WHO IS THAT MASKED MAN: SHOULD ANONYMOUS POSTERS TO NEWSPAPER WEBSITES BE UNMASKED?

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I. INTRODUCTION

A variety of cases have considered the privacy rights of anonymous posters on newspaper websites. Do the First Amendment or state shield laws defeat a subpoena demanding the names of these individuals? There are several competing considerations. Are journalistic shield laws appropriate in a situation in which the news source is presenting information directly to the public without the filtering influence of a professional journalist? To what extent does the First Amendment protect the right to be anonymous and what competing interests are sufficiently important to overturn this protection? May a newspaper argue on behalf of the legal rights of a third-party poster? What ethical considerations are present on both sides of this debate? What public policy is appropriate in the new media age that society has entered? The answers to these questions will shape society’s understanding of the First Amendment and the rights of the individual in this new digital age.

II. INFORMATIONAL AND DECISIONAL PRIVACY

While privacy is fundamental to personal autonomy and freedom, how broadly it may be asserted in a social setting is a significant policy question. Some scholars divide privacy into informational privacy and decisional privacy. Informational privacy “limits the ability of others to gain, disseminate, or use information about oneself.”

Information privacy involves the collection, use, and disclosure of personal information. Information privacy is often contrasted with “decisional privacy”, which concerns the freedom to make decisions about one’s body and family. Decisional privacy involves such matters as contraception, procreation, abortion, and child rearing,

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and is at the center of a series of Supreme Court cases often referred to as substantive due process or the constitutional right to privacy.2

Of special significance for this analysis is the fact that U.S. law only treats decisional privacy as a fundamental individual right. Freedom of information is a significant public policy issue and the First Amendment gives added weight to this consideration. European law treats information privacy as a significant human right officially protected by European Union (EU) Data Protection Directive 95/46 EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.3

The EU directive is broadly written to define personal data as “any information relating to an identified or identifiable natural person (data subject); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.”4 However, the Directive does allow exceptions for “the prevention, investigation, detection and prosecution of criminal offenses, or of breaches of ethics for regulated professions”5 and “the protection of the data subject or of the rights and freedoms of others.”6 Doubtless the European restrictions are a result of historical abuses by Communist and Fascist dictatorships.

U.S. federal legislation does not broadly regulate the collection and use of online personal information. A variety of offline data collection activities are regulated, notably video rental records7, motor vehicle record8, and cable TV subscription information.9 While many states protect library records, Section 215 of the 2001 Patriot Act broadly permits the Director of the Federal Bureau of Investigation to “make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items). . .”10 Mentioned are “library circulation records, library patrons lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, or medical

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4 Directive 95/46/EC article 2(a).
5 Directive 95/46/EC article 13(d).
6 Directive 95/46/EC article 13(g).
8 See id.
records…” 11 These provisions are controversial and some librarians have resisted such requests. 12 The reauthorized act changes the standard for production from “sought for an authorized investigation” to a showing of “reasonable grounds to believe that” the records requested are “relevant to an authorized investigation” and the subject of the request may disclose the order to “an attorney to obtain legal advice or assistance with respect to the production of things in response to the order.” 13

The modern discourse concerning the right to privacy dates from Samuel Warren and Louis Brandeis’s formulation of privacy as “the right to be let alone.” 14 However, what is not as well known is their blunt criticism of the excesses of newspapers.

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadest in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. Nor is the harm wrought by such invasions confined to the suffering of those who may be the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in the lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of the people. When personal gossip attains the dignity of print, and crowds the space available or matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to the weak side of human nature which is never wholly cast down by misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality

11 Id.
destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.\footnote{Id.}

In attempting to formulate a legal principle Warren and Brandeis wrote:

\begin{quote}
[T]he general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man’s life has ceased to be private, before the publication under consideration has been made, to that extent the protection is likely to be withdrawn. Since, then, the propriety of publishing the very same facts may depend wholly upon the person concerning whom they are published, no fixed formula can be used to prohibit obnoxious publications. Any rule of liability adopted must have in it an elasticity which shall take account of the varying circumstances of each case, a necessity which unfortunately renders such a doctrine not only more difficult of application but also to a certain extent uncertain in its operation and easily rendered abortive. Besides, it is only the more flagrant breaches of decency and propriety that could in practice be reached, and it is not perhaps desirable even to attempt to repress everything which the nicest taste and keenest sense of respect due to private life would condemn.\footnote{Id.}
\end{quote}

Consequently, at the foundation of the development of the law of privacy there is an unresolved tension between clearly recognized outrageous conduct and the necessity of allowing open discussion in a free society. Decisional privacy was protected in a series of U.S. Supreme Court decisions starting with \textit{Griswold v. Connecticut}.\footnote{Griswold v. Connecticut, 381 U.S. 479 (1965).} Justice Douglas, writing for seven members of the Court, created a constitutional right of decisional privacy, although the word \textit{privacy} does not appear in the text. Douglas famously wrote: “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”\footnote{Id. at 484.} Justice Black wrote in dissent: “I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.”\footnote{Id. at 510 (Black, J. dissenting).}

Justice Black emphasized in a statement that many would consider prescient:
I repeat so as not to be misunderstood that this court does have the power, which it should exercise, to hold laws unconstitutional when they are forbidden by the Federal Constitution. My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court’s belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.20

Indeed, Black mentions *Lochner v. New York*.21 “That formula, based on subjective considerations of ‘natural justice’, is no less dangerous when used to enforce this Court’s view about personal rights than those about economic rights.”22 Justice Peckham in *Lochner* wrote: “There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.”23 Liberty and privacy may well be in the eye of the beholder.

But what is the legal status of informational privacy? The U.S. Supreme Court has never used the phrase *informational privacy*, although one may assert that it addressed the question in a Nixon tapes decision.24 This case involved a challenge to the Presidential Recordings and Materials Preservation Act. Regarding an asserted right of privacy, Justice Brennan wrote:

>[T]he merit of appellants’ claim of invasion of his privacy cannot be considered in the abstract; rather, the claim must be considered in light of the specific provisions of the Act, and any intrusion must

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20 Id. at 521 (Black, J. dissenting).
22 *Griswold*, 381 U.S. at 523 (Black, J. dissenting).
23 *Lochner*, 198 U.S. at 57.
be weighed against the public interest in subjecting the Presidential materials of appellants’ administration to archrival screening. [citations omitted].

This balancing model has been followed by lower courts that have used the phrase informational privacy in their decisions.

In another 1977 decision, the U.S. Supreme Court did note that, “the cases sometimes characterized as protecting ‘privacy’ have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.” The Court explicitly stated that it did not decide any question concerning the collection or disclosure of data by the government. In this case, requiring records to be kept of controlled substances prescriptions, “we simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.”

On January 19, 2011, the Supreme Court decided NASA v. Nelson. Justice Alito wrote the opinion for the Court with Justice Kagan taking no part in the decision. Reversing the Ninth Circuit, the court upheld the right of NASA to request detailed background information from an independent contractor, Caltech, regarding drug counseling and treatment of Caltech employees. The Court emphasized that the questionnaire only took five minutes to complete and was widely used. The opinion did not address the specific question of whether or not there is a constitutionally protected right of informational privacy. The Court cast the government in the role of an employer making reasonable inquiries into the fitness of prospective employees. Consequently, Alito wrote: “We reject the argument that the Government, when it requests job-related personal information in an employment background check, has a constitutional burden to demonstrate that its questions are ‘necessary’ or the least restrictive means of furthering its interests.” Justice Scalia, concurring, was blunt: “A constitutional right to ‘informational privacy’ does not exist.” Justice Thomas in his concurring opinion stated the same conclusion.

In the underlying case, the Ninth Circuit found the balance in favor of the employees. The Ninth Circuit specifically addressed a section of its

25 Id. at 458.
27 Id.
29 Id. at 782.
30 Id. at 791.
opinion to the informational privacy claim. Regarding questions concerning illegal drug usage the Court wrote:

[W]e doubt that the government can strip personal information of constitutional protection simply by criminalizing the underlying conduct—instead, to force disclosure of personal information, the government must at least demonstrate that the disclosure furthers a legitimate state interest. Drug dependence and abuse carries an enormous stigma in our society and is not generally disclosed by individuals to the public [citation omitted]. If we had to reach the issue, therefore, we would be inclined to agree with the district court that SF 85’s drug questions reach sensitive issues that implicate the constitutional right to informational privacy.31

In support of this position the Ninth Circuit cited its prior decision in Crawford v. United States.32 In Crawford, a non-attorney bankruptcy petition preparer was fined for failing to include his own Social Security Number on documents submitted to the bankruptcy court. Repeatedly citing its 1991 decision involving the Rehabilitation Act, the Court stated that “the right to informational privacy, however, is not absolute; rather, it is a conditional right which may be infringed upon a showing of proper governmental interest.”33

The Crawford court indicated that the relevant factors to consider in determining if the government could properly disclose private information include:

[T]he type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.34

The court stated that this list of factors was not exhaustive. The court concluded that the possibility of identity theft was insufficient to overcome

31 Nelson v. NASA, 530 F.3d 865 at 879 (9th Cir. 2008).
33 Id. at 964 (citing Doe v. Attorney Gen., 941 F.2d 780 at 796 (9th Cir. 1991)).
34 Id.
the governmental interest in requiring the disclosure of Social Security Numbers.

In a 2010 decision, the Ninth Circuit noted that a prisoner has no constitutional right to privacy involving AIDS and HIV medical records. The court additionally noted that the only Supreme Court decision addressing medical privacy was *Whalen v. Roe*, which the physicians and patients lost, and concluded that in the current case medical information concerning sexually violent predators was not immune from disclosure. In 2009 the Ninth Circuit in dicta mentioned “the general, and somewhat amorphous, right to informational privacy.”

In a 2010 decision the Sixth Circuit discussed privacy in the context of claims asserting unlawful patronage dismissal. The court noted two forms of privacy: one is decisional privacy and the second is informational privacy.

The Sixth Circuit has narrowly construed the informational privacy right to apply only to those personal rights that can be deemed fundamental or implicit in the concept of ordered liberty. As such, the Sixth Circuit has recognized this right in only two cases; (1) where the release of personal information could lead to bodily harm, as in *Kallstrom v. City of Columbus*, 136 F. 3d 1055 (6th Cir. 1998), and (2) where the information released was of a sexual, personal and humiliating nature, as in *Bloch v. Ribar*, 156 F. 3d 673, 683 (6th Cir. 1998). The Sixth Circuit has determined that only after a fundamental right is identified should the court proceed to the next step of the analysis, i.e., balancing the government’s interest in disseminating the information against the individual’s interest in keeping the information private.

The Seventh Circuit in 2010 wrote: “In *Whalen v. Roe*, 429 U.S. 589, 598-600 . . . (1977), the Supreme Court had held that ‘liberty’ includes ‘privacy’. But except when dealing with searches and seizures, the Court in the decades since has confined the label ‘privacy’ mainly to sexual and reproductive rights . . . (citations omitted).”

The privacy at issue in this case is different; it is the right to conceal information about oneself. That is the right commonly infringed by illegal searches and seizures, but in other contexts is

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35 See Seaton v. Mayberg, 610 F.3d at 539 (9th Cir. 2010).
36 Mangum v. Action Collection Serv., 575 F.3d at 935 (9th Cir. 2009).
38 Id. at 287.

Furthermore:

[T]he tension between informational privacy and free speech resides not only in its extravagant (as it seems to some observers) modern conception of the scope of free speech but also in the fact that people often conceal personal information not out of regard for privacy as such but as a means of advancing their personal interests by selective, which is to say tactical, disclosure of such information.41

### III. REASONS FAVORING INFORMATIONAL PRIVACY

#### A. Autonomy

A major reason favoring the protection of information privacy, dating from George Orwell’s book *1984*, is that informational privacy is essential to personal autonomy. The more information that is available about an individual, the more subject to control and manipulation one becomes.

Consider legislation that proposed to track mental patients to determine if public funds were being well spent and if the patients were receiving continuity of care.42 The Washington Supreme Court wrote that, “while disclosure of intimate information to governmental agencies is permissible if it is carefully tailored to meet a valid governmental interest, the disclosure cannot be greater than is reasonably necessary.”43 The Court’s majority allowed the records to be kept with the patient’s name and diagnostic code without encoding.

Justice Pearson in dissent wrote:

[E]ach additional thread that attaches to an individual lessens his own psychological security and invites governmental abuse…. Approval of one makes it that much easier to sanction the next. When viewed in isolation, a particular privacy invasion may seem

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40 *Id.*
41 *Id.*
42 *See* Peninsula Counseling Ctr. v. Rahm, 719 P.2d 926 (Wash. 1986).
43 *Id.* at 938.
harmless, but when each isolated invasion is added to all other harmless invasions, the resulting society begins to mirror that which George Orwell contemplated in his novel, *1984*.44

Justice Pearson continued his dissent in depth and quoted a scholar of privacy:

Professor Westin defines privacy as ‘the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others (A. Westin, Privacy and Freedom 7 (1967)).’ Professor Westin also identifies four reasons why this privacy is essential to the individual. First, it preserves the individual’s personal autonomy. Second, it facilitates emotional release from the pressures of daily life. Third, it makes possible self-evaluation, including the exercise of conscience. Finally, privacy permits an individual to engage in limited and protected communication, thus enabling the individual to share confidences. A. Westin, at 33-39. As noted by the majority, the law already recognizes that individuals should be allowed the autonomy to make certain decisions, and that they also should be protected from the disclosure of certain personal matters to the government.45

B. Privacy Rights

A 2009 South Carolina Supreme Court decision held that the right of publicity survived death.46 A widow sought damages from her deceased husband’s law firm for their use of his name without compensation. The lower courts granted summary judgment to the firm.

The South Carolina Supreme Court quoted commentary that “the right of publicity is best defined as the inherent right of every human being to control the commercial use of his or her identity.” “The focus is on commercial use and the right to control that use and to be compensated monetarily for that use; whereas, the right to privacy addresses damages of a person’s mental psyche.”47

Professor William Prosser identified four basic torts under the right to privacy: (1) intrusion, (2) disclosure, (3) false light, and (4)

44 See id. at 944.
45 Id. at 947.
47 Id. at 759.
appropriation. The first three torts are based upon the idea that a person has the right to be left alone, whereas the fourth is based on the theory that a person has the right to control his or her identity. The term “right of publicity” was coined to break away from the theory of the right to privacy. Most states now recognize some form of the right of publicity, either under the common law or by statute.

The South Carolina Supreme Court noted that its prior decisions already recognized causes of action for wrongful appropriation, wrongful publicizing of private affairs, and wrongful intrusion into private affairs. The Court concluded that “encompassed in these three recognized torts is the infringement on the right of publicity; it is denominated wrongful appropriation of personality. It addresses the plaintiff’s right to the commercial protection of his name, likeness, or identity.” The court held that South Carolina recognizes the tort of infringement on the right of publicity and that “the right to control the use of one’s identity is a property right that is transferable, assignable, and survives the death of the named individual.” However, the widow lost her damage claim because of undisputed evidence that her husband, Gignilliat, requested that the firm continue to use his name after his death.

C. Criminal Actions

In 2003 the New Hampshire Supreme Court considered a suit against an information broker who provided information to a stalker who murdered the victim at her place of employment and then committed suicide. The Court wrote: “we conclude that an investigator who obtains a person’s work address by means of pretextual phone calling and then sells the information may be liable for damages…to the person deceived.” The Court wrote that an investigator “owes a duty to exercise reasonable care not to subject the third person to an unreasonable risk of harm,” particularly in light of stalking and identity theft.

The threats posed by stalking and identity theft lead us to conclude that the risk of criminal misconduct is sufficiently foreseeable so

48 Id.  
49 Id. at 760.  
50 Id. at 761.  
52 Id. at 1020.  
53 Id. at 1021.
that an investigator has a duty to exercise reasonable care in disclosing a third person’s personal information to a client. And we so hold. This is especially true when, as in this case, the investigator does not know the client or the client’s purpose in seeking the information.54

D. Freedom of Association

In a 1958 decision, the U.S. Supreme Court refused to compel the National Association for the Advancement of Colored People (NAACP) to turn its membership lists over to the state of Alabama.55 Justice Harlan wrote for a unanimous Court that:

[If petitioner’s rank-and-file members are constitutionally entitled to withhold their connection with the association..., it is manifest that this right is properly assertable by the association....The reasonable likelihood that the association itself through diminished financial support and membership may be adversely affected if production is compelled is a further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members.56 It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute an effective restraint on freedom of association...Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissent beliefs.57

. . . .

We hold that the immunity from state scrutiny of membership lists which the association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests, privately and to associate freely with others in so doing as to come within the protection of the fourteenth Amendment.58

E. Chilling Free Expression

The phrase chilling effect has appeared in 130 U.S. Supreme Court decisions based on a LexisNexis search on October 24, 2010. The idea in

54 Id. at 1022.
56 See id. at 459.
57 Id. at 460.
58 Id. at 465.
some of these cases is that anonymous sources are essential to reporting. A recent Pennsylvania Supreme Court decision upheld the state’s shield law from an attack that the anonymous source had violated another statute prohibiting the disclosure of Grand Jury proceedings.\textsuperscript{59} The trial judge in this case had required the disclosure of the source, stating: “The limited application of this ruling will not have a chilling effect on the ability of reporters to investigate and report on matters of public concern.”\textsuperscript{60}

\section*{IV. The Anonymous and Pseudonymous Speaker}

A classic early example of anonymous political speech involves The Federalist Papers, written by Alexander Hamilton, John Jay, and James Madison, published in 1787 and 1788 under the pseudonym \textit{Publius}. This example and numerous others were discussed in a 1995 U.S. Supreme Court decision.\textsuperscript{61} The Court struck down as overbroad an Ohio statute that prohibited the distribution of anonymous campaign literature. Justices Scalia and Rehnquist dissented stating that:

I can imagine no reason why an anonymous leaflet is any more honorable, as a general matter, than an anonymous phone call or an anonymous letter. It facilitates wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity. There are of course exceptions, and where anonymity is needed to avoid “threats, harassment, or reprisals” the First Amendment will require an exemption from the Ohio law. \textit{Cf. NAACP v. Alabama ex rel. Patterson}, 357 U.S. 449 (1958). But to strike down the Ohio law in its general application—and similar laws of 49 other states and the Federal Government—on the ground that all anonymous communication is in our society traditionally sacrosanct, seems to me to be a distortion of the past that will lead to a coarsening of the future.\textsuperscript{62}

Using pseudonymity, such as \textit{Publius}, allows the speaker to develop a relationship and reputation with readers over time. In a 1995 decision, the U.S. Supreme Court has equated anonymous and pseudonymous speech.\textsuperscript{63} The Court wrote: “Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. \textit{Talley v.}

\textsuperscript{60} See id. at 945.
\textsuperscript{62} Id. at 385 (Scalia, J. dissenting).
\textsuperscript{63} See id. at 341.
California, 362 U.S. at 64. Great works of literature have frequently been produced by authors writing under assumed names.”

V. JOURNALISTIC PRIVILEGE

The First Amendment’s language: “Congress shall make no law…abridging the freedom of the press,” is the foundational concept for journalistic independence. The question of whom or what meets the definition of journalist is foggy. The U.S. Supreme Court has never provided a definitive definition of journalist or press. A famous statement by the Court is that:

[L]iberty of the press is the right of the lonely pamphleteer who uses carbon paper or a micrograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. Freedom of the press is a “fundamental personal right” which is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets…the press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.

The majority holding in the five-to-four Branzburg case was that there is no reporter’s privilege in the U.S. Constitution. The Court wrote: “the issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not.” The majority did not believe that the lack of a privilege would deter sources from providing information. Furthermore, the Grand Jury’s right to gather evidence overcame the “consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.” However, Justice Powell, who was part of the majority opinion, provided what the dissenters called an “enigmatic” concurring opinion in which he noted the “limited nature of the Court’s holding” and that the press was not completely without First Amendment protections”. Powell asserted that in special cases any “asserted claim to

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65 U.S. CONST. amend. I.
67 Id. at 692-93.
68 Id. at 690-91.
69 Id. at 709 (Powell, J. concurring).
privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”

While *Branzburg* rejected a constitutional reporter’s privilege, many federal courts recognize a qualified reporter’s privilege in some situations relying on language in Powell’s concurrence. Today state law recognizes some form of reporter’s privilege with a majority of states having a reporter’s shield law. Recently, Texas enacted a broadly worded shield law covering information sought in both civil and criminal cases. Journalist is defined as a person who gains a “substantial portion of his livelihood” or who gathers information disseminated by a news medium” for substantial financial gain.” However, the Texas privilege does not apply to information gathered prior the effective date of the legislation (May 13, 2009).

Cases are contradictory concerning the legal status of bloggers, with New Jersey denying reporter status to an individual who never identified herself to sources as a reporter, sought their confidentiality, or proved that she had the intent to disseminate news. In contrast, California granted reporter status to bloggers who published Apple’s new product trade secrets. The U.S. Supreme Court has extended First Amendment protection to information published through the Internet stating that there are no cases for “qualifying the level of First Amendment scrutiny that should be applied to the Internet medium.”

VI. THE ANONYMOUS SPEAKER

As previously mentioned, there are numerous shield laws protecting news sources. A classic decision that predates these statutes is *Cervantes v. Time, Inc.*, rendered by the Eighth Circuit concerning a Life Magazine article entitled “The Mayor, The Mob, and The Lawyer.”

While New York did have such a statute, the applicable Missouri state law did not. The Court noted that *N.Y. Times v. Sullivan* requires public

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70 Id. at 750.
71 Subchapter C added to Chapter 22 of the Civil Practice and Remedies Code and Article 38.11 added to the Code of Criminal Procedure (Acts 2009, 81st leg., Ch 29 (H.B. 670), Sec. 2, effective May 13, 2009)).
73 See In re Rabb, 293 S.W.3d 865 (Tex. App. 2009)
76 Reno v. ACLU, 521 U.S. 844 at 870 (1997).
figures to prove actual malice in libel actions. Furthermore, “central to the mayor’s appellate attack is his contention that he cannot possibly meet his burden of proof if the reporter is allowed to hide behind anonymous news sources.”\(^79\) However, the Court concluded that, “quite apart from the tactics employed in collecting data for the article, mayor has wholly failed to demonstrate with convincing clarity that either defendant acted with knowing or reckless disregard of the truth.”\(^80\) The court stated:

> Where there is a concrete demonstration that the identity of defense news sources will lead to persuasive evidence on the issue of malice, a District Court should not reach the merits of a defense motion for summary judgment until and unless the plaintiff is first given a meaningful opportunity to cross-examine those sources, whether they be anonymous or known.\(^81\)

However, the Court concluded that such was not the case in the present litigation because of the length of time spent researching the published article.\n
*Cervantes* is significant because it represents an early attempt to create a list of facts for courts to consider in deciding whether or not to unmask an anonymous speaker. The Maryland Supreme Court recently wrote, for example, that the Court should require a plaintiff to attempt to notify the anonymous posters that they are the subject of a subpoena, give the posters a reasonable opportunity to oppose the application for a subpoena, require a precise showing of the statements considered actionable, determine if the complaint shows a prima facie case, and balance the poster’s First Amendment rights against the strength of the prima facie case and necessity of disclosure.\(^82\) These requirements are typical in this setting.

**VII. RECENT CASE STUDY OF SUBPOENAED NEWSPAPERS**


On September 18, 2008, a grand jury for the Third Judicial Circuit Court issued a subpoena to The Alton Telegraph in Alton, Illinois. The Subpoena sought records containing identifiable information for five specific

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79 Cervantes, 464 F.2d at 995.
80 Id. at 997.
81 Id. at 1000.
anonymous bloggers on their website. The subpoena was issued in the investigation of the brutal death of 5-year-old Ethan Nathaniel Allen.

The paper filled a Motion to Quash the subpoena on September 29, 2008, citing that the posters were protected sources under the state’s shield laws (Section 5/8-902). The motion cited *Branzburg*, where the Supreme Court ruled that newspaper reporters have a constitutional right to file a motion to quash to a grand jury subpoena. The motion continued to quote Justice Powell’s concurring opinion:

> If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.\(^8^4\)

Shortly after the paper submitted the motion, the State of Illinois arrested Frank Price on charges of first-degree murder. Allen was the son of Price’s former girlfriend.\(^8^5\) The anonymous bloggers alluded to specific information revealing their personal encounters with Price, his suspected drug abuse, and their personal suspicions of past abuse against Allen.

The state argued that the bloggers did not constitute sources for the paper since they willingly provided the information after the article was published. Judge Richard L. Tognarelli, the presiding judge, wrote:

> There is no dispute that the author of the website article is a reporter, nor that the website is a news medium under the Act. The Shield Law defines a “source” as “the person or means from or

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\(^8^3\) See Motion to Quash, Alton Tel. v. Illinois, Cause No. 08-MR-548 (Third Judicial Circuit Madison County, Ill., 2008).

\(^8^4\) *Branzburg* 408 U.S. at 709.

through which the news or information was obtained.” While the bloggers were not used specifically to write this article, there is the possibility of the commentators becoming sources. It can be argued that the commentators are persons through which the information was obtained. However, the information is not necessarily obtained for the purpose of gathering the news. The commentary section provides readers with a platform for discussing the case at their leisure. Bloggers feel the comfort, and sometimes too much comfort, of freely conversing with the protections normally provided through the expected anonymity of the internet, A lack of these protections and/or anonymity might well have a chilling effect on future bloggers…As discussed herein, it is not clear whether the unsolicited public comments made by the various bloggers whose identities are sought by the State falls within the scope of the Illinois Shield Law. It is clear that the Illinois Shield Law does not address the applicability of the Act to online bloggers. However, it is for the legislature, not this Court, to determine that applicability.86

On May 15, 2009, Tognarelli denied the Motion to Quash in the case of three out of the five commentators. The two to which the subpoena was upheld revealed details of witnessing or suspecting abuse of Allen at the hands of his mother and Price. The Judge stressed that the bloggers had information relevant to a first-degree murder trial and it was in the public’s best interest that they be questioned.

On May 26, 2009, the Las Vegas Review-Journal ran an article entitled “Employer’s Gold, Silver Payroll Standards May Bring Hard Time.”87 The article, written by reporter Joan Whitely, detailed the charges in the ongoing case against a local business owner Robert Kahre, his girlfriend, sister, and a former business assistant. The team was accused of fifty-seven counts of tax evasion, fraud, and criminal conspiracy. Several of the defendants were acquitted on similar charges two years prior. The article sparked numerous anonymous commentators to harshly lash out against Kahre, the prosecutor, and the jurors. One commentator said, “The sad thing is there are 12 dummies on the jury who will convict him. They should be hung along with the feds.”88 Another writer suggested supporting Kahre with a public protest

86 Alton Tel. v. Illinois Cause No. 08-MR-548 (Third Judicial Circuit, Madison County, Ill., 2009).
at the courthouse. A third writer advised moving it across the street from the courthouse, or to the local IRS office, to avoid court security officers.89

In an article on June 7, 2009, editor Thomas Mitchell revealed that the paper received a grand jury subpoena demanding they turn over identifiable information of all the commentators, including their “full name, date of birth, physical address, gender, ZIP code, password prompts, security questions, telephone numbers and other identifiers... the IP address.”90 Mitchell wrote:

There was no indication what they were looking for or what crime, if any, was being investigated, just a blanket subpoena for voluminous and detailed records on every private citizen who dared to speak about a federal tax case. Sure, some of the comments were a bit rough, but criminal? . . . These comment posters are not reporters; they have no shield law protection, especially since Congress has yet to pass the pending federal shield law.91

Mitchell expressed the paper’s desire to fight the subpoena stating, “My first instinct is to fight the subpoena tooth and nail . . . On the other hand, if someone were to confess to a real and specific crime on our Web site, I’d give him up at the drop of a hat.”92 The paper later complied with a replacement subpoena targeting two specific comments that explicitly threatened the jury and a federal prosecutor. “‘I’d hate to be the guy who refused to tell the feds Timothy McVeigh was buying fertilizer,’ Mitchell said, referring to domestic terrorist McVeigh, who destroyed a federal building in Oklahoma City in 1995.”93

On June 9, 2010, Judge David A. Ezra, the presiding judge in US v. Kahre, commented:

There is no stronger defender of the First Amendment than me . . . My concern here, however, is that it is a federal crime and a very serious one to attempt in any way, shape or form to threaten or obstruct or impede a jury in either a civil or criminal case . . . Somebody writing in and saying, you know, if the jury reaches a

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89 See id.
91 Id.
92 Id.
verdict of conviction, they should be hung, is really no different than saying, you know, if President Obama does X, Y or Z, he should be killed. That’s a crime, too. So I think we have to be very, very careful when we say that there is no basis to be concerned here or that this is simply government demagoguery or something of the sort. If, really, had the comments had just been of a more neutral nature in the sense that they supported Mr. Kahre in his efforts and that the government’s terrible and, you know, everybody should be able to pay in gold coins and the money is worth this or that, fine, you know; and then if the government was chasing people down and issuing subpoenas, I think I would be very concerned about that . . . . They [the commentators] do not have a First Amendment right to threaten juries.94

However the American Civil Liberties Union argued that the original subpoena was a violation of the commentator’s rights and represented four anonymous Does in an effort to win a ruling in their favor. On December 17, 2010, the Court of Appeals for the Ninth Circuit affirmed Judge Kent J. Dawson’s ruling finding that the Does’ claims were ungrounded as the subpoena was no longer in effect and “alternatively, that there was no set of facts supporting Does 1-4’s First Amendment claims. We do not reach the First Amendment claims because we decide the case on standing and mootness grounds.”95


On April 14, 2008, The Journal News, located in White Plains, New York, received a subpoena demanding identifying information regarding three specific screen names used on their website.96 The comments were added to a community forum post on September 11, 2007 entitled Sounds of Silence.97 The post, initiated by the Does in question, allegedly consisted of defamatory remarks accusing former House Representative Richard Ottinger and his wife, June of obtaining a fraudulent deed to a house and attempting to bribe public officials in order to obtain renovation permits for the property.98 The Ottingers named the Does in a civil law suit seeking half a million

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98 See id.
dollars in compensatory damages, a million dollars in punitive damages, and a public apology from the parties responsible.\textsuperscript{99} In order to obtain damages, the Orringers needed the identities of the anonymous commenters to be revealed.

The paper submitted a Motion to Quash the subpoena. On May 28, 2008 Judge Victor J. Alfieri acknowledged the quandary between the Freedom of Speech and the need to query into a possible crime using whatever means necessary.

The issue before this Court, which appears to be one of first impression in New York, involves a balancing of the right to “speak” anonymously on the Internet with the duty of the District Attorney to investigate criminal conduct. As part of the District Attorney’s function to investigate crime, New York “courts have traditionally given the Grand jury the widest possible latitude in the exercise of its powers to inquire into possible criminal conduct.” \textit{Matter of Doe v. People}, 56 N.Y.2d 348, 352 ((1982), citing, \textit{People v. Stern}, 3 N.Y.2d 658, 661 (1958)). In this regard, subpoenas issued by a grand jury “are presumptively valid and can only be challenged by an affirmative showing of impropriety.” \textit{Viraq v. Hynes}, 54 N.Y. 2d 437, 442 (1981). The Grand Jury’s broad investigative powers, however, must be tempered with a citizen’s right to speak anonymously as protected by the First Amendment. This right to speak anonymously extends to the right to speak anonymously on the Internet. See, \textit{Doe v. 2TheMart.com}, 140 F, Supp.2d 1088, 1092 (W.D.Wa. 2001).\textsuperscript{100}

Alfieri denied the motion on the grounds that the District Attorney adequately “demonstrated an evidentiary basis for the information sought,” and found it “unnecessary to decide the constitutional issue raised by the petitioner.”\textsuperscript{101}

On August 14, 2009, Home in Henderson, a citizen news blog serving Henderson and Vance Counties in North Carolina, published a story detailing a recent arrest in a case involving housing code violations and elder abuse. Social Services removed a total of eight people including three elderly men from an unfit living situation. The rental property, leased to Mary Ester Thompson, was being used as a boarding house. “Residents were living with no food, no water and no power. Human feces were on the floor throughout

\textsuperscript{99} See id.
\textsuperscript{100} The Journal News v. New York, Index No. RJI JD-NOI (N.Y. Sup. Ct., County of Rockland, 2008).
\textsuperscript{101} Id.
the residence. One elderly tenant stated that residents only received a small amount of nourishment each day.” Anonymous commentators quickly began voicing their opinions online and soon focused their disgust towards Thomas S. Hester, Jr., Thompson’s landlord.

On April 8, 2010, Hester issues a subpoena to Jason Feingold, editor of Home in Henderson, demanding information identifying twenty of the commentators. Hester later filed a complaint against the commentators claiming:

The Postings were published and intended to harm the Plaintiff’s personal and business reputation. The Postings were false and upon information and belief were known by Defendants to be false at the time they were made or were made with reckless disregard as to their truth or falsity and were made with malicious intent.

The complaint detailed the names and comments including:

[I]’m not letting Hester off the hook. I’m sick of these slumlords and their pig sty properties making money from misery and destroying the city.104

Tommy is the only one in the county or city who is making any money or deriving any benefit out of this situation . . . It is expense to the taxpayer to have to prosecute, investigate, provide a legal trial and the social services costs of providing an environment where these small time crooks like Thompson can set up shop.105

On April 14, 2010, Feingold submitted a Motion to Quash, citing the state’s shield laws as the blog’s reporters “at all material times were engaged in publishing local news and commentary on the website.” The motion continued to invoke the First Amendment rights of the commentators and the

103 See Complaint, Hester v. Does Case, No. 10-cvs-361 (Superior Court Division of North Carolina, County of Vance 2010).
104 Id. (quoting post 156 made by “ziggy” on HOME IN HENDERSON, http://homeinhenderson.com/?p=9317 (last visited Feb. 20, 2011)).
105 Id. (quoting post 15 made by “who’s winning” on HOME IN HENDERSON, http://homeinhenderson.com/?p=9317 (last visited Feb. 20, 2011)).
106 See Motion to Quash, Hester v. Does, Case No. 10-cvs-361 (Superior Court Division of North Carolina, County of Vance 2010).
insufficient evidence from the plaintiff that the comments meet the standard for a libel claim. 107

On June 28, 2010, Judge Howard E. Manning, Jr. ruled that the identities of six of the twenty named bloggers be released. The Court provided four reasons for the decision.

First, that the subpoena was issued in good faith and not for an improper purpose. Second, that the information sought (the identity of the anonymous bloggers) relates directly to the core claims of defamation. Third, that the identification of the bloggers so they can be made named defendants is material to the claims against them. Fourth, that unless their identities are disclosed, that information is not available from any other source. 108

On August 12, 2008, The Richmond Register, in Richmond, Kentucky, published a story entitled, “You Can Buy It at the Mall, But You Can’t Wear It There.” 109 The article detailed Kymberly Clem’s run-in with a mall security guard over the length of her dress. Anonymous commenters on the paper’s websites immediately began to post harsh comments regarding Clem’s character, race, and intentions. Clem and her lawyers focused on one specific blogger who implied that Clem intentionally exposed herself to a woman and children. The paper quickly removed the comment and banned the blogger citing a violation of the terms of service. 110

Kenyon Meyer, The Richmond Register’s attorney, stated in an article that he believed the posters were protected under the state’s shield laws. 111 Clem’s lawyer, Wesley Browne argued that the shield laws do not protect website comments.

Browne said he does not think [the commentator] should be considered a protected source, noting the initial comment was posted with no action from the Register. “It automatically goes up.

107 See Id.
108 Order Re: Motion to Quash Subpoena, Hester v. Does, Case No. 10-cvs-361 (Superior Court Division of North Carolina, County of Vance 2010).
They don’t fact check it, they don’t do anything to check the source,” he said. “We don't see that as a source of news.”112

However, Meyer countered by pointing out that the comment was used in an article at a later point and the reporter received other sources that corroborated the story. As of February 20, 2011 no verdict had been reached in the case.


In October of 2007, the Abilene Reporter News, in Abilene, Texas, published a series of articles about the death of Eric McMahon, a homeless man. McMahon was found beaten to death in downtown. The heinous murder and subsequent arrest of the 15-year old suspect, Michael Martinez Jr., sparked an intense debate on the paper’s website. Many citizens expressed outrage at the seemingly random murder and demanded that the suspect be tried and punished as an adult.

In the summer of 2009, David Thedford, Martinez’s lawyer, issued a subpoena seeking the identities of anyone who posted online in response to any story regarding McMahon or Martinez.113 Martinez was only identified by name in two stories, after being certified to be tried as an adult. Thedford cited his client’s right to a fair trial. “A lock-him-up-and-throw-away-the-key attitude among some commenters led Thedford to file the request, he said. He wants to ensure the commenters are ‘questioned properly for their true feelings’ on the case should they make the jury pool,” Thedford said.114

The paper’s attorney, Ken Leggett, countered with a motion citing the First Amendment and the state’s new shield laws. The shield laws went into effect in May of 2009. “Privilege shouldn't trump the right for ‘Mikey’ to have a fair trial”, Thedford countered, adding that the need for the information outweighs the public’s right to discuss the case. “Those protections should trump the right to claim privilege,” he said of Martinez’s right to a fair trial.115 On June 19, 2009, a judge ruled that the shield laws covered the anonymous commenters.

In January of 2009, the Gaston Gazette, located in Gastonia, North Carolina, published a series of articles accounting the arrest and pretrial of Michael Mead suspected of killing Lucy Johnson. Johnson, a single mother

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112 Id.
114 Id.
115 Id.
of two, was found shot to death inside her burning house. She was 15 weeks pregnant with Mead’s child at the time of her death. The stories drew hundreds of comments on the paper’s website.\textsuperscript{116}

An anonymous commenter gained the attention of Mead’s attorney’s after he divulged a scheduled court date in which prosecutors planned to revoke Mead’s bond after a polygraph test. Many of the court records in the case were sealed. The court date and the reason behind it were not made public.\textsuperscript{117} Mead’s attorney filed a subpoena seeking identifiable information for the commenter. On July 27, 2010, the Gaston Gazette filed a Motion to Quash citing the commenter was a source and thus the information was protected under the North Carolina shield laws. On August 16, 2010, Judge Calvin E. Murphy sided with the paper granting the motion.\textsuperscript{118}

VIII. POLICY CONSIDERATIONS

When evaluating the history and the possible policy considerations regarding anonymous commentators, three issues need to be addressed. First, a consistent vocabulary and commonly agreed-upon definition must be developed. Second, these definitions must be applied to the current understanding of state shield laws. Finally, the laws must be adjusted to reflect an understanding that equally considers the conflicting civil liberties.

The courts, as evident in the judicial documents, lack a common agreement in the area of terminology. Anonymous comments are often referred to as \textit{blogs}, \textit{comments}, or \textit{posts}. Likewise, the individual writing the comments are called anything from \textit{blogger}, \textit{commenter}, \textit{commentator}, \textit{poster}, \textit{source}, and in rare cases a \textit{journalist}. While these words appear on the surface to be similar, they all denote slightly different persons maintaining varying levels of rights and responsibilities. If you place the individuals in question at a simple baseball game, their differences become apparent.

The \textit{journalist} rarely can be found spending the entire game in the stands. He understands that he is not merely a spectator of the game, but rather carries a responsibility to inform those not present of the events occurring. In order to accurately portray the game, the \textit{journalist} can be found observing the action from a variety of views. He spends his time


\textsuperscript{118} See Order Re: Motion to Quash, North Carolina v. Mead, No. 10 CRS 2160 (Superior Court of Justice, County of Gaston 2010).
interviewing the fans, questioning the players, and noting the reaction and response not only of himself, but of everyone present. His enjoyment of the game is framed through a collective window harmonizing a fair and balance recollection removing any personal bias he may experience.

The blogger may attempt to also recreate an accurate account of the game. However, his version inadvertently or blatantly may contain a personal bias. Perhaps he spent the entire game in the stands without attempting to gather another point of view or simply he might lack the understanding or training necessary to provide a balanced report. Rather, intentional or not, the blogger presents a skewed perspective of the game. Every account he gives must be viewed with such an understanding.

The commenter (sometimes referred to as a commentator) attends the game for personal reasons. Found in the stands, he is the ultimate spectator and often becomes highly engaged in the event. While the journalist and blogger recount the event under the guidance of informing an audience, the commenter merely spews his personal ideas. This is not to say that the commenter never informs the audience, but rather that his words are presented as a stream of consciousness in disregard for their relevance or relation to each other as a whole. Furthermore, these ideas are often fueled in an underlying passion that often surpasses that of the blogger or the journalist.

Finally, the source is a spectator that supplies information or reactions to the journalist. In many ways the source mimics the qualities of a commenter. However, the distinction is that the source’s words are filtered through the eyes of a journalist. It is the journalist who decides which of the source’s words enhances the audience’s understanding and which do not. Due to this slight distinction and the reputation of the journalist, the source’s words are given strength and relevance in our society surpassing that of the commenter.

Journalists invoke shield laws to protect the identity of their sources. The autonomy that the source can maintain is an important right. The idea of journalistic privilege relies on the understanding that an exchange between a journalist and his source is protected as secure communication. Shield laws provide a valuable service and should be applied to all communication regardless of venue. However, the courts must be careful when allowing journalists to invoke these rights. Using the definitions above, one could argue that anonymous comments in response to stories without the filter of a journalist do not constitute a source, but rather a commenter. The lack of journalistic oversight through which the information is filtered creates an environment of chaos allowing any thought to be protected as privileged. While it may work in some cases, it is a slippery slope with the potential to cause confusion.
In the case of the Gaston Gazette, Mead’s attorney “argued the commenting section of The Gazette’s website was more of a social network than a news gathering operation.”\textsuperscript{119} If shield laws protect every thought made in response to a newspaper article, the question becomes when does that protection end? Would a tweet made in response to a news article bearing the paper’s hashtag be considered privileged? And if so, would the same comment made without the hashtag be subject to litigation? And as the technology advances beyond tweets, comments, and blogs, when is the protection guaranteed under a shield law and when is it not? In the case of the Gaston Gazette, Amanda Martin, the counsel to the North Carolina Press Association, stated, “The shield law is a case-by-case analysis. . . . It is not a blanket prohibition on compelled information. But it sets out a threshold or a standard before the court can order information turned over.”\textsuperscript{120}

**XI. CONCLUSION**

We are a country built on a system of checks and balances from the way our government is designed to the way corporations, churches, and organizations are run. This separation of power ensures that democracy remains intact generation after generation. While one can argue that the system has flaws, it has worked for over two hundred years and is the foundation on which American is built. This foundation relies on the constitutional right of the First Amendment and the right to speak anonymously. Our society depends on journalists presenting a fair and balanced account of the world around us. The First Amendment, the right of the press, and the right to speak anonymously foster the dialogue, debate, and discussion found at the heart of democracy. It is society’s duty to protect these rights at all cost. The question in a society based on checks and balances becomes what situation overrules these rights? When do the needs of the public outweigh the rights of the individual?

When looking at the history, data, and specific situations, a trend begins to emerge. Across the country, the court rules in favor of the rights of the individual in cases where the specific anonymous comments do not involve a crime or show intent to commit said crime. In cases of defamation, threatening language, or suspected abuse, the courts overwhelming rule against the news organizations citing the public’s best interest over the First Amendment, Judge Gives Online Commenters First Amendment Protection, GASTON GAZETTE, July 28, 2010, available at http://www.gastongazette.com/articles/mead-49409-court-online.html.

Amendment. In regard to these situations, one could argue that the limitations of the First Amendment as applied to face-to-face communication should translate online. The Internet is neither a shield nor a safe harbor in which the rules do not apply. In using that argument, there are certain statements unprotected by individual freedom. These statements should remain unprotected regardless of the medium in which they are delivered. These statements were defined by Justice Murphy in *Chaplinsky v. New Hampshire*:

No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.121

The courts are hesitant to rule on issues regarding the First Amendment and anonymous posters. These rulings are often framed with the provision that they will not serve as a precedent for future cases involving the First Amendment online. The caution in this area displayed by state courts highlights the need for the Supreme Court to offer a solid ruling regarding online speech and the First Amendment. As technology continues to develop, the guidance of the Supreme Court is crucial to maintaining the freedoms of all parties.

Furthermore, the challenges of these communication tools should be met with both hesitancy and enthusiasm. While we must embrace and appreciate these tools for their ability to connect our society like never before by giving a voice to the voiceless, we must always be mindful of their potential to create an imbalance in our culture and strip away our rights. It is the duty of the judicial branch to be mindful of these potential imbalances and maintain order within the spectrum of reason. Likewise, it is the responsibility of the press to monitor these rulings and bring to light inconsistencies impeding one’s right to due process. By looking to the past for guidance and applying the lessons to a new environment, society can ultimately maintain its system of checks and balances and thus preserve the democracy of America.