

Authorship, Audiences, and Anonymous Speech

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Abstract: A series of United States Supreme Court decisions establishes that the First Amendment provides a qualified right to speak and publish anonymously, or under a pseudonym. But the Court has never clearly defined the scope of this right. As a result, lower courts have been left with little guidance when it comes to dealing both with the Internet-fueled growth of torts and crimes committed by anonymous speakers, and with the increasing number of lawsuits aimed at silencing legitimate anonymous speech. In this Article, we provide both positive and normative foundations for a comprehensive approach to anonymous speech. We first draw upon intellectual property theory, particularly as it relates to trademarks and copyright, to develop a positive analysis of the private and social costs and benefits of anonymous speech. Traditional First Amendment jurisprudence then supplies the missing normative component by providing two crucial presumptions that suggest how to weigh the relevant costs and benefits. The first is the anti-paternalism presumption. This assumes that audiences are capable of responding to anonymous speech in much the same way they respond to generic, nontrademarked products—by recognizing that the product, in this case speech, lacks an important quality indicator and should be evaluated accordingly. In this manner, audiences can minimize the potential social harm of many forms of anonymous speech. The second presumption, which we refer to as “more is better,” favors more speech over less, and thus places considerable weight on anonymity as a tool for encouraging otherwise reluctant speakers to come forward—even at the risk of simultaneously encouraging more potentially harmful speech. These twin presumptions form the basis for the detailed guidance we supply for legislatures contemplating regulation of anonymous speech, and for courts seeking to balance the rights of anonymous speakers with other important interests.

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I. Introduction

*Thence comes it that my name receives a brand,
And almost thence my nature is subdu'd
To what it works in, like the dyer's hand.*

--William Shakespeare, Sonnet 111^{***}

What's in a name? Audiences often rely on author identity to reduce the search costs involved in sorting and interpreting the constant barrage of messages they receive.¹ Yet the First Amendment, as interpreted by the United States Supreme Court, confers upon authors a right to speak anonymously or pseudonymously, even when doing so interferes with audiences' attempts to decode their messages.² In *McIntyre v. Ohio Elections Commission*, the Supreme Court emphasized the contributions anonymous speakers have made to public discourse and held that the State cannot punish citizens for pseudonymous publication of handbills concerning a ballot initiative.³ But this right to speak anonymously is not absolute. In *McConnell v. FEC*, the Court emphasized the dangers of anonymous speech and qualified the right to speak anonymously,

^{***} WILLIAM SHAKESPEARE, *Sonnets (London 1609)*, in THE RIVERSIDE SHAKESPEARE, 1839 (1998).

¹ For recent discussions of authorial attribution and its relation to trademark law, see Jane C. Ginsburg, *The Author's Name as a Trademark: A Perverse Perspective on the Moral Right of "Paternity"?*, 23 CARDOZO ARTS & ENT. L.J. 379 (2005); Laura Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377 (2005); Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171 (2005); see also *infra* Part III.A. In face-to-face communications, the communicative impact of identity is even greater: an audience will rely on the speaker's posture, dress, body language, and facial expressions to gauge the sincerity and credibility of her message. See ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

² Throughout this article, we generally use the term "anonymous" to refer to both anonymous and pseudonymous speech—that is, to speech by an author whose identity is unknown, whether or not that identity is ultimately traceable. See L. Detweiler, *Identity, Privacy, and Anonymity on the Internet*, § 3.1 (1993) ("anonymity is the absence of identity"), available at <http://www.rewi.hu-berlin.de/jura/proj/dsi/netze/privint.html>.

³ 514 U.S. 334 (1995).

though none too explicitly, by upholding a statutory provision requiring persons who purchase television advertisements advocating for or against a candidate for federal office to disclose their identities.⁴

These decisions, and the handful of others addressing anonymous speech,⁵ provide insufficient guidance to lower courts dealing with the growing problem of malfeasance by anonymous speakers online, and with the growing threat frivolous lawsuits pose to legitimate anonymous speech.⁶ Although speech emanating from unidentifiable sources contributes to the diversity, quantity, and quality of voices in the marketplace of ideas,⁷ anonymity can also shield speakers from liability for a variety of torts, including defamation, invasion of privacy, fraud, copyright infringement, and trade secret misappropriation. A relatively “strong” right to speak anonymously therefore may induce more “core” First Amendment speech while enabling more tortfeasors to avoid detection; on the other hand, a weak or nonexistent right to speak anonymously would tend to chill core speech but also render more tortfeasors amenable to legal process.

⁴ 540 U.S. 93 (2003).

⁵ See *infra* note 10.

⁶ The growth is largely attributable to the Internet, which has made anonymous speech much more common. See generally Lyrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000). A new category of lawsuits against anonymous online speakers has garnered the label “cyberslapps” from those who see the suits as frivolous; people who tend to view them favorably refer to the speech at issue as “cybersmears.” Compare Shaun B. Spencer, *CyberSLAPP Suits and John Doe Subpoenas*, 19 J. MARSHALL J. COMP. & INFO. L. 493 (2001), with Thomas G. Ciarlone, *Cybersmear May Be Coming to a Web Site Near You*, 70 DEF. COUNS. J. 51 (Jan. 3, 2003).

⁷ We concede at the outset that the “marketplace” metaphor has its limitations. As Jeffrey Stake notes, however, in spite of criticism the metaphor “will likely persist as a normative framework for analyzing First Amendment issues until we find a better model.” Jeffrey Evans Stake, *Are We Buyers or Hosts? A Memetic Approach to the First Amendment*, 52 ALA. L. REV. 1213, 1214 (2001). And we do think that the metaphor, hackneyed and incomplete as it may be, captures some key (albeit contestable) assumptions underlying current First Amendment law. See generally *infra* Part IV.B.

This Article aims to assist lawmakers and courts to find the proper balance between the right to speak without disclosing one’s true identity and the rights of those injured by anonymous speech. To this end, we present both a positive and a normative analysis of anonymous speech. In the positive analysis, we examine the private costs and benefits that speakers encounter when deciding whether to publish with or without attribution; among these costs and benefits are the potentially differing responses of audiences to attributed and nonattributed speech. For example, speakers may feel less vulnerable to retaliation when they speak anonymously, and thus may be more apt both to speak truthfully *and* to engage in tortious or harmful speech. At the same time, audiences are likely to discount the value of nonattributed speech, thus mitigating some (but not all) of anonymous speech’s potential harm.⁸ In theory, audiences could be either better or worse off under a regime that grants strong protection to anonymous speech, as opposed to one that grants only weak protection, depending upon which effect—the production of more socially valuable speech, or the production of more harmful, though discounted, speech—predominates. Put another way, speakers’ pursuit of the optimal balance of private costs and benefits in a regime that protects anonymity may produce outcomes that diverge from the optimal balance of social costs and benefits, as viewed from the standpoint of the audience. The extent of the

⁸ As we will show, when speech is completely anonymous, rational audiences can be expected to take the lack of an attributed source into consideration in assessing the speech’s quality and truth-value. On the other hand, when the speaker uses a pseudonym, audiences may not discount the value of the speech very much, perhaps because they are not aware that the author’s name is a pseudonym. But even when audiences are made aware of this fact, they may (rationally) choose not to discount pseudonymous speech as much as anonymous speech, on the assumption that the pseudonymous author’s identity is known to what Saul Levmore refers to as a “responsible intermediary,” *see* Saul Levmore, *The Anonymity Tool*, 144 U. PA. L. REV. 2191, 2202 (1996); and because pseudonyms sometimes serve a trademark-like function of signaling a degree of quality control, *see* Heymann, *supra* note 1, at 1419; Lastowka, *supra* note 1, at 1194.

divergence is unclear, however, and thus the implications of the positive analysis standing alone are indeterminate.

Our normative analysis nevertheless suggests a way of resolving this indeterminacy. Traditional First Amendment theory suggests two presumptions that can assist in weighing the relevant costs and benefits of anonymous speech. The first is that the audience for “core” First Amendment speech is both educated and critical—and thus able to defend itself, in large part, from the effects of harmful anonymous speech.⁹ This assumption is not empirically based, to be sure, but it is consonant with versions of democratic theory that assume that citizens are rational and capable of self-government. The second is that more speech is, in general, better than less, and therefore that measures designed to reduce the quantity or diversity of speech are inherently suspect. To the extent the anonymity option makes otherwise reluctant speakers more willing to speak, therefore, it is presumptively a social good, despite some risk that it will induce some harmful speech as well. Taking these assumptions as touchstones, we advocate (in the context of claims involving torts such as defamation) a constitutional privilege for anonymous speech, which privilege may be overcome only when the party seeking disclosure of the speaker’s identity presents sufficient evidence from which the trier of fact may conclude that the speaker has committed the tort at issue, and that disclosure of that person’s identity is essential to the alleged victim’s case. Laws requiring disclosure in the context of political speech, on the other hand, should be (if anything) even more difficult to justify; in the context of commercial speech,

⁹ The Supreme Court has been willing to indulge more paternalistic assumptions about the audience in the context of commercial speech. Consumer protection is an accepted rationale for regulating commercial speech. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (noting that commercial speech may be regulated to ensure that it is not false and misleading).

however, the assumption of a rational, critical audience may give way to more paternalistic assumptions and thus make it relatively easy for the state to compel disclosure.

Part II inspects the unstable foundation upon which the Supreme Court has grounded the right to speak anonymously in cases such as *McIntyre* and *McConnell*. Part III presents the positive analysis of the private and public costs and benefits of anonymous speech referred to above. Among other things, this Part makes use of concepts from the law of intellectual property (particularly trademarks and copyright) to illuminate some recurring problems surrounding the publication of anonymous speech. Part IV makes the case that our two presumptions, of rational audiences and more-is-better, are firmly grounded in conventional First Amendment jurisprudence. Part V employs the positive and normative analyses of anonymous speech to provide guidance to legislatures attempting to curb anonymous speech (particularly anonymous speech online) and to courts adjudicating cases that present conflicts between the right to speak anonymously and other important interests.

II. The Many Faces of Anonymity

The Supreme Court has held that the First Amendment protects anonymous speech, but the scope of that protection is murky. The two main decisions, *McIntyre v. Ohio Elections Commission* and *McConnell v. FEC*, rely on conflicting assumptions about how audiences respond to anonymous or pseudonymous speech and, ultimately, conflicting assumptions about its value. The Court's jurisprudence has thus generated conflicting approaches to balancing such speech against other important rights.

A. *McIntyre* and the Contributions of Anonymous Speech

The leading Supreme Court case on anonymous speech is *McIntyre v. Ohio Elections Commission*.¹⁰ Margaret McIntyre wrote handbills opposing a school tax referendum and then handed them out to people attending public meetings to discuss the tax. She omitted her name from some of the handbills, instead signing them: “CONCERNED PARENTS AND TAX PAYERS. [sic]”¹¹ Responding to a complaint from a school official, the Ohio Elections Commission fined McIntyre \$100 for violating an Ohio law forbidding distribution of any publication promoting a ballot issue unless it contained the “name and residence” of the person “who issues, makes, or is responsible therefor.”¹² McIntyre appealed, and the Ohio Supreme Court held that the Ohio law did not violate the First Amendment, since the minor burden on speakers posed by the law was more than offset by the state interest in helping voters assess the “validity” of campaign literature and “identify[ing] those who engage in fraud, libel or false advertising.”¹³ The Supreme Court struck down the Ohio law on a 7-2 vote, with Justice Scalia and Chief Justice Rehnquist dissenting. The Court held that “an author’s decision to remain

¹⁰ 514 U.S. 334 (1995). Three other cases deal directly with anonymous speech. In *Watchtower Bible & Tract Soc’y v. Village of Stratton*, 536 U.S. 150 (2002), the Court addressed the constitutionality of an ordinance prohibiting door-to-door canvassing without a permit from the mayor’s office. The Court struck down the ordinance on the grounds that it was overbroad and not sufficiently tailored to the interests of preventing fraud and crime and protecting privacy. *Id.* at 168-69. The Court cited *McIntyre* for the proposition that the permit requirement would have a “pernicious effect” in part because it “necessarily results in a surrender of anonymity.” *Id.* at 165. *See also* *Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 199-200 (1999) (striking down state law requiring people circulating petitions dealing with issue referenda to wear identification badges), and *Talley v. California*, 362 U.S. 60, 80 (1960). *Talley* struck down a Los Angeles ordinance that prohibited *all* anonymous handbilling, holding that Los Angeles could employ means less restrictive of freedom of expression in protecting its citizens from fraud. *Id.* *See also* *NAACP v. Button*, 371 U.S. 415 (1963) (right to anonymous association).

¹¹ 514 U.S. at 337.

¹² *Id.* at 338 & n.3.

¹³ *Id.* at 339.

anonymous, like other decisions concerning omissions or addition to the content of a publication, is an aspect of freedom of speech protected by the First Amendment.”¹⁴

The Court rested its decision on two grounds. The first ground was instrumental: Protecting anonymity is necessary to induce some authors to contribute valuable information to the marketplace of ideas. The Court lauded the contributions anonymous and pseudonymous authors have made to the “progress of mankind,”¹⁵ citing political examples such as the *Federalist Papers* and literary examples such as Mark Twain and George Eliot.¹⁶ The Court’s opinion focused on benign reasons motivating speakers to remain anonymous: fear of retaliation or reprisal, the desire to avoid social ostracism, the wish to protect privacy,¹⁷ or the fear that the audience’s biases will distort the meaning of the work.¹⁸ The Court grandiloquently concluded that “[a]nonymity is a shield from the tyranny of the majority”¹⁹ without which public discourse would certainly suffer.

The Court’s second ground for protecting anonymous speech was authorial autonomy. An author’s decision to remain anonymous is an exercise of autonomy over choice of content,

¹⁴ *Id.* at 342. See Lee Tien, *Who’s Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117 (1996) (arguing that the Court treated “anonymity as the speaker’s rightful choice” in *McIntyre*).

¹⁵ *Id.* at 341. In his concurrence, Justice Thomas cited historical examples to show that the Framers believed in protecting anonymous speech. He concluded: “[W]hether certain types of expression have ‘value’ today has little significance; what is important is whether the Framers in 1791 believed anonymous speech sufficiently valuable to deserve the protection of the Bill of Rights.” *Id.* at 370 (Thomas, J., concurring).

¹⁶ *Id.* at 342.

¹⁷ *Id.* at 341-42. The Court further noted that the right may be particularly important for “persecuted groups” who criticize oppressive practices. *Id.* at 342.

¹⁸ *Id.* at 342 n.5.

¹⁹ *Id.* at 357. Indeed, the Court concluded that protection of anonymity is therefore consistent with the “purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.” *Id.*

and “an author generally is free to decide whether or not to disclose his or her true identity.”²⁰ The Court labeled identification requirements “intrusive” because they require authors to reveal “the content of [their] thoughts on a controversial issue.”²¹ In essence, the Court treated the decision to remain anonymous as an editorial judgment like any other, which makes choosing to omit one’s name no different than choosing to omit an opposing viewpoint or to include serial commas.

Once the Court equated the author’s name with all other editorial content, the outcome of *McIntyre* was clear. If an author’s name is “content,” it logically follows that the statute in *McIntyre* was a content-based regulation. The statute required particular content (i.e., the author’s name) to be included in an author’s work.²² Moreover, the statute’s application was triggered only by publications that dealt with particular subjects (ballot issues or candidates).²³ Ultimately, however, Ohio’s content-based disclosure requirement was unconstitutional only because it regulated speech “at the core of the protection afforded by the First Amendment.”²⁴ Handbills that seek to influence “issue-based elections” are “political speech” entitled to every bit as much First Amendment protection as speech advocating the election of a candidate.²⁵

²⁰ *Id.* at 341.

²¹ *Id.* at 355.

²² *Id.* at 338 n.3.

²³ Ohio Rev. Code Ann. § 3599.09(A) (1988).

²⁴ *McIntyre*, 514 U.S. at 345-46.

²⁵ *Id.* at 347.

Indeed, the Court asserted that “No form of speech is entitled to greater constitutional protection than Mrs. McIntyre’s.”²⁶

A content-based regulation of core political speech almost never survives strict scrutiny, and the regulation in *McIntyre* was no exception. The Court rejected Ohio’s assertions that the regulation was necessary to “provid[e] the electorate with relevant information” and to prevent fraud and libel.²⁷ The Court saw no reason to think that McIntyre’s handbill was misleading, essentially glossing over the implication that others supported the arguments made in the handbill. Moreover, the Court did not think that McIntyre’s name was likely to be useful to the electorate in evaluating her message, noting that the name of the author of a “handbill written by a private citizen who is not known to the recipient” is likely to “add little, if anything, to the reader’s ability to evaluate the document’s message.”²⁸ The mere possibility that an author’s name might, in some cases, “buttress or undermine the argument in a document” was insufficient.²⁹ The Court also rejected as insufficient Ohio’s second asserted interest--the “ancillary benefit” of deterring and detecting fraud and libel.³⁰ Although the Court believed that this interest “carries special weight during election campaigns,” it found that the interest could be protected effectively through direct prohibitions on fraud and libel.³¹

²⁶ *Id.*

²⁷ *Id.* at 335.

²⁸ *Id.* at 348.

²⁹ *Id.*

³⁰ *Id.* at 350-51.

³¹ *Id.* at 249.

Despite the Court’s praise of anonymous speech throughout *McIntyre*, the opinion acknowledges that First Amendment protection is not absolute.³² The Court envisions a balancing process to ensure that speakers remain accountable for fraud, libel, or other unlawful acts. Indeed, dictum in *McIntyre* suggests several types of identification requirements that might survive constitutional scrutiny.³³ These include requirements applicable “only to the activities of candidates and their organized supporters,”³⁴ requirements applicable only to “elections of public officers,”³⁵ and requirements applicable only to “leaflets distributed on the eve of an election.”³⁶ Although the Court never fully explains this dictum, one possible explanation is that the right to speak anonymously is qualified precisely because anonymity sometimes deprives the audience of information that has significant communicative value. The Court’s decision acknowledges that an author’s identity, as content, contributes to the communicative impact of her work.³⁷ As the Court notes, in the realm of political rhetoric a speaker’s identity “is an important component of many attempts to persuade.”³⁸ The Court also concedes that author identity helps “critics in

³² See *id.* at 358 (Ginsburg, J., concurring) (suggesting that the State may in other, larger circumstances require the speaker to disclose its interest by disclosing its identity).

³³ *Id.* at 380-81 (Scalia, J., dissenting). Justice Scalia notes, correctly, that the Court’s indication that a “more limited identification requirement” might be upheld is inconsistent with its application of “exacting scrutiny” in *McIntyre*.

³⁴ *Id.* at 351.

³⁵ *Id.*

³⁶ *Id.* at 352.

³⁷ “In most circumstances we attend as carefully to the social status of the speaker, and to the social context of her words, as we do the bare content of her communications.” Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 640 (1990).

³⁸ *McIntyre*, 514 U.S. at 343 (quoting *City of Ladue v. Gilleo*, 512 U.S. 43 (1994)).

evaluating the quality and significance of the writing.”³⁹ But this concession suggests that an author’s name may be even more important than other types of “content,” and stripping an author’s identity from a work may deprive the audience of an important clue to unlocking its meaning.

Why are the interests in protecting speaker autonomy and increasing contributions to the marketplace of ideas enough to justify, in the name of the First Amendment, depriving speakers of information that might be needed to correctly interpret a work? Author identity, the Court asserts, is not “indispensable” to the interpretation of a work.⁴⁰ The Court reaches this conclusion based on its theory regarding audience response to anonymous speech. Toward the end of the *McIntyre* opinion, the Court posits that the “inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source.”⁴¹ However, this conclusion rests on the assumption that the audience will use other clues of quality and significance to play the role that might in some cases be played by author identity.

The Court’s explanation of the process by which the audience “interprets” author anonymity is oblique. As noted above, the Court suggests that the identity of an author unknown to the audience would add few clues to the meaning of the text. Yet even where an author’s identity would be helpful to an audience, the Court believes that the audience is skilled enough to interpret most messages without it. The Court quotes with approval the following statement from *New York v. Duryea*:

³⁹ *Id.* at 342 n.5; *see also id.* at 348 n. 11 (noting that a source’s identity is “helpful in evaluating ideas”).

⁴⁰ *Id.* at 342 n.5.

⁴¹ *Id.* at 353 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)).

Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is "responsible," what is valuable, and what is truth.⁴²

The quote makes several contestable assumptions about the audience of anonymous speech. Crucially, it presumes the existence of an audience united by common values and habits of interpretation. But the audience for anonymous speech is essentially a construct. The Court did not consult poll data or experts before deciding that Margaret McIntyre's handbill would not mislead or fool the voters who received it. Instead, the Court simply stated that "[t]here is no suggestion that the text of [McIntyre's] message was false, misleading, or libelous," even though the fact that it was signed "Concerned Parents and Taxpayers" might well lead one to assume that numerous citizens had joined in the handbill.⁴³ What the Court seems to be suggesting is that anyone who read McIntyre's message critically would not be misled—taking into account the facts that the author was unknown, that anyone could adopt the label "Concerned Parents and Taxpayers," and that the text had grammatical errors, an unsophisticated graphic design, and a clear bias on a controversial local political issue.

Thus the *McIntyre* Court appears to be imputing, in the name of the First Amendment, certain qualities to the audience of anonymous speech. Ostensibly this audience is composed of common men, who can exercise common sense to give the proper weight to anonymous speech. The "common man" in the audience presumably will use the tone and style of the text, the

⁴² *Id.* at 349 n. 11 (quoting *New York v. Duryea*, 351 N.Y.S.2d 978, 996 (1974)).

⁴³ *Id.* at 337.

context in which it appears, and the persuasiveness of its arguments in deciding “what is ‘responsible,’ what is valuable, and what is truth.” The Court portrays this as simply an instance of the marketplace of ideas determining the value of ideas⁴⁴ and demands no empirical evidence about how any particular audience member would interpret anonymous speech.

The Court’s theory of audience response to anonymous speech is a critical underpinning of the *McIntyre* decision, but the Court never spells out the full implications of the theory. The Court implicitly acknowledges that audiences cannot always gauge the value of anonymous speech; as a result, both individual audience members and reasoned discourse as a whole may be harmed. Moreover, the Court recognizes that anonymity should not shield abusive speakers from accountability, and that the right to speak anonymously may be outweighed by other important rights. But the Court gives little guidance about how to calibrate the balance.⁴⁵ Instead, the Court merely expresses faith in the audience’s ability to discount anonymous speech, reducing (but not eliminating) any potential harm that might flow from it.

B. *McConnell* and the Dangers of Anonymous Speech

The Court’s faith in the critical faculties of the audience for anonymous speech appeared to waver in *McConnell v. FEC*.⁴⁶ *McConnell* addressed the constitutionality of several

⁴⁴ Justice Scalia’s dissent, joined by Chief Justice Rehnquist, argued that the Ohio law “forbids the expression of no idea, but merely requires identification of the speaker when the idea is uttered in the electoral context.” *Id.* at 378. The dissent further argued that in the absence of evidence that the framers intended the First Amendment to protect anonymous speech, the Court should defer to the “long-accepted practices” of the states in regulating the electoral process. *Id.*

⁴⁵ See *id.* at 381 (“It may take decades to work out the shape of this newly expanded right-to-speak-incognito, even in the elections field.”) (Scalia, J., dissenting).

⁴⁶ 540 U.S. 93 (2003).

provisions of the Bipartisan Campaign Reform Act of 2002 (“BCRA”),⁴⁷ and, in the process, clouded the status of the constitutional right to speak anonymously.⁴⁸ The BCRA’s main purpose was to close loopholes in existing campaign finance regulations, especially the “soft money” loophole in the Federal Election Campaign Act.⁴⁹ However, the BCRA also imposed various disclosure requirements whose effect was to limit certain types of anonymous political speech during election campaigns.⁵⁰ Largely ignoring *McIntyre*, the Supreme Court upheld most of these disclosure requirements, often relying on paternalistic assumptions about the imagined audience at which this anonymous campaign speech would be targeted.

A bit of background is necessary to understand the BCRA’s disclosure requirements. In 1971, the Federal Election Campaign Act (FECA)⁵¹ began requiring sponsors of political ads expressly advocating election or defeat of a candidate to disclose their names to the Federal Election Commission.⁵² The FEC construed the disclosure provision to apply only when an election ad contained “‘magic words’ such as ‘Elect John Smith’ or ‘Vote Against Jane Doe.’”⁵³ The FECA did *not* require sponsors of “issue ads” to disclose their identities. Issue ads do not

⁴⁷ Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C. and 47 U.S.C.). The Act is also commonly referred to as the McCain-Feingold Act.

⁴⁸ See, e.g., Richard M. Cardillo, *I Am Publius, and I Approve This Message: The Baffling and Conflicted State of Anonymous Pamphleteering Post-McConnell*, 80 NOTRE DAME L. REV. 1929 (2005) (detailing the confusion *McConnell* created in lower courts).

⁴⁹ The FECA limits the amount of contributions made to influence federal election campaigns (“hard money” contributions); these limits, however, do not apply to contributions of “‘nonfederal money’—also known as ‘soft money’—to political parties for activities intended to influence state or local elections.” *McConnell*, 540 U.S. at 123.

⁵⁰ See, e.g., Pub. L. No. 107-155, 116 Stat. 81, §§ 201, 311, and 504.

⁵¹ 2 U.S.C. § 431 et. seq.

⁵² *McConnell*, 540 U.S. at 126 (citing *Buckley v. Valeo*, 424 U.S. 1, 80 (1976)).

⁵³ *Id.*

expressly advocate election or defeat of a candidate. Not only were issue ads exempt from the disclosure requirements of the FECA; they were also exempt from provisions that capped the source and amount of funds that could be spent on express advocacy.⁵⁴ This meant that anyone who wanted to sponsor an ad advocating for or against a candidate could avoid the FECA's disclosure and spending limitations as long as the sponsor was clever enough to avoid using the "magic words." As a result, issue ads meant to influence elections proliferated.⁵⁵

One of the chief goals of the BCRA was to curb perceived abuses that flowed from FECA's differential treatment of issue ads.⁵⁶ To achieve this goal, the BCRA broadened the FECA's disclosure requirements to apply to a new category of ads known as "electioneering communications." Electioneering communications are "broadcast, cable, or satellite communication[s]" that refer to a candidate for federal office in the 60 days prior to the general election or the 30 days prior to the primary.⁵⁷ The BCRA subjected this new category of electioneering communications to "significant disclosure requirements."⁵⁸

Justices Stevens and O'Connor upheld the electioneering provisions in a decision joined by Justices Breyer, Ginsburg, and Souter.⁵⁹ The *McConnell* majority revealed a relatively hostile

⁵⁴ Express advocacy must be financed with "hard money," that is, "funds that are subject to the [Federal Election Campaign] Act's disclosure requirements and source and amount limitations." *Id.* at 122. Prior to the BCRA, "issue ads" could be financed with "soft money," that is, funds not subject to the FECA's limitations.

⁵⁵ *Id.* at 127-28.

⁵⁶ *Id.* See also *id.* at 194.

⁵⁷ 2 U.S.C.A. Sec. 434(f)(3)(A)(i) (Supp. 2003). They also must be targeted to an audience of at least 50,000 viewers or listeners within the relevant electorate. This definition of electioneering communications, which appears in section 201 of the BCRA, amends section 304 of the FECA.

⁵⁸ *McConnell*, 540 U.S. at 190. The BCRA also limits the funding of electioneering communications by corporations and unions.

⁵⁹ *Id.* at 114-225 (Stevens and O'Connor, JJ., delivered the opinion of the Court with respect to BCRA Titles I and II, in which Souter, Ginsburg, and Breyer, JJ., joined).

attitude toward anonymous political speech. To begin with, the *McConnell* majority agreed that the proliferation of issue ads during election campaigns was a problem and implied that this was at least in part because the ads were often anonymous. For example, the Court noted that sponsors of “*so-called* issue ads . . . often used misleading names to conceal their identity.”⁶⁰ As this sentence suggests, the Court questioned both the motives of those who sponsor issue ads and the contribution they make to public debate. The objectionable ads were not “true issue ad[s]” because their sponsors sought to support or defeat a candidate, albeit without using the “magic words” denoting express advocacy; presumably a true issue ad would address a public controversy without connecting it any way to particular candidates.⁶¹ Even though the deception would have been readily obvious to potential voters, the Court denigrated the motives of the sponsors because they were attempting to disguise their objective: to support or defeat a particular candidate.

Furthermore, the Court denigrated the motives of the sponsors precisely because they often chose to remain anonymous. The Court criticized them as attempting to “hide themselves from the scrutiny of the voting public,” and accepted the argument that this would impair the public’s ability “to make informed choices in the political marketplace.”⁶² What is it about these kinds of anonymous ads that would impair the public’s ability to make informed political choices? The Court endorsed the notion that the ads were “dubious and misleading”⁶³ because the pseudonyms under which they were aired suggested a broad base of support for their views.

⁶⁰ *Id.* at 128 (emphasis added).

⁶¹ *Id.* at 126.

⁶² *Id.* at 197 (Stevens and O’Connor, JJ.).

As an example, the Court cited “‘Republicans for Clean Air,’ which ran ads in the 2000 Republican Presidential primary, and was actually an organization consisting of just two individuals . . .”⁶⁴ One might quibble that this is little different than Margaret McIntyre calling herself “Concerned Parents and Taxpayers,” which the Court deemed *not* to be misleading.⁶⁵ Certainly the nature of the chosen pseudonym is not much different here than it was in *McIntyre*.

Why should the voting public be smart enough to see through Margaret McIntyre’s attempt to give her message more weight but not smart enough to see through the same tactic when used by “Republicans for Clean Air”? Moreover, whatever happened to the argument that the choice to remain anonymous is just like any other editorial choice an author might make? The *McConnell* Court gave no deference to this editorial choice when it noted that many “mysterious groups” ran issue ads under “misleading names” to increase the ads’ effectiveness.⁶⁶ No longer was this a “choice of content like any other,”⁶⁷ but was instead just a dirty campaign trick.

The Court’s hostile assumptions about both the motives behind and the importance of anonymous political ads led it to conclude that the BCRA’s various disclosure requirements were constitutional. The Court’s scrutiny of BCRA § 201 illustrates some of these assumptions.⁶⁸

⁶³ *Id.* at 197 (citing the district court’s per curiam opinion with approval).

⁶⁴ *Id.* at 128.

⁶⁵ *See supra* Part II.A.

⁶⁶ *McConnell*, 540 U.S. at 128 n.23. Admittedly, the Court was also concerned that these issue ads were being used by candidates and political parties to circumvent FECA limitations. *Id.* at 129.

⁶⁷ *McIntyre*, 514 U.S. at 355.

⁶⁸ These same assumptions are mirrored in the Court’s treatment of Section 504 of the BCRA. Section 504 directly affects the right to speak anonymously. Section 504 amends the Communications Act of 1934 to require broadcasters to keep public records of all requests to purchase broadcast time “made by or on behalf of a legally

Section 201 amended the FECA to require anyone who disburses, or makes a contract to disburse, ten thousand dollars or more per calendar year⁶⁹ on electioneering communications to file a statement with the FEC. This statement must identify, among other things, all those who contributed \$1,000 or more to the disbursement. Although the Court recognized that this disclosure requirement might, as applied, interfere with the First Amendment right of association,⁷⁰ it gave no apparent weight to the potential for interference with anonymous political speech. Indeed, the Court concluded that section 201's disclosure requirements "d[o] not prevent anyone from speaking."⁷¹ The Court found the requirement was amply supported by three "important state interests," namely "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions."⁷²

qualified candidate for public office." More sweepingly, the disclosure provision also applies to purchasers of broadcast time to "communicate[] a message relating to *any political matter of national importance*." In essence, Section 504 contains three disclosure requirements: (1) the candidate request requirement, which affects requests "made by or on behalf of" candidates for public office, (2) the election message requirement, which affects requests to broadcast information referring to a "legally qualified candidate" or to any election to Federal office; and (3) the issue request requirements, which affects requests that refer to any "national legislative issue of public importance," or any "political matter of national importance." BCRA § 504; 47 U.S.C.A. § 315 (e)(1) (Supp. 2003). The Court concluded that the section 504 provision was facially constitutional under "any potentially applicable First Amendment standard, including that of heightened scrutiny." *See McConnell*, 540 U.S. at 245 (Breyer, J.). The Court's opinion focused primarily on the burden the regulation placed on broadcasters, rather than the burden it placed on would-be anonymous speakers. *See id.* at 359 (Rehnquist, J., dissenting) (citing examples from the majority opinion to argue that "[t]he Court approaches § 504 almost exclusively from the perspective of the broadcast licensees"). The Court reasoned that section 504's burdens are similar to those already imposed on broadcasters by Federal Communications Commission regulations. Essentially ignoring the rights of the would-be anonymous speakers, the Court refused to apply exacting scrutiny to the disclosure requirement. *But see Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (2006) (per curiam) (allowing an "as-applied" challenge to the disclosure provisions by a self-proclaimed "grassroots lobbying organization" to go forward).

⁶⁹ 2 U.S.C.A. §§ 434(f)(2)(A), (B), (D) (Supp. 2003).

⁷⁰ *McConnell*, 540 U.S. at 198 (Stevens and O'Connor, JJ.).

⁷¹ *Id.* at 201 (quoting *McConnell v. FEC*, 251 F. Supp.2d at 241).

⁷² *Id.* at 196.

The Court’s reliance on the “informational rationale” is troubling.⁷³ An author’s name will almost always provide relevant information to the audience, and if that interest alone is sufficient to overcome the right to speak anonymously, the right has little meaning.⁷⁴ Moreover, as Justice Thomas noted in his dissent, the *McIntyre* Court explicitly rejected the notion that the “simple interest in providing voters with additional relevant information . . . justif[ied] a state requirement that a writer make statements or disclosures she would otherwise omit.”⁷⁵ Certainly the interest in providing information to the audience would not justify requiring authors to make other types of content additions. A political ad might be more informative if it were broadcast in black and white and its message was read somberly by an announcer, but a statute attempting to require this would certainly be struck down as an interference with political speech. Nor, one suspects, would the government be constitutionally justified if it were to require all books to include an index, even if this would make them more informative.

The *McConnell* Court did not rely solely on the informational rationale in upholding section 201’s disclosure requirements, however, and for that reason it is possible to make a

⁷³ Raleigh Levine notes the Court’s growing reliance on the informational rationale in the electoral context: “[T]he Court remains committed to the long-ingrained national conception that the electorate should consist of informed, intelligent voters, and that the Court has become increasingly concerned that voters may not exercise their right to vote in the manner that the Court prefers.” Raleigh Hannah Levine, *The (Un)Informed Electorate: Insights into the Supreme Court’s Electoral Speech Cases*, 54 CASE W. RES. L. REV. 225, 243 (2003). Levine notes that historically the interest in ensuring informed voters helped justify literacy tests. *Id.* at 239-40.

⁷⁴ See Elizabeth Garrett, *McConnell v. FEC and Disclosure*, 3 ELECTION L.J. 237, 237 (2004) (noting that *McConnell*’s informational rationale could also be applied in the context of issue elections).

⁷⁵ *McConnell*, 540 U.S. at 276 (Thomas, J., concurring in part and dissenting in part). See also *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (striking down law used to “punish a newspaper editor” for “publishing an editorial on election day” and rejecting argument that statute was a reasonable means of protecting the public “from confusive [sic] last-minute charges and countercharges”); Tien, *supra* note 14, at 155 (stating that the identity of Margaret McIntyre would have provided very little information to her audience and thus “[t]here [wa]s no victim in *McIntyre*. The Court could wax poetic about the virtues of anonymous speech because the only victim would be discourse itself.”)

credible argument distinguishing *McConnell* from *McIntyre*. In *McConnell*, the justices in the majority gave great weight to the argument that the disclosure requirements were necessary to deter corruption and prevent circumvention of other campaign finance regulations.⁷⁶ The campaign regulation in *McIntyre* affected anonymous speech in support of a ballot referendum, i.e., advertising on behalf of an *issue*. By contrast, the regulations in *McConnell* affected advertising by supporters of a *candidate*, creating a danger that the candidate, if elected, would “repay” his supporters with favorable legislation. Thus, the anti-corruption rationale and anti-circumvention rationales are arguably stronger in *McConnell* than *McIntyre*. Even so, the Ohio law at issue in *McIntyre* was not justified solely by an interest in providing voters more information; Ohio had also invoked its interest in preventing fraud and libel, but the Court rejected this as inadequate to justify infringing the right to speak anonymously.⁷⁷

The *McConnell* Court not only gave more weight to the state interest in preventing corruption than the *McIntyre* Court; it also tacitly assumed that advertising on behalf of a candidate makes less of a contribution to public debate than advertising purely to advance an issue. As Justice Kennedy pointed out, however, the distinction the Court attempts to draw is rather arbitrary.⁷⁸ Often the reason one supports a candidate is precisely because of his views on policy issues. Nonetheless, the potential for corruption is indeed greater, and it must be remembered that the disclosure requirements were part of a much larger program of campaign

⁷⁶ *McConnell*, 540 U.S. at 143-144.

⁷⁷ *McIntyre*, 514 U.S. at 389.

⁷⁸ *McConnell*, 540 U.S. at 291.

finance reform designed to decrease the influence of “big money” on the political system.⁷⁹ Even so, the *McIntyre* Court explicitly rejected the argument *McConnell* seems to adopt, namely that the Ohio law regulated merely the electoral process rather than pure speech.⁸⁰

Two additional features distinguish *McConnell* from *McIntyre*. First, *McConnell* dealt with broadcasting rather than print media. In the broadcast context, the First Amendment right of “viewers and listeners” to receive information sometimes trumps broadcasters’ First Amendment right to exercise editorial discretion.⁸¹ Broadcasters are subject to extensive government regulation to ensure that they present conflicting views on issues of public importance.⁸² More to the point, federal law has long required broadcasters to provide the public with adequate information about candidates for federal office, and keep records of candidate requests for broadcast time.⁸³ The BCRA, according to the Court, merely expanded these existing obligations.⁸⁴ Moreover, the *McConnell* majority explicitly contemplated that the

⁷⁹ *Id.* at 115. In *Buckley v. Valeo*, 424 U.S. 1, 66 (1976), the Court stated that “disclosure provides the electorate with information ‘as to where political campaign money comes from and how it is spent by the candidate’ in order to aid the voters in evaluating those who seek federal office” (quoting H.R. REP. NO. 92-564, at 4 (1971)).

⁸⁰ *McIntyre*, 514 U.S. at 345.

⁸¹ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). The Supreme Court has even upheld a limited right of access to the broadcast medium on behalf of candidates for federal office; this limited right of access “makes a significant contribution to present, and the public to receive, information necessary for the effective operation of the democratic process.” *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981) (upholding FCC’s interpretation of Communications Act § 312(a)(7), which requires broadcast licensees to give federal candidates “reasonable access” to the airwaves). This right of access would be clearly unconstitutional if applied to the print media. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

⁸² *See McConnell*, 540 U.S. at 239 (citing 47 C.F.R. §73.1910 (2002)).

⁸³ *See, e.g.*, 47 U.S.C. § 315(a) (requiring broadcasters that give time to one candidate to provide an “equal opportunity” to other candidates for the same office); § 315(b) (providing that broadcasters must allow candidates to purchase ads at their “lowest unit rate”); § 315 (e) (imposing, even prior to passage of the BCRA, disclosure requirements regarding “candidate requests” to purchase time).

⁸⁴ According to the Court, these expanded disclosure obligations were not unduly burdensome on broadcasters, *McConnell*, 540 U.S. at 242, and they had the virtue of helping “the public evaluate broadcasting fairness.” *Id.* at 239.

audience for “documents” might be different than the audience for broadcasts and refused to address the constitutionality of regulation of broadcast anonymous speech.⁸⁵

Second, the speakers affected by the disclosure requirements in *McConnell* were primarily corporate entities or unions. While the Supreme Court has generally held that corporations have the same speech rights as individuals,⁸⁶ its decisions in the context of election campaigns have treated corporations and other organizations differently than individual speakers.⁸⁷ *McConnell*, on one reading, simply applies the logic of prior “corporate electoral speech decisions”⁸⁸ in finding a compelling interest in limiting “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”⁸⁹ In other words, corporations and unions should not be allowed to exercise “undue influence” on the electoral process, and their speech may be regulated lest it drown out the speech of individual citizens and impair their ability to choose their representatives.

Even if *McConnell* and *McIntyre* are technically distinguishable, they have a deep theoretical inconsistency. The *McConnell* Court’s assumptions about both the value of anonymous speech and the ability of the audience to properly interpret it differed markedly from

⁸⁵ *Id.* at 245.

⁸⁶ *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); *Pacific Gas & Elec. Co. v. Public Util. Comm’n*, 475 U.S. 1, 8 (1986) (asserting that “[t]he identity of the speaker is not decisive in determining whether speech is protected” and affirming that the First Amendment rights of corporations and other organizations are equal to those of individual speakers).

⁸⁷ See Michael Siebecker, *Corporate Speech, Securities Regulation and An Institutional Approach to the First Amendment*, 48 WM & MARY L.J. __, __ n.96 (forthcoming 2006) (emphasizing this point and collecting cases).

⁸⁸ See, e.g., *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256-58 (1986).

⁸⁹ *McConnell*, 540 U.S. at 205 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

the assumptions in *McIntyre*. The *McConnell* majority seems hostile to anonymous or pseudonymous speech in the election context. The *McConnell* opinion rests on paternalistic notions about the abilities of voters; as opponents of campaign finance reform have argued, even the assumption that “money influences outcomes paternalistically implies that voters cannot sift through various information to make decisions.”⁹⁰ *McIntyre*, on the other hand, assumes voters are savvy consumers of political information, able to discern the partisan motivations behind campaign literature and make informed decisions even without knowing the identity of the author.⁹¹

C. Why Anonymity Matters Now

This theoretical inconsistency makes the two decisions unstable guides for the new challenges presented by anonymous speech on the Internet.⁹² *McConnell* and *McIntyre* both involved anonymous speech in the physical world, where the ability to be truly anonymous is limited. By contrast, the architecture of the Internet makes it easy to speak anonymously, or at least pseudonymously.⁹³ As a result, there are more anonymous speakers than ever before using

⁹⁰ See Spencer Overton, *The Donor Class: Campaign Finances, Democracy, and Participation*, 153 U. PA. L. REV. 73, 86 n. 42 (2004) (citing opponents of reform).

⁹¹ As communications theorist Ien Ang has observed, the social construction of an “audience” is a mechanism of exercising power over that audience. IEN ANG, *DESPERATELY SEEKING THE AUDIENCE* 7 (1991). Yet the “audience” itself remains “an imaginary entity, an abstraction constructed from the vantage point of [an] institution[.]” *Id.* at 2. Ang observes: “[M]asses are illusory totalities: there are no masses, ‘only ways of seeing people as masses.’” *Id.*

⁹² This inconsistency is not unique to the anonymous speech issue, and occasionally the Supreme Court will explicitly lay out its paternalistic assumptions about the audience. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 64 (1973) (stating that the First Amendment does not prevent states from having laws that regulate what issuers of securities “may write or publish about their wares” because “[s]uch laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition.”)

⁹³ Catherine Crump, Note, *Data Retention: Privacy, Anonymity, and Accountability Online*, 56 STAN. L. REV. 191, 217 (2003) (contending that the “architecture of real space” curbs “this unaccountable form of speech” and that “anonymity is substantially easier on the Internet”).

the freedom anonymity provides for both good and bad purposes. Certainly Internet anonymity has made public discussion more “uninhibited, robust, and wide-open”⁹⁴ than ever before, but at the same time it has magnified the number of speakers abusing the right to speak anonymously.

From a legal standpoint, anonymity issues come in a variety of guises. One of the most common types of cases involves a pseudonymous speaker who uses the Internet to criticize a powerful corporation, institution, or public figure.⁹⁵ The targets of the criticism retaliate by suing the speaker for defamation, disclosure of trade secrets, or some other allegedly tortious act. Typically, the plaintiff initiates suit against “John Doe,” perhaps identifying him by screen name, and then subpoenas John Doe’s Internet service provider to disclose his true identity. Some plaintiffs pursue “John Doe” suits as their only available remedy against harmful anonymous speech; other plaintiffs bring “John Doe” suits to discover who their critics are so they can retaliate against them and silence other critics.⁹⁶ If plaintiffs can obtain the identity of an anonymous speaker with nothing more than an unfounded allegation of defamation, the right to speak anonymously is meaningless. On the other hand, anonymity cannot be a complete shield for tortious speech. Thus, courts are struggling to craft standards to distinguish “cyberslapps” from legitimate tort claims before compelling defendants to disclose their identities.⁹⁷

⁹⁴ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

⁹⁵ For further discussion, see generally Lidsky, *supra* note 6.

⁹⁶ The term “SLAPP” stands for strategic lawsuits against public participation. See George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 3 (1989). A SLAPP is a lawsuit, typically brought as a defamation action, aimed at silencing legitimate speech on matters of public concern. *Id.*

⁹⁷ See *infra* Part V.B.

Another prominent anonymity issue has involved attempts by the Recording Industry Association of America (RIAA) to track down online copyright infringers. After several courts concluded that the RIAA could not use the subpoena provisions of the Digital Millennium Copyright Act (DMCA) to force Internet Service Providers (ISPs) to reveal the identities of ISP subscribers whom the RIAA suspected had engaged in online copyright infringement,⁹⁸ the RIAA began resorting to the “John Doe” procedure in these types of cases as well.⁹⁹ The RIAA reportedly has succeeded in compelling ISPs to reveal the identities of several thousand users.¹⁰⁰ In one of the leading cases, *Sony Music Entertainment Inc. v. Does 1-40*,¹⁰¹ Judge Chin

⁹⁸ Specifically, three courts have concluded that Copyright Act § 512(h) does not authorize the clerk of court to subpoena an ISP that acts merely as a conduit for the transmission of allegedly infringing materials by third parties, but rather only when, *inter alia*, the ISP can remove or disable access to allegedly infringing material. *See In re Charter Comms., Inc. Subpoena Enforcement Matter*, 393 F.3d 771, 776-78 (8th Cir. 2005); *RIAA v. Verizon Internet Servs.*, 351 F.3d 1220, 1233-36 (D.C. Cir. 2003), *cert. denied*, 543 U.S. 924 (2004); *In re Subpoena to Univ. of N.C.*, 367 F. Supp. 2d 945, 950-56 (M.D.N.C. 2005); *see also* 17 U.S.C. § 512(h)(2)(A) (incorporating by reference 17 U.S.C. § 512(c)(3)(A)). The dissenting judge in *Charter Communications* and the district court in *Verizon* concluded that § 512(h) *does* apply with respect to ISPs that function merely as conduits. *See Charter Comms.*, 393 F.3d at 779-83 (Murphy, J., dissenting); *In re Verizon Internet Servs., Inc. Subpoena Enforcement Matter*, 240 F. Supp. 2d 24, 29-39 (D.D.C.) (Bates, J.), *rev'd*, 351 F.3d 1220 (D.C. Cir. 2003), *cert. denied*, 543 U.S. 924 (2004). Judge Murphy also rejected arguments that § 512(h) unconstitutionally burdens subscribers’ right to remain anonymous, reasoning that subscribers who anonymously transmit copyrighted materials over the Internet are not engaging in protected expression. *See Charter Comms.*, 393 F.3d at 785-86 (Murphy, J., dissenting). Judge Bates concluded that, although “there is some level of First Amendment protection that should be afforded to anonymous expression on the Internet,” that “protection is minimal where alleged copyright infringement is the expression at issue,” and in any event that the DMCA provides sufficient safeguards insofar as it requires copyright owners to, among other things, plead a prima facie case of infringement. *See In re Verizon Internet Servs., Inc. Subpoena Enforcement Matter*, 257 F. Supp. 2d 244, 258-64 (D.D.C.), *rev'd on other grounds*, 351 F.3d 1220 (D.C. Cir. 2003), *cert. denied*, 543 U.S. 924 (2004). In a follow-up article, we hope to discuss the constitutional dimensions of anonymous speech specifically as it relates to the DMCA procedures.

⁹⁹ For discussion, *see, e.g.*, Lori A. Morea, *The Future of Music in a Digital Age: The Ongoing Conflict Between Copyright Law and Peer-to-Peer Technology*, 28 CAMPBELL L. REV. 195, 205-09 (2006); Robert C. Piasentin, *Unlawful? Innovative? Unstoppable? A Comparative Analysis of the Potential Legal Liability Facing P2P End-Users in the United States, United Kingdom, and Canada*, 14 INT’L J.L. & INFO. TECH. 195, 201-02 (2006); Matthew Sag, *Piracy: Twelve Year-Olds, Grandmothers, and Other Good Targets for the Recording Industry*, 4 NW. J. TECH. & INTELL. PROP. 133, ¶ 6 (2006).

¹⁰⁰ *See* Morea, *supra* note 99, at 205-09; Piasentin, *supra* note 99, at 201-02; Sag, *supra* note 99, at ¶ 6.

¹⁰¹ 326 F. Supp. 2d 556 (S.D.N.Y. 2004).

concluded that, although filing sharing is “not ‘political expression’ entitled to the ‘broadest protection’ of the First Amendment,” it is “entitled to ‘some level of First Amendment protection.’”¹⁰² Nevertheless, he found the plaintiff was entitled to discovery of the alleged file sharers’ identities, based upon (1) a sufficiently “concrete showing of a prima facie claim of actionable harm,” including “supporting evidence listing the copyrighted song downloaded or distributed” and the dates and times of the acts alleged; (2) “the specificity of the discovery request”; (3) the absence of alternative means of discovering the users’ identities; (4) the centrality of the need for this information; and (5) in light of the terms of the users’ ISP service agreement, their lack of a reasonable expectation of privacy with respect to the downloading and distribution of copyrighted works.¹⁰³

These two categories of online anonymity cases have garnered the lion’s share of scholarly attention, but anonymity issues arise in other contexts as well. Congress and the states are attempting to combat spammers who hide behind anonymity to overwhelm targeted computer servers with millions of emails.¹⁰⁴ The Securities and Exchange Commission is working desperately to combat securities fraud committed by anonymous speakers.¹⁰⁵ More troublingly,

¹⁰² *Id.* at 563.

¹⁰³ *See id.* at 564-67 (citations omitted). *Accord* UMG Recordings, Inc. v. Does 1-4, No. 06-0652 (EMC), 2006 WL 1343597, at *2-3 (N.D. Cal. Mar. 26, 2006); Elektra Enter. Group, Inc. v. Does 1-9, No. 04 Civ. 2289 (RWS), 2004 WL 2095581, at * 2-5 (S.D.N.Y. Sept. 8, 2004).

¹⁰⁴ For a brief discussion of spam regulation, see Andrea Matwyshyn, *Material Vulnerabilities: Data Privacy, Corporate Information Security, and Securities Regulation*, 3 BERKELEY BUS. L. J. 129, 158 (2005).

¹⁰⁵ *See* Lyrisa Barnett Lidsky & Michael Pike, *Cybergossip or Securities Fraud?: Some First Amendment Guidance for Drawing the Line*, 5 NO. 5 WALLSTREETLAWYER.COM: SEC. Elec. Age 15 (Oct. 2001), available at: 5 No. 5 GLWSLAW 15.

federal and state legislators are passing laws to curb anonymous speech online. A new federal law makes it a crime for a speaker to use the Internet to “annoy” someone unless the speaker reveals his or her true identity.¹⁰⁶ A New Jersey bill, if passed, will require any “public forum Web site” to collect the names and addresses of everyone who posts to the site. And there are calls for further regulation. John Siegenthaler, a journalist and former assistant to Attorney General Robert Kennedy, criticized Congress for “enabl[ing] and protect[ing]” “volunteer vandals with poison-pen intellects” after he was defamed by an anonymous speaker on Wikipedia.¹⁰⁷ Siegenthaler criticized Congress both for immunizing Internet service providers from tort liability based on content posted by their users and for failing to force service providers to help uncover the identity of anonymous defamers. Whatever the merits of Siegenthaler’s arguments, it seems clear that legal issues concerning online anonymity will continue to arise, and when they do, courts and legislators can expect only limited guidance from *McConnell* and *McIntyre*.

III. A Positive Analysis of Anonymous Speech

Neither *McIntyre* nor *McConnell* appears to recognize the true complexity of anonymous speech. Speakers may use the shield of anonymity for a variety of purposes, only some of which

¹⁰⁶ The provision comes from section 113 of the Violence Against Women and Department of Justice Reauthorization Act of 2005, H.R. 3402. The section is entitled “Preventing cyberstalking,” and it provides as follows:

Whoever...utilizes any device or software that can be used to originate telecommunications or other types of communications that are transmitted, in whole or in part, by the Internet. . .without disclosing his identity and with intent to annoy, abuse or threaten, or harass any person . . . who receives the communications. . . shall be fined under title 18 or imprisoned not more than two years, or both.

¹⁰⁷ John Siegenthaler, *A false Wikipedia ‘biography,’* USA TODAY, Nov. 29, 2005, available at www.usatoday.com/news/opinion/editorials/2005-11-29-wikipedia-edit_x.htm.

may be consistent with the public good; at the same time, audiences may not accord anonymous speech as much value as attributed speech, which in turn may affect speakers' decisions whether to publish anonymously in the first place. In this Part, we attempt to catalogue the costs and benefits of anonymous speech, both to speaker and audience, as well as the strategic considerations that are likely to impact both speaker and audience behavior. We will then suggest in Parts IV and V a method for normatively weighing these costs and benefits so as to arrive at concrete policy recommendations.

A. The Informational Value of Authorial Identity

We begin our positive analysis by noting a curious fact about anonymous speech: anonymous speech persists despite the fact that it is, on average, *less* valuable than nonanonymous speech to speech consumers (audiences), who often use speaker identity as an indication of a work's likely truthfulness, artistic value, or intellectual merit. Without attribution, audiences must necessarily rely upon other indicia, which can be less reliable than speaker identity. In this regard, attribution serves a function analogous to that of a trademark used in connection with a product or service, whereas anonymous speech is like a generic or nontrademarked product: consumers must work harder, sometimes considerably harder, before they can draw reliable conclusions about the qualities of the product itself.¹⁰⁸

¹⁰⁸ See Heymann, *supra* note 1, at 1378; Lastowska, *supra* note 1, at 1179. See also MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 1-2 (1992) (observing that “[t]he name of the author becomes a kind of brand name, a recognizable sign that the cultural commodity will be of a certain kind and quality” and noting that “copyright . . . helps to produce and affirm the very identity of the author as author”). To understand the analogy, imagine a world with no trademarks, i.e., without unique symbols that identify differentiated products or services. See, e.g., 15 U.S.C. § 1127 (2000) (defining a trademark as “any word, name, symbol, or device, or any combination thereof . . . used by a person . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown”). You enter a convenience store to buy a soft drink and are immediately confronted with several cans or bottles all stamped with

To illustrate, suppose that you encounter an anonymous pamphlet attributing some moral failing to the President of the United States. Depending on how well or how poorly the allegations mesh with your background beliefs and assumptions about the President's character, you assign some implicit probability to the veracity of the allegations.¹⁰⁹ You will also look to other indicia to gauge the truth of the allegation, e.g., the professional quality of the pamphlet, whether it contains misspellings and grammatical errors, and the like. Suppose that, on the basis of all this evidence, you conclude that the probability that the allegations are true is 50%. Now suppose that, in addition to the other indicia of truth or falsity, you know the speaker's identity. First assume the speaker is someone whose integrity you know to be impeccable: George, the modern-day equivalent of Parson Weems's "I cannot tell a lie" George Washington.¹¹⁰ Given this new piece of information, you would change your probability-of-truth estimate from 50% to, say, 90%. (Changing it to 100% might be taking things too far; it is possible, after all, that

the generic word "Cola." Different firms produce these different drinks, using different formulas, and each tastes slightly different. In fact, you may have a favorite, but there is no way to tell which is which without sampling the goods until you find the one you like the best. In the real world, trademarks come to the rescue by reducing the cost of searching among differentiated goods for the ones that contain the specific characteristics you value the most. *See, e.g.*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 cmts. b, c (1995). Trademarks also encourage producers to invest in quality control. Consumers will rely upon trademarks as source identifiers only if the trademarked product has roughly the same characteristics each time a consumer encounters it. Trademark owners therefore have an interest in maintaining consistent quality in order to develop and preserve customer goodwill. *See id.* As long as quality remains constant, consumers who prefer the taste of Coca-Cola to Pepsi can readily find the product that satisfies their preference, and vice versa. We argue above that the author's identity performs a trademark-like function of enabling speech consumers to draw inferences about, and speech producers to invest in promoting, the quality of expressive works.

¹⁰⁹ *See, e.g.*, Linda Simon et al., *Trivialization: The Forgotten Mode of Dissonance Reduction*, 68 J. PERSONALITY & SOC. PSYCH. 247-60 (Feb. 1995) (discussing ways in which people approach new information that relates to existing beliefs, so as to reduce cognitive dissonance). Consider, for example, the allegation that former President William Clinton had an adulterous relationship with a famous singer. The same allegation would be less credible if made about President George W. Bush or President Jimmy Carter.

¹¹⁰ Mason Locke Weems published the first edition of his hagiographical biography of Washington anonymously around 1800, the year after Washington's death. Weems added his name to later editions. The fifth

George, though honest, is mistaken.) Alternatively, assume you know the speaker to be Cretan, a pathological liar.¹¹¹ Armed with this information, you would alter your probability estimate downward, say to 10%. A third possibility is that knowledge of the speaker's identity would provide you with no useful information at all; the speaker is unknown to you, and his credibility is not important enough for you to investigate further. On these facts, knowledge of the speaker's identity does not change your *ex ante* probability estimate of 50%. Reflection therefore suggests that knowledge of the speaker's identity does not always matter to you; but that in some nontrivial class of cases, *not* knowing the author's identity could mislead you into either over- or underestimating the statement's truth value.¹¹²

edition, published in 1806, added the fictional story about young George Washington and the cherry tree. See MASON LOCKE WEEMS, *THE LIFE AND MEMORABLE ACTIONS OF GEORGE WASHINGTON* (5th ed. 1806).

¹¹¹ Although none of the works of the ancient Cretan philosopher Epimenides survives, the so-called Epimenides Paradox that is attributed to him consists of the statement "All Cretans are liars." Technically, the Paradox dissolves unless Epimenides is the only member of the set of Cretans. See RAYMOND M. SMULLYAN, *WHAT IS THE NAME OF THIS BOOK?: THE RIDDLE OF DRACULA AND OTHER LOGICAL PUZZLES* 214-15 (1978). A cleaner version of the paradox is the sentence "I am lying." See *id.*

¹¹² Bayes' Theorem can be used to revise an initial probability estimate on the basis of additional observations. See MICHAEL O. FINKELSTEIN & BRUCE LEVIN, *STATISTICS FOR LAWYERS* 75-77 (2d ed. 2001). To illustrate, suppose that your initial estimate is that statement S has a 50% chance of being true and a 50% chance of being false. Suppose further that there are five possible speakers, Alice, Bill, Claire, Dan, and Edna; that four of the five (Alice through Dan) always speak the truth; and that the remaining possible speaker, Edna, tells the truth 75% of the time. On these assumptions, we can analyze the problem as follows:

$P(X) =$ *ex ante* probability that S is true = .50

$P(X | E) =$ probability that S is true, given that Edna is the speaker = to be determined

$P(E | X) =$ probability that Edna is the speaker, given that S is true = .15

$P(\text{NOT-}X) =$ *ex ante* probability that S is not true = .50

$P(E | \text{NOT-}X) =$ probability that Edna is the speaker, given that X is not true = 1

Bayes' Theorem states that:

$$P(X | E) = \frac{P(E|X)P(X)}{P(E|X)P(X)+ P(E|\text{NOT} - X)P(\text{NOT} - X)}$$

We must also consider that the speaker is aware that disclosing his identity might discount the credibility of his message. So once again, consider the three possible speaker-types: one speaker whose identity, if revealed, would cause you to revise your probability-of-truth estimate upward; a second whose identity, if revealed, would cause you to reduce that probability; and a third the revelation of whose identity would have no effect. The first speaker clearly has a motive to reveal his identity, because in doing so he enhances the likelihood that his message will be believed. The fact that the actual speaker has chosen not to reveal therefore suggests either that (1) the actual speaker is not, in fact, the first (truthful) speaker; or (2) the speaker has other reasons, such as fear of retaliation, to keep his identity secret (more on this below). By contrast, the speaker with the reputation for dishonesty or poor quality work has an obvious motive to keep her identity a secret, because in doing so she may increase the likelihood that people will believe her statement or overrate her work product. (Of course, she, like the

$$= \frac{(.15)(.5)}{(.15)(.5) + (1)(.5)}$$

$$= .130$$

Thus, knowing that Edna is the speaker decreases one's probability of truth estimate from .5 to .13. Knowing that one of the other possible speakers was the actual speaker would, of course, increase the probability estimate to 1.0. Alternatively, suppose that there is one chance in a million (.000001) that Edna is the speaker, given that S is true, and two chances in a million (.000002) that Edna is the speaker, given that X is not true. Applying Bayes' Theorem reduces the probability of truth estimate from .5 to 1/3.

Note also that a reader who knows that a work is anonymous rationally will take the lack of an attributed source into consideration in evaluating the work's probable truth or quality. If the work provides some clues as to the speaker's reasons for publishing anonymously, the reader may be able to assess whether the speaker is more likely to fall into the "George" or the "Cretan" category. See *infra* Part III.B for discussion of the reasons, good and bad, for publishing anonymously. But the reader may be uncertain how to interpret the clues, or may err in interpreting those clues. Alternatively, if the reader is unable to discern or presume whether "good" or "bad" reasons for publishing anonymously predominate, the rational inference is to accord anonymity no weight at all. Either way, there is a risk that the reader will over- or underestimate the work's truth or quality, absent source attribution.

well-reputed speaker, may have other reasons to keep her identity a secret.) As for the third possible speaker, whose identity means nothing to you, presumably the revelation of his identity would influence some readers—those who, unlike you, are familiar with him—either to believe or disbelieve his statement, but you have no way of knowing which effect would predominate. In the abstract, therefore, it is difficult to tell whether you should accord the statement less weight than you otherwise might, simply by virtue of its being anonymous; one rational strategy might be to consider, on the basis of textual or other evidence, precisely why the speaker at issue may have chosen anonymity.¹¹³ In the following section, we will consider in greater depth what these reasons for remaining anonymous might be; first, however, we respond to some possible objections to our approach thus far.

The first objection to our equation of anonymous speech with nontrademarked products is that, as Laura Heymann points out, trademark law *permits* the underlying producer of a good to remain anonymous: as long as a mark conveys the message that the product emanates from a unique source, it is irrelevant that consumers know the identity of that source.¹¹⁴ Relatively few beer drinkers may care, for example, that a firm known as The Boston Beer Company, Inc. produces the beer bearing the trademark “Samuel Adams”; the trademark is all they need to know to obtain a beer of predictable quality. Similarly, readers of detective novels may not be very interested in learning that the original name of the author who wrote under the pen name

¹¹³ See *supra* note 112.

¹¹⁴ See Heymann, *supra* note 1, at 1381, 1414.

“Ed McBain” was Salvatore Lombino;¹¹⁵ his pseudonym, like a trademark, conveys useful information even while his true identity remains unknown to most readers. A trademark might therefore be more analogous to an author’s pseudonym than to his true identity. His true identity would in turn be more like a company’s “trade name,” that is, the name under which the source company does business,¹¹⁶ which need not be identical with its trademark. This objection is not fatal to our analysis, however. Presumably, knowledge of an author’s true identity (or of a producer’s trade name) in addition to the author’s pseudonym (or a product’s trademark) provides additional value to *some* consumers, even if most are indifferent. Literary critics might be interested in learning more about the man behind the McBain pseudonym, after all, even if fans are not;¹¹⁷ similarly, business analysts, regulators, and home brewers might be more interested than the average drinker in learning about the company behind Samuel Adams beer.¹¹⁸

¹¹⁵ See Marilyn Stasio, *Evan Hunter, Writer Who as Ed McBain Created Police Procedural, Dies at 78*, N.Y. TIMES, July 7, 2005, at B10.

¹¹⁶ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 12 (1995).

¹¹⁷ Donald W. Foster, *Commentary: In the Name of the Author*, 33 NEW LITERARY HISTORY 375, 375 (2002). To be sure, different schools of criticism manifest differing levels of interest, or disinterest, in the details of the author’s life and circumstances. See, e.g., RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 218-23 (1988) (distinguishing New Critics from intentionalists). We contend nevertheless that knowledge of these details is of some use in interpreting a work, even though reasonable minds might accord them differing weight.

¹¹⁸ Fortunately, the source of trademarked product is almost never anonymous in any strong sense. Many companies’ trade names are the same as their trademarks (e.g., Coca-Cola, Microsoft, BMW), in which case the source is not anonymous at all. Moreover, state legislation often requires “registration of assumed or fictitious names under which individuals or commercial entities conduct business” so as “to assist others in identifying the owners of the businesses with whom they deal.” RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 12 cmt. c. Federal and state regulations also often require identifying information of the manufacturer to appear on or in connection with the products sold, see, e.g., 21 C.F.R. § 201.1(a) (2006) (requiring that drug labeling include the manufacturer’s information); 16 C.F.R. § 1500.121 (2006) (requiring that hazardous substances be labeled with the manufacturer’s information); trademark registrations are public records, and thus enable interested persons to discover who owns a registered mark, see 15 U.S.C. § 1062(a) (2000); see also Levmore, *supra* note 8, at 2206 n.21 (noting postal regulation).

A second possible objection to the identity-trademark analogy is that there is likely to be a much greater difference in quality among an author's various works than among goods marketed under the same trademark. Consumers rightly expect every bottle of Coca-Cola to taste the same; but one might not expect every book by the same author to be precisely the same in terms of aesthetic merit, accuracy, or insight. In response to this argument, we would analogize a new book by an existing, well-regarded author to a new product bearing an existing, well-regarded trademark or brand. For example, when Coca-Cola or Samuel Adams or any other firm markets a new product under the so-called "family" or "house" mark,¹¹⁹ consumers are likely to draw some inferences about the quality of the new product based upon their familiarity with the old. A consumer who has come to trust Coca-Cola as the licensor of quality beverages is rational when she expects a new Coca-Cola sponsored product to meet similar quality standards, despite some possibility that her expectations will be disappointed. Knowing that the product is approved by Coca-Cola enables the consumer to draw a rational *ex ante* inference that she would be unable to draw if the product were generic. Similarly, knowledge of a well-regarded author's identity does not provide a guarantee that a new work will meet the author's previous quality standards, but it does increase the Bayesian probability that the work will meet those standards. The benefit to the reader is not absolute but it is not trivial either.¹²⁰

Two other objections go not so much to the fit between authorial identity and trademarks as to the rationality of relying upon either as a proxy for quality. For surely sometimes

¹¹⁹ See 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 7:5 (4th ed. 2006) (discussing house marks) [hereinafter MCCARTHY]; 4 MCCARTHY § 23:61 (discussing families of marks).

¹²⁰ See Heymann, *supra* note 1, at 1416 & n.128.

trademarks do *not* provide much useful information about product quality, and that the same can be said about attributed speech as well. Economists recognize that trademarks are relatively more useful for distinguishing among so-called “experience” goods, that is, goods whose qualities are not easy to evaluate prior to purchase, and relatively less valuable for distinguishing among “search” goods which consumers can evaluate in advance of purchase on the basis of observable characteristics.¹²¹ In our hypothetical above, the taste of a soft drink is clearly an experience good, but other products (say, fresh fruits and vegetables) are largely search goods, whose color, shape, and firmness (though often not taste) can be evaluated in advance. Not surprisingly, trademarks play a less prominent role in the market for fresh produce than in the markets for some other goods, but they are not entirely absent either; different grocery store chains may distinguish themselves on the basis of their produce, and companies such as Harry & David *do* market themselves as purveyors of quality fruit.¹²² In any event, most goods manifest at least some experience characteristics, even if they also exhibit some search qualities as well; clothing, perfume, and automobiles can all be sampled before purchase, but qualities such as durability often remain experience characteristics. Speech shares this dual character. To be sure, some poems, jokes, or works of music (for example) may tend more toward the “search” end of the spectrum, in that one can quickly sample and evaluate them, without needing to know anything about their source. But even simple works may be better appreciated if one knows something about the author, the context in which she wrote, her likely influences, and so on; all

¹²¹ See Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68-69 (1973); Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311, 312 (1970).

the more so for more complex works.¹²³ And it is often not the case that one can adequately sample a work prior to purchase or consumption, in which case knowing something about the author can provide useful information upon which to decide whether to purchase or consume.¹²⁴ As with other goods and services, attribution may not *always* provide much informational value, but this is not to say that it never does or that it typically does not.

Similarly, one might contest the usefulness of both trademarks and authorial identity by noting that consumers sometimes overvalue brand-name goods—and, presumably, brand-name authors, too. But it hardly follows that the use of brand names is a net cost to society rather than a net benefit. Granted, consumers occasionally pay more for a product bearing a famous mark than for a lesser-known product that functions equally well; consider, for example, consumers who continue to purchase brand-name drugs even after bioequivalent generics come on the market.¹²⁵ But even this behavior may be rational. Some consumers may believe, for example, that the maker of a brand-name drug will invest more in quality control than the maker of a

¹²² Disney also has a trial program in some markets where it is testing a strategy of branding up-market produce using a Disney character sticker. See Jenny Wiggins, *Disney Gets a Taste for Fresh Fruit*, <http://www.ft.com> (June 7, 2006), available at 2006 WLNR 9812021.

¹²³ Forgeries, for example, once exposed as such typically lose whatever critical acclaim they previously enjoyed, even though the physical attributes of the work remain the same. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 255-56 (2003) (discussing some possible reasons for this phenomenon); Lastowka, *supra* note 1, at 1181.

¹²⁴ See LANDES & POSNER, *supra* note 123, at 117 n.51 (suggesting that books are an “intermediate case” between search and experience goods, insofar as one can examine a book before buying it, but the process is time-consuming and “there are too many books to be able to sample them in this way”); Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 *STAN. L. REV.* 1131, 1133-34 (1995) (noting that an author’s reputation functions as a proxy for article quality, in much the same way that trademarks signal product quality).

¹²⁵ See Roger D. Blair & Thomas F. Cotter, *Are Settlements of Patent Disputes Illegal Per Se?*, 47 *ANTITRUST BULL.* 491, 500-01 (2002) (noting that the price of brand name drugs sometime go up when generics enter the market, due to the brand loyalty and price insensitivity of some portion of consumers).

generic equivalent.¹²⁶ Perhaps it is equally rational to assume that some “brand-name” expressive works will embody small, but potentially important, quality advantages over their lesser-known and superficially fungible competitors. Other times, consumers may prefer brand-name goods because of the consumptive value of the brand name itself. People who wear designer jeans and drive Porsches may do so in order to communicate a message about their tastes, status, and income that they might not be able to communicate as effectively without these products.¹²⁷ Perhaps we also sometimes convey messages about our taste or status based upon our choice of which authors we credit or admire. It would be at least marginally more difficult to convey such messages if anonymous authorship were the norm.

That said, it is nevertheless quite plausible that reliance upon authorial reputation as a proxy for quality or truth or status sometimes results in our according certain works more credence or esteem than they deserve--or in paying insufficient attention to lesser-known authors' works.¹²⁸ But the fact that attribution may enable biased decisionmaking does not mean that it always does so, or that audiences can never foresee and take precautions against their biases. Some scholarly journals, for example, require anonymous submissions; many institutions, including law schools and bar examiners, typically require students taking examinations to use a code number so that graders will not be able to discern the identities of students being graded; and auditions for symphony orchestras typically are conducted so that judges cannot discover the identity of performers until the audition is completed. Perhaps more

¹²⁶See LANDES & POSNER, *supra* note 121, at 195.

¹²⁷ See *id.* at 208-09; Alex Kozinski, *Trademarks Unplugged*, 68 NYU L. REV. 960, 969-70 (1993).

¹²⁸ Indeed, consumers may even rely on the presumed characteristics of an author, such as age, race, social class, gender, and so forth, as proxies for quality or truth.

such measures would be desirable to combat bias or otherwise force audiences to consider a work or performance on the basis of its inherent characteristics,¹²⁹ but again this hardly suggests that the social costs of attribution routinely outweigh the social benefits.

Finally, most of what we have said about anonymous speech applies to pseudonymous speech as well, though with a few additional twists. A problem unique to pseudonymous speech is that audiences may be unaware that a pen name is merely a pseudonym that masks the author's true identity, and thus may not discount the value of the speech appropriately.¹³⁰ Even so, there are two countervailing effects that arguably tend to make pseudonymous speech more reliable on average than completely anonymous speech. One is that pseudonymous speech is often published through the intermediation of a publisher who is likely to know the speaker's identity. The publisher is, in a sense, vouching for the speaker's credibility. Of course, the same may also be true of some anonymous speech; it may be anonymous to the public but not the publisher.¹³¹ The other effect is that pseudonyms actually *can* function something like trademarks, as both Heymann and Lastowka demonstrate.¹³² To the extent the speaker has reputational capital invested in his pseudonym, that investment creates an incentive for the speaker to continue to produce work of predictable quality. The author's incentive to maximize the value¹³³ of his

¹²⁹ For example, when an author remains anonymous as a matter of artistic choice, revelation of her identity might undermine her message and deprive audiences of the opportunity to receive that message as intended. *See infra* notes 137, 153 and accompanying text; *see also* Heymann, *supra* note 1, at 1425 & n.153 (discussing instances in which the audience might be better off not knowing the author's identity); Lastowka, *supra* note 1, at 1240 (similar); Levmore, *supra* note 8, at 2210 (similar).

¹³⁰ *See supra* note 112. The same problem would attend any other type of misattribution.

¹³¹ *See Levmore, supra* note 8, at 2210.

¹³² *See Heymann, supra* note 1, at 1380; Lastowka, *supra* note 1, at 1197.

¹³³ The 'value' could be measured economically, or as a product of the author's desire that the speech be persuasive, or even as a factor of the author's need for affirmation.

authorial trademark may counteract much of the potential for abuse that is inherent in pseudonymous speech.

B. The Private Benefits of Anonymity

If attribution generally is something that speech consumers find valuable, it is reasonable to ask why authors who seek public acclaim for their ideas and expression would ever choose to publish anonymously. We have alluded to some possible reasons above, but in this section provide a more comprehensive list of the reasons that authors may derive private value from withholding their identities. First, the author may derive some internal, noninstrumental satisfaction from speaking without attribution; we will refer to this as the “Intrinsic Rationale” for anonymity. Second, the author may be concerned about the private costs that she, or others whose welfare matters to her, may incur if she speaks truthfully—if she presents her artistic vision without flinching—but without the shield of anonymity. We refer to this as the “Wrongful Retaliation” rationale. Third, the author may be concerned about the private costs that could flow from speaking *falsely* without the shield of anonymity; we refer to this as the “Justifiable Retaliation” rationale. Fourth, the author may wish to conceal her identity in order to derive some collateral benefit that would be more costly to obtain were her identity revealed. We refer to this as the “Collateral Benefits” rationale. Fifth, the author may be someone who is perceived to be untruthful or the purveyor of low-quality work, but who is in fact telling the truth or producing high-quality work and wants her message to be taken seriously. We refer to this as the “Boy Who Cried Wolf” rationale.

The Intrinsic Rationale. Anonymous speech is sometimes said to promote individual autonomy and self-fulfillment¹³⁴ by enabling individuals to explore new ideas, new means of expression,¹³⁵ and even new identities.¹³⁶ Thus, one reason for some authors to publish anonymously is that they derive internal satisfaction from not having their true identity revealed. An author may even believe that by publishing anonymously she is making a political or artistic statement.¹³⁷ This rationale may underlie the Supreme Court’s characterization of Margaret McIntyre’s decision to publish anonymously as an integral part of her freedom to choose the content of her speech.¹³⁸ As such, the interest is akin to one of the “moral rights” that many nations accord to authors, on the theory that the author’s infusion of her unique personality into her artistic creations entitles her, as a matter of natural law, to a substantial degree of autonomy

¹³⁴ See 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”); C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 47-50 (1989) (referring to “self-realization and self-determination as the key first amendment values”).

¹³⁵ Jerry Kang, *Cyber-Race*, 113 *HARV. L. REV.* 1130, 1131 (2000) (noting that the Internet, with its custom of anonymous and pseudonymous speech, “alters the architecture of both identity presentation . . . and social interaction . . .”).

¹³⁶ Tien, *supra* note 14, at 117 (arguing that “anonymity is more than concealing authorial identity; speech is discursive interaction, and anonymity is useful for constituting individual and group identity in interaction”).

¹³⁷ For example, the literary journal *Nemonymous* publishes stories that are not attributed to an author until the following installment. Thus, the reader does not know the name until after reading (and presumably evaluating) the story. See <http://www.nemonymous.com>. See also Anne Ferry, *Anonymity: The Literary History of a Word*, 33 *NEW LITERARY HISTORY* 193, 197 (2002) (noting that in the nineteenth century, “[t]he desire of poets to escape over-personal interpretations of their poems” spurred them to publish anonymously); Foster, *supra* note 117, at 391 (citing the example of Yehiel Feiner, who wrote about the Holocaust under the pseudonym that translates as “Prisoner,” because he “refuse[d] the right to valorize his individual experience” and “spoke as the invisible man, for one and all” who were killed at Auschwitz); Heymann, *supra* note 1, at 1401-06; Lastowka, *supra* note 1, at 1222-27. Yet another possibility is that the author believes that anonymity is the more virtuous choice. Religious or ethical traditions may bestow greater esteem upon anonymous contributions to charities, for example. See Levmore, *supra* note 8, at 2196 n.5. A less exalted motivation for anonymous contributions is that the donor may be less likely to be solicited for other worthy causes.

¹³⁸ See *McIntyre*, 514 U.S. at 342.

with respect to how those creations are presented to the public.¹³⁹ In these countries, the author is viewed as having an inalienable right to attribution, which right embraces a subsidiary right to be properly attributed as the author of that which she has created, a right *not* to be attributed as the author of that which she has not created, and a right to publish anonymously or under a pseudonym.¹⁴⁰ Although the United States has never fully embraced the concept of moral rights as it is understood in some (mostly European) countries,¹⁴¹ our anonymous speech cases appear to recognize something similar to a moral right to speak anonymously—though, as noted above, they leave unresolved the question of how much weight to accord this interest when it comes into conflict with other social interests.

¹³⁹ See, e.g., Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 6-15 (1997).

¹⁴⁰ See *id.* at 12. Of course, the author may have both intrinsic and instrumental reasons for wishing to publish anonymously or under an assumed name. Note also that these rights are not absolute, even in countries with robust moral rights traditions. See Michael B. Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 601, 628 (2001) (citing ADOLF DIETZ, *DAS DROIT MORAL DES URHEBERS IM NEUEN FRANZÖSISCHEN UND DEUTSCHEN URHEBERRECHT* 121 (1968)) (noting that German law, unlike French law, requires adherence to an express contractual duty for an author to remain anonymous, with exceptions allowed if the author must prove his authorship or if the work enjoys unforeseeable success).

¹⁴¹ The U.S. has incorporated some aspects of moral rights protection into its copyright and unfair competition laws over the past generation, however. See Cotter, *supra* note 139, at 15-27. In 1990, for example, Congress amended the Copyright Act to include a new Visual Artists Rights Act (VARA). See Pub. L. No. 101-650, §§ 601-610, 104 Stat. 5089, 5128-33 (codified as amended in scattered sections of 17 U.S.C.). VARA confers upon the authors of qualifying “works of visual art,” see 17 U.S.C. § 101 (definition of “work of visual art”), a right of attribution, see *id.* § 106A(a)(1), (2), but it does not explicitly endow authors with a right to publish anonymously or pseudonymously. See 2 WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* 1037 n.88 (1994). Nevertheless, U.S. copyright law has permitted the registration of anonymous and pseudonymous works for close to 100 years, see Act of Mar. 4, 1909, Pub. L. No. 60-349, ch. 320, § 23, 35 Stat. 1075, 1082 (repealed 1976) (stating that the copyright term ran for 28 years from the date of publication, whether the work bore the author’s true name or was published anonymously or pseudonymously), though prior to 1909 the copyright status of anonymous works was precarious. See 1 PATRY, *supra*, at 20 (stating that some early state copyright laws declined to extend protection to anonymous or pseudonymous works); Stenographic Report of the Proceedings of the First Session of the Conference on Copyright, May 31-June 2, 1905, in 1 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT (E. Fulton Brylawski & Abe Goldman eds. 1976), at C40 (comments of Register of Copyrights Thorvald Solberg that, as of 1905, an author who wished to obtain federal copyright protection and to remain anonymous had to arrange for another to file the registration as copyright proprietor).

Wrongful retaliation. A second reason for speaking anonymously is that the author is concerned about the potentially negative personal consequences of speaking truthfully and with attribution. This interest may be implicated in a number of recurring situations. One common example is the whistleblower who reports on corporate or government wrongdoing despite some risk of incurring retaliation.¹⁴² Similarly, police informants may prefer to remain anonymous to avoid harms to themselves, their families, or to other informants whose identities might be compromised. Employees who publish writings that displease their employers risk being fired,¹⁴³ and people who speak out against corporate policies risk becoming SLAPP targets.¹⁴⁴ The nuisance of having to defend oneself from such a suit, even if the suit proves unsuccessful on the merits, creates an incentive for would-be critics to voice their opinions anonymously.¹⁴⁵ And even when the potential consequences are of a lesser magnitude, some speakers may simply

¹⁴² For discussion of the piecemeal nature of whistleblower protection laws, see DANIEL P. WESTMAN AND NANCY M. MODESITT, *WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE* 67-75 (2d ed. 2004).

¹⁴³ Government employees have First Amendment rights when speaking “as citizens on matters of public concern,” but not when speaking “pursuant to their official duties.” See *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1960 (2006). The First Amendment protects both the autonomy interest of the employee when speaking as a citizen, and the public interest in receiving information. See *id.* (“[W]idespread costs may arise when dialogue is repressed.”); *San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam) (stating that the public has an “interest in receiving *informed* opinion”) (emphasis added).

¹⁴⁴ See Pring, *supra* note 96, at 3-4 (summarizing a U.S. study on the existence, causes, and effects of SLAPPs). While many state legislatures have enacted “anti-SLAPP” legislation in the past fifteen years, Lauren McBrayer, *The DirecTV Cases: Applying Anti-SLAPP Laws to Copyright Protection Cease-and-Desist Letters*, 20 BERKELEY TECH. L.J. 603, 609-10 (2005), companies are now merely shifting their strategies, and in some cases are using anti-SLAPP legislation itself as a sword. See *id.* at 607.

¹⁴⁵ Alternatively, the speaker may fear retaliation that is lawful but questionable for policy reasons. To cite one example, W. Mark Felt might have been subject to prosecution had his role as “Deep Throat” been revealed at the time of the Watergate scandal. See 18 U.S.C. § 641 (2000) (criminalizing the theft, conveyance or disposal of public records or things of value). If Felt had exposed such information today, he could also be prosecuted under the Privacy Act, 5 U.S.C. § 552a (2000), or found in contempt of court under the federal grand jury secrecy rule, Fed. R. Crim. Proc. 6(e) (2002). See Timothy Noah, *Were Felt’s Leaks Illegal?*, SLATE, at <http://www.slate.com/id/2120069/index.html> (June 1, 2005). Ironically, President Nixon also took advantage of anonymity by planting pseudonymous newspaper articles praising his administration. See Foster, *supra* note 117, at 381; Heymann, *supra* note 1, at 1408 n.106.

feel they can be more candid if allowed to express their opinions anonymously. In many academic disciplines, for example, peer reviews of scholarship are anonymous for precisely this reason. A reviewer forced to disclose her identity may feel inhibited from speaking critically about a person or institution with whom or with which she will share future professional contacts.¹⁴⁶ Other times, speakers may simply wish not to be harassed with follow-up questions or solicitations.¹⁴⁷

Alternatively, authors may wish to avoid the shame, humiliation, or social ostracism that might result from disclosure of their identities. To vindicate this interest, courts in some rare instances permit litigants—the putative authors, or at least *authorizers*, of the papers filed on their behalf—to proceed without revealing their identities, as in *Roe v. Wade*.¹⁴⁸ More generally, absent anonymity an author may feel constrained by her class,¹⁴⁹ her gender,¹⁵⁰ or her

¹⁴⁶ Such records are often confidential, but they are potentially discoverable in litigation. *See EEOC v. Univ. of Pa.*, 493 U.S. 192 (1990).

¹⁴⁷ *See Levmore, supra* note 8, at 2193.

¹⁴⁸ *See Roe v. Wade*, 410 U.S. 113, 120 n.4 (1973) (noting without comment that the petitioner’s name was a pseudonym). Federal Rule of Civil Procedure 10(a) requires every pleading to include the caption of the case, including the parties’ names, and Rule 17(a) requires that every action be prosecuted in the name of the real party in interest. *See FED. R. CIV. PROC.* 10(a), 17(a). In cases implicating “significant privacy interests,” however—principally challenges to laws regulating such matters as sexual behavior, birth control, and abortion—courts sometimes permit parties to litigate under pseudonyms, though even in this context often on condition that the party’s real name be disclosed to the court *and* to the defense. *W.N.J. v. Yocom*, 257 F.3d 1171, 1172 (10th Cir. 2001) (citing *Nat’l Commodity & Barter Ass’n v. Gibbs*, 886 F.2d 1240, 1245 (10th Cir. 1989)); *see also Roe v. Aware Woman Center for Choice, Inc.*, 253 F.3d 678, 684-87 (11th Cir. 2001). The practice of not publishing the names of alleged rape victims or underage criminal defendants, either in news accounts or in reported cases, is based upon a similar rationale, although in these instances both parties would be aware of the identities of the alleged victim and of the defendant, and their names would usually be used in open court. And sometimes fear of outright retaliation, not just ostracism, appears to predominate. *See Doe v. Barrow Cty.*, 219 F.R.D. 189, 192-94 (N.D. Ga. 2003) (permitting anonymous challenge to Ten Commandments display).

¹⁴⁹ *See Ferry, supra* note 137, at 195 (noting that in the seventeenth century “it was considered altogether improper for gentlemen and persons of rank to appear in print as poets, so that [those] who wanted to display their wit as a way of advancing themselves in courtly circles were driven to publish verse unsigned but under fancy disguises that could be seen through . . .”); Foster, *supra* note 117, at 379 (observing that in early modern England, “[p]ersons of rank . . . were more heavily invested in their personal name than in their literary product . . .”).

professional status, or by the ideas or opinions of her employer. An author of erotic stories, for example, may prefer to keep her identity as a high-school physics teacher secret—perhaps because of potential retaliation from her employer, but also because of the potential for embarrassment and breakdown of classroom discipline that may otherwise result.¹⁵¹ Nor is the need for anonymity necessarily limited to narrow personal interests; one might be motivated to protect the group or nation to which one belongs instead. For example, when George Kennan published his famous *Foreign Affairs* article (under the pseudonym “X”) in 1947, heralding what came to be known as the U.S. containment policy against the Soviet Union, he requested anonymity due to his employment at the time with the U.S. State Department.¹⁵²

In all of the preceding examples, anonymity not only reduces the speaker’s private costs of speaking but also may be seen to advance two important social goals as well. First, anonymity encourages contributions to the marketplace of ideas by eliminating barriers both to speaking (such as age, social status, or ethnicity) and to listening (such as fear of social censure or geographical isolation).¹⁵³ Protecting anonymity helps those with inside information sound

¹⁵⁰ “The motivations for publishing anonymously . . . have included an aristocratic or gendered reticence, religious self-effacement, anxiety over public exposure, fear of prosecution, hope of an unprejudiced reception, and the desire to deceive.” Robert J. Griffin, *Anonymity and Authorship*, 30 *NEW LITERARY HIST.* 877, 884 (1999). Another example that might fall within this category is that of a speaker who publishes anonymously or under a pseudonym to avoid the audience’s perceived irrational bias. As Levmore and Heymann both note, for example, women authors often resorted to male-sounding pseudonyms (e.g., George Sand) so that their works would be taken seriously within a male-oriented culture. See Heymann, *supra* note 1, at 1398-1400; Levmore, *supra* note 8, at 2208-09, 2213-14.

¹⁵¹ See also Heymann, *supra* note 1, at 1404-05.

¹⁵² See, e.g., WALTER ISAACSON & EVAN THOMAS, *THE WISE MEN: SIX FRIENDS AND THE WORLD THEY MADE* 383-85 (1986).

¹⁵³ It does this in part by encouraging speakers to contribute to public discourse without fear. Kang observes that “individuals are less fearful in cyberspace” because their “physical body is never at risk.” See Kang, *supra* note 135, at 1161. Anonymous speech also encourages audiences to listen without allowing the identity of the speaker to prejudice their interpretation of his message. See Post, *supra* note 37, at 640 (“In most circumstances, we

the alarm against threats to public welfare, and it helps citizens to check abuses by powerful institutions, corporations, and actors.¹⁵⁴ Second, anonymous speech promotes democratic self-governance, which Alexander Meiklejohn and others have argued is the ultimate aim of the First Amendment.¹⁵⁵ The inclusion of voices in public debate that might not otherwise be heard, particularly the voices of those with less power and influence, makes public discourse and ultimately our system of government more democratic. By increasing the likelihood that unconventional perspectives will be brought to bear on important social problems, anonymity may help generate creative solutions. And even if it does not, citizens who participate in public discourse are more likely to seek out information about important policy issues and thus to become more capable of exercising democratic self-governance.

Justifiable retaliation. A darker side of anonymity is revealed, however, when we consider various other reasons why authors may wish to speak without attribution. One prominent reason is that the speaker wants to conceal his identity because he fears the negative

attend as carefully to the social status of a speaker, and to the social context of her words, as we do to the bare content of her communication.”); Lidsky, *supra* note 6, at 896 (arguing that the widespread use of anonymity and pseudonymity on the Internet “disguises status indicators such as race, class, gender, ethnicity, and age, which allow elite speakers to dominate real-world discourse”). Lee Bollinger offers another argument that, if true, applies equally well to anonymous speech; he contends that one of the functions of the First Amendment is to make us more tolerant of others by bringing us into contact with diverse ideas and viewpoints. LEE BOLLINGER, *THE TOLERANT SOCIETY* 50 (1986).

¹⁵⁴ See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527. Anonymity also enables speakers to initiate social movements to challenge repressive regimes. See Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119 (2001).

¹⁵⁵ See *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (arguing that speech not relevant to self-government is protected by due process clause, but not by First Amendment); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961); Cass R. Sunstein, *Exchanges; Speech in the Welfare State*, 59 U. CHI. L. REV. 255, 313-14 (1992) (noting the First Amendment reflects a “structural commitment to deliberative democracy”).

consequences of his having spoken *falsely*. The disgruntled employee may wish to spread lies about his employer with impunity; the anonymous reviewer may wish to settle a personal score; a confidential informant or spy may wish to sow the seeds of discontent or control public opinion. More generally, the pathological liar (Epimenides's Cretan in our earlier example) is likely to be better off speaking anonymously than with attribution; unaware of the liar's true identity, people may accord his anonymous speech more credit than, on balance, it is due.¹⁵⁶ Thus Schopenhauer may have been exaggerating when he called anonymous speech "the refuge for all literary and journalistic rascality," but he cogently stated the case for author attribution as a curb to abuse:

[W]hen a man publicly proclaims through the far-sounding trumpet of the newspaper, he should be answerable for it, at any rate with his honor, if he has any; and if he has none, let his name neutralize the effect of his words. And since even the most insignificant person is known in his own circle, the result of such a measure would be to put an end to two-thirds of the newspaper lies, and to restrain the audacity of many a poisonous tongue.¹⁵⁷

Nearly two hundred years after Schopenhauer, the Internet has come to exacerbate this dark side of anonymity due to its "disinhibiting effect" on many speakers. Studies show that even when an Internet user is *not* anonymous and knows the recipient of his e-mail message, the speaker is more likely to be disinhibited when engaged in "computer mediated communication"

¹⁵⁶ In addition, it may be more difficult to track down and punish a truly anonymous speaker. Whether a rule forbidding anonymity would give rise to substantial social benefits for this reason alone, all other things being equal, is nevertheless difficult to say. People who wished to speak falsely might simply flout a rule requiring them to disclose their *true* identities. *Compare McIntyre*, 514 U.S. at 352-53, *with id.* at 382 (Scalia, J., dissenting).

¹⁵⁷ ARTHUR SCHOPENHAUER, *THE ART OF LITERATURE* 51 (2004).

than in other types of communications.¹⁵⁸ The technology separates the speaker from the immediate consequences of her speech, perhaps (falsely) lulling her to believe that there will be no consequences. Since the Internet magnifies the number of anonymous speakers, it also magnifies the likelihood of false and abusive speech.

Collateral benefits. A fourth possibility, related to the preceding one, is that the speaker wishes to conceal his identity in order to enhance the probability of obtaining some collateral benefit to which he is not entitled, or which could otherwise be obtained only at higher cost.¹⁵⁹ To cite one example, one can imagine a book reviewer who wishes to conceal his identity because people would be more likely to conclude that the review is biased if the author's identity were known. History is indeed replete with examples of writers who published favorable reviews of their own work or other accomplishments, either anonymously¹⁶⁰ or under pseudonyms.¹⁶¹ Alternatively, a speaker may wish to conceal his identity as the funding source

¹⁵⁸ See M.E. Kabay, *Anonymity and Pseudonymity in Cyberspace: Deindividuation, Incivility and Lawlessness Versus Freedom and Privacy*, Paper presented at the Annual Conferences of the European Institute for Computer Anti-virus Research (EICAR), Munich, Germany 16-8 March 1998, at 10 (arguing that anonymity lowers peoples "normal inhibitions" because "the deindividuation of anonymous people lowers their self-reflective propensities"); Danah Boyd, *Faceted Identity, Managing Representation in a Digital World*, at 30 ("[I]n anonymous situations, people's lack of fear of retribution or sense of other people undermines the effectiveness of social regulation."); Adam Joinson, *Causes and Implications of Disinhibited Behavior on the Internet*, in *PSYCHOLOGY AND THE INTERNET* (Jayne Gackenback ed., 1998).

¹⁵⁹ To be sure, the First Amendment does not protect fraud: for example, using fake identification to obtain liquor or cigarettes, to register to vote, or to obtain a driver's license or passport. See also *Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177 (2004) (upholding requirement that persons detained on "reasonable suspicion" of criminal activity identify themselves to police). Clearly, the state may require disclosure of identity in order to obtain a wide range of government benefits, without incurring liability for compelling speech. Our examples above, however, touch upon the publication of expressive speech to obtain collateral benefits such as public acclaim or political favors.

¹⁶⁰ See, e.g., PAUL ZWEIG, *WALT WHITMAN: THE MAKING OF THE POET 271-73* (1984) (discussing Walt Whitman's anonymous self-reviews).

¹⁶¹ STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* 133 (2005) (discussing an author's favorable statements about himself under the

for political advertisements in order to deflect suspicion, post-election, that the prevailing candidate is repaying the funder from the public fisc. Or consider the copyright infringement cases discussed in Part II.C. When I transmit copyrighted materials to another person, I may well be expressing something true and valuable (e.g., “I like this music,” or “I think you will enjoy this song”). But the main reason I choose to transmit anonymously may be to shield myself and the recipient from copyright liability, assuming the transmission is without consent of the copyright owner, and to induce future exchanges.

Arguably all of the phenomena described above could simply be listed as further examples under the heading “Justifiable Retaliation.” We separate them out only to make the point that, in these instances, the speaker may well be telling the truth: he may believe that his work is admirable, or that his political party deserves to win, or that the file-shared music is worth listening to.¹⁶² (Depending on the circumstances, he may not face retaliation either, other than in the soft sense of suspicion or disbelief; though in the copyright and breach-of-confidentiality cases the penalties could be much more serious.) The public nevertheless also has some interest in knowing the identity of the source, so as to judge for itself the credibility of the review, or the potential for political corruption or other rent-seeking behavior; or, assuming

pseudonym “Mary Rosh”). One might publish an anonymous review of another’s work for similar reasons, that is, to minimize the suspicion of bias (either for or against the author). An author’s publication of anonymous reviews also might be compared to publishing a study without revealing that it is being funded by a person or entity that stands to benefit from a particular conclusion.

¹⁶² Another example might be that of a doctor, lawyer, or other fiduciary who anonymously discloses truthful, but confidential, information about a patient or client. Whether the motivation was to attain some collateral benefit or to settle a score, the author’s interest in anonymity is clearly at odds with the perceived social benefits of enforcing legal duties of confidentiality.

that the application of copyright liability to file-sharing is on balance socially desirable, to discourage the unauthorized transmission of copyrighted works.

The Boy Who Cried Wolf. A fifth possibility is that the speaker prefers anonymity because she perceives that the public will accord her speech less value--to the public's own detriment, as well as to the speaker's--if it realizes her identity. Everyone but the wolf, after all, would have been better off had the boy in Aesop's fable been credited on the one occasion on which he spoke the truth about the lupine menace. As noted above, when the public perceives the probability of a given speaker speaking the truth as being below the average for speakers generally, the speaker is likely better off speaking anonymously than he would be if he revealed his true identity. In this instance, however, withholding the speaker's identity also may protect the public against (rationally) underestimating the truth-value of the statement.

IV. Towards a Normative Standard

The analysis presented above suggests, among other things, that attribution often provides valuable information for speech consumers, and accordingly that audiences will tend to discount speech from an undisclosed source. Some authors nevertheless prefer to publish anonymously, either because of the intrinsic satisfaction anonymity gives them or because they believe that anonymity shields them from adverse consequences that they would suffer if their identities were known. Yet our positive analysis standing alone leads to few if any clear normative conclusions concerning the appropriate legal response to anonymous speech. In crafting a normative analysis, therefore, we draw upon traditional First Amendment principles to provide some weight to the various interests that our normative analysis has identified as relevant. We argue below that existing First Amendment law generally assumes that more

speech is better than less, even if a necessary byproduct of more speech is the production of more harmful speech; and that audiences for core First Amendment speech are largely rational and capable of self-governance. Whether or not these assumptions are demonstrably true,¹⁶³ they are deeply enmeshed in our constitutional system, and rules that comport with them are more likely to withstand constitutional scrutiny. Taking these assumptions as our starting point, we can begin to devise standards for the regulation of anonymous speech, based upon the premise that the potential chilling effects of compulsory disclosure are real and must be given substantial weight, and that audience self-help is, in general, an adequate if imperfect substitute for compulsory disclosure. We develop this analysis and apply it to some current matters of controversy in the following Part.

A. Assessing the Social Costs and Benefits of Anonymous Speech

One way of further analyzing the social costs and benefits described in Part III is to consider the consequences of a hypothetical rule that required speakers to disclose their identities under all circumstances. An obvious consequence of a rule forbidding anonymity would be that some authors who crave anonymity for intrinsic reasons might prefer not to publish at all. On the other hand, authors who speak anonymously only to avoid wrongful retaliation could be induced to speak with attribution if retaliation could be deterred in other ways. Indeed, for this class of speakers, a system that simultaneously compelled disclosure of authorial identity *and* effectively prevented retaliation would be preferable to one that merely protected anonymity, because (1) speech consumers would stand to benefit from knowing the speaker's identity, and

¹⁶³ They may well be false in some commonplace settings. See Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 704-05

(2) the speaker would stand a better chance of being taken seriously, all other things being equal. Reality suggests, however, that retaliation (let alone mere social ostracism) can never be prevented with 100% effectiveness, and thus that a rule forbidding anonymity almost certainly would discourage some apprehensive speakers from coming forward. Stronger penalties against retaliation nevertheless could ameliorate some of the negative consequences of a nonanonymity rule (though such penalties could give rise to other negative consequences such as an increase in the cost of false positives, i.e., erroneous determinations that wrongful retaliation has occurred). In addition, a rule forbidding anonymity might cause the public to accord too little weight to truthful warnings emanating from speakers such as the Boy Who Cried Wolf—though potential wolf-criers who recognize this problem in advance would have a marginally greater incentive not to develop a reputation as wolf-criers in the first place. A rule requiring them to disclose their identities therefore could conceivably have a net positive effect on the dissemination of truthful information, at least in the long run.¹⁶⁴

On the other side of the ledger, a rule that required speakers to disclose their identities would deter some members of the third class of anonymous speakers—those who fear justifiable retaliation—from coming forward. But this result might appear to be a positive social good, to the extent this class of speakers gives rise to greater social losses than private benefits.¹⁶⁵ Moreover, a rule protecting this class against retaliation would make no sense, even if it were

(2006).

¹⁶⁴ An analogy can be drawn to the firm that wants consumers to recognize its trademark as symbolizing a consistent level of quality. *See supra* note 108.

¹⁶⁵ *But see* *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 n. 19 (1964) (“Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about “the clearer perception and livelier

feasible, precisely because such a rule would immunize the class from liability for defamation, product disparagement, and other conduct that the legal system (rightly, in our view) condemns. A disclosure rule also would require speakers in the fourth class, those seeking collateral benefits, to reveal their identities--and this too would appear to be a social good, if for example it would enable speech consumers to draw appropriate inferences about the credibility of the speech at issue.¹⁶⁶

What the preceding analysis suggests, unfortunately, is that any attempt to tally up the social costs and benefits of anonymous speech is destined to be indeterminate; or, to put it another way, that our positive analysis standing alone leads to few if any clear normative conclusions. On the one hand, it is conceivable (though, we think, unlikely) that a rule forbidding anonymity altogether would maximize social welfare, even when the potential chilling effect with respect to speakers falling into categories one and two—those who crave anonymity for intrinsic reasons, and those who fear wrongful retaliation--is taken into account. Surely some of these speakers would continue to speak out, even at some risk or discomfort to themselves; those risks could be reduced somewhat by increasing the penalties for retaliation; and whatever social losses would nevertheless ensue would have to be balanced against the gains

impression of truth, produced by its collision with error.”) (citing JOHN STUART MILL, *ON LIBERTY* (Oxford: Blackwell, 1947), at 15).

¹⁶⁶ This is not to say that all cases arguably falling into this or other categories would be easy cases. Speakers may have mixed motives for retaining anonymity--or it may be difficult to discern what the speaker's motive is at all. Political speech in particular may be difficult to disentangle. On the one hand, speakers may rightly fear retaliation for speaking their minds in a public forum. On the other, knowing who has funded a political advertisement provides some insight into who is likely to be showered with benefits flowing from the public fisc, if the candidate whose position aligns with the advertisement comes to power.

flowing from a reduction in the quantity of harmful speech.¹⁶⁷ For surely more harmful speech and other rent-seeking behavior would either be deterred or more easily detected if anonymity were forbidden; perhaps, then, the benefits of a nonanonymity rule would outweigh the costs, as measured by some felicific calculus. On the other hand, a regime that forbade anonymity altogether might seem creepy, if not outright totalitarian. And it may well be the case—in fact, we suspect that it probably *is* the case—that a reasonable social welfare calculus cuts in favor of *some* sort of proanonymity norm, if we assume that (1) substantial numbers of speakers falling into categories one and two *would* be deterred from coming forward under a mandatory disclosure rule, and (2) audiences can protect themselves from many¹⁶⁸ of the potential harms of anonymous speech by resort to the self-help option, i.e., by not giving anonymous speech as much credit as attributed speech.¹⁶⁹ Exactly how strong the proanonymity norm must be, however, assuming that some version of a proanonymity norm is welfare-enhancing at all, is

¹⁶⁷ Indeed, whistleblowers, informants, and other would-be truth-tellers often *do* have to reveal their identities eventually, for example if they are called to testify in court. Due process is surely sufficiently weighty to overcome the speaker's interest in anonymity—which simply shows that the strong version of the right to speak anonymously, which some might read into *McIntyre*, cannot be the last word. Moreover, as suggested in the text above, government sometimes does try to protect non-anonymous whistleblowers from retaliation—for example, through anti-SLAPP legislation, *see, e.g.*, CAL. CIV. PROC. CODE § 425.16 (2006); witness protection programs, *see* Witness Security Reform Act of 1984, 18 U.S.C. §§ 3521-28 (2000); and rules protecting the identity of confidential tipsters under some circumstances, *see, e.g.*, *Scher v. United States*, 305 U.S. 254 (1938) (stating that, in a criminal case, disclosure of an informer's identity is forbidden 'unless essential to the defense'). Where such protections are in place, the social interest in permitting anonymity is reduced as well. To the extent audiences may benefit from artistically-motivated anonymity, however, *see supra* notes 137, 153, that benefit would be lost under a nonanonymity regime.

¹⁶⁸ Concededly, not all audience members will respond reasonably to speech by an unknown author, as the prevalence of spam emails suggests. After all, if *no one* responded to the often-pseudonymous offers of sexual enhancement or stock market tips, the spam would stop coming.

¹⁶⁹ Here the rationale in favor of anonymity is similar to that which underlies copyright and some other forms of intellectual property protection: that, while copyright may give rise to a variety of social costs, on balance it creates a surplus of social benefits, by encouraging the production and publication of works of authorship that otherwise would not be produced or published. The rationale is also similar to that underlying various evidentiary privileges, such as the attorney-client.

hardly the sort of thing that can be determined with scientific precision. Strictly speaking, the analysis remains indeterminate.¹⁷⁰

We nevertheless contend that the analysis is useful in several respects. First, it shows that implicit tradeoffs *will* occur, whether we desire them or not and whatever the rule society adopts happens to be. A rule that provides strong protection to anonymous speech will result in more harmful speech, whereas a rule that provides weak protection threatens to chill a good deal of core speech. We may not know which effect predominates, but it is useful to recognize that some socially desirable consequences will be forgone, no matter which rule prevails. The analysis also encourages us to consider other ways (such as increased reliance upon self-help or the adoption of measures to prevent retaliation) of reducing the anticipated but inevitable negative consequences that are likely to flow from whatever rule is adopted. Second, the analysis suggests that, to the extent that social welfare considerations play at least *some* role in the debate, the premises implicit in existing law can be used to craft presumptions about whether the benefits or harms of anonymous speech are likely to predominate under various possible standards. We elaborate upon this point in the following section.

B. First Amendment Presumptions

¹⁷⁰ Indeed, the problems with a purely utilitarian analysis of anonymous speech go beyond mere indeterminacy. Whether the costs and benefits of anonymous speech are even commensurable with respect to one another is debatable: as we suggested above, for example, if the autonomy interests in support of a right to speak anonymously are worthy of respect, how exactly does one determine the optimal tradeoff in return for a reduction in harmful speech? More importantly, and as others before us have noted, the social welfare approach appears inconsistent with a good deal of existing First Amendment jurisprudence (even if, as we would argue, it captures some aspects of that jurisprudence). Much speech may be of little value, or even positively harmful, but few accounts of the First Amendment make these observations paramount, or even relevant under all circumstances. *See, e.g.,* Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 20-24 (2002).

Traditional First Amendment theory helps to fill the gaps left by the positive analysis by providing two important premises: first, that audiences are capable of rationally assessing the truth, quality, and other characteristics of core speech; and second, that more speech is generally preferable to less. Both premises are open to debate.¹⁷¹ But both have a long and distinguished pedigree and are unlikely to be displaced from the pantheon of general First Amendment principles anytime soon. Thus, anonymity norms that take these principles as starting points will fit comfortably within the existing First Amendment framework, and reliance on these principles will avoid the impasse that otherwise arises due to the unquantifiable nature of the costs and benefits of anonymous speech.

1. Audiences Are Rational

A critical factor in weighing the value of the right to speak anonymously against other important rights and interests is how audiences respond to anonymous speech. Traditional First Amendment jurisprudence does not address the issue directly, despite the fact that its dominant metaphor, the “marketplace of ideas,” entails an implicit theory of audience response.¹⁷² Oliver Wendell Holmes, who together with Louis Brandeis articulated the philosophical foundation of modern First Amendment theory,¹⁷³ introduced the marketplace of ideas metaphor into First Amendment jurisprudence. Holmes asserted in *Abrams v. United States*¹⁷⁴ that “[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market”

¹⁷¹ See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 928 (2006) (citing empirical studies “demonstrat[ing] citizens’ lack of political knowledge,” but observing that public choice theory explains why “the public’s ignorance is rational”).

¹⁷² *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes and Brandeis, Jj., dissenting).

¹⁷³ See MARC FRANKLIN ET AL., *MASS MEDIA LAW* 7-12 (7th ed. 2005).

¹⁷⁴ 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Holmes' assertion is a tenet of modern First Amendment jurisprudence, but it only has credence if the "consumers" in the marketplace of ideas are shrewd evaluators of information circulating in that market. Consumers in a market pick and choose what is valuable, and their aggregate decisions drive purveyors of worthless goods (or information) out of the market. Yet marketplace theory only works if consumers are capable of thinking critically and exercising autonomy to discern what is valuable and what is not.¹⁷⁵ Extending the analogy, if truth (whether Truth with a capital "T" or some more contingent notion of truth) is to emerge from the marketplace of ideas, the consumers of ideas must be capable of exercising their critical faculties to separate the wheat from the chaff, the valuable (by each consumer's own lights) from the valueless.

Holmes recognized that the operation of the marketplace of ideas relies on the rationalism of American citizens. *Abrams* involved the prosecution of five Russian socialist immigrants for distributing pamphlets opposing U.S. involvement in World War I.¹⁷⁶ Although Holmes had nothing but contempt for the "creed" espoused by the defendants, "these poor and puny anonymities,"¹⁷⁷ he believed that the government had failed to establish that their speech hindered the U.S. war effort. Employing what would come to be known as the clear and present

¹⁷⁵ See M. Neil Browne et al., *The Shared Assumptions of the Jury System and the Market System*, 50 ST. LOUIS U. L. J. 425, 433 (2006) ("The key to market optimality is the presumed existence of the calculating, well-informed, intensely rational consumer in a context where power relationships permit the rationality to function freely.").

¹⁷⁶ *Id.* at 628-29.

¹⁷⁷ *Id.* at 629.

danger test,¹⁷⁸ Holmes concluded that the defendants' speech did not present an imminent threat of "immediate" harm precisely because a rational audience would discount what the defendants had written; "[o]nly the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the [First Amendment]."¹⁷⁹ A rational and skeptical audience, if given time for deliberation, can discuss and ultimately see through "evil counsels," thereby eliminating their dangers without resort to government regulation.¹⁸⁰

Justice Brandeis further articulated this rationalist conception of public discourse.¹⁸¹ Brandeis firmly believed that the forces of "reason as applied through public discussion" would ameliorate potentially dangerous speech.¹⁸² According to Brandeis, "[o]nly an emergency can justify repression"¹⁸³ of speech, even speech the State believes to be "false and fraught with evil consequence."¹⁸⁴ In ordinary circumstances, the State must rely on its citizens to "expose through discussion the falsehood and fallacies [of dangerous speech], to avert the evil by process

¹⁷⁸ Justice Brandeis further refined the test in *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring): "[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by processes of education, the remedy to be applied is more speech, not enforced silence." Vincent Blasi has called Brandeis' opinion in *Whitney* "arguably the most important essay ever written . . . on the meaning of the first amendment." Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM & MARY L. REV. 653, 668 (1988).

¹⁷⁹ *Id.* at 630-631.

¹⁸⁰ As scholar G. Edward White has noted, Holmes, despite his famous skepticism about human nature, believed that "humans are inherently rational beings." G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 579 n.11 (1995); see also Lyrissa Barnett Lidsky, *Brandenburg and the United States War on Incitement Abroad: Defending a Double Standard*, 37 WAKE FOREST L. REV. 1009, 1017-1027 (2002), for a discussion of the intellectual contributions of Holmes and Brandeis to modern First Amendment theory.

¹⁸¹ *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring).

¹⁸² *Id.* at 375-76.

¹⁸³ *Id.* at 377.

of education.”¹⁸⁵ Brandeis, like Holmes, preferred the correction of evil speech via public discussion rather than state coercion, viewing state coercion not only as unnecessary but also as a threat to citizen autonomy, democratic participation, and the search for truth.¹⁸⁶

This faith in rationalism permeates First Amendment jurisprudence.¹⁸⁷ To list just a few examples, the Supreme Court adapted the test for punishing speech that incites violence directly from Holmes’ clear and present danger test, and the incitement test assumes that audiences can avoid the dangers of inciting speech by employing their common sense.¹⁸⁸ The Supreme Court made this point abundantly clear in the incitement case *Dennis v. United States*: “[T]he basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies.” This same assumption is the basis of the Court’s prohibition of fighting words, which include only those expressions that spur the listener to violence before he has time for rational thought.¹⁸⁹

Defamation law also strongly reflects the Supreme Court’s faith in rationalism. In *New York Times v. Sullivan*, the landmark case “constitutionalizing” defamation law, the Court

¹⁸⁴ *Id.* at 374.

¹⁸⁵ *Id.* at 377.

¹⁸⁶ See Lidsky, *supra* note 180, at 1023-4.

¹⁸⁷ This article makes no claim about original intent, but Thomas Jefferson’s First Inaugural displays a rationalist bent: “If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.” *Gertz v. Robert Welch*, 418 U.S. 323, 340 n.8 (1974) (quoting Jefferson). See also Letter from James Madison to W.T. Barry (Aug. 4, 1822), in *THE COMPLETE MADISON: HIS BASIC WRITINGS* 337 (Saul K. Padaver ed., 1953) (“[A] people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”).

¹⁸⁸ *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The incitement test has been adapted to the tort context as well. For thoughtful discussion, see David A. Anderson, *Incitement and Tort Law*, 37 *WAKE FOREST L. REV.* 957 (2002).

explicitly quoted Justice Brandeis’s concurring opinion in *Whitney v. California* for the proposition: “Those who won our independence believed . . . that public discussion is a political duty; that this should be a fundamental principle of the American government. . . . *Believing in the power of reason as applied through public discussion*, they eschewed silence coerced by law—the argument of force in its worst form.”¹⁹⁰ Yet the *Sullivan* Court did not paint an idealized portrait of public discussion. The Court recognized that “debate on public issues” will “include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,”¹⁹¹ as well as “half-truths,” “misinformation,” “exaggeration,” “vilification,” and “false statement[s].” The Court nonetheless held that the State may only punish defamatory falsehoods about public officials when the speaker knows or recklessly disregards the falsity of his words. Thus, the State may punish lies about public officials, but not merely negligent falsehoods. The *Sullivan* Court based its holding in part on the inevitability of “erroneous statement . . . in free debate” and the chilling effect that would result were such statements to form the basis for large tort verdicts. However, *New York Times v. Sullivan* also rests on the premises that public officials will not suffer unduly as a result of the inevitable false statement. For this premise to be realized, however, the public must be capable of sorting through the “half-truths” and “misinformation” to glean the foundations of “enlightened opinion.” As the Court wrote, a paramount First Amendment value is ensuring that public discourse is “uninhibited, robust, and

¹⁸⁹ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

¹⁹⁰ 376 U.S. 254 (1964) (emphasis added).

¹⁹¹ *Id.* at 270.

wide-open,” but this kind of discourse can only benefit citizens who are capable of exercising their critical faculties to ferret out valuable information.

This same reliance on the audience to apply its critical faculties lies at the heart of the public figure/private figure distinction in defamation.¹⁹² This distinction rests largely on the fact that public figures, as speakers, have more access than other speakers to the marketplace of ideas, and can protect themselves from the harm of defamation by employing “self-help—using available opportunities to contradict the lie or correct the error”¹⁹³ Public figures, in other words, have more ability than other speakers to win over the public in the “competition of [] ideas.” If the audience is allowed to hear both sides, it can rationally determine the truth of the matter for itself. Thus, public figures must show a high standard of fault in order to recover for defamation.¹⁹⁴ Private figures, unable to use self-help as effectively to remedy defamation, receive more legal solicitude and are able to recover damages under much less stringent standards. The constitutional lesson to be drawn seems to be that the First Amendment prefers self-help remedies to state coercion. Put another way, the constitutional preference is for requiring victims of potentially harmful speech to mitigate that harm by engaging the critical faculties of the audience; the audience can then discern the truth from the competing claims, at least in the realm of speech that lies at the core of the First Amendment.

2. More Is Better

¹⁹² See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (noting that public figures have access to the media to rebut defamatory falsehoods, and using this to justify, in part, forcing them to prove actual malice before recovering for defamation).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

The presumption that audiences will respond rationally to speech is integrally related to a second fundamental presumption in First Amendment jurisprudence, namely that truth is best gathered “out of a multitude of tongues.”¹⁹⁵ This proposition too is debatable. Speech from a multitude of tongues may be diverse, but it also may be unintelligible; and some observers question whether true diversity can be accomplished without paternalistic governmental intervention.¹⁹⁶ Whatever the merits of these arguments, the *laissez faire* approach to the marketplace of ideas remains the dominant paradigm for regulating the print media, including the Internet.¹⁹⁷ The *laissez faire* approach reflects both the strength of our national commitment to democratic self-governance as well as our distrust of governmental interventions.¹⁹⁸ Respect for the autonomy of citizens demands that they be allowed to consider all available information in deciding what course to follow. And they must be free to make these choices without governmental intervention, for such intervention “would necessarily circumscribe the potential

¹⁹⁵ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (citing *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943), *aff'd*, 326 U.S. 1 (1945)). Presumably, diversity in the marketplace of ideas maximizes the choices available to consumers. See *Browne et al.*, *supra* note 176, at 433 (pointing out that this same assumption—of “social benefit emerging from a vigorous clash of interests”—underlies the jury system).

¹⁹⁶ See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* xvii-xx, 18-19 (1993). Diversity is thwarted when powerful media corporations “set the parameters of public debate.” FRANKLIN ET AL., *supra* note 173, at 11. Moreover, “[m]any citizens are barred from meaningful participation in the marketplace of ideas by poverty or inadequate education, and class, race, or gender may impair the ability of some speakers to make their voices heard.” *Id.*

¹⁹⁷ *ACLU v. Reno*, 521 U.S. 944, 995 (1997) (applying this approach to regulation of Internet speech). Broadcasting is subject to far more government controls due to spectrum scarcity. See generally Mehmet Konar-Steenberg, *The Needle and the Damage Done: The Pervasive Presence of Obsolete Mass Media Audience Models in First Amendment Doctrine*, 8 VAND. J. ENT. & TECH. L. 45, 46 (2005) (decrying paternalistic regulation of the broadcast media as inconsistent with empirical research on audience behavior); Ronald Krotoszynski, Jr., *Enhancing the Spectrum*.

¹⁹⁸ As Alexander Meiklejohn eloquently wrote, “[w]hen men govern themselves, it is they—and no one else—who must pass judgment upon unwise and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones” MEIKLEJOHN, *supra* note 156, at 26-27.

for collective self-determination.”¹⁹⁹ Even if a benign moderator might improve the quality of public discourse, American constitutional theory normally bars the state from playing that role (and rightly so). If history proves anything, it proves that distrust of governmental intervention in the marketplace of ideas is warranted, for governmental attempts to “prescribe what shall be orthodox”²⁰⁰ have resulted frequently in suppression of truth and enshrinement of error.²⁰¹

In recognition of this fact, First Amendment jurisprudence has committed to “uninhibited, robust, and wide-open” public discourse, even at the expense of tolerating some degree of false and abusive speech. Early on, James Madison recognized that “[s]ome degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.”²⁰² Explicitly adopting Madison’s philosophy, the Supreme Court in *New York Times v. Sullivan* refused to punish even negligent “erroneous statement[s];”²⁰³ the Court realized that errors that are “inevitable in free debate” in order to ensure that “freedoms of expression [] have the breathing space that they need . . . to survive”²⁰⁴ This landmark decision, like many others, opts for underregulation of potentially harmful speech lest protected speech be chilled. In other words, more speech is better than less speech, and a more diverse public discourse must sometimes be bought at the expense of a less civilized one.

¹⁹⁹ Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993); see also Kenneth Karst, *Equality and the First Amendment*, 43 U. CHI. L. REV. 20, 40 (1975) (observing that the “state lacks ‘moderators’ who can be trusted to know when ‘everything worth saying’ has been said.”).

²⁰⁰ *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

²⁰¹ For eloquent expression of this idea, see FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 81-86 (1982).

²⁰² *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

²⁰³ *Id.* at 271-272.

C. Implications

These First Amendment assumptions are directly relevant to evaluating the contribution anonymous speech makes to public discourse and to deciding how that contribution is to be weighed against other important rights. Any regulation of anonymous speech should begin with the presumption that information consumers are likely to discount unattributed speech and to use indicia other than author identity to judge its reliability. In other words, regulation of anonymous speech should start with the assumption that the audience itself will be able to dissipate much of the harm of anonymous speech.²⁰⁵ Another implication is that anonymous speech is, presumptively, valuable speech. While First Amendment jurisprudence might prefer attributed speech to anonymous speech, it clearly prefers anonymous speech to no speech at all, especially when audiences can exercise “self-help” to minimize the perils of anonymous speech.²⁰⁶ This is not to say that all audience members will be intelligent, sophisticated, critical readers; indeed, many audience members will not be capable of the rationalism that is an article

²⁰⁴ *Id.*

²⁰⁵ *See* *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (“At the heart of the First Amendment lies the principle 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.”). Certainly we can and sometimes do make different assumptions about the citizenry as information consumers. For example, regulation of the speech of issuers of securities is explicitly premised on paternalism. As the Supreme Court noted, writing specifically about so-called “blue sky” laws: “Such laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition.” *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 64 (1973). Yet to make such paternalistic assumptions as a general matter, especially when applied to core speech, is fundamentally antithetical to democratic theory.

²⁰⁶ This argument is sometimes made in support of giving reporters a privilege to protect confidential sources of information. The reporter’s privilege increases the overall quantity and quality of speech that the public receives, and it encourages speakers to come forward when they might otherwise remain silent. However, there is one key difference between the argument for a reporter’s privilege and the argument for a privilege to speak anonymously or pseudonymously, namely, that the reporter who receives the information presumably knows the identity of the source and therefore vouches for its reliability.

of faith in much First Amendment jurisprudence. Even so, both democratic theory and First Amendment jurisprudence are deeply committed to respecting citizens' autonomy and capacity for self-governance, and this commitment dictates a rationalist account of audience response to core speech rather than a paternalistic one.²⁰⁷ As Justice Potter Stewart eloquently wrote, “[e]nlightened choice by an informed citizenry” is “the basic ideal upon which an open society is premised.”²⁰⁸

V. Coping with Anonymous Speech: A Guide for Legislators and Courts

The cost-benefit and constitutional analyses presented here have important practical implications for both legislatures and courts. Lawmakers who rely solely on cost-benefit analysis might rationally decide that anonymous speech is more trouble than it is worth, despite its many benefits. But the First Amendment analysis tips the balance. This section provides guidance to legislatures about what types of situations might justify statutes compelling disclosure of author identity. We also argue that legislatures and courts should recognize a privilege to speak anonymously in cases involving political or other core speech; a privilege that

²⁰⁷ Several theorists have focused on the importance of public discourse as a component of democracy. Robert Post, for example, quotes John Dewey for the proposition that “democracy begins in conversation,” and Post’s own theory focuses on how Supreme Court decisions have made “public discourse” a central facet of our constitutional system. See ROBERT POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 186-87 (1995). Similarly, Robert Bennett has proposed a “conversational model” to describe “the actual functioning of democracy in the United States.” Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 845, 871 (2001). Under this model, “an important influence in producing a sense on the part of citizens of involvement in the processes of government—and thence of fidelity to its decisions—is its pervasive tendency to direct conversation about public affairs their way.” *Id.* Bennett concedes that the discourse that results is not necessarily “enlightened or high-minded,” *id.* at 872, but his theory demands that citizens be capable of meaningful “engagement” in “ongoing public conversation.” See Robert W. Bennett, *Democracy as Meaningful Conversation*, 14 CONST. COMM. 481, 481 (1997).

²⁰⁸ See *Branzburg v. Hayes*, 408 U.S. 665, 726 (1972) (Stewart, J., dissenting) (arguing that the press promotes citizens’ ability to make enlightened choices).

can only be overcome upon an exacting showing of need by either the State or private litigants.²⁰⁹

A. When Should the State Mandate Disclosure?

Congress recently passed legislation criminalizing threatening, harassing or “annoying” online anonymous speech.²¹⁰ This patently unconstitutional²¹¹ statute is not the first or only legislative attempt to quell online anonymous speech.²¹² Nor will it be the last. Hence, both legislators and their critics can benefit from the insights that this analysis yields.

The first, and perhaps most obvious insight, is that legislatures should not regulate anonymous speech in the literary, artistic or political realms, absent a compelling need for the regulation beyond simply providing the audience with more information. More specifically, legislatures should not regulate types of speech in which (a) speakers have high autonomy

²⁰⁹ Of course, context can be crucial. Our focus remains centered principally on anonymous speech as it relates to political campaigns and to torts such as defamation and infringement. Other contexts may be quite different. As we noted above, for example, in the context of civil litigation, courts occasionally permit parties to appear anonymously, but there is certainly no presumption *in favor* of anonymous litigation. See *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993) (listing factors that a court should consider before allowing a party to proceed as a “Doe” defendant). In the context of criminal litigation, courts rarely permit the state to withhold a testifying witness’s identity, taking into account the centrality of the witness to the prosecution or defense case and the danger to the witness’s safety. See, e.g., *United States v. Varella*, 692 F.2d 1352, 1355-56 (11th Cir. 1982); *Alvarado v. Superior Ct.*, 99 Cal. Rptr. 2d 149 (S. Ct. 2000). In such instances, constitutional guarantees of due process or the right to confront one’s accusers normally give rise to a presumption *against* anonymity. Similarly, we express no general views in this paper, though we may in future work, on the constitutionality of “antimask” laws that forbid people from disguising their identities in public places. These laws may chill some speech but may conceivably be justified as anti-intimidation measures. Compare *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004) (holding an antimask law constitutional), with *Am. Knights of the Ku Klux Klan v. City of Goshen*, 50 F. Supp.2d 835 (N.D. Ind. 1999) (unconstitutional).

²¹⁰ 47 U.S.C.A. § 223 (purporting to restrict anonymous Internet communications made with “intent to annoy, abuse, threaten, or harass any person . . . who receives the communication . . .”).

²¹¹ See *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (“Conduct that annoys some people does not annoy others”); *Cohen v. California*, 403 U.S. 15, 25 (1971) (“[O]ne man’s vulgarity is another’s lyric.”).

²¹² See, e.g., New Jersey bill A1327 (2006-2007 legislative session), available at: http://www.njleg.state.nj.us/2006/Bills/A1500/1327_I2.HTM. See *ACLU v. Miller*, 977 F. Supp. 1228 (1997) (striking down Georgia law forbidding Internet users to falsely identify themselves).

interests (such as literary or artistic speech), (b) the potential for abuse is relatively low, and (c) a rational audience exists with the ability to protect itself from potential harms. Consideration of these factors will not obviate making hard choices between competing interests in all cases, but it will facilitate analysis of whether compelled disclosure is practically or constitutionally warranted.

As an illustration, reconsider the example of anonymous book reviews. Whatever the merits of Schopenhauer's criticisms of anonymous reviewers, it would be unwise and unconstitutional to criminalize anonymous book reviews. The speaker's autonomy interest in making aesthetic judgments is high, aesthetic judgments are notoriously subjective, and a rational audience is likely to discount anonymous reviews. If, for example, a reader wants to buy a copy of Milan Kundera's *The Unbearable Lightness of Being* from Amazon, she will find 212 customer reviews on the book's web page. As far as the reader is concerned, these reviewers are anonymous, even when they include their real names. She has no reason to credit their aesthetic judgments apart from the persuasiveness of their writing. It is unlikely that any single review will influence her purchasing decision, and the potential for damage from any one review (say, one which abuses its anonymity) is mitigated by the presence of numerous other entries.²¹³ She almost certainly will not read all 212 reviews, but the reviews in the aggregate provide information about the popular opinion of Kundera's book; if she generally hews to popular opinion, the reviews may determine whether she purchases the book.

²¹³ Quixotically, virulent negative reviews might make the reader more likely to purchase. Consider the case of a highly controversial political author whose reviews garner countless emotional tirades from opponents, making the book more desirable in the eyes of a fan who enjoys the author's controversial qualities.

This is not to say that anonymous reviews are always harmless.²¹⁴ Naïve readers may give anonymous reviews undue credit, and in this case an anonymous reviewer could successfully abuse the right to speak anonymously by skewering a rival’s book that he secretly admires. Even though this behavior is boorish, it would unduly infringe speaker autonomy to criminalize it, especially where a rational audience will discount the review as the subjective opinion of someone whose motives and biases are unknown. Moreover, legal remedies are already available to pursue the anonymous speaker who crosses the line into making false and defamatory factual assertions. A statute compelling disclosure is simply too blunt an instrument to regulate anonymous “core” speech that poses a low risk of harm when rationally discounted.

A corollary, however, is that the State should have authority to compel speakers to disclose their identities to their audiences when the speakers’ autonomy interests are particularly low and the potential for abuse particularly high. Thus, nothing in our analysis would prevent legislatures from regulating anonymous unsolicited commercial email, or “spam.” Estimates suggest that 13 million spam are sent each day,²¹⁵ many of them pseudonymously. The sender of the email is motivated by financial self-interest rather than self-fulfillment, and the potential for fraud is high.²¹⁶ Even though most rational audience members can protect themselves from fraudulent anonymous spam (if not from annoying anonymous spam), First Amendment

²¹⁴ A prankster, masquerading as “Andrew Lloyd Webber,” posted near-defamatory book reviews on Amazon.com. John Schwartz, *Compressed Data; Who’s Composing All Those Fake Online Reviews?*, N.Y. TIMES, August 27, 2001 at C4 (“false Lloyd Webber endorsements went to guidebooks on combating halitosis and premature ejaculation. . . . [m]any of the reviews were not fit to print in this newspaper and might qualify as libelous if not for the latitude that the law affords to obvious parodies”).

²¹⁵ See Jameel Harb, Note, *White Buffalo Ventures, LLC v. University of Texas at Austin: The CAN-SPAM Act & the Limitations of Legislative Spam Controls*, BERK. TECH. L. J. 531, 532 (2006).

jurisprudence specifically allows for a limited degree of paternalistic regulation of commercial (as opposed to core) speech.²¹⁷

What, then, should legislators do in the realm of electoral speech? Anonymous speech during election campaigns is largely political speech, and yet the Supreme Court’s electoral speech jurisprudence occasionally allows paternalistic regulation in the name of ensuring an informed citizenry.²¹⁸ As we saw in Part II, the compelled disclosure provisions in *McConnell* rest in part on the assumption that voters will not be able to perceive partisan bias in election advertisements, at least when the advertisements are run immediately before an election. And yet the Supreme Court in *Mills v. Alabama*²¹⁹ struck down a law that made it a crime for a newspaper to publish editorials for or against a ballot measure on election day, even though the purpose of the law was to protect voters from “confusive last-minute charges and countercharges.”²²⁰ *Mills v. Alabama* refused to allow the state to criminalize election-day editorials as a means of preventing voter confusion; paternalism simply could not justify such an “obvious and flagrant abridgement of the constitutionally guaranteed freedom of the press.”²²¹

²¹⁶ Nigerian banking con schemes and email viruses are common examples of spam-based fraud, and both should probably be familiar to anyone who has been using electronic mail for any length of time.

²¹⁷ See *Central Hudson Gas & Electric Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980); *but see Lorillard Tobacco v. Reilly*, 533 U.S. 525 (2001).

²¹⁸ See Levine, *supra* note 73, at 253 (discussing this paternalistic strain in electoral speech jurisprudence).

²¹⁹ 384 U.S. 214 (1966).

²²⁰ The law made it a crime to solicit votes for or against a ballot proposition on election day, and the editor of the Birmingham Post-Herald was arrested for violating it after his newspaper carried an election-day editorial urging voter to adopt a mayor-council form of government. 384 U.S. 214 (1966).

²²¹ *Id.* In theory the arguments made against paternalistic regulation should apply equally to broadcasting, but the Supreme Court has tolerated regulation to achieve broadcast “fairness” due to the fact that the broadcast spectrum is a scarce resource not available to all citizens. This sort of paternalistic regulation is reflected in a 2005 FCC ordering broadcasters and cable operators to disclose the “nature, source, and sponsorship” of “prepackaged

Although detailing the problems with the Court’s electoral speech jurisprudence is beyond the scope of this article, our normative analysis suggests that restrictions on political speech, even in the electoral context (or especially in the electoral context), should not be based on paternalistic assumptions about voters. Thus, the relevant question both for lawmakers and for courts ought to be whether a compelled disclosure law can be justified without reference to paternalism. Reconsider the compelled disclosure provision in *McConnell*. It was not motivated solely by the desire to protect the audience from being misled by clever partisans.²²² It was also motivated by the desire to prevent corporations and unions from circumventing contribution limits and to prevent politicians from being corrupted. Our analysis does not undermine the legitimacy or weightiness of these concerns, but instead indicates that they should be evaluated standing alone, without the added weight of paternalistic assumptions about voters to bolster them.²²³

news stores” or face up to a \$10,000 fine and/or a year in jail. *See* Frank Ahrens, *Broadcasters Must Reveal Video Clips’ Sources, FCC Says*, WASH. POST, April 14, 2005 at A2.

²²² Voters certainly do not need to know the identity of the speaker to understand that a purported issue ad that ending with the message “Call Senator Russ Feingold and tell him not to filibuster President Bush’s judicial nominees” is really a partisan ad aimed at defeating Feingold’s bid for re-election. *See* Wisconsin Right to Life, Inc. v. FEC, 126 S. Ct. 1016 (2006).

²²³ The overall vitality of the regulatory scheme upheld in *McConnell* is already being called into question by the Supreme Court, albeit indirectly. *See id.*; *Randall v. Sorrell*, 126 S. Ct. 2479 (2006).

A more difficult illustration is presented by the anonymous speech regulation in *Justice for All v. Faulkner*, 410 F.3d 760 (5th Cir. 2005). A “literature policy” at the University of Texas required all printed materials distributed on campus, regardless of subject matter, to contain the name of a university-affiliated person or group responsible for distribution. *Id.* at 763. One of the University’s justifications for restricting anonymous leafleting was to “preserve the campus for use by students, faculty, and staff” by excluding “non-affiliated” speakers from distributing literature on campus. *Id.* at 764. An anti-abortion student group contended that the literature policy abridged its First Amendment right of anonymous speech, and the Fifth Circuit Court of Appeals agreed. *Id.* at 763. The court recognized anonymous speech on university campuses as an important means of expressing “controversial ideas.” *Id.* at 765. In other words, the court acknowledged the strong autonomy interests of students in speaking anonymously on campus. However, the case was complicated by the fact that university campuses are not open to the public; the court therefore had to parse public forum jurisprudence before concluding that the area affected by the literature policy was a designated public forum. *Id.* at 769. As regulation of speech in a public forum, the

B. Balancing Anonymous Speech Rights in Torts Cases

In the last ten years, courts have found themselves adjudicating more disputes pitting the rights of anonymous speakers against the rights of those allegedly harmed by their speech. The typical case begins with the aggrieved plaintiff bringing suit against a “John Doe” for anonymously publishing defamation, perpetrating fraud, divulging trade secrets, or violating the plaintiff’s copyright—all on the Internet.²²⁴ The plaintiff files suit, then subpoenas “John Doe’s” Internet service provider to reveal his true identity. If John Doe is lucky, his ISP notifies him and he is able to file a motion to quash the subpoena. At that point, a court must decide whether and how to balance the plaintiff’s right to proceed in tort with the defendant’s right to speak anonymously. If all it takes is an allegation of defamation to uncover a defendant’s identity, the right to speak anonymously is very fragile indeed, because it is easy for a plaintiff to allege

literature policy had to pass “strict scrutiny,” at least the version applicable to content neutral regulations. It failed. *Id.* Although the court acknowledged that the university’s interest in “preserving the campus for student use” was significant, it held that the literature policy was not narrowly tailored to advance that interest. *Id.* at 770. Although the literature policy affected only leaflets and not other forms of anonymous speech, the court still concluded that it placed an inordinate burden on anonymous speech because it “require[d] the speaker to identify himself, not just to certain University officials, but to every person who receives the literature being distributed.” *Id.* at 771. The court then suggested that lesser restrictions on anonymous speech, such as requiring a registered student to notify university officials before distributing leaflets, might be narrowly enough tailored to survive strict scrutiny. *Id.* Although the court’s decision reached a justifiable conclusion, our positive analysis points out a significant factor that the court’s decision overlooked. The regulation was not aimed at protecting the audience from any harm that would flow from the anonymous speech; rather, it was aimed at protecting them from the secondary effects of speech, namely the presence of “unauthorized” anonymous speakers who might displace authorized speakers from the university campus.

²²⁴ See cases cited *infra* at note 227; see also Lidsky, *supra* note 6 at n.6 (listing numerous libel cases brought against pseudonymous Internet speakers between 1995 and 2000). For commentary on this phenomenon, see, e.g., Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL’Y 405, 407 (2003) Jennifer O’Brien, Note, *Putting a Face to a (Screen) Name*, 70 FORDHAM L. REV. 2745 (2002); David L. Sobel, *The Process that “John Doe” is Due: Addressing the Legal Challenge to Internet Anonymity*, 5 VA. J.L. & TECH. 3 (2000); Shaun B. Spencer, *CyberSLAPP Suits and John Doe Subpoenas*, 19 J. MARSHALL J. COMPUTER & INFO L. 493 (2001); Michael S. Vogel, *Unmasking “John Doe” Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OR. L. REV. 797 (2004).

defamation any time he comes in for harsh criticism online.²²⁵ On the other hand, anonymity should not immunize the defendant's tortious conduct. How, then, is a judge to adjudicate the dispute?

Some courts have simply found the anonymous speaker's rights unworthy of protection once the plaintiff has alleged the speech is tortious.²²⁶ More commonly, though, courts have struggled to balance the rights of plaintiffs and defendants, adopting a variety of different standards to the task.²²⁷ The most noteworthy recent decision of this second type is *Doe v. Cahill*,²²⁸ which serves as a good point of departure for developing a uniform framework, whether statutory or judicial, to protect the interests of both plaintiffs and defendants. In *Cahill* the plaintiffs filed suit against a "John Doe" defendant²²⁹ for defamation and invasion of privacy. Writing under the pseudonym "Proud Citizen," the defendant criticized plaintiff Cahill's

²²⁵ The lawsuits are not frivolous merely because they are brought to silence the defendant. Defamation suits are almost always aimed at "silencing the defendant, and from a traditional First Amendment standpoint, there is no harm in silencing knowingly or recklessly false statements of fact, for these statements have no value to public discourse." See Lidsky, *supra* note 6, at 860.

²²⁶ See, e.g., *Hvide v. John Does 1 Through 8*, No. 99-22831, Order at 1-2 (Fla. Cir. Ct. May 25, 2000) (comparing anonymous speakers to hooded Ku Klux Klan members) (on file with author Lyrissa Lidsky, who was acting as counsel for the Does at the hearing in which the judge made this statement); see also Vogel, *supra* note 224, at 803 & n.39 (2004) (citing cases that "contained little if any analysis of the competing interests").

²²⁷ In addition to the copyright infringement cases cited *supra* at notes 98-103, some of the more noteworthy attempts to develop protections for anonymous speech include *Columbia Ins. Co. v. SeesCandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999); *Dendrite Int'l v. Does*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) (adopting a four-part balancing test); *Doe v. 2TheMart, Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001); *Cahill v. Doe*, 884 A.2d 451 (Del. 2005) (adopting "summary judgment" standard); *Lassa v. Rongstad*, 2006 WL 1912409, at *8 (Wis. 2006) (holding that under Wisconsin law a trial court should decide a pending motion to dismiss a defamation claim before compelling disclosure of the identities of anonymous speakers). *But see* *Melvin v. Doe*, 836 A.2d 42 (2003) (not articulating clear standard); *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Dev., Inc.*, 2006 WL 37020 (Pa. C.P. 2006) (concluding that ordinary discovery processes were sufficient to balance the relevant interests."). A Virginia statute gives procedural protections to anonymous Internet speakers alleged to have committed torts. See VA. CODE ANN. §§ 8.01-407.1 (Michie Supp. 2002).

²²⁸ 884 A.2d 451 (Del. 2005).

performance as a city councilman on a website devoted to discussion of local politics.²³⁰ Plaintiffs complained that two postings in particular were defamatory. The first praised the local mayor and called Cahill, in contrast, “a divisive impediment to any kind of cooperative movement,” asserting that “[a]nyone who has spent any amount of time with Cahill would be keenly aware of such character flaws, not to mention an obvious mental deterioration. . . .”²³¹ The other posting again praised the mayor and stated “Gahill [sic] is as paranoid as everyone in town thinks he is.”²³² Plaintiffs obtained a court order requiring Doe’s Internet service provider to disclose his identity. The provider notified Doe, who filed a motion to prevent disclosure, which the judge denied on the ground that plaintiffs had a good faith basis for their tort claims.²³³

On appeal, the Delaware Supreme Court found the good faith standard to be insufficiently protective of anonymous speakers’ First Amendment rights.²³⁴ Instead, the Court, faced with “an entire spectrum of ‘standards’ that could be required,”²³⁵ held that plaintiffs must meet a “summary judgment standard” before piercing a defendant’s anonymity. Under this standard a plaintiff must: (1) provide notice to the anonymous poster, to the extent possible, that

²²⁹ Plaintiff councilman and his wife originally filed suit against four John Doe defendants. Only one defendant appealed. *See id.* at 453.

²³⁰ The court also referred to it as a blog. *Id.*

²³¹ *Id.* at 454.

²³² *Id.*

²³³ The trial judge determined that, in order to obtain disclosure of Doe’s identity, the plaintiffs had to establish a “good faith basis” for their claims, that the identity was “directly and materially related to their claim,” and “that the information could not be obtained from any other source.” *Id.* at 455.

²³⁴ *Id.* at 457.

²³⁵ *Id.* at 457.

his identity is being sought and allow defendant a reasonable opportunity to respond;²³⁶ (2) establish the prima facie elements of his claim sufficiently to avoid summary judgment.²³⁷ The court believed that no explicit balancing of interests was necessary, since balancing was already entailed in the application of the summary judgment standard.

The Delaware Supreme Court was careful to tailor the summary judgment standard to the defamation context, requiring the plaintiff to “introduce evidence creating a genuine issue of material fact” only for those elements “*within the plaintiff’s control.*”²³⁸ What that meant in *Cahill* was that the plaintiff, a public figure, had to produce prima facie evidence that the defendant published a false and defamatory statement concerning him to a third party; once plaintiff established these elements, the court would compel disclosure to allow plaintiff to establish the remaining element of his claim, namely that the defendant made the statement with knowledge or reckless disregard of its falsity (that is, with actual malice). The court believed this standard fairly balanced the plaintiff’s and defendant’s interests since plaintiff had “easy access to proof” of all of these elements except for actual malice, which hinges on the defendant’s state of mind.²³⁹

Applying this standard, the court concluded that no reasonable person would interpret the substitution of a “G” for the “C” in “Cahill” as an indication that Mr. Cahill had a same-sex

²³⁶ *Id.* at 460.

²³⁷ *Id.* at 461.

²³⁸ *Id.* at 463 (emphasis added).

²³⁹ *Id.* The court stressed that the first element—which requires courts to determine whether a statement contains factual assertions that are capable of a defamatory meaning—is “perhaps the most important” in establishing the legitimacy of a plaintiff’s claim.

affair.²⁴⁰ Nor would it conclude that Cahill was mentally ill. The “Gahill” statement was more likely a typo than a homosexual slur, and the paranoia allegation was merely a statement of opinion rather than an assertion of fact. The court based this determination in part on how “reasonable readers” decode anonymous messages on Internet websites or blogs. Such readers take their cues from context and “are unlikely to view messages posted anonymously as assertions of fact,”²⁴¹ especially when they appear on websites filled with invective and hyperbole.²⁴² The Court pointed out that the website’s guidelines stated that it was devoted to “opinions” about local politics. Moreover, at least one reader of Doe’s postings responded that “your tone and choice of words is [that of] a type of person that couldn’t convince me. You sound like the person with all the anger and hate . . .”²⁴³ Read in context, Doe’s statements were “incapable of a defamatory meaning.”²⁴⁴ The court therefore held that the plaintiff failed to satisfy the summary judgment standard necessary to obtain Doe’s true identity.

The Delaware Supreme Court’s approach in *Doe v. Cahill* is broadly consistent with the kind of balancing this Article advocates. However, it is the first decision on this issue by a state’s high court, and it adds yet another standard to the “spectrum” available to any court or legislature searching for a workable solution. Therefore, it is worthwhile to lay out the steps in a workable solution in the hope that a uniform standard will evolve from the current morass. This

²⁴⁰ *Id.* at 466.

²⁴¹ *Id.* at 465 (citing *Rocker Mgmt., LLC v. John Does 1 through 20*, 2003 WL 2214930 (N.D. Cal. 2003)).

²⁴² *Id.* at 466.

²⁴³ *Id.*

²⁴⁴ *Id.*

uniform standard could be enacted by legislators or adopted by courts. The components of an ideal standard are as follows.

1. Notice to the Anonymous Speaker

The first component is a requirement that anonymous speakers be given notice and an opportunity to be heard. A speaker cannot defend her right to speak anonymously unless she receives notice that her identity is being sought in a civil or criminal action and she is given an opportunity to come forward to assert her rights. Obviously, the notice requirement cannot be applied too stringently when the defendant's identity is unknown. In the Internet context, it is reasonable to require the plaintiff to post notice on the same website, blog, chat room, or other forum where the defendant's allegedly tortious communications was made. Moreover, since plaintiff will ordinarily seek the defendant's identity from an ISP, it is logical to require the ISP to give notice to its subscriber before disclosing the subscriber's identity. The Cable Communications Policy Act places such a burden on cable ISPs,²⁴⁵ but these requirements should be extended to cover other claims as well to help guarantee the defendant has a chance to defend his right to speak anonymously before it is too late.

2. Applying a Qualified Privilege to Speak Anonymously

Once the anonymous speaker challenges disclosure of his or her identity, a court must step in to determine whether the speaker enjoyed a privilege to speak anonymously and, if so,

²⁴⁵ The Cable Communications Policy Act, 47 U.S.C. § 521 *et. seq.*, prohibits the dissemination of subscriber data by operators of cable systems without consent, unless the disclosure is necessary to render service or if it is made to a government entity pursuant to court order, in which case the subscriber must be notified of the order and given an opportunity to prohibit or limit the disclosure. This act was subsequently modified by the Cable Television Consumer Protection and Competition Act of 1992. See *Fitch v. Doe*, 869 A.2d 722 (Me. 2005) (trial court erred in ruling subscriber had consented to disclosure; under 47 U.S.C.S. § 551(c)(2)(B), ISP could release such information to non-governmental entity in response to court order if it notified subscriber).

whether the plaintiff has presented sufficient evidence to overcome that privilege. As a threshold matter, the court must determine whether the speech at issue is core First Amendment speech, as defined (broadly) by Supreme Court precedent. If the anonymous speech at issue is core speech, the qualified right to speak anonymously acts as a privilege to protect the anonymous speaker's identity from automatic disclosure.²⁴⁶

Although the process we advocate here differs little from the process applied in *Doe v. Cahill*, it is nonetheless useful to describe the process in terms of privilege law. Privilege concepts are familiar to both First Amendment law and to tort law.²⁴⁷ A variety of First Amendment and tort privileges attempt to balance competing interests in ways that foster open discussion and debate.²⁴⁸ *New York Times v. Sullivan*,²⁴⁹ the most famous First Amendment

²⁴⁶ As for the copyright infringement cases involving the file-sharing of recorded music, we suggested above that the act of file-sharing is partially expressive, even if it is also (perhaps predominantly) conduct to which the expression is incidental. See *supra* notes 159-62 and accompanying text. We therefore tend to agree with those courts that have required plaintiffs to overcome the presumption of anonymity with, *inter alia*, specific supporting evidence that the file-sharer has downloaded copyrighted material. See *supra* notes 98-103 and accompanying text.

²⁴⁷ The “reporter’s privilege” to shield confidential sources is probably the most familiar. Depending on the jurisdiction, the basis for any applicable “reporter’s privilege” may be a statute, a state constitution, common law, or possibly the First Amendment to the U.S. Constitution. See FRANKLIN ET AL., *supra* note 173, at 577 (discussing sources of reporter’s privilege). The Supreme Court has never recognized a reporter’s privilege based on the First Amendment, but many lower courts have interpreted the Court’s unusual and enigmatic decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), “as creating a federal constitutional privilege.” See FRANKLIN ET AL., *supra* note 173, at 575. In *Branzburg v. Hayes*, the Supreme Court held that the First Amendment does not shield reporters from having to testify before grand juries about information obtained from confidential sources. 408 U.S. at 668. *Branzburg* was a 5-4 decision, but Justice Powell, who joined the majority opinion, wrote a separate concurrence emphasizing how “limited” the majority decision was and suggesting that he would extend reporters a testimonial privilege in some circumstances. *Id.* at 709-710 (Powell, J., concurring). The irony of *Branzburg* is that Justice Powell’s concurrence ultimately lent weight to the dissenting Justices’ contention that the First Amendment creates a qualified privilege for reporters who are subpoenaed to appear before grand juries. See *id.* at 728 (Stewart J., dissenting). Justice Stewart later suggested that considering Powell’s concurrence, *Branzburg* could be characterized as rejecting the reporters’ claim of privilege by a vote of “four and a half to four and a half.” Potter Stewart, *Or Of the Press*, 26 HAST. L.J. 631, 635 (1975).

²⁴⁸ See FRANKLIN ET AL., *supra* note 173, at 259-62 (discussing common law privileges that apply in defamation actions).

²⁴⁹ 376 U.S. 254 (1964).

case of the twentieth century, is often described as creating a constitutional privilege to criticize public officials; a plaintiff can overcome the privilege by showing that the defendant's speech was false and made with actual malice. And courts have developed a number of qualified privileges, such as the privilege to fairly and accurately report information in an open public record, to protect public discussion from suffering the chilling effects of defamation liability. One virtue of describing the right to speak anonymously in this familiar way is that it suggests at the outset that the right is not absolute but must be balanced against plaintiffs' interests in order to foster uninhibited public discourse. Moreover, it suggests the relevant mechanism for balancing: once the privilege applies, it creates something in the nature of a presumption that the defendant's identity is protected and places the burden on the plaintiff to overcome it by establishing, in essence, the legitimacy of her need for disclosure.²⁵⁰

3. *Overcoming the Privilege*

In order to overcome the privilege to speak anonymously, a plaintiff should be required to provide prima facie evidence to support those elements of plaintiff's claim that are within plaintiff's control. By helping to guarantee the legitimacy of plaintiff's claim, this requirement ameliorates the threat that plaintiffs will bring claims merely to silence or retaliate against those who criticize them. Moreover, it strikes a proper balance between the interests of plaintiffs and defendants. The plaintiff is able to uncover the defendant's identity, but only when she shows the identity is necessary for the plaintiff to pursue her claim. The burden of producing prima

²⁵⁰ Michael Vogel is correct in asserting that existing procedural rules *could* be used to protect the right to speak anonymously. But a formal mechanism for protecting the right, such as the privilege we advocate here, focuses attention on the significance of the right and guides the balancing that is to take place, thereby increasing predictability. *See* Vogel, *supra* note 225, at 823.

facie evidence of the elements of her claim is one that the plaintiff must bear anyway; all that this requirement does is to require this evidence be produced at the outset, prior to disclosure of defendant's identity. *Doe v. Cahill* demonstrated how such a burden could be met by defamation plaintiffs. Although defamation is the most common tort brought against anonymous speakers, there is no practical reason why the same approach could not be taken to other types of tort cases involving expressive speech. For example, a plaintiff alleging misappropriation of a trade secret by an anonymous defendant should be required to produce evidence tending to show that the information disclosed was indeed a trade secret.²⁵¹ Establishing this element does not require defendant's identity, and it serves as some indicium of the genuineness of plaintiff's claim. Once established, the plaintiff should be able to obtain defendant's identity to establish misappropriation, which depends on the status and mental state of the defendant. This same approach can and should be applied to other tort claims brought based on anonymous speech.

4. *Balancing Harms*

One final component should be added to the privilege analysis. If a plaintiff is able to overcome the defendant's privilege to speak anonymously, the defendant should have a final opportunity to convince the judge, in camera, that the magnitude of harm she faces if her identity is revealed outweighs the plaintiff's need for her identity. Only at this point would a court need

²⁵¹ A trade secret can be any information that "derives independent economic value . . . from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use," and is subject to "efforts that are reasonable under the circumstances to maintain its secrecy." UNIF. TRADE SECRETS ACT § 1(4). As with copyright infringement, however, there may be a preliminary question of whether the act of using or disclosing an alleged trade secret is expressive speech or merely conduct. For a recent discussion of the occasional tensions between First Amendment law and trade secret law, see Pamela Samuelson, *Principles for Resolving Conflicts Between Trade Secrets and the First Amendment*, abstract posted at <http://law.berkeley.edu/institutes/bclt/ipsc/papers2/Samuelson.doc>.

to consider the speaker's actual motive (*e.g.*, fear of death) and, if necessary, to engage in difficult task of weighing the competing interests.²⁵² Although a defendant would rarely be able to establish a threat of sufficient magnitude to outweigh plaintiff's need for defendant's identity, this last component of the privilege analysis serves as a final piece of insurance that defendant's right to speak anonymously is not too lightly compromised.

VI. Conclusion

Judge Learned Hand once famously wrote that "the First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."²⁵³ As Judge Hand recognized, democracy rests on our faith in citizens' ability to decide for themselves where truth lies in public discourse. This same faith underlies the Supreme Court's recognition of a First Amendment right to speak anonymously. The Court's anonymous speech decisions manifest a faith, albeit one that wavers at times, in citizens' ability to discount anonymous information and protect themselves from its harms, at least in most cases. This faith is being challenged by the Internet-fuelled growth of anonymous speech. Legislators increasingly seek to curb anonymous speech in the name of protecting citizens from harm, and courts increasingly must adjudicate tort claims against anonymous speakers. Both legislatures and courts need guidance in dealing with these issues that the Supreme Court has failed to provide.

²⁵² *But cf.* Columbia Ins. Co. v. SeesCandy.com, 185 F.R.D. 573 (N.D. Cal. 1999).

²⁵³ United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.), *aff'd*, 326 U.S. 1 (1945).

This Article provides that guidance. We provide a positive analysis of the motivations, both good and bad, of anonymous speakers. Our positive analysis is supported by recent scholarship on the trademark function of authorship, which we use to show how audiences infer the motivations of authors and thereby decode anonymous speech. Even so, our positive analysis fails to show that anonymous speech, on balance, produces more social good than social harm.

We therefore turn to First Amendment jurisprudence and democratic theory to provide a normative basis for protecting anonymous speech and to provide guidance on how to balance it against other important rights. These sources largely forbid paternalistic regulation of anonymous speech concerning matters at the core of the First Amendment, and they suggest that the first line of defense against the threat posed by anonymous speech is audience “self-help.”

Ultimately, therefore, we caution legislators against passing legislation compelling authors to disclose their identities in the name of providing audiences more information: compelled disclosure cannot be justified absent a compelling need for author identity, at least in the realm of core speech. We also advocate that legislatures enact or courts adopt an evidentiary privilege to safeguard the right to speak anonymously from the chilling effect of cyberslapps. Adoption of the privilege would bring a uniform approach to the vexing problem of balancing the rights of anonymous speakers with the rights of those harmed by their speech.