § 31-01-06.2 (2013); TENN. CODE ANN. § 24-1-208 (2014); W.VA. CODE § 57-3-10 (2014).

<sup>143</sup> *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 83–92 (Cal. Ct. App. 2006).

<sup>144</sup> Order Granting TechnoBuffalo’s Motion to Reconsider and Denying Johns-Byrne Company’s Rule 224 Petition for Discovery, *Johns-Byrne Co. v. Technobuffalo LLC*, No. 2011 L 009161, 2012 WL 7746968 (Ill. Cir. Ct. July 13, 2012).

<sup>145</sup> *Mortg. Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, 999 A.2d 184, 239 (N.H. 2010).

those three cases, courts ruled that the material published online was comparable to traditional journalism and therefore deserved the same protections for the identities of sources. By contrast, a federal judge in Oregon held that the Internet did not qualify as a protected medium under that state's law.<sup>146</sup> Likewise, a New Jersey court ruled that a blogger could not claim shield protection, although the court also said other forms of digital communication might qualify in similar cases.<sup>147</sup> More recently, however, a trial judge in New Jersey determined that a blogger who frequently commented on local political issues qualified for shield law protection and did not have to comply with a grand jury subpoena regarding accusations she made about the behavior of county employees during Hurricane Sandy's aftermath.<sup>148</sup>

In summary, online communication that has produced evidence of gathering and disseminating news to the public has received shield protection.<sup>149</sup> However, the privilege is less likely to be upheld when online communication less reliably mimics traditional forms of journalism, such as when bloggers cannot produce evidence of newsgathering or in cases involving anonymous comments on websites,<sup>150</sup> blogs, or discussion boards that do not contribute to the free flow of information. Courts have expressed concern about watering down the protection of the shield laws to meaninglessness if a broader range of online communication is protected.<sup>151</sup> Therefore, judges have used ad hoc assessments of the websites and materials in question to determine whether the

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<sup>146</sup> *Obsidian Fin. Grp., L.L.C. v. Cox*, No. CV-11-57-HZ, 2011 WL 5999334 at \*1 (D. Or. Nov. 30, 2011).

<sup>147</sup> *Too Much Media, L.L.C. v. Hale*, 20 A.3d 364, 380 (N.J. 2011).

<sup>148</sup> *In re Jan. 11, 2013 Subpoena by the Grand Jury of Union Cnty.*, Prosecutor's Docket No. 13-0001 (N.J. Super. Ct. Apr. 12, 2013).

<sup>149</sup> *Johns-Byrne*, No. 2011 L 009161, 2012 WL 7746968 at \*5.

<sup>150</sup> *But see* Martin et al., *supra* note 7, at 106–14 (discussing examples of courts ruling that newspapers could decline to identify persons who posted anonymous comments on Internet versions of stories because of broad language in some state shield laws).

<sup>151</sup> *See, e.g., Too Much Media*, 20 A.3d at 383 (addressing concerns about broadening the privilege to online communication that does not tend to resemble traditional journalism).

communication at issue could be protected statutorily as journalism.<sup>152</sup>

For example, in *O'Grady v. Superior Court*,<sup>153</sup> the California Court of Appeal held that the reporter's privilege applied to Internet publishers in circumstances where their work was "conceptually indistinguishable" from traditional journalism, both in terms of protection by California's shield law and the First Amendment.<sup>154</sup> In the *O'Grady* opinion, the California court highlighted the difference in publishing on a news-oriented web site as compared to the "deposit of information, opinion, or fabrication by a casual visitor to an open forum such as a newsgroup, chatroom, bulletin board system, or discussion group."<sup>155</sup>

#### B. *Online Anonymity and Defamation*

In the United States, Internet-related legislation has created a tortuous path for identifying individuals who wish to remain anonymous, even if those individuals may be culpable in civil suits regarding defamation, privacy, and intellectual property. Section 230 of the Communications Decency Act<sup>156</sup> immunizes ISPs and other providers of "interactive computer services" from defamation suits for content they did not originate.<sup>157</sup> As a result, plaintiffs alleging harm to reputation, privacy, or intellectual property can only sue the anonymous speakers if they want to recover damages,

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<sup>152</sup> *Id.*; see also Amended Memorandum Opinion and Order Re: Cowles Publ'g Co.'s Motion to Quash Subpoena Duces Tecum at 8–9, *Jacobson v. Doe*, No. CV-12-3098 (1st Idaho D. Ct. July 10, 2012) (recognizing the digital transition of news yet indicating that no evidence was presented that reporting capitalized on the anonymous comments in question to qualify for the constitutional reporter's privilege).

<sup>153</sup> 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006).

<sup>154</sup> *Id.* at 76–79, 99. Apple alleged that unauthorized use and distribution of information via email amounted to a violation of California's trade secret statute and sought to identify the sources who potentially had breached a confidentiality agreement with Apple. *Id.* at 80.

<sup>155</sup> *Id.* at 99.

<sup>156</sup> The Communications Decency Act was part of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

<sup>157</sup> 47 U.S.C. § 230(c) (2012).

and they must serve subpoenas on ISPs in order to attempt to identify the proper defendants. ISP compliance with subpoenas has varied, with some companies complying immediately and others notifying subscribers in time to move to quash the subpoena or ask the court to evaluate the requests for identifying information.<sup>158</sup>

As a result, in the past decade, state and federal courts have created frameworks for balancing the First Amendment rights of anonymous Internet users and protection from defamation in an online setting.<sup>159</sup> Some of these procedural tests that have been developed include the plaintiff-friendly “good faith” test,<sup>160</sup> the more stringent “motion to dismiss” standard,<sup>161</sup> state discovery and civil procedure rule application tests,<sup>162</sup> and tests that apply substantive defamation law to determine evidentiary burdens.<sup>163</sup>

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<sup>158</sup> David Sobel, *The Process That “John Doe” Is Due: Addressing the Legal Challenge to Internet Anonymity*, 5 VA. J.L. & TECH. 3, ¶ 14 (2000).

<sup>159</sup> Courts have consistently been mindful of the need for plaintiffs to provide pre-trial evidence in order for a ruling on a motion to dismiss to be properly administered, although their approaches have varied. *See* Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 577 (N.D. Cal. 1999) (establishing a three-part test for identifying anonymous Internet parties to evaluate whether the defendant is a real person or entity able to be identified with sufficient specificity: (1) that the plaintiff has taken reasonable steps to locate the defendant; (2) that the plaintiff can satisfy that the suit could withstand a motion to dismiss; and (3) that discovery is targeted toward revealing identifying information about the person or entity who committed the act).

<sup>160</sup> *See, e.g.,* Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001); *In re* Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26, 37 (Jan. 31, 2000), *rev'd on other grounds* 542 S.E.2d 377 (Va. Cir. Ct. 2001) (determining that plaintiff should only need to show a legitimate, good faith claim to unmask an anonymous speaker); *see also* Virologic, Inc. v. Doe, No. A101571, A102811, 2004 Cal. App. Unpub. LEXIS 8070 (Cal. Ct. App. Sept. 1, 2004).

<sup>161</sup> *See, e.g.,* SPX Corp. v. Doe, 253 F. Supp. 2d 974, 978–81 (N.D. Ohio 2003) (holding that, because comments were statements of opinion and not fact, plaintiff could not state a valid claim); *Rocker Mgmt. v. Does* 1-20, No. MISC 03-003 3 CRB, 2003 U.S. Dist. LEXIS 16277 (N.D. Cal. May 29, 2003) (similar).

<sup>162</sup> *See, e.g.,* Klehr Harrison Harvey Branzburg & Ellers v. JPA Dev., Inc., No. 0425, 2006 Phila. Ct. Com. Pl. LEXIS 1 (Pa. Ct. Comm. Pl. Jan. 4, 2006) (determining that state civil procedure law was adequate basis for decision on whether to quash subpoena); *La Societe Metro Cash & Carry France v. Time*

The test most widely adopted by appellate courts across jurisdictions for balancing the speech rights of anonymous defendants with the reputational rights of plaintiffs, however, has been the summary judgment standard. Four state appellate courts have increased procedural protections for anonymous online speakers and applied a summary judgment test that requires that a plaintiff, at the outset, be able to submit proof that would be sufficient to defeat a defendant's summary judgment motion. Decisions in this area have also ruled that the nature of the speech itself should be considered when determining whether to compel disclosure of identity.<sup>164</sup>

The summary judgment standard was applied in *Dendrite International v. Doe, No. 3*,<sup>165</sup> in which the Appellate Division of

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Warner Cable, No. CV030197400S, 2003 Conn. Super. LEXIS 3302 (Conn. Super. Ct. Dec. 2, 2003) (citing state common law requirements for discovery); *Maxon v. Ottawa Publ'g Co.*, 402 Ill. App. 3d 704 (Ill. App. Ct. June 1, 2010).

<sup>163</sup> See, e.g., *In re Richard L. Baxter*, Misc. No. 01-00026-M, 2001 U.S. Dist. LEXIS 26001 at 48–54 (W.D. La. Dec. 19, 2001) (applying standard defamation guidelines about matters of public versus private concern to determine that plaintiff had viable case and was entitled to identity of anonymous commenter); see also Christine N. Walz, *D.C. Court of Appeals Permits Early Anti-SLAPP Appeals for Anonymous Speakers*, HOLLAND & KNIGHT (May 29, 2014) <http://www.hklaw.com/Publications/DC-Court-of-Appeals-Permits-Early-Anti-SLAPP-Appeals-for-Anonymous-Speakers-05-29-2014/> (detailing the D.C. Court of Appeals' first ruling under the D.C. Anti-SLAPP statute).

<sup>164</sup> See *Martin et al.*, *supra* note 7. See also *Mobilisa, Inc. v. John Doe 1*, 170 P.3d 712 (Ariz. Ct. App. 2007); *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154 (Cal. Ct. App. 2008); *In re Does 1–10*, 242 S.W. 3d 805 (Tex. App. 2007).

<sup>165</sup> 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001). The Appellate Division of the New Jersey Superior Court weighed anonymity versus defamation in a case of anonymous online message board criticism of a quarterly report for Dendrite International, which the company claimed constituted materially false assertions. The anonymous critic Doe filed a motion to quash a subpoena to reveal his identity, which prompted the court to develop its four-part summary judgment standard. *Id.* at 761, 763. Using the four-part standard, the court determined that although Dendrite had established that the anonymous defendants had published statements that could be viewed as both false and defamatory, the company had failed to provide sufficient evidence that the online criticism had impaired its reputation. *Id.* at 772. *But see* *Immunomedics, Inc. v. Doe*, 775 A.2d 773, 777–78 (N.J. Super. App. Div. 2001) (finding for plaintiff in breach of duty of loyalty and breach of employee confidentiality case—in an opinion issued by the same



the New Jersey Superior Court established a four-part balancing test.<sup>166</sup> The first part of the *Dendrite* standard requires plaintiffs to notify the anonymous posters to provide a reasonable opportunity to contest the action that would unmask them.<sup>167</sup> Second, plaintiffs must identify the exact statements they believe to be defamatory.<sup>168</sup> Third, plaintiffs must produce prima facie evidence to support every element of their cause of action prior to the court order to disclose the defendant's identity.<sup>169</sup> Finally, if the first three requirements are met, the court must balance the necessity of disclosing the identity with the First Amendment right of the defendant to speak anonymously on a case-by-case basis.<sup>170</sup>

The *Dendrite* test's four-part summary judgment standard has served as the basis for balancing tests used by several other federal and state courts.<sup>171</sup> In 2009, the Maryland Court of Appeals upheld

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judge and on same day as *Dendrite*—because of the need to determine if anonymous speaker was an employee in order to proceed).

<sup>166</sup> *Dendrite*, 775 A.2d at 760. The *Dendrite* court relied on a standard used in *Columbia Ins. Co. v. Seescandy.com*, in which the court said the interests of the plaintiff in securing a trademark from infringement must outweigh the right of the anonymous defendant “to participate in online forums anonymously and pseudonymously.” *Id.* (citing *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999)).

<sup>167</sup> *Id.* at 760.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 760–61.

<sup>171</sup> See, e.g., *In re Indiana Newspapers Inc.*, 963 N.E.2d 534, 537 (Ind. Ct. App. 2012); *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969, 974–75 (N.D. Cal. 2004); *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695, 698–99 (N.Y. Sup. Ct. 2007); *Polito v. AOL Time Warner, Inc.*, 78 Pa. D. & C.4th 328, 342 (Pa. Ct. Comm. Pl. 2004). The *Polito* court adopted the prima facie evidentiary requirements of *Dendrite* and added additional procedural requirements regarding (1) demonstrating the evidence sought is directly related and necessary to the claim(s) asserted; (2) seeking the information in good faith and not for purposes of harassment, intimidation or silencing of critics; and (3) the availability of alternative means of discovering the identity of the anonymous speaker. See *id.* at 341–42; see also *Doe I v. Individuals*, 561 F. Supp. 2d 249, 255–57 (D. Conn. 2008); *Alvis Coatings, Inc. v. John Does One Through Ten*, No. 3:04CV374-H, 2004 U.S. Dist. LEXIS 30099, at \*8–10 (W.D.N.C. Dec. 2, 2004); *Mortg. Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, 999 A.2d 184, 193 (N.H. 2010); *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1171–72 (Cal. Ct. App. 2008); *Ottinger v. Non-Party The Journal News*, No. 08-03892, 2008

anonymous speech protections on the Internet using a summary judgment standard.<sup>172</sup> For the first time, a state's highest court adopted the *Dendrite* four-part balancing standard for defamation cases, pitting reputational interests against speech rights for anonymous defendants.<sup>173</sup>

Two other state court decisions have offered slightly modified versions of the *Dendrite* summary judgment standard. In *Doe v. Cahill*,<sup>174</sup> the Delaware Supreme Court applied a refined two-prong version of the *Dendrite* test.<sup>175</sup> The *Cahill* court included the notification provision and the summary judgment standard, while rejecting the sections of the *Dendrite* test calling for the offending statements to be introduced and an explicit judicial balancing of interests because they would be part of the summary judgment analysis.<sup>176</sup>

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N.Y. Misc. LEXIS 4579, at \*4–6 (N.Y. Sup. Ct. June 27, 2008). The *Ottinger* court adopted the *Dendrite* standards but also held that the requirement to set forth proof of actual malice cannot be required at this stage. *Id.*

<sup>172</sup> *Indep. Newspapers v. Brodie*, 966 A.2d 432, 456 (Md. 2009).

<sup>173</sup> *Id.* at 457. A state circuit court ruled that a newspaper had to unmask three participants who had made derogatory comments about a business on an online message forum, the Maryland Court of Appeals granted certiorari on its own initiative expressly to provide guidance to trial courts in such cases. *Id.* at 447. The ruling overturned the lower court and recommended the *Dendrite* standard for future similar cases. *Id.* at 456.

<sup>174</sup> 884 A.2d 451 (Del. 2005). A city council member in Smyrna, Delaware, sued four anonymous defendants for defamation and invasion of privacy for making critical comments on an Internet blog. *Cahill* sought to unmask John Doe's identity and asked the trial court to order the ISP, Comcast, to turn over the IP address of the blog's owner, thereby surrendering his anonymity. The *Cahill* court found the trial court's reliance on the "good faith" standard "insufficiently protective of Doe's First Amendment right to speak anonymously," reversed the judgment ordering Comcast to unmask the anonymous speaker, and urged the trial court to dismiss the case. *Id.* at 454.

<sup>175</sup> *Id.* at 461.

<sup>176</sup> *Id.* at 460. The *Cahill* court said the second requirement of the plaintiff, to set forth the exact statements in question, was subsumed in the summary judgment inquiry and made redundant by the need to quote the alleged offending text in the motion. As to the fourth part of the test, which asked the trial court to balance the defendant's First Amendment rights against the strength of the plaintiff's prima facie case, the court found it unnecessary, as it added no protection beyond that already contained within a summary judgment

Finally, *Mobilisa, Inc. v. John Doe I*<sup>177</sup> combined the procedural aspects of *Dendrite* and *Cahill* to formulate what is likely the most speech-protective of the three summary judgment standards.<sup>178</sup> The Arizona Court of Appeals adopted the notification requirements and summary judgment standards that *Cahill* shared with *Dendrite*, but argued that those protections for anonymous online speech were insufficient.<sup>179</sup> Therefore, the court additionally held that the balancing step of *Dendrite* was required to “achieve appropriate rulings in the vast array of factually distinct cases likely to involve anonymous speech.”<sup>180</sup> The court was concerned that, because surviving a summary judgment standard is not dependent upon knowing the speaker’s identity, other factors that cut against disclosure may exist.<sup>181</sup> The court also reasoned that it is crucial to balance interests because there is no adequate redress for anonymous speakers who are erroneously unmasked.<sup>182</sup>

The Supreme Court of Virginia referenced the summary judgment standard approach used in the *Dendrite/Cahill* line of cases in its May 2014 order granting review of *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*<sup>183</sup> Among the questions the court agreed to consider was whether Virginia’s “good faith” legislative standard was unconstitutional because it failed to incorporate a

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requirement. *Id.* After refining the *Dendrite* standard, the *Cahill* court applied the revised two-part standard and found that *Cahill* had not met his summary judgment burden because “a reasonable person would not interpret Doe’s statements as stating facts” and, therefore, the statements had no defamatory meaning. *Id.* at 467.

<sup>177</sup> 170 P.3d 712 (Ariz. Ct. App. 2007).

<sup>178</sup> See *id.* at 720 (holding that courts must “balance the parties’ competing interests” to assure proper rulings).

<sup>179</sup> *Id.* at 719–20.

<sup>180</sup> *Id.* at 720.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 721. But see Marian K. Riedy & Kim Sperduto, *Revisiting the “Anonymous Speaker Privilege,”* 14 N.C. J.L. & TECH. 249, 249 (2012) (arguing that the discovery privilege in the line of John Doe subpoena cases does not follow a First Amendment principle prohibiting governments from requiring identification as a precondition of speech, but instead advocating for rooting such privilege in the First Amendment’s “associational privilege”).

<sup>183</sup> 2014 Va. LEXIS 84 (Va. May 29, 2014) (order granting review).

*prima facie* showing of wrongdoing before unmasking anonymous speakers.<sup>184</sup> In the lower courts, Hadeed had argued that anonymous customer reviews of its business were defamatory and false because they did not come from actual customers, and it needed the reviewers' identities to prove its case.<sup>185</sup> The Virginia Supreme Court heard oral arguments in late October 2014 on issues such as whether Virginia's statute adequately protected the First Amendment rights of anonymous Internet users.<sup>186</sup>

Additionally, two cases have addressed the legal right to communicate anonymously online in the context of digital journalism and website commentary. In these cases, the courts had to consider complicated issues of journalist's privilege applicability and the legal rights to remain anonymous of people who comment in venues such as news websites and blogs.

In *Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*,<sup>187</sup> the Supreme Court of New Hampshire considered a defamation case in which the defendant, a news website focused on economic news, published material that linked to a document purporting to represent the plaintiff mortgage company's annual loan figures.<sup>188</sup> In response to that material, a visitor to Implode-Explode's website called "Brianbattersby" posted two negative comments about the company and its president.<sup>189</sup> The court found that the website was recognizably devoted to news and deserving of the state's common law newsgathering privilege, and therefore, was not required to reveal

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<sup>184</sup> *Id.* at \*2; see also VA. CODE ANN. § 8.01-407.1 (2014).

<sup>185</sup> *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 752 S.E. 2d 554, 566–68 (Va. Ct. App. 2014).

<sup>186</sup> See Mark Wilson, *Va. Sup. Ct. Hears Arguments Over Anonymous Reviews on Yelp*, FindLaw Fourth Circuit News, Oct. 28, 2014, 4:53 p.m., [http://blogs.findlaw.com/fourth\\_circuit/2014/10/va-sup-ct-hears-arguments-over-anonymous-reviews-on-yelp.html](http://blogs.findlaw.com/fourth_circuit/2014/10/va-sup-ct-hears-arguments-over-anonymous-reviews-on-yelp.html).

<sup>187</sup> 999 A.2d 184 (N.H. 2010).

<sup>188</sup> *Id.* at 187.

<sup>189</sup> *Id.* Mortgage Specialists alleged that the material and the comments harmed its business reputation. It sued for injunctive relief, alleging that the publication of the loan figures was unlawful and that Brianbattersby's posts were "false and defamatory." *Id.* at 187–88.

the source of the loan figures.<sup>190</sup> However, the plaintiffs also insisted that Implode-Explode reveal the identity of “Brianbattersby.”<sup>191</sup> After tracing the history of anonymous speech’s importance to the First Amendment and reviewing a range of balancing tests regarding the disclosure of anonymous Internet speakers, the New Hampshire Supreme Court adopted the four-part *Dendrite* standard for balancing First Amendment rights of publishers with the reputational rights of plaintiffs in cases of online anonymity.<sup>192</sup>

*Jacobson v. Doe*<sup>193</sup> also involved issues of journalist’s privilege and anonymous website speech.<sup>194</sup> In *Jacobson*, an employee of the Spokane, Washington, *Spokesman Review* was facilitating a local news blog when a person called “almostinnocentbystander” posted allegedly defamatory statements about Tammy Jacobson, chairwoman of the Kootenai County, Idaho, Republican Party.<sup>195</sup> After the newspaper moved to protect the anonymous commenter’s identity under common law journalist’s privilege, the Idaho district court determined that the reporter assigned to monitor content and comments on a newspaper website’s blog did not qualify as a

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<sup>190</sup> *Id.* at 190–91. The court drew the distinction of applying the newsgathering privilege in this case in which damages were not sought and other instances, such as when the plaintiff seeks damages from newsgatherers for libel and when the privilege is qualified in criminal cases. See *Downing v. Monitor Publ’g Co., Inc.*, 415 A.2d 683, 686 (N.H. 1980) (establishing application of privilege when a defendant-newspaper in a libel case should be required to disclose the source of allegedly defamatory information it published); see also *State v. Siel*, 444 A.2d 499, 503–04 (N.H. 1982) (establishing the qualified newsgathering privilege in New Hampshire criminal cases).

<sup>191</sup> *Mortgage Specialists*, 999 A.2d at 191.

<sup>192</sup> *Id.* at 192–93. See also *Dendrite International, Inc. v. Doe*, No. 3, 775 A.2d 756, 768 (N.J. Super. Ct. App. Div. 2001) (outlining the four-part summary judgment standard).

<sup>193</sup> Amended Memorandum Opinion and Order Re: Cowles Publ’g Co.’s Motion to Quash Subpoena Duces Tecum, *Jacobson v. Doe*, No. CV-12-3098 (1st Idaho D. Ct. July 10, 2012).

<sup>194</sup> *Id.* The Idaho Supreme Court has recognized that the reporter’s privilege rests in the state constitution’s guarantee of a free press. IDAHO CONST. art. I, § 9; see also *In re Contempt of Wright*, 700 P.2d 40, 43–45 (Idaho 1985).

<sup>195</sup> *Jacobson*, No. CV-12-3098 at 2.

journalist.<sup>196</sup> The case was made more complicated by the fact that Idaho, like New Hampshire, is one of the few states without a shield statute. The court ruled that anonymous posters who allegedly defamed a local government official were not protected by the journalist's privilege and applied the *Dendrite* summary judgment standard.<sup>197</sup> Although the court found that the plaintiff met the *Dendrite* standard for the original defamatory statements, the court held that the authors of two replies were protected because the replies provided no actionable remarks and were in effect statements of witnesses.<sup>198</sup>

#### IV. ANONYMITY IN INTERNATIONAL CONTEXT

The legal right to anonymity is not defined anywhere else to the degree that it is in the United States. However, given that the Internet is, by nature, a global medium, the laws of one country do not define the right for everyone who may communicate anonymously online. The global nature of Internet communication

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<sup>196</sup> *Id.* at 7–9. The judge based his ruling on the fact that there was no indication that the reporter or others at the newspaper viewed the comments as newsworthy or intended to use the information provided there as the basis of a news story or editorial opinion. *Id.* at 9.

<sup>197</sup> *See id.* at 9–22.

<sup>198</sup> *Id.* The judge applied a modified balancing standard from the federal U.S. District Court of Idaho. *See id.* (applying a three-part test from *SI03 v. Bodybuilding.com*, CV-07-6311-EJL (D. Idaho, 2008) that permits a court to order disclosure when (1) the plaintiff makes reasonable efforts to notify the defendant of a subpoena or order of disclosure; (2) the plaintiff provides sufficient evidence to survive a summary judgment motion; and (3) the court determines that the strength of the plaintiff's case and the necessity of disclosure outweigh the defendant's First Amendment right of anonymous speech). In *Jacobson*, "almostinnocentbystander" had posted statements about a local government official alleging "embezzlement" as part of her duties as a "bookkeeper." *Id.* at 16. The court found evidence of reputational harm in those statements, but not two replies by "Phaedrus" and "OutofStaterTater," who did not add any additional actionable content. *Id.* at 2–17. As a result, the judge ordered the newspaper to provide the plaintiff with any document establishing the identity, email address, and IP addresses of "almostinnocentbystander" as identified on the blog; copies of any communication between the newspaper and the commenter; and any document that could indicate whether "almostinnocentbystander" had changed to an alternate identity on the blog. *Id.* at 22–23.

also suggests that some multinational understanding of the right to publish anonymously online would be useful. So far, such an understanding remains elusive.

Various multinational governing and monitoring agencies around the world share concerns about protecting freedom of expression, freedom of assembly and association, and privacy,<sup>199</sup> all of which are implicated by a right to be anonymous. However, the United Nations and similar organizations do not specifically declare that people have a right to publish or speak anonymously, whether online or offline.<sup>200</sup>

For example, the United Nations' Universal Declaration of Human Rights states, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation."<sup>201</sup> The Declaration also asserts, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."<sup>202</sup> Finally, the Declaration provides, "Everyone has the right to freedom of peaceful assembly and association," and that "[n]o one may be compelled to belong to an association."<sup>203</sup>

Similar statements are included in the U.N. Human Rights Committee's International Covenant on Civil and Political Rights,<sup>204</sup> the European Convention on Human Rights' Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>205</sup> and the Inter-American Commission on Human Rights' American

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<sup>199</sup> See *infra* notes 223–27 and accompanying text.

<sup>200</sup> See *infra* notes 201–08 and accompanying text.

<sup>201</sup> Universal Declaration of Human Rights art. 12, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>202</sup> *Id.* art. 19.

<sup>203</sup> *Id.* art. 20.

<sup>204</sup> U.N. Human Rights Commission, International Covenant on Civil and Political Rights arts. 17, 19, 21–22, U.N. Doc. A/RES/2200/XXI (Dec. 16, 1966), arts. 17, 19, 21, & 22.

<sup>205</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8, 10–11 (Nov. 4, 1950), *available at* [http://www.echr.coe.int/documents/convention\\_ENG.pdf](http://www.echr.coe.int/documents/convention_ENG.pdf).

Convention on Human Rights,<sup>206</sup> although the latter also provides for a “right of reply” for anyone damaged by “inaccurate or offensive statements . . . by a legally regulated medium of communication.”<sup>207</sup> The African Union’s African (Banjul) Charter on Human and Peoples’ Rights contains no specific right of privacy but does guarantee rights to receive information, express opinions, associate freely, and assemble with others lawfully.<sup>208</sup>

The implications of having no clear international standard for protecting the anonymity of Internet publishers are mostly speculative (so far) but not hard to imagine. Suppose a blogger writing under a pseudonym wants to publish a controversial message about an international issue that she fears could bring unpleasant consequences to her personal or professional relationships. She knows that, although the law is unsettled in the United States, the odds of remaining unknown, at least to most people, are good. But what consequences could she face if someone in another country claims her blog post defamed a citizen or official, caused a security problem, or did some other evil? The answer would vary widely depending upon the country.

In contrast with the United States, the question of whether online publications qualify for protection under a journalist’s privilege has seldom come up in most of the world. However, in September 2012, the Irish High Court ruled that a blogger could claim protection for his sources because his work contributed to the “education of public opinion” in the same way a newspaper article would.<sup>209</sup>

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<sup>206</sup> Organization of American States, American Convention on Human Rights ch. II, arts. 11, 13, 15–16 (Nov. 22, 1969), *available at* [http://www.oas.org/dil/treaties\\_B\\_32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B_32_American_Convention_on_Human_Rights.htm).

<sup>207</sup> *Id.* at ch. II, art. 14.

<sup>208</sup> African Union, African (Banjul) Charter on Human and Peoples’ Rights arts. 9–11, OAU Doc. CAB/LEG/67/3 rev. 5 (June 27, 1981), *available at* <http://www.au.int/en/content/african-charter-human-and-peoples-rights>.

<sup>209</sup> *Cornec v. Morrice*, [2012] IEHC 376 (H. Ct.) (Ir.) (internal quotations omitted); *see also* T.J. McIntyre, *High Court Rules That Bloggers Can Benefit from Journalistic Privilege*, INFORMM’S BLOG (Sept. 27, 2012), <http://informm.wordpress.com/2012/09/27/ireland-high-court-rules-that-bloggers-can-benefit-from-journalistic-privilege-t-j-mcintyre>.



While not comprehensive, the following discussion is designed to provide an overview of the extent to which various countries have recognized or prohibited a legal right to online anonymity.<sup>210</sup> As in the United States, the law in this regard is still developing in most countries.

#### A. *North America*

There has been considerable case law in Canada regarding the right to remain anonymous online. By contrast, there appears to be no applicable constitutional, statutory, or case law in Mexico.

There is no general right to anonymity in Canadian law, although such a right is sometimes recognized as tied to the right to privacy.<sup>211</sup> With regard to online anonymity, Canadian courts have developed a balancing test requiring the party seeking to compel identification of anonymous users to first show that it has a bona fide claim and that there is no alternative source of the needed information.<sup>212</sup> If the party can make such a showing, a court must weigh factors favoring or disfavoring disclosure.<sup>213</sup> Canadian courts developed this test in a case involving an attempt to unmask ISP customers who were allegedly violating the plaintiff's copyright interests.<sup>214</sup>

This test has not been cited in recent online defamation cases, however. In *Warman v. Wilkins-Fournier*,<sup>215</sup> the Ontario Superior Court of Justice stated that courts determining whether a website owner should have to identify users who post allegedly defamatory material should consider: (1) whether the alleged tortfeasor had a

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<sup>210</sup> The authors relied on English-language resources, which limited their access to some materials only available in other languages. Exclusion from this discussion does not necessarily imply that a country has not recognized or expressly prohibited a right to anonymous online expression; however, the authors were able to identify materials on this topic only for the countries included in this article.

<sup>211</sup> Carole Lucock & Katie Black, *Anonymity and the Law in Canada*, in *LESSONS FROM THE IDENTITY TRAIL* 465 (Ian Kerr, Valerie Steeves, & Carole Lucock, eds., 2009).

<sup>212</sup> *BMG Canada Inc. v. Doe*, [2005] 4 F.C.R. 81, 99 (Can. Fed. Ct.).

<sup>213</sup> *Id.* at 99–102.

<sup>214</sup> *Id.*

<sup>215</sup> [2011] O.J. No. 2418 (Can. Ont. Super. Ct.).

reasonable expectation of anonymity; (2) whether the plaintiff had established a prima facie case and was acting in good faith; (3) whether reasonable efforts to identify the tortfeasor by other means had failed; and (4) a balancing of the interests in reputation versus freedom of expression and privacy.<sup>216</sup> In an earlier case, another Ontario Superior Court judge adopted a test from the House of Lords in the United Kingdom in the 1973 case *Norwich Pharmacal Co. v. Commissioners of Customs and Excise*.<sup>217</sup> Under this test, a plaintiff must show: (1) that it had a bona fide claim; (2) that the third party from whom the information was sought was “somehow involved” in the alleged tortious act; (3) that the third party was the only “practicable” source of the information; (4) that the third party could be indemnified for its costs in regard to the order; and (5) that the interests of justice favored disclosure.<sup>218</sup> The *Warman* court did not explicitly state whether it meant to substitute its test for the one used in the earlier case, noting instead that both tests required a showing that the plaintiff had a bona fide claim.<sup>219</sup> In both cases, the courts required ISPs to comply with orders to identify users who allegedly defamed the plaintiffs. As a result, Canada currently operates with two similar procedural standards of apparent equal weight.

## B. Central and South America

There is little case law in Latin America regarding a right to anonymity, at least in English-language sources. In Brazil, although freedom of expression is a constitutional right, anonymity is specifically forbidden.<sup>220</sup> In October 2013, a *Wall Street Journal* article noted that state officials in Rio de Janeiro used the constitutional provision to justify barring street protesters’ use of masks.<sup>221</sup> The article also noted that Google receives more

<sup>216</sup> *Id.* ¶ 12.

<sup>217</sup> [1973] 2 All E.R. 943 (U.K.H.L.). See *infra* note 243 and accompanying text.

<sup>218</sup> *York Univ. v. Bell Canada Enters.*, [2009] O.J. No. 3689 ¶ 13 (Can. Ont. Super. Ct.).

<sup>219</sup> *Warman*, ¶ 51.

<sup>220</sup> “The expression of thought is free, and anonymity is forbidden.” CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 § IV (Braz.).

<sup>221</sup> Loretta Chao, *Brazilians on Social Media at Fore of Free-Speech Battle*, WALL ST. J., Oct. 9, 2013, at A11.

take-down notices regarding content on its YouTube video-sharing site and other portals it owns from Brazil than any other country.<sup>222</sup>

### C. *European Union*

European law tends to be more protective of privacy than American law,<sup>223</sup> although the extent of that protection can vary somewhat from country to country. Anonymity is sometimes viewed as a privacy-related right, particularly with regard to personal data. In 2013, the European Parliament voted to adopt new regulations that would require companies to anonymize personal data collected from users<sup>224</sup> after German Chancellor Angela Merkel persuaded EU commissioners to back regulations requiring Internet companies to report to whom they gave users' personal information.<sup>225</sup> In 2014, the European Court of Justice ruled that Google and other ISPs and content providers must, in certain circumstances, acquiesce to demands that older links to even truthful information about persons be disabled so they do not appear in search results related to those persons.<sup>226</sup> Critics of the decision question whether enforcing this "right to be forgotten" is practical.<sup>227</sup>

In addition to the differences between the United States and Europe in regard to privacy protection, it should be noted that

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<sup>222</sup> *Id.*

<sup>223</sup> *Compare* *Kurier Zeitungsverlag und Druckerei GmbH v. Austria*, [2012] Eur. Ct. H.R. 3401/07 (finding that Austrian courts did not violate newspaper's free-expression rights by holding it liable for publishing name of sexual assault victim), *with* *Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989) (concluding that holding a newspaper liable for publishing name of a sexual assault victim would violate First Amendment when information was truthful and lawfully acquired).

<sup>224</sup> Carol J. Williams, *Amid NSA Spying, European Lawmakers Vote to Tighten Data Protection*, L.A. TIMES (Oct. 21, 2013), <http://articles.latimes.com/2013/oct/21/world/la-fg-wn-europe-data-protection-NSA-spying-20131021>.

<sup>225</sup> Alan Travis, *European Commission Backs Merkel's Call for Tougher Data Protection Laws*, GUARDIAN (July 15, 2013), <http://www.guardian.co.uk/world/2013/jul/15/european-commission-angela-merkel-data-protection>.

<sup>226</sup> *Google Spain SL v. Agencia Española de Protección de Datos*, Case No. C-131/12 (May 13, 2014).

<sup>227</sup> Charles Arthur, *Explaining the "Right to be Forgotten" – the Newest Cultural Shibboleth*, GUARDIAN (May 14, 2014), <http://www.theguardian.com/technology/2014/May/14/explainer-right-to-be-forgotten-the-newest-cultural-shibboleth>.

European Union law makes more of a distinction between ISPs and Internet content providers than U.S. law does. For example, a 2000 Council of Europe directive on electronic commerce instructs member countries to shield from liability “information society service” providers that are “mere conduits” for customers’ information.<sup>228</sup> The directive immunizes service providers from liability as long as they do not initiate a transmission; do not “select the receiver of the transmission;” and do not “select or modify the information contained in the transmission.”<sup>229</sup> Similar provisions in the directive provide protection for services that cache or host material without creating or manipulating it<sup>230</sup> and free service providers of an obligation to monitor the information they store or transmit.<sup>231</sup> The directive also states, however, that member nations may require service providers to report suspected illegal actions of recipients if they know of them and “information enabling the identification of recipients of their service with whom they have storage agreements.”<sup>232</sup>

While the European directive seems similar in many ways to the protection afforded ISPs and other computer service providers in the United States, a recent case from the European Court of Human Rights illustrates the differences. In *Delfi AS v. Estonia*,<sup>233</sup> an Internet news portal sued Estonia claiming that a decision holding it liable for allegedly defamatory comments posted on its site by anonymous users violated its right to free expression.<sup>234</sup> However, the court determined that filtering and take-down-notice policies of the ISP were not sufficient to protect the reputation of the plaintiff and that it was legally responsible, as a publisher, for all comments posted on its site.<sup>235</sup> The court also rejected Delfi’s argument that the plaintiff could have sued the commenters instead

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<sup>228</sup> Council Directive 2000/31, art. 12, 2000 OJ (L178) 12 (EC).

<sup>229</sup> *Id.* art. 12 § 1 (a)-(c).

<sup>230</sup> *Id.* arts. 13 & 14, 2000 O.J. (L178) 13.

<sup>231</sup> *Id.* art. 15.

<sup>232</sup> *Id.* art. 15, § 2.

<sup>233</sup> *Delfi AS v. Estonia*, [2013] ECHR 64569/09.

<sup>234</sup> *Id.* ¶ 46.

<sup>235</sup> *Id.* ¶¶ 88–89.

of the ISP, noting the government's counter-argument that it would be very difficult to find the commenters' true identities.<sup>236</sup>

One critic of the court's decision in *Delfi* worries that it could radically alter the legal landscape for information service providers.<sup>237</sup> But with regard to the balance between privacy<sup>238</sup> and free expression on the Internet, the decision was in line with other recent rulings by the court. For example, in another case the court ruled that Finland failed to adequately protect the privacy of a boy who was the victim of an anonymous Internet prank involving a fake profile on a dating site.<sup>239</sup> Finnish courts had ruled that laws in that country did not authorize the government to require ISPs to disclose user identification data in such a case.<sup>240</sup> The European court ruled that the failure of Finnish law to allow the boy or the police to force the ISP to identify the person who posted the fake profile amounted to a violation of the boy's right to privacy under Article 8 of the European Convention on Human Rights.<sup>241</sup>

### 1. *United Kingdom*

Much of American law has evolved from Anglo-Saxon traditions and documents, but that has become less true as time has passed since the United States declared independence in 1776. One area in which American law has developed differently than English law is with regard to anonymity.

England has a long social and legal history of respecting a right to anonymity, though this history has manifested sporadically

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<sup>236</sup> *Id.* ¶ 91.

<sup>237</sup> Neville Cox, *Delfi AS v. Estonia: The Liability of Secondary Internet Publishers for Violation of Reputational Rights under the European Convention on Human Rights*, 77 Mod. L. Rev. 619, 627 (2014).

<sup>238</sup> The European Court of Human Rights generally regards the protection of one's reputation to be among the interests protected by Art. 8 of the Convention, which deals broadly with the right to privacy. See *Delfi AS v. Estonia*, [2013] ECHR 64569/09 ¶ 80.

<sup>239</sup> *KU v. Finland*, [2008] ECHR 2872/02.

<sup>240</sup> *Id.* at ¶¶ 11–12.

<sup>241</sup> *Id.* at ¶¶ 49–50. The opinion notes, however, that Finland's legislature later adopted a law, the Exercise of Freedom of Expression in Mass Media Act (Act No. 460/2003), which provided a mechanism for such an order to an ISP. *Id.* at ¶ 21.

without establishing a clear precedent.<sup>242</sup> In 1973, however, the House of Lords established a test for the conditions under which a litigant could force a third party in a lawsuit to identify potential defendants. The party seeking the information must show that: (1) the unknown party arguably committed a wrong against the plaintiff; (2) identification of the unknown party is necessary; and (3) the third party is able to identify the alleged wrongdoer.<sup>243</sup> Courts are expected to balance the third party's interests in maintaining confidentiality versus the interests of justice.<sup>244</sup> This test has also been used in other UK lawsuits involving Internet bulletin boards and other online publications,<sup>245</sup> and also was adopted by the Ontario Supreme Court in Canada.<sup>246</sup>

## 2. *France*

In 2011, a French appellate court ruled that the host of a blog was liable for damages under privacy laws with regard to a breach of a user's privacy.<sup>247</sup> The plaintiff, identified as Jean-Marc D. in the decision, had posted an anonymous comment on a blog hosted by JFG Networks, but another blogger identified him by name,

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<sup>242</sup> Paul Bernal, *Internet Anonymity: A Very British Dilemma*, U.K. CONST. L. GROUP (Nov. 6, 2012), <http://ukconstitutionallaw.org/2012/11/06/paul-bernal-internet-anonymity-a-very-british-dilemma>.

<sup>243</sup> *Norwich Pharmacal Co. v. Comm'rs of Customs and Excise*, [1973] 2 All E.R. 943 (H.L.); see also Ian Lloyd, "Anonymity and the Law in the United Kingdom," in LESSONS FROM THE IDENTITY TRAIL, *supra* note 211, at 498 (discussing *Norwich Pharmacal* and its impact).

<sup>244</sup> *Norwich Pharmacal*, 2 All E.R. at 944.

<sup>245</sup> See, e.g., *Rugby Football Union v. Consol. Info. Servs. Ltd.*, [2013] 1 All E.R. 928; [2012] U.K.S.C. 55 (S.C.) (order to ISP to disclose identities of rugby match ticket resellers upheld); *Smith v. ADVFN PLC*, [2008] EWCA (Civ) 518 (A.C.) (ordering ISP disclosure of users in defamation case); *Clift v. Clarke*, [2011] EWHC 1164 (Q.B.) (denying *Norwich Pharmacal* order to ISP in defamation case); *G. v. Wikimedia Found. Inc.*, [2009] EWHC 3148 (Q.B.) (ordering parent of Wikipedia to disclose identity of contributor(s) who amended Wikipedia entry about plaintiff); *Sheffield Wednesday Football Club Ltd. v. Hargreaves*, [2007] EWHC 2375 (Q.B.) (ordering ISP to disclose identities of users in defamation case).

<sup>246</sup> *York Univ. v. Bell Canada Enters.*, [2009] O.J. No. 3689 ¶ 13 (Can. Ont. Super. Ct.).

<sup>247</sup> *Cour d'appel [CA] [regional court of appeal] Montpellier*, 5e ch. Dec. 15, 2011, No. 11.5A-4310, *Legalis* (Fr.).

physical address, e-mail address, and accused him of being part of a pedophilia ring.<sup>248</sup> JFG refused to take down the information after Jean-Marc D. complained and, after he filed suit, argued that it was not liable under a French law that immunized host-service providers from liability for user content, similar to Section 230 of the Communications Decency Act in the United States.<sup>249</sup> But the appellate court ruled that JFG was also a site publisher and therefore not immune from liability when it collected, processed, and stored personal data.<sup>250</sup>

In 2013, the Paris Court of Appeal ordered Twitter to provide the names of users who sent anti-Semitic tweets.<sup>251</sup> Twitter had deleted the offensive tweets upon request of the Union of Jewish French Students, but its appeal to protect the identities of the users was rejected.<sup>252</sup>

### 3. Germany

German law requires that online media services provide users with the option of using pseudonyms in their online communications.<sup>253</sup> In January 2013, a data protection agency in the German state of Schleswig-Holstein announced that it planned to fine Facebook founder Mark Zuckerberg €20,000 because of the social media site's policy requiring users to provide their identities in order to use the service. Facebook executives said they would fight the fine aggressively.<sup>254</sup> In February 2013, a German court ruled in favor of Facebook.<sup>255</sup>

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<sup>248</sup> *Court Rules E-Commerce Law Does Not Trump Web Privacy Rights*, WORLD DATA PROT. REP. (BNA), Jan. 2012, at 31.

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

<sup>250</sup> *Id.*

<sup>251</sup> Katia Moskvitch, *Twitter Told to Reveal Details of Racist Users*, BBC NEWS (June 13, 2013), <http://www.bbc.co.uk/news/technology-22887988>.

<sup>252</sup> *Id.*

<sup>253</sup> Louise Osborne, *German State Fights Facebook Over Alleged Privacy Violations*, GUARDIAN (Jan. 4, 2013), <http://www.guardian.co.uk/world/2013/jan/04/facebook-germany-data-protection>.

<sup>254</sup> *Id.*

<sup>255</sup> Hayley Tsukayama, *Facebook Wins Germany Lawsuit on Naming Policy*, WASH. POST (Feb. 15, 2013), [http://www.washingtonpost.com/blogs/post-tech/post/facebook-wins-germany-lawsuit-on-naming-policy-the-circuit/2013/02/15/5c6d19ee-778c-11e2-aa12-e6cf1d31106b\\_blog.html](http://www.washingtonpost.com/blogs/post-tech/post/facebook-wins-germany-lawsuit-on-naming-policy-the-circuit/2013/02/15/5c6d19ee-778c-11e2-aa12-e6cf1d31106b_blog.html).

#### 4. *Hungary*

In May 2014, the Hungarian Constitutional Court ruled that ISPs are liable for comments posted by users regardless of whether they regularly monitor such comments or not.<sup>256</sup> Free-speech advocates expressed concern that the ruling would lead to self-censorship by ISPs and content providers, and they criticized the court for violating international standards for regulation of Internet content and service providers.<sup>257</sup>

#### 5. *Russia*

As tensions have escalated between Russia and other countries in the West in recent years, the Russian government has adopted several measures to control its citizens' use of the Internet. In August 2014, new regulations approved by Parliament went into effect that would require bloggers with 3,000 or more daily readers to register as mass media and comply with rules that require bloggers to identify themselves publicly.<sup>258</sup> Bloggers also are responsible for all content on their blogs, including comments from readers.<sup>259</sup> Also, it was reported that Russia's interior ministry was offering close to £65,000 (more than \$100,000) for research on how to identify the anonymous users of Tor, which masks the sources and destinations of Internet browsing and prevents tracking of users.<sup>260</sup> In August 2014, another regulation went into effect

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<sup>256</sup> Zoltan Simon, *Hungary Internet-Comment Ruling Sparks Free-Speech Worry*, BLOOMBERG NEWS SERVICE (May 29, 2014), <http://www.bloomberg.com/news/2014-05-29/Hungary-Internet-comment-ruling-sparks-free-speech-worry.html>.

<sup>257</sup> *Ruling of Hungarian Constitutional Court Can Further Curb Freedom of Expression, Warns OSCE Media Freedom Representative*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (May 29, 2014), <http://www.osce.org/fom/119216>.

<sup>258</sup> See Birnbaum, *supra* note 14. See also Olga Razumovskaya, *Russian Parliament Approves New Law Restricting the Internet*, WALL ST. J. (Apr. 29, 2014), <http://online.wsj.com/news/articles/sb10001424052702304163604579531460215555456>.

<sup>259</sup> Birnbaum, *supra* note 14.

<sup>260</sup> Alec Luhn, *Russia Offers 3.9m Roubles for 'Research to Identify Users of Tor'*, GUARDIAN (July 25, 2015), [www.theguardian.com/world/2014/jul/25/russia-research-identify-users-tor](http://www.theguardian.com/world/2014/jul/25/russia-research-identify-users-tor).



requiring users of public WiFi services to provide identification, but it was not clear how the rule would or could be enforced.<sup>261</sup>

## 6. *Sweden*

The Swedish constitution grants near-total anonymity for personal freedom of expression with exceptions only in circumstances such as war crimes or limited instances that could harm the country's defense or economy.<sup>262</sup>

## 7. *The Netherlands*

There is no general right of anonymity in the Dutch constitution, but government officials have suggested that it is implied by other rights.<sup>263</sup> These rights include the right of free expression,<sup>264</sup> the right to personal and data privacy,<sup>265</sup> and the right to confidential communication.<sup>266</sup> With regard to anonymity on the Internet, the Supreme Court of the Netherlands has established a balancing test for when an ISP can be required to identify a user. The test is primarily a reasonableness test: is it reasonable that the information in the communication in question was unjust and damaging to another; does the party seeking the information have a reasonable interest in receiving it; are there no reasonable alternatives to obtaining the information; and do the interests of the party seeking the identity outweigh the interests of the ISP and the anonymous person?<sup>267</sup> Later courts required persons seeking identities from ISPs to show beyond a reasonable doubt that the persons they sought to unmask actually posted the damaging

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<sup>261</sup> *Russia Demands Internet Users Show ID to Access Public Wifi*, REUTERS (Aug. 8, 2014), [www.reuters.com/article/2014/08/08/us-russia-internet-idUSKBN0G81RV20140808](http://www.reuters.com/article/2014/08/08/us-russia-internet-idUSKBN0G81RV20140808).

<sup>262</sup> REGERINGSFORMEN [RF] [CONSTITUTION] 2:1–12 (Swed.).

<sup>263</sup> Simone Van Der Hof, Bert-Jaap Koops, & Ronald Leenes, *Anonymity and the Law in the Netherlands*, in LESSONS FROM THE IDENTITY TRAIL, *supra* note 211, at 504–05.

<sup>264</sup> DUTCH CONST. (GRONDWET) art. 7 (2008), available in English at <http://www.government.nl/documents-and-publications/regulations/2012/10/198/the-constitution-of-the-kingdom-of-the-netherlands-2008.html>.

<sup>265</sup> *Id.* art. 10.

<sup>266</sup> *Id.* art. 13.

<sup>267</sup> Van Der Hof, et al., *supra* note 263, at 509–10 (citing HR 25 November 2005, LJN 2005, 4019 m.nt. AU (Lycos/Pessers) (Neth.)).

material and held that online marketplaces do not have to provide information on clients unless failing to do so would be unreasonable.<sup>268</sup>

#### D. *Asia*

The continent is home to a variety of different governmental systems, from constitutional democracies to one-party authoritarian states. Not surprisingly, there is wide variety among the nations in Asia about the treatment of anonymity online.

##### 1. *China*

The Chinese constitution guarantees freedoms of speech, association, and publication subordinate to the ruling party; however, the constitution cannot be invoked as a legal basis of defense in most cases.<sup>269</sup> As a matter of policy, the Chinese government has taken great strides to prevent anonymous and pseudonymous participation in controversial topics through a complex system of filtering, blocking, and investigating websites, ISPs, and Internet users.<sup>270</sup>

In 2011 and 2012, China took several specific steps to try to control anonymity on the Internet, including creating a new agency to coordinate Internet regulation, increasing pressure on intermediaries to “self-censor” content and users, and tightening controls on social media.<sup>271</sup> In 2012, the Chinese government approved a policy that would require Internet users to register their real names with service providers. The government said the policy would help service providers better protect customers’ information, while critics suggested the policy was actually targeted at silencing dissenters who used blogs and comment sections of sites.<sup>272</sup> As real-name registration requirements expand into all forms of digital

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<sup>268</sup> Van Der Hof et al., *supra* note 263, at 510.

<sup>269</sup> XIANFA art. 35, § 1 (1982) (China).

<sup>270</sup> *China: Freedom on the Net 2012*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-net/2012/china> (last visited Oct. 16, 2014).

<sup>271</sup> *Id.* A series of municipal laws and administrative guidelines buttress legislation and regulations passed by the National People’s Congress in 2012. *Id.*

<sup>272</sup> See Warr, *supra* note 12.

communication, including social media services, the practice of anonymous online communication becomes scarcer.<sup>273</sup>

However, by 2011, weibo, or Chinese microblogging services, had become the fastest-growing form of online interaction for about 300 million Chinese netizens, or about half of all Chinese Internet users.<sup>274</sup> Weibo have been credited with breaking news about disasters and exposing corruption,<sup>275</sup> and urban Chinese place greater trust in anonymous microblogs than mainstream media.<sup>276</sup> These microblogs empower citizens and journalists working for mainstream media in China to use the text-based service to distribute information outside of official channels and real-name registered services.<sup>277</sup> Faced with a growing number of reporting constraints, Chinese journalists have used microblogs to conduct independent investigations and interviews, which they then post on weibo in order to avoid official pre-publication censorship.<sup>278</sup> Government censors are quick to remove from weibo what they view as undesirable content, but the news usually already has diffused, making weibo one of the last relatively unregulated forms of anonymous online communication in China.

## 2. South Korea

In 2007, South Korea adopted a regulation requiring Internet users to verify their identities when they posted comments on many popular websites, including some belonging to newspapers. The regulation was aimed at curbing false and defamatory online comments that were blamed, in some cases, for driving celebrities

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<sup>273</sup> Jonathan Ansfield, *China Web Sites Seeking Users' Names*, N.Y. TIMES (Sept. 5, 2009), <http://www.nytimes.com/2009/09/06/world/asia/06chinanet.html?pagewanted=all>.

<sup>274</sup> *China Records 300 Million Registered Microblog Users*, REUTERS (Nov. 21, 2011), <http://www.reuters.com/article/2011/11/21/us-china-microblogs-idUSTRE7AK1Q720111121>

<sup>275</sup> Keith Bradsher, *China Toughens Its Restrictions on Use of the Internet*, N.Y. TIMES (Dec. 28, 2012), [http://www.nytimes.com/2012/12/29/world/asia/china-toughens-restrictions-on-internet-use.html?\\_r=0](http://www.nytimes.com/2012/12/29/world/asia/china-toughens-restrictions-on-internet-use.html?_r=0).

<sup>276</sup> *Urban China Trusts Anonymous Sources over State Media*, PHAYUL (Dec. 24, 2012, 7:49 AM), <http://www.phayul.com/news/article.aspx?id=32706&t=0>.

<sup>277</sup> Yi Yang, *China's Micro-blog Revolution*, THE DIPLOMAT (Aug. 12, 2011), <http://the-diplomat.com/new-leaders-forum/2011/08/12/chinas-micro-blog-revolution/>.

<sup>278</sup> *Id.*

to suicide.<sup>279</sup> However, in August 2012, the South Korean Constitutional Court unanimously declared the regulation unconstitutional, saying it violated free speech rights.<sup>280</sup> The court said that anonymous or pseudonymous comments allowed people to criticize majority opinions without facing undue pressure, and it expressed concern that the regulation would cause a “chilling effect” on expression.<sup>281</sup> At this writing, a new regulation had not been approved.

### 3. *The Philippines*

In September 2012, the Congress of the Philippines passed a cybercrime prevention act<sup>282</sup> that critics said would criminalize anonymous criticism and allow the government to shut down websites hosting allegedly libelous material.<sup>283</sup> The sections of the law that attracted the most criticism would have made it a crime to commit libel “through a computer system or any other similar means which may be devised in the future”<sup>284</sup> and allowed the Philippines’ Department of Justice to block or restrict access to electronic messages or documents based on a *prima facie* showing that their publication violated the act.<sup>285</sup> Another section would have required individuals or service providers to turn over subscriber information within seventy-two hours in response to a court warrant.<sup>286</sup> However, the Supreme Court of the Philippines issued a restraining order to prevent enforcement of the act and extended the order indefinitely in February 2013 after journalists

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<sup>279</sup> See Sang-Hun, *supra* note 8.

<sup>280</sup> Constitutional Court [Const. Ct.], 2010Hun-Ma47&252 (consol.), Aug. 23, 2012, (S. Kor.).

<sup>281</sup> *Id.*

<sup>282</sup> An Act Defining Cybercrime, Providing for the Prevention, Investigation, Suppression and the Imposition of Penalties Therefor and for Other Purposes, Rep. Act No. 10175 (Sept. 12, 2012) (Phil.), available at <http://www.gov.ph/2012/09/12/republic-act-no-10175>.

<sup>283</sup> Jillian C. York, *A Dark Day for the Philippines as Government Passes Cybercrime Act*, ELECTRONIC FRONTIER FOUNDATION (Oct. 3, 2012), <https://www.eff.org/deeplinks/2012/10/dark-day-philippines-government-passes-cybercrime-act>.

<sup>284</sup> Rep. Act No. 10175 § 4(c)(4).

<sup>285</sup> *Id.* § 19.

<sup>286</sup> *Id.* § 14.

and others challenged the constitutionality of the law.<sup>287</sup> In May 2013, the Filipino Department of Justice announced that it would propose changes to the law eliminating the online libel section and other troublesome provisions.<sup>288</sup>

In February 2014, however, the Supreme Court of the Philippines upheld most of the provisions of the original act.<sup>289</sup> The court struck down the section of the law that would have allowed the Department of Justice to block access to electronic messages or documents upon a *prima facie* showing that its publication violated the law, citing concerns about free expression and unreasonable searches.<sup>290</sup> But the court upheld the law's penalties for online libel, though it limited responsibility to the author of a defamatory post, rather than persons who commented on it.<sup>291</sup> The court also upheld a section that requires ISPs to turn over subscriber information in response to a valid court warrant.<sup>292</sup>

#### 4. *Vietnam*

In April 2012, the Vietnamese government, which had already been cracking down on opponents of the ruling Communist Party, announced that it intended to adopt a decree that would require Internet users to provide their real names online. The decree would also require ISPs to cooperate more closely with Vietnamese officials to remove questionable content and to house data centers and servers in the country, where they would be subject to Vietnamese law.<sup>293</sup> The decree, which took effect in September 2013, also stated that blogs and social networks should only be used to share personal information, rather than news stories.<sup>294</sup>

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<sup>287</sup> Ellyne Phneah, *Philippines Extends Suspension of Cybercrime Law*, ZD NET (Feb. 5, 2013), <http://www.zdnet.com/ph/philippines-extends-suspension-of-cybercrime-law-7000010820/>.

<sup>288</sup> Ellyne Phneah, *Philippine Proposed Changes to Cybercrime Law Criticized*, ZD NET (May 27, 2013), <http://www.zdnet.com/ph/philippine-proposed-changes-to-cybercrime-law-criticized-7000015897/>.

<sup>289</sup> *Disini v. Secretary of Justice*, G.R. No. 203335 (S.C. Feb. 18, 2014) (Phil.).

<sup>290</sup> *Id.* at 45.

<sup>291</sup> *Id.* at 24–25.

<sup>292</sup> *Id.* at 42.

<sup>293</sup> Roughneen, *supra* note 13.

<sup>294</sup> Vietnam Internet Restrictions, *supra* note 13.

### E. *Africa and the Middle East*

Much of Africa and the Middle East is under the control of totalitarian governments or in the midst of political turmoil, making it difficult to pin down whether there is any right to use the Internet, whether anonymously or not.<sup>295</sup> There are at least two exceptions: Israel and South Africa.

#### 1. *Israel*

A 2010 ruling by Israel's Supreme Court found no established judicial process for determining whether and how ISPs should reveal identities in legal proceedings. Therefore, the court found that any motion to reveal identities of Internet users would be dismissed until legislation was passed addressing the issue.<sup>296</sup> In effect, the decision granted a constitutional right to unconditional anonymity to anyone on the Israeli Internet unless or until statutorily prohibited.<sup>297</sup>

#### 2. *South Africa*

South Africa is one of the most restrictive nations of online anonymous speech in the world because it constrains the speaker's identity in two ways: it prevents online anonymity through legally mandated real-name registration and through monitoring communication. ISPs are required to retain customer data for government inspection, and Internet systems that cannot be monitored are banned.<sup>298</sup> ISPs receive limited liability for monitoring their services if they register with government-approved

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<sup>295</sup> Among African and Middle Eastern countries, only Ghana and Israel have been characterized as "free" nations in terms of press freedom by Freedom House. See *Freedom of the Press 2014*, FREEDOM HOUSE, <http://freedomhouse.org/report/freedom-press/freedom-press-2014#.U5HmjPldWvQ> (last visited Oct. 16, 2014). For individual country ratings, see *id.*

<sup>296</sup> CA 4447/07 Rami Mor v. Barak E.T.C. 1(2) [2010] (Isr.). In *Rami Mor*, an Israeli health care practitioner sued an Israeli ISP to unmask an anonymous blogger who allegedly defamed him. *Id.* The Supreme Court ruled that the blogger was entitled to anonymity and dismissed the petition. *Id.*

<sup>297</sup> *Israel Cannot Reveal Identity of an Anonymous Surfer*, LAW.CO.IL (March 26, 2010), <http://law.co.il/news/free-speech/2010/03/26/first-john-doe-ruling-of-israeli-supreme-court/>.

<sup>298</sup> Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2003 § 1 (S. Afr.).

representative organizations.<sup>299</sup> Mobile subscribers must provide extensive personal information to service providers for potential government use, and each subscriber receives a registered identification number. In addition, trained inspectors may enforce these provisions and monitor Internet communications.<sup>300</sup>

#### F. *Australia*

The law of anonymity does not appear to be well established at the national level in Australia. Since 2010, however, judges in two regional courts have ordered ISPs to identify defamation defendants.<sup>301</sup> In one case, HotCopper, which operated an Internet forum about publicly traded companies, was required to identify the person who posted anonymous and allegedly defamatory comments about Datamotion Asia Pacific.<sup>302</sup> In 2013, a court in South Australia ordered Google to disclose the people responsible for websites criticizing the sports and business skills of a former Australian Rules Football player.<sup>303</sup>

### V. ANALYSIS OF GLOBAL DISPARITIES AND SUGGESTIONS FOR GREATER COHESION

More than fifty years ago, Fred Siebert and his colleagues at the University of Illinois published their seminal book *Four Theories of the Press* comparing press systems around the globe.<sup>304</sup> The book examined authoritarian, libertarian, social responsibility, and Soviet communist systems and explained how and why the systems differed. History has rendered parts of the book obsolete, and the book has been criticized for framing its theories in terms of

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<sup>299</sup> See *South Africa, Freedom on the Net 2012*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-net/2012/south-africa> (last visited Oct. 16, 2014).

<sup>300</sup> Electronic Communications and Transactions Act of 2002 § 1 (S. Afr.).

<sup>301</sup> David Rolph, *Defamation by Social Media* (Sydney Law School Legal Studies Research Paper, Paper No. 13/81, 2013), available at <http://ssrn.com/abstract-id=2356028>.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> FRED S. SIEBERT, THEODORE PETERSON, & WILBUR SCHRAMM, *FOUR THEORIES OF THE PRESS* (1956; 1963).

Western (particularly American) ideology and other failings.<sup>305</sup> However, the book's general thesis—that press freedom does not exist in a vacuum and is a product of a complex interplay between cultural and governmental traditions and assumptions—remains valid. The book also provides a caution to anyone attempting to posit a universal guideline or rule for freedom of expression or a subset of that freedom, such as anonymity. Finding cohesion is an elusive goal at best, and one must also be wary of viewing the world through the prism of American law.<sup>306</sup>

With that said, historical perspective on the development of legal protection for anonymity and recent areas of emphasis in Internet anonymity law highlight two key areas of commonality. This analysis specifically points to two looming issues that will help to shape our understanding of the legal relationship between free expression and anonymity in the coming years. We also offer suggestions on how governing bodies and free speech advocates might bring greater cohesion to these global disparities to produce a clearer international standard for the qualified protection of anonymous online speech.

Consideration for anonymity as a legal right tied to free expression is linked to fundamental issues of individual rights and technological proliferation. Although there is no clear international concurrence on this issue, freedom of expression has been distinguished as a basic human right by many nations and governing bodies, including reinforcement through the United Nations' Universal Declaration of Human Rights.<sup>307</sup> Likewise, American courts' attitudes toward anonymity were mostly

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<sup>305</sup> See generally LAST RIGHTS: REVISITING FOUR THEORIES OF THE PRESS (John C. Nerone, ed., 1995) (consisting of a collection of essays about the strengths and weaknesses of the Siebert's FOUR THEORIES OF THE PRESS).

<sup>306</sup> See, e.g., Anna Vamialis, *Online Defamation: Confronting Anonymity*, 21 INT. J. LAW & INFO. TECH. § 1 (2013) (noting the "unique value" the First Amendment attaches to anonymous speech).

<sup>307</sup> See Universal Declaration of Human Rights. art. 19, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 12 1948) ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media regardless of frontiers.").



formulated beginning in the 1950s and continued through a period of liberalized thinking about civil rights and expression. The spread of democracies in the latter half of the twentieth century included more global interest in freedom of expression. On the second issue, technological developments have made media more horizontal than vertical in structure, particularly during the Web 2.0 era of interactivity. Accordingly, more people than ever are able to express, connect, and share information and opinions through lowered barriers of entry based on monetary and opportunity cost. The merging of these two areas has created the basis for many of the cases and laws analyzed in this Article. The merging of these areas has also given rise to concerns about the optimal balance when freedom of anonymous expression conflicts with other societal goals, including rights of privacy, protection of intellectual property, and protection of reputation. As noted, jurisprudence becomes complicated in the area of online anonymous expression because the act of unmasking an unknown speaker requires pretrial discovery motions that necessitate precise consideration of the irreparable consequences of identification. As a result, protection afforded to free speech considerations varies considerably based on jurisdiction.

Thus, the global spread of more liberal attitudes about individual rights to expression and the ease of acquiring and using communication technology have been bundled on this issue, resulting in the emergence of legally protected online anonymity as a complicated and important topic for law and policy. Analysis of recent law and policy developments worldwide indicates two areas that deserve further scholarly examination and which likely will produce forthcoming case law and statutory action. First, the legal right of anonymity in an online context has developed in a manner that tends to mirror countries' general attitudes about press freedom and reflects societal and cultural values about the role of media and expression within those societies. Second, related differences continue to emerge about how governments attempt to regulate anonymity and the identification of online users through the use of intermediaries, software, and hardware.

Theories about press freedom generally tend to focus on political and social structural factors, while more recent research

has focused on the role of journalists' autonomy within media systems as an important consideration.<sup>308</sup> Incorporating both of those perspectives into analysis of international legal attitudes toward anonymous online speech indicates that legal protection for anonymous expression tends to be the strongest in liberalized media systems with some variation in protection based on cultural values, journalist autonomy, and style of government. For instance, countries with the Western media model, such as the United States, United Kingdom, Germany, Canada, Sweden, and the Netherlands tend to have some degree of constitutional protection for anonymity. Additionally, South Korea's unique media system and the Philippines' transitional liberal media system have been sites of recent high-court rulings that have favored freedom of expression for anonymous communicators, although the Philippines may have taken a step backward in this regard.<sup>309</sup>

On the other hand, countries with authoritarian media regulation or developing economic systems tend to take a more conservative approach toward anonymous expression. The approach taken by China and Vietnam reflect the control of the Communist Party and the communitarian orientation of their media systems. Moreover, Brazil and South Africa historically have struggled to balance economic development with civil rights, such as press freedom.<sup>310</sup> Russia seems to be taking a giant step back

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<sup>308</sup> See Jennifer Ostini & Anthony Y.H. Fung, *Beyond the Four Theories of the Press: A New Model of National Media Systems*, 5 MASS COMM. AND SOC'Y 41–56 (2002) (comparing traditional theories of press functions with more recent research that has focused on multiple levels of influence at both societal and individual levels).

<sup>309</sup> See Sang-Hun, *supra* note 8. See also Mark Merueñas, *Internet Libel in Cybercrime Law Constitutional – SC*, GMANETWORK (Feb. 18, 2014), <http://www.gmanetwork.com/news/story/348945/scitech/technology/internet-libel-in-cybercrime-law-constitutional-sc> (quoting the National Union of Journalists of the Philippines calling the Philippines Supreme Court's decision to uphold most of a controversial cybercrime bill “[a] half-inch forward but a century backward”).

<sup>310</sup> See generally Kenneth Bollen, *World System Position, Dependency, and Democracy: The Cross-National Evidence*, 48 AM. SOCIOLOGICAL REV. 468 (1983); Zehra F. Arat, *Democracy and Economic Development: Modernization Theory Revisited*, 21 COMP. POL. 21 (1988); Taewoo Nam, *Freedom of Information Legislation and Its Impact on Press Freedom: A Cross-National Study*, 29 GOV'T INFO. Q. 521 (2012).

toward Soviet-style government domination of the media, but it is unclear how permanent that move may be.

This dichotomy may not be surprising in relation to how the threads of online expression and journalism have emerged and merged in recent years. In spaces as disparate as court cases in the United States and the microblog services in China, issues of anonymity are surfacing in terms of anonymous expression by citizens and use of anonymous content provided to journalists. While courts have recognized some degree of philosophical separation between the right to anonymous expression and the journalist's privilege to protect confidential sources, those issues remain intertwined in legal settings.<sup>311</sup>

Of course, anonymous or pseudonymous expression on the Internet is merely conditional or temporary.<sup>312</sup> Therefore, the second important area of development and focus will be how governments and laws handle the use of intermediaries and hardware registration as a means of identifying citizens who would prefer to remain anonymous in their online communications.

Recent law and policy developments indicate a global trend toward requiring intermediaries to be more cognizant and controlling of their users' identities and to require real-name registration for Internet and social media services and mobile phone hardware.<sup>313</sup> Real-name registration and hardware identification certification has become an emerging practice in countries trying to control use of the Internet in the name of societal order or economic development, such as China and South Africa.<sup>314</sup> For example, in Malaysia, a 2012 amendment to the Evidence Act of 1950 requires computer or mobile device owners, bloggers, online forum operators and editors, news outlets, and ISPs to provide and verify the identity of anyone posting from their

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<sup>311</sup> See Jason A. Martin & Anthony L. Fargo, *Rebooting Shield Laws: Updating Journalist's Privilege to Reflect the Realities of Digital Newsgathering*, 24 U. FLA. J.L. & PUB. POL'Y 47, 68–84 (2013).

<sup>312</sup> See SOLOVE, *supra* note 119, at 146–47.

<sup>313</sup> See *infra* notes 314–16 and accompanying text.

<sup>314</sup> See Warr, *supra* note 12; see also South Africa, *Freedom on the Net 2012*, *supra* note 299.

sites, accounts, or devices.<sup>315</sup> And in Thailand, a blog moderator received a suspended eight-month sentence and a fine for comments made by an anonymous user that were not deleted quickly enough.<sup>316</sup>

Even countries with relatively liberal laws about press freedom and Internet use have seen increased government pressure on intermediaries to divulge information about users who wish to remain anonymous. In May 2013, Germany passed a law that gives investigators access to information that could help identify users by their temporarily assigned IP addresses.<sup>317</sup> Officials from agencies as varied as police, security services, customs, and other criminal investigation units can demand that ISPs release their customers' names, addresses, account information, web history, and mobile phone data if they can show the information is needed to solve even low-level crimes like parking violations.<sup>318</sup> By the end of 2014, the United States stood alone among the countries identified for this analysis in its provisions immunizing third parties such as ISPs and other interactive computer service providers from liability for potential civil infractions committed by anonymous users.

Recent developments have made clear that a more cohesive multinational understanding of the right to publish anonymously online is needed. Therefore, it is incumbent upon free speech advocates to encourage states, governing bodies, and other entities to work toward an international standard of qualified legal protection for anonymous online speech. To that end, this analysis

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<sup>315</sup> LAWS OF MALAYSIA, Act A1432, Evidence (Amendment) (No. 2) Act 2012 (June 18, 2012), available at [http://www.federalgazette.agc.gov.my/outputaktap/20120622\\_A1432\\_BI\\_Act%20A1432%20BI-evidence%20\(amendment\)%20\(no.%202\).pdf](http://www.federalgazette.agc.gov.my/outputaktap/20120622_A1432_BI_Act%20A1432%20BI-evidence%20(amendment)%20(no.%202).pdf).

<sup>316</sup> See *Evolving Tactics of Internet Control and the Push for Greater Freedom*, FREEDOM ON THE NET 2012 6 (Sept. 24, 2012), available at <http://www.freedomhouse.org/report/freedom-net/freedom-net-2012>; see also Mong Palatino, *Malaysia's Sinister Internet Law*, MONG PALATINO (Sept. 24, 2012, 2:41 PM), <http://mongpalatino.com/2012/09/malaysias-sinister-internet-law/>.

<sup>317</sup> See *New Law Unmasks Anonymous Web Surfers*, THE LOCAL (May 3, 2013, 12:35 PM), <http://www.thelocal.de/society/20130503-49513.html>.

<sup>318</sup> *Id.*

of the global state of the law surrounding anonymous speech yields three suggestions.

First, free speech advocates in some countries could pursue the passage of anonymity shield statutes similar in purpose and nature to journalist's privilege shield laws in the United States. For instance, American courts have been concerned with online anonymity primarily in the two key areas: (1) journalists protecting confidential sources and (2) defendants in defamation cases who wish to maintain their anonymous or pseudonymous identities, often in the face of strategic lawsuits against public participation.<sup>319</sup> Given the parallels in the relationships between anonymity, online expression, and the legal process in those two areas, a case could be made for a qualified anonymity shield that would serve as a consistent check on infringement of the right of anonymous expression by developing a consistent *prima facie* test protective of distributing high-value online speech about political and social issues.

For example, in the United States, instead of a patchwork of state and federal common law balancing tests, an anonymity shield would allow defendants in defamation cases to invoke a speech-protective test that would allow judges to make summary judgment rulings in instances in which unmasking was not necessary.<sup>320</sup> Likewise, an anonymity shield would complement existing common law and statutory privileges for journalists by adding constitutional protection for the rights of sources to communicate newsworthy information to the public through journalists or other methods. Such an argument is at the heart of

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<sup>319</sup> See Martin et al., *supra* note 7, at 124–25. See also Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 876 (2000) (detailing the rise in the number of strategic lawsuits against public participation, or SLAPP suits, which are initiated by subpoenas in defamation cases in which the plaintiffs' goal appears to be to unmask the identity of online speakers, often with the sole or primary purpose of silencing criticism).

<sup>320</sup> For further arguments toward a tiered standard for unmasking anonymous defendants similar to multiple fault standards used in libel law, see generally Clay Calvert, Kala Gutierrez, Karla D. Kennedy & Kara Carnley Murrhee, *David Doe v. Goliath, Inc.: Judicial Ferment in 2009 for Business Plaintiffs Seeking the Identities of Anonymous Online Speakers*, 43 J. MARSHALL L. REV. 1 (2009).

many of the journalist's privilege protections that have sought to protect the identity of sources through their relationship with journalists.

An American anonymity shield law could serve as a model for other countries with similar liberalized political and media systems. Its widespread application obviously would be limited, however, because online anonymity law is more advanced in the United States than most countries, and because the divisions among countries are so complex and rooted in a variety of structural differences. While helpful in some countries, and a step in the right direction, the anonymity shield statutory solution does little to draw together disparate international laws.

Therefore, in the service of moving toward a more global solution, a second suggestion supports consideration of an international treaty or agreement recognizing the primacy of "core" online anonymous expression to public life, perhaps modeled after the Berne Convention<sup>321</sup> on intellectual property and authorship rights. The Berne Convention provides one historical precedent to advance common interests in the protection of the legal right of communication against the realities of commercial market pressures and related government interests. At a minimum, such a treaty would advocate for protection of high-value anonymous online speech as an important international civil right with public and private benefits that cross sovereign jurisdictions.

The widely held position that a global marketplace of ideas is rewarded with more, rather than fewer, contributors would be buoyed by an international agreement that respects anonymous expression as a legal right, and which formally recognizes that the

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<sup>321</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised at Paris, July 24, 1971, amended, September 28, 1979. The United States, a holdout for more than a century after Berne's original passage, was a notable late adopter. See The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988); see also Jane C. Ginsburg & John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1, 1-8 (1988) (summarizing the issues surrounding the United States' late adoption of the Berne Convention standards in Congressional legislation and the circumstances that led to its passage).

Internet has fostered new pathways for introducing ideas and modes of discussion of public issues to people across traditional borders.<sup>322</sup> Such an agreement would be rooted in the historical importance of anonymous public speech, which is reflected by the many nations that have recognized qualified legal rights for anonymity and expression.<sup>323</sup> The tradition of protecting anonymous speech on political and social topics also supports the clarification of a multinational understanding for how and when online anonymous expression should be balanced with other individual rights and social interests.<sup>324</sup> Furthermore, similar international rights examinations were developing in late 2013 in relation to issues of human rights of privacy, surveillance, and whistleblower protection in an era of digital data.<sup>325</sup> An international treaty could generate discussion that places anonymous expression into the proper legal context along with related online considerations such as privacy, reputation, and intellectual property.

Along with promoting participation in public life, free speech advocates also commonly cite the pursuit of individual self-fulfillment, the promotion of citizen autonomy, and the protection from retaliation for whistleblowers and other critics of societal power structures as benefits of protecting anonymous speech.<sup>326</sup>

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<sup>322</sup> See Tien, *supra* note 17, at 117.

<sup>323</sup> See generally MEIKLEJOHN, *supra* note 113, at 1–28 (arguing for unabridged public discussion as the basis for public participation in governance).

<sup>324</sup> See Ekstrand, *supra* note 26, at 35–36.

<sup>325</sup> See *Hearing at Inter-American Commission on Human Rights on Mass Surveillance*, ELECTRONIC FRONTIER FOUNDATION (Oct. 28, 2013, 10:15 A.M.), <https://www EFF.ORG/event/hearing-inter-american-commission-human-rights-mass-surveillance> (detailing the first international human rights law examination of the United States National Security Agency mass surveillance programs on Oct. 28, 2013).

<sup>326</sup> See C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47–48 (1989) (citing “self-realization and self-determination” as values critical to autonomy that are developed through freedom of speech); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–9 (1970) (arguing that “freedom of expression is essential as a means of assuring individual self-fulfillment”); Terry Morehead Dworkin & A.J. Brown, *The Money or the Media? Lessons from Contrasting Developments in U.S. and Australian Whistleblowing Laws*, 11

Those philosophical positions are supported by evidence-based arguments that citizens are capable of rational assessment of speech regarding public issues, including characteristics such as truth and quality, even when the speaker's identity is unknown or obscured by pseudonym.<sup>327</sup> Indeed, the United States Supreme Court has gone so far as to state that one of the core principles of the First Amendment is that "each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal."<sup>328</sup>

Despite any noble shared philosophical and legal intentions, a non-binding treaty or agreement may not have much practical influence in a global climate of increasing Internet regulation. This realization leads to a third suggestion, which calls for amendments to the United Nations' Universal Declaration of Human Rights and related documents that acknowledge anonymous expression as a civil right and as an important component of public discourse. This solution is the most complicated, but it would perhaps be the most effective option in service of the protection of international legal rights to communicate anonymously online.

A 2011 report by the United Nations' special rapporteur on the promotion of the right to freedom of opinion and expression<sup>329</sup> arguably laid groundwork for such an international agreement. The special rapporteur, Frank La Rue, expressed concern about attempts by various governments to restrict citizens' freedom to use the Internet, which he suggested should have even fewer legal limits than traditional media because of the Internet's unique interactive nature.<sup>330</sup> La Rue also warned of a chilling effect on speech when intermediaries, such as ISPs, are threatened with

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SEATTLE J. FOR SOC. JUST. 653 (2012) (comparing and contrasting international developments in whistleblower protection).

<sup>327</sup> See Lyrrisa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 805–25 (2010).

<sup>328</sup> *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994).

<sup>329</sup> Frank LaRue, *Report of the Special Rapporteur on the Promotion of the Right to Freedom of Opinion and Expression*, U.N. Human Rights Council, 17th Session, U.N. Doc. A/HRC/17/27 (May 16, 2011).

<sup>330</sup> *Id.* ¶¶ 23–27.



being held legally responsible for user content in some jurisdictions and are forced into censoring or informing on their users.<sup>331</sup> He cited anonymity as a privacy interest that facilitated public debate, and he criticized governments that attempted to identify Internet users or limit the right to be anonymous, saying that these governments could “impede the free flow of information and ideas online.”<sup>332</sup> Later in the report, the special rapporteur recommended that nations “ensure that individuals can express themselves anonymously online” and avoid adopting real-name registration requirements for online forums.<sup>333</sup>

Taking the special rapporteur’s report a step further, one legal scholar has suggested that international protection for anonymous speech already exists.<sup>334</sup> Molly Land of New York Law School argues that Article 19(2) of the International Covenant of Civil and Political Rights implicitly protects a right to use the Internet as a form of expression.<sup>335</sup> Article 19(2) states:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.<sup>336</sup>

Land goes on to suggest that Article 19(2) protects anonymity, which “is critically important for ensuring freedom of expression” because it allows people to express themselves on controversial issues without fearing negative consequences.<sup>337</sup> However, noting that the Internet also poses an increased risk of harm, particularly to targeted groups in areas where ethnic tensions are raw and potentially dangerous, Land also recommends that it may be

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<sup>331</sup> *Id.* ¶¶ 38–43.

<sup>332</sup> *Id.* ¶¶ 53–55.

<sup>333</sup> *Id.* ¶ 84.

<sup>334</sup> Molly Land, *Toward an International Law of the Internet*, 54 HARV. INT’L L. J. 393, 394 (2013) (arguing that Article 19’s explicit protection of “media” expression and information was intended to include technologies that developed afterwards such as the Internet).

<sup>335</sup> *Id.* at 394.

<sup>336</sup> International Covenant on Civil and Political Rights art. 19, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 178 (entered into force Mar. 23, 1976).

<sup>337</sup> Land, *supra* note 334, at 433.

necessary to limit intermediary immunity (such as Section 230 in the United States) to provide an incentive for ISPs to control some harmful behaviors.<sup>338</sup>

Another possible route to international protection for anonymity would be through a broader interpretation of the U.N. Universal Declaration of Human Rights. That Declaration covers arbitrary interference with correspondence,<sup>339</sup> the right to freedom of opinion and expression without interference,<sup>340</sup> the right to seek, receive, and share information “regardless of frontiers;”<sup>341</sup> and the right of association.<sup>342</sup> Although one may reasonably infer that anonymous online expression touches on all of these areas—and therefore deserves similar protection—explicit recognition would explicate international concern for this issue.

Amending international human rights declarations also could offer protection for the inherently delicate nature of online anonymity. In many cases, the simple act of unmasking the defendant is the only goal sought by the plaintiff.<sup>343</sup> This imbalance of rights and identity is acutely important when an individual tries to express unpopular viewpoints and becomes legally entangled with the interests of sovereign nations or other global power structures. Even in cases in which anonymous expression on important matters of political or social concern warrant protection, the reality of technology is that true anonymity online is fleeting at best and unobtainable at worst.<sup>344</sup> Amendments could point to the long-standing heritage of anonymous expression and the inherently global nature of anonymous speech online as two deserving reasons to declare specific additional rights of anonymous expression to existing areas of similar content.

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<sup>338</sup> *Id.* at 437.

<sup>339</sup> Universal Declaration of Human Rights art. 12, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 12, 1948).

<sup>340</sup> *Id.* art. 19.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* art. 20.

<sup>343</sup> See, e.g., Rowland, *supra* note 109, at 530 (noting that corporations often bring legal action against “gripe” sites primarily to unmask anonymous speakers).

<sup>344</sup> See SOLOVE, *supra* note 119, at 146–47.

## VI. CONCLUSION

Anonymous or pseudonymous publishing on matters of public and social affairs has a long tradition based mainly in geographic locations that were limited to a select group of individuals. However, the expansion of the Internet has created new legal dilemmas regarding how to balance rights of online anonymity with other interests in situations in which conventional physical boundaries no longer apply.

This analysis indicates that a comprehensive international understanding of anonymity as a legal right of expression remains elusive, with national standards varying based on government regulatory approaches and cultural attitudes about press freedom. However, the benefits of a greater global understanding of this topic have important implications for how people communicate ideas in situations in which protecting their identities, even temporarily, may be in their best interests. Therefore, we suggest three law and policy remedies that would preserve a qualified right to anonymous expression on topics of public life, balanced with other legal interests and safeguards to protect unmasking anonymous online speakers as a matter of course. Anonymity shield laws, international treaties, and amendments to international human rights declarations would serve to protect anonymous expression as a civil right while also drawing together a more cohesive global recognition of the importance of such speech.