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Real Masks and Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech

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Cover Page Footnote

Lecturer in Law at Yale Law School and Executive Director of the Information Society Project at Yale Law School. Many thanks to M. Ryan Calo, Bryan H. Choi, A. Michael Froomkin, Chris Hoofnagle, and other workshop participants at the 2012 Privacy Law Scholars Conference (PLSC) for their helpful comments and suggestions.

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Real Masks and Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech

Margot Kaminski*

The First Amendment protects anonymous speech, but the scope of that protection has been the subject of much debate. This Article adds to the discussion of anonymous speech by examining anti-mask statutes and cases as an analogue for the regulation of anonymous speech online. Anti-mask case law answers a number of questions left open by the Supreme Court. It shows that courts have used the First Amendment to protect anonymity beyond core political speech, when mask-wearing is expressive conduct or shows a nexus with free expression. This Article explores what the anti-mask cases teach us about anonymity online, including proposed real-name policies. It closes by returning to the real world of real masks, addressing the significance of physical anonymity in an age of remote biometric identification and drone use.

* Lecturer in Law at Yale Law School and Executive Director of the Information Society Project at Yale Law School. Many thanks to M. Ryan Calo, Bryan H. Choi, A. Michael Froomkin, Chris Hoofnagle, and other workshop participants at the 2012 Privacy Law Scholars Conference (PLSC) for their helpful comments and suggestions.

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INTRODUCTION

Anonymity can be a shield against the tyranny of the majority, or a mask used to protect the perpetrator of a crime.[1] The Supreme Court has held that the First Amendment protects anonymous speech.[2] In recent years, however, lower courts have recognized how challenging it is to protect an unqualified right to anonymous expression when anonymity is used by the perpetrators of legal harms. Courts have converged on a standard for a more qualified right to anonymity online.[3] Most scholarly discussion of anonymity focuses on this recently developed *John Doe* subpoena standard. But courts addressed the puzzle of anonymity's relationship to speech prior to the *Doe* standard. States enacted anti-mask statutes as early as 1845, and various courts have evaluated those statutes under the First Amendment since the 1960s.[4] This Article examines how courts have treated anti-mask statutes, and compares that treatment to the *Doe* standard and Supreme Court jurisprudence on anonymity. Anti-mask case law and *Doe* case law turn out to inform each other in fascinating ways.

The core puzzle of anonymity is also its core value: anonymity protects speakers from both social stigma and legal enforcement. In a repressive regime, anonymity allows dissidents to protest against the government without fear of arrest, or worse. In a

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1 McIntyre v. Ohio, 514 U.S. 334, 357 (1995) (observing that anonymity can "protect unpopular individuals from retaliation . . . at the hand of an intolerant society" and provide a "shield from the tyranny of the majority"). *But see* A. Michael Froomkin, *Anonymity and its Enmities*, 1995 J. ONLINE L. art. 4, ¶¶ 44–46 (1995), *available at* http://groups.csail.mit.edu/mac/classes/6.805/articles/anonymity/froomkin.html [hereinafter Froomkin, *Anonymity and its Enmities*].

2 *See generally McIntyre*, 514 U.S. at 334 (holding that "the freedom to publish anonymously is protected by the First Amendment").

3 Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1373, 1378 (2009) (describing the converging *Doe* standards employed by lower courts).

4 *See* People v. Aboaf, 187 Misc. 2d 173, 183, 721 N.Y.S.2d 725, 733 (Crim. Ct. 2001) (discussing N.Y. PENAL LAW § 240.35(4) (LexisNexis 2012)) (observing that an early 1845 New York anti-mask law arose out of demonstrations and riots by anti-rent protestors disguised as Indians); Talley v. California, 362 U.S. 60 (1960); *see, e.g.*, Schumann v. State of New York, 270 F. Supp. 730, 731–32 (S.D.N.Y. 1967); *see also* Aryan v. Mackey, 462 F. Supp. 90, 94 (N.D. Tex. 1978); Ghafari v. Mun. Court, 87 Cal. App. 3d 255, 259 (Cal. Ct. App. 1978).

democracy, anonymity allows authors to be judged on the merits of their words alone, and whistleblowers to come forward without fear of getting fired. But to a government, anonymity can be coterminous with untraceability, preventing perpetrators from being discovered and laws from being enforced.[5] And to an online publisher, anonymity can encourage nasty online comments unchecked by social feedback or social consequences.

Can the government impose a blanket ban on anonymity to thwart the masked and uncatchable bank robber, at the expense of the mask-wearing protester? The answer to this question has consequences in both the real world and the world online. The proliferation of both online trolls and offline revolutionaries has led governments around the world to adopt online real-name policies, where individuals are required to register their real identity with their Internet Service Provider (ISP) or Online Service Provider (OSP), or receive a state-assigned identity number.[6] Scholars have called for a similar registration regime in the United States,[7] and legislation requiring online identification was recently proposed in New York.[8] This Article addresses whether such a regime would be constitutional under the First Amendment. I conclude, based on anti-mask case law, that it would not be constitutional, due to the overbreadth of such a statute and the chilling of a great deal of protected speech. A blanket real-world ban on anonymity similarly chills protected expression; and physical anonymity is becoming increasingly important in today's surveillance society.[9]

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[5] Bryan H. Choi, *The Anonymous Internet*, 72 MD. L. REV. 501 (forthcoming), *available at* http://ssrn.com/abstract=2005941.

[6] *See e.g.*, Choi, *supra* note 5, at 534 (discussing how China and South Korea have been at the forefront of imposing "real name" requirements).

[7] *See, e.g.*, Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 67 (2009); Choi, *supra* note 5, at 531–32.

[8] Chenda Ngak, *New York Lawmakers Propose Ban on Anonymous Online Comments*, CBS NEWS (May 24, 2012, 11:46 AM), http://www.cbsnews.com/8301-501465_162-57440895-501465/new-york-lawmakers-propose-ban-on-anonymous-online-comments.

[9] *See* Laura K. Donohue, *Technological Leap, Statutory Gap, and Constitutional Abyss: Remote Biometric Identification Comes of Age*, 97 MINN. L. REV. 407, 425 (2012) (outlining the development of federal biometric and facial identification programs).

A related and equally important question is when, precisely, unidentifiability ceases to be an instrument and becomes protected speech. We do not give First Amendment protection to the person who chooses not to put a license plate on her car, so when do we give protection to the person wearing a mask? The *Doe* scholarship and cases fail to address this question, because the online anonymity they address is inextricably intertwined with speech. When you make a comment online under a pseudonym, you have at some point written down that pseudonym. Anti-mask case law, by contrast, struggles deeply with the dividing line between expression and instrumentality, often employing the *O'Brien* test to determine when mask-wearing is symbolic speech.[10] Perhaps surprisingly, anti-mask case law also shows that anonymity can be connected to speech even when it is purely functional in nature, because courts recognize that anonymity's functionality can enable expression or association.

The third question raised by both anti-mask statutes and online policies is whether untraceability creates enough of a state interest that untraceable anonymity can always be banned. It turns out that in many cases, untraceability is not a concern. Anonymity usually exists on a continuum of traceability. Often, anonymity or pseudonymity creates an extra layer of obscurity, rather than enabling true untraceability.[11] For example, the *Doe* defendants online are not untraceable; their identities are knowable through websites and Internet service providers. The *Doe* cases arise precisely because the law both creates a mechanism for discovery of the Does' identities, and raises additional hurdles to that discovery in the name of free speech. This continuum of traceability exists offline as well. Masked individuals are not untraceable; they are just more difficult to trace, and require the use of other kinds of deduction and forensic evidence. Given the

10 *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

11 For discussion of the related idea of an "obscurity continuum," see Woodrow Hartzog & Frederick Stutzman, *The Case for Online Obscurity*, 101 CAL. L. REV. 1, 4 (2013) ("[I]nformation is obscure online if it lacks one or more key factors that are essential to discovery or comprehension. We have identified four of these factors: (1) search visibility, (2) unprotected access, (3) identification, and (4) clarity . . . . Courts could use an obscurity continuum when determining if certain information is eligible for privacy protections.").

legal scholarship's repeated focus on traceability in online anonymous speech, what is perhaps most surprising in the anti-mask case law is how little of a focus courts place on the state interest in traceability.

This Article begins with a discussion of anonymity and pseudonymity, and the relationship between anonymity and traceability. Part II discusses related Supreme Court case law. Part III examines anti-mask case law to determine how courts have treated government bans of real masks. Part IV asks whether these cases teach us anything about anonymity online, including recently proposed real-name policies. Part V returns to the real world of real masks, and addresses the significance of physical anonymity in the age of remote biometric identification and aerial drones. Part VI connects online anonymity to anti-mask laws more broadly speaking, by briefly discussing what the Internet has in common with freedom of assembly offline.

I. ANONYMITY AND ITS FEATURES

There are different kinds of anonymity. Some kinds of anonymity may be more expressive than others, and some may be more dangerous than others. Online speech arguably permits a different kind of anonymity than offline speech. Online speech may be untraceable; that is, the speaker's identity might never be revealed.

Existing scholarship either concludes that untraceable online anonymity is essential to protect dissidents,[12] or deplores the fact that untraceability enables harms to others.[13] One scholar recently suggested that online untraceability causes states to restrict the development of new technologies as part of law enforcement

[12] *See, e.g.*, A. Michael Froomkin, *Flood Control on the Information Ocean: Living with Anonymity, Digital Cash, and Distributed Databases*, 15 J.L. & COM. 395, 429 (1996) (explaining that "[t]he Supreme Court has . . . tended to be highly solicitous of the need of dissidents . . . to speak anonymously when they have a credible fear of retaliation for what they say") [hereinafter Froomkin, *Flood Control*].

[13] *See, e.g.*, Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 62 (2009) ("Social networking sites and blogs have increasingly become breeding grounds for anonymous online groups that attack women, people of color, and members of other traditionally disadvantaged groups.").

efforts.[14] If that is the case, we may have to choose between the twin values of anonymity and innovation.

The difference between types of anonymity leads to open questions about First Amendment doctrine: does the Supreme Court intend that all anonymity must be equally protected, or does some anonymity have less expressive value than others? Is it possible that some anonymity receives less protection under a balancing test because it may be inherently more harmful than other kinds?

A. Definition

There are four types of anonymity, or more accurately, identity obfuscation: (1) traceable anonymity, (2) untraceable anonymity, (3) traceable pseudonymity, and (4) untraceable pseudonymity.[15] This taxonomy disentangles the audience's ability to identify the author from the author's choice of whether to self-identify.

Untraceable anonymity arises when the author or speaker both does not identify herself, and is ultimately not identifiable. This form of anonymity is extremely difficult to achieve in the real world, due to the increasing prevalence of forensic evidence. In the real world, untraceability is a temporal and effort-based concept; one can be truly untraceable only for a period of time, until resource expenditure over time eventually reveals one's identity.[16] Online, untraceability is more easily achievable, and herein lies the appeal of, and justification for, regulation of online anonymity for many governments.[17] Governments fear that complete untraceability will permit the perfect crime.[18]

Increasingly, however, most people online are traceable through intermediaries or other identifiers. Traceable anonymity creates a temporary experience of anonymity, but leaves identifying information in the hands of an intermediary or registry

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[14] Choi, *supra* note 5, at 541 (explaining that "[t]he trouble with using technology to elevate anonymity of the law is that it turns the enabling technology into a target").

[15] Froomkin, *Anonymity and its Enmities*, *supra* note 1, at ¶¶ 11–40.

[16] *See* Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1381 (2000).

[17] Froomkin, *Flood Control*, *supra* note 12, at 418, 427.

[18] Froomkin, *Anonymity and its Enmities*, note 1, at ¶¶ 44–45.

of some sort. In reality, most anonymous people online are traceably anonymous.[19] The upcoming switch to IPv6 makes it even harder to go untraced online in the absence of deliberately deploying anonymizing software like Tor.[20]

Traceable anonymity is often advocated as a compromise between identity play and societal safety. In the context of a civil lawsuit or criminal investigation, traceable anonymity allows plaintiffs to identify an online speaker. But the problem with traceable anonymity is that the online speaker may not be aware that she is traceable when she speaks, and in authoritarian regimes or with overeager litigants, the consequences can be dire. This is why courts have developed the *Doe* standard, to prevent misuse of the subpoena process through the filing of frivolous lawsuits to discover the identity of an anonymous critic.

One can also be unidentifiable while not being truly anonymous, if one adopts a pseudonym. The difference between pseudonymity and anonymity is interesting and under-theorized. Pseudonymity allows for the adoption of a developing, ongoing identity that can itself develop an image and reputation.[21] Pseudonymous individuals presumably abstain from abusing others more than anonymous individuals, because of the importance of ongoing reputation in pseudonymous communicative contexts.[22] Or, perversely, pseudonymous individuals may be encouraged to abuse others, depending on the type of social reputation that matters most to them.[23] Pseudonyms can also be adopted by

[19] Citron, *supra* note 7, at 123–24.

[20] Duncan B. Hollis, *An e-SOS for Cyberspace*, 52 HARV. INT'L L.J. 373, 399 n.172 (2011); *see also* TOR PROJECT, https://www.torproject.org.

[21] Interview with A. Michael Froomkin, Professor of Law, University of Miami School of Law (regarding the Privacy Law Scholars Conference 2012). Anonymity is more appropriate for discrete one-off actions, although it can become clear in the context of one conversation that the same person is behind a given stream of comments. *Id.*

[22] *See* Jennifer Van Grove, *Data Suggests People Using Pseudonyms Leave Better Comments*, VENTURE BEAT (Jan. 15, 2012), http://venturebeat.com/2012/01/15/pseudonyms-vs-real-names (observing that sixty-one percent of comments made by people using pseudonyms showed positive quality signals, compared to thirty-four percent from anonymous commenters and fifty-one percent from real name commenters).

[23] Citron, *supra* note 7, at 83.

numerous people at once, allowing for a shared voice and shared identity.[24]

Pseudonymity has implications for First Amendment doctrine, because it always involves a conscious choice of an alternate name. By contrast, anonymity is sometimes attained through passivity, rather than through active speech. Supreme Court doctrine refers to anonymity as an editorial choice, where the author chooses to speak a different name, or to not speak at all.[25] However, in anti-mask cases, lower courts' tendency to view anonymity as conduct suggests that the distinction between anonymity and pseudonymity might be revisited in online contexts where anonymity does not involve words. Anonymity might be seen as conduct, while pseudonymity by virtue of the use of words must always be expressive.

Like anonymity, pseudonymity can be split into two categories: traceable and untraceable. Untraceable pseudonymity occurs when an author identifies herself through a pseudonym, but is not ultimately identifiable. Traceable pseudonymity again allows somebody to eventually trace the identity of the author.[26] From a policy perspective, these do not differ measurably from untraceable anonymity or traceable anonymity. From a free-expression-focused perspective, however, pseudonymity represents a conscious choice to "speak" a different name than one's own.

B. Is Anonymity Good or Bad?

Anonymous online speech has received a lot of attention, both scholarly and in the popular press, in recent years. Some argue that anonymity is essential to a functioning democracy, allowing minorities and whistleblowers to speak without fearing repercussion.[27] Others point out that anonymity enables nasty

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[24] Thanks to Nabiha Syed for identifying this phenomenon. For an example, the popular author "Ellery Queen," is a joint pseudonym of Daniel Nathan and Manfred Lepofsky. *See* Joyce Carol Oates, *Pseudonymous Selves*, USF CELESTIAL TIMEPIECE, *available at* http://www.usfca.edu/jco/pseudonyms (last visited Apr. 3, 2013).

[25] *See* McIntyre v. Ohio, 514 U.S. 336, 341 (1995).

[26] Froomkin, *Anonymity and its Enmities*, *supra* note 1, at ¶ 36.

[27] *See* Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1574 (2007) (noting that anonymity

behavior such as harassment and stalking, with no social consequences.[28] The issue has been hotly debated in the online context because anonymity is a feature of the early Internet that has gradually been disappearing as private companies, the forums for online communication, turn to real-name policies for business and other reasons.[29]

Anonymity can promote certain kinds of desirable speech, and arguably can increase the total amount of speech.[30] It can also, however, cloak bad behavior and have other negative effects.[31]

Allowing anonymous speech arguably benefits both speakers and audience.[32] To some, the First Amendment's goal is to protect speakers; to others, the First Amendment provides value to society as a whole, through the creation of a vibrant and egalitarian marketplace of ideas.[33] In this second view, although the First Amendment right belongs to the speaker, the value of the speech depends on the audience.[34] Thus in the following discussion I

engenders the opinions of people, such as the less wealthy and powerful, who might not otherwise choose to partake in the public discourse).

[28] *See, e.g.*, Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1642–43 (1995) (stating that anonymity results in less civilized and more outrageous behavior); Nathaniel Gleicher, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L. J. 320, 324 (2008) (noting that anonymity spurs gossip, defamation, harassment, and enables "[f]aceless crowds of online tormentors wield virtual pitchforks, carry virtual torches, and hound innocent targets into hiding and out of the online world entirely").

[29] Margot Kaminski, *Reading Over Your Shoulder: Social Readers and Privacy Law*, 2 WAKE FOREST L. REV. 13, 14 (2012) (discussing how Facebook's and Google's policy that users register with their real names facilitates advertising and encourages civil user comments).

[30] *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084, 1112 (1961) (explaining that disclosure may deter speech and accordingly inhibit certain ideas from being shared).

[31] *See* Froomkin, *Flood Control*, *supra* note 12, at 402 (explaining that anonymous communication facilitates engagement in miscreant behavior such as conspiracy, hateful speech, electronic stalking, and libel).

[32] Lidsky & Cotter, *supra* note 27, at 1539–40.

[33] *See, e.g.*, Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 176–77 (2010) (contrasting free speech libertarians with free speech egalitarians).

[34] Lidsky & Cotter, *supra* note 27, at 1539–40 (demonstrating the concern with the speaker and the audience in both a positive and normative analysis of anonymous speech).

focus first on the value of anonymous speech to speakers, and then on the value of anonymous speech to an audience.

From a speaker's perspective, anonymity can protect a speaker from any costs incurred by speaking, including retaliation and social ostracism.[35] Because anonymity protects authors from costs, it can permit speech that otherwise would be "chilled."[36] As the Supreme Court has noted, anonymity can thus empower the minority author to speak against the majority opinion.[37] This protection from costs allows authors to engage in minority political speech and "whistle-blowing."[38] Anonymity also provides protection for those speakers who are being stalked or harassed, allowing them to seek information and counseling without fearing the more intimate reprisal from a harasser or an abusive ex-boyfriend.

Anonymity can additionally allow an author to obtain collateral benefits that could be more costly if his or her identity is known.[39] An author can thus speak about an area entwined with her own interests and not fear that the audience will discount the information based on the author's identity.[40] This feature of anonymity puts authors' interests in tension with the audience's interests, as the ability to gain collateral benefits might be good for the author but bad for the audience.[41]

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[35] *Id.* at 1568 (referring to two kinds of costs: "Wrongful Retaliation," a private cost that results from speaking truthfully, and "Justifiable Retaliation," a private cost that results from speaking falsely).

[36] Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 48 DUKE L. J. 855, 888 (2000) (explaining the chilling effect to be the self-censorship people practice to avoid the repercussions of speaking, a result of defamation law) [hereinafter Lidsky, *Silencing John Doe*].

[37] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995); Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL'Y 405, 413 ("[A]nonymous speech protects and advances the minority viewpoint, which might otherwise face discrimination.").

[38] Froomkin, *Anonymity and its Enmities*, *supra* note 1, at ¶ 7. ("[C]ommunicative autonomy allows users to engage in political speech without fear of retribution, to engage in whistle-blowing while running a greatly reduced risk of detection.").

[39] Lidsky & Cotter, *supra* note 27, at 1568.

[40] *Id.* at 1575–76.

[41] *Id.* at 1540.

Anonymity can allow an author to "play," or experiment with identities or ideologies that differ from his or her real identity and may differ from the acceptable norm.[42] This identity "play" includes permitting better known authors to cast aside their social and artistic identity and start afresh.[43] Anonymity allows a person to associate with a particular group or particular religion of which others disapprove.[44] It allows an author to form a new self or engage in a new community. Historically, pseudonyms may have been adopted for class-related reasons, because they allowed a gentleman author to compete with "scribblers," and lower-class writers to gain the authority of gentlemen.[45]

In addition to external benefits, an anonymous author may derive internal satisfaction from speaking without attribution.[46] An author may specifically wish to escape her previous reputation in order to have her message taken seriously.[47] Or a particularly timorous author may be encouraged to step beyond that timidity and take on an authoritative voice.[48] An author whose viewpoint may be judged based on age, sex, race, or national origin may use anonymity to escape bigotry and stereotyping and be judged solely on quality of the message.[49] To repurpose a comment made about

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42 *See id.* at 22.

43 See Oates, *supra* note 24.

44 NAACP v. Alabama, 78 S. Ct. 1163, 1171–72 (1958) (explaining that privacy in one's associations, be it with a religious faith or political group, is often essential if people are to have freedom of association).

45 Chesa Boudin, *Publius and the Petition: Doe v. Reed and the History of Anonymous Speech*, 120 YALE L.J. 2140, 2155 n.66 (2011) (explaining that there may also have been class-based reasons for the common use of pseudonyms). Adair suggests "[a] gentleman lost caste if he wrote professionally in competition with mere scribblers; and conversely, a lower-class professional writer concealed behind a nom de plume could gain authority by writing as if he were a gentleman." *Id.* (quoting DOUGLASS ADAIR, FAME AND THE FOUNDING FATHERS 386 n.1 (Trevor Colbourn ed., Liberty Fund 1998) (1974)).

46 Lidsky & Cotter, *supra* note 27, at 1568.

47 *See id*. at 1577 (describing what Lidsky and Cotter refer to as "The Boy who Cried Wolf" rationale, which occurs from the speaker's realization that the public will discount the speech, and accordingly be harmed, if it knows the source); *see also* Oates, *supra* note 24.

48 *See* Froomkin, *Flood Control*, *supra* note 12, at 408.

49 *See id.* at 409.

the Internet, anonymity "not only removes barriers to speaking; it also removes barriers to being heard."[50]

From an audience's perspective, anonymity can increase the amount of speech, which at a minimum allows for greater variety in the marketplace of ideas.[51] Anonymity can allow for the distribution of particularly valuable speech that otherwise would not be made, such as when whistleblowers and other less powerful individuals speak up against the status quo and provide useful information.[52] Anonymity can also benefit the audience by preventing it from judging an idea based on the identity or background of a particular author, when that identity would unfairly bias the audience against the author's point of view.[53]

Anonymity allows for more uninhibited information-seeking.[54] Although this feature technically concerns authors rather than audiences, it is at an intersection with audience interests because the authors become audience members as they ask for information.[55] Anonymity allows individuals to seek answers to private or semi-private embarrassing questions.[56] This allows them to avoid shame or embarrassment, a fear distinct from

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[50] Lidsky, *Silencing John Doe*, *supra* note 36, at 895.

[51] Choi, *supra* note 5, at 524–25 (describing this as a macroeconomic benefit to the marketplace of ideas).

[52] *See id.*

[53] *See id.* ("[I]n a microeconomic sense, an individual idea becomes more competitive within the existing market when identifying information is withheld, because readers are forced to judge it on its merits without being biased by the identity or background of the author."); *see also* Lidsky & Cotter, *supra* note 27, at 1577 (describing the "Boy Who Cried Wolf" feature of anonymity).

[54] *See* Lidsky & Cotter, *supra* note 27, at 1574.

[55] *Id.*

[56] *See, e.g.*, Ekstrand, *supra* note 37, at 413 (explaining that anonymity protects private information); Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 576, 578 (N.D. Cal. 1999) ("[I]t permits persons to obtain information relevant to a sensitive or intimate condition without fear or embarrassment."); Ekstrand, *supra* note 37, at 413 (explaining that anonymity protects private information); Froomkin, *Anonymity and its Enmities*, *supra* note 1, at ¶ 7 ("[C]ommunicative anonymity allows users . . . to seek advice about embarrassing personal problems without fear of discovery."); Froomkin, *Flood Control*, *supra* note 12, at 408 ("Communicative anonymity encourages people to post requests for information to public bulletin boards about matters they may find too personal to discuss if there were any chance that the message might be traced back to its origin.").

retaliation.[57] The protection of potentially shameful information-seeking may in turn have larger positive benefits for society, including the enhancement of public health.[58]

Allowing anonymous speech, however, also allows for harms, from both an author's and an audience's perspective.[59] Anonymity can have a "disinhibiting effect," separating the speaker from the immediate consequences of her speech.[60] This can cause an author to feel safer from consequences than she actually is.[61] That same disinhibiting effect can lead to the spread of gossip, defamation, and harassment.[62]

The anonymity of some authors may in fact prevent the speech of other authors.[63] Online harassment by a group can subjugate and drown out the minority voice, potentially chilling more speech than it generates.[64] This has led one scholar to call for an assessment of the *Doe* standard under the public figure doctrine, with an eye towards how effectively the target of harassing speech can protect himself in a public forum.[65] Anonymity is not just a shield against the tyranny of the majority; it can also "enable[] a majority to terrorize the few."[66]

Anonymous speech may be less valuable to its audience from an informational standpoint than named speech; the audience receives no information about speaker identity and thus must rely

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[57] Lidsky & Cotter, *supra* note 27, at 1568, 1572 (comparing authors' motivation to maintain anonymity due to a concern about ensuing that authors may want to prevent "shame, humiliation, or social ostracism" with those who are concerned about retaliation).

[58] Froomkin, *Flood Control*, *supra* note 12, at 408–09.

[59] Lidsky & Cotter, *supra* note 27, at 1539 (noting that authors of anonymous speech are more likely to be disregarded and audiences of anonymous speech are more likely to be harmed by the tortuous or deleterious speech).

[60] *Id.* at 1575.

[61] *See id.*

[62] *Id.* ("Since the Internet magnifies the number of anonymous speakers, it also magnifies the likelihood of false and abusive speech.").

[63] Gleicher, *supra* note 28, at 324–25.

[64] *Id.* at 325 ("[A]nonymous harassing speech may reduce, rather than enhance, the amount and quality of online speech.").

[65] *See id.* at 334.

[66] *Id.* at 324.

upon other indicia of reliability.[67] Anonymity can thus give rise to unverifiable speech.[68] It can make it more difficult for an audience "to identify the self interest or bias underlying an argument."[69] Transparency and anonymity can be competing values. The Supreme Court has recognized this tension, and seems to have recognized that in the electoral context, transparency should trump anonymity.[70]

As mentioned, the most significant feature of anonymity from a law enforcement perspective is that anonymity is in general "a great tool for evading detection of illegal and immoral activity," which can lead to the proliferation of both illegal and immoral speech as the disincentive structure changes.[71] "Hate-speech" and "general nastiness," in addition to illegal activity "become lower-risk activities if conducted via anonymous communications."[72] When anonymity is used to perform illegal acts, it gets in the way of the enforcement of rules that could otherwise benefit society.[73] Completely untraceable anonymity can allow for the "perfect crime[]."[74] A government that cannot regulate anonymity may instead regulate technology, with bad collateral effects on innovative platforms.[75]

Thus from an audience perspective, even if there is more speech, that increase in speech might be "bad."[76] As Robert Post has observed, certain restrictions on speech, such as defamation

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[67] Lidsky & Cotter, *supra* note 27, at 1559.

[68] Froomkin, *Flood Control*, *supra* note 12, at 403; Lidsky, *Silencing John Doe*, *supra* note 36, at 862–63.

[69] *Id*. (quoting Note, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084, 1111 (1961)).

[70] Boudin, *supra* note 45, at 2172.

[71] Froomkin, *Flood Control*, *supra* note 12, at 402–03.

[72] *Id.* at 402.

[73] *See, e.g.*, Froomkin, *Flood Control*, *supra* note 12, at 404 ("Anonymous communication . . . poses particularly stark enforcement problems for libel law and intellectual property law.").

[74] Froomkin, *Anonymity and its Enmities*, *supra* note 1, at ¶ 44.

[75] Choi, *supra* note 5, at 520–22.

[76] *Id.* at 403; *see also* Lidsky & Cotter, *supra* note 27, at 1556 (noting that anonymity can be seen as "bad" because of the number of speakers abusing this right).

law, can help make meaningful discourse possible, in addition to protecting dignitary interests.[77]

Finally, just as anonymity can be intrinsically valuable, it can also be intrinsically harmful.[78] In anti-mask cases, anonymity is often seen as inherently threatening.[79] This arises in the context of the long line of historical intimidation using masks by the Ku Klux Klan.[80] But it is also articulated in broader terms.[81] Masks and lack of identity can be inherently frightening.[82] The discomfort of an audience, however, is not an adequate policy reason—or an adequate reason under the First Amendment—for banning anonymity.

C. *Should Anonymity be Banned?*

Despite these dangers, a number of factors weigh in the favor of protecting anonymous speech. Attempts to regulate against harmful anonymity are often overbroad, and create collateral censorship of perfectly legitimate speech.[83] The First Amendment requires "breathing space" for protected speech to flourish, even if that means incurring harms.[84]

Blanket identity registration requirements change the nature of speech by deterring spontaneous anonymous speech. This

[77] Lidsky, *Silencing John Doe*, *supra* note 36, at 886 (citing Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 713 (1986)).

[78] Ekstrand, *supra* note 37, at 407.

[79] *See, e.g.*, Choi, *supra* note 5, at 538–39 (stating that in cases dealing with the KKK and Communist Party, anonymity was not appropriate because the groups' messages and actions were too perilous).

[80] *See, e.g.*, *id.* at 38, n.196 (citing Church of the Am. Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197 (2d Cir. 2004). *See generally* Hernandez v. Superintendent, 800 F. Supp. 1344 (E.D. Va. 1992)).

[81] *See, e.g.*, Choi, *supra* note 5, at 538, n.197 (citing Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Barenblatt v. United States, 360 U.S. 109, 126 (1959)).

[82] NAACP v. Patterson, 357 U.S. 449, 465 (1958) (noting that certain mask groups such as the KKK committed "acts of unlawful intimidation").

[83] Froomkin, *Flood Control*, *supra* note 12, at 402 ("Some . . . argue . . . the harms (e.g., censorship) associated with trying to ban anonymity are not worth any benefits that could ensue.").

[84] *Id.*

rationale has come up at least twice in Supreme Court case law.[85] In *Thomas v. Collins*, for example, the Supreme Court found that registration requirements were "incompatible" with the First Amendment.[86] In *Watchtower Bible*, the Court feared that upholding a registration requirement for door-to-door noncommercial solicitation would prevent neighbors from going to each other's houses to talk.[87] Spontaneity thus has its own First Amendment value that is implicated in discussions of anonymity and identity registration requirements.[88]

Historical tradition also suggests that we afford strong protections for anonymity. The United States has a recognized tradition of anonymous pamphleteering.[89] This national history was a driving force behind the Supreme Court's decisions in *Talley* and *McIntyre*,[90] with one scholar noting that "[a]nonymous publications have profoundly shaped American history going back to the colonial era."[91]

The United States also has a historical preference for more speech rather than less, and protecting anonymity would be in keeping with this tradition as well. The First Amendment assumes that audiences are capable of rationally assessing the characteristics of speech, and assumes that more speech is generally preferable to less.[92] The truth is best gathered "out of a multitude of tongues."[93]

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[85] *See* Thomas v. Collins, 323 U.S. 516, 539 (1945) (stating that "a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly"); *see also* Watchtower Bible v. Vill. of Stratton, 536 U.S. 150, 165–66 (2002) (stating that "[i]t is offensive . . . to the very notion of a free society that . . . a citizen must first inform the government of [their] desire to speak to [their] neighbors and then obtain a permit").

[86] *Thomas*, 323 U.S. at 540.

[87] *See Watchtower Bible*, 536 U.S. at 165–66.

[88] *See id.*

[89] *See* Talley v. California, 362 U.S. 60, 64 (1960); *see also* McIntyre v. Ohio, 514 U.S. 334, 360 (1995).

[90] Jocelyn Hanamirian, *The Right to Remain Anonymous: Anonymous Speakers, Confidential Sources and the Public Good*, 35 COLUM. J.L. & ARTS 119, 123 n.24 (2011).

[91] *See* Boudin, *supra* note 45, at 2152.

[92] Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 810–11.

[93] United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)).

Anonymity is, at its foundation, about power. Mandating the retention of identity information puts a great deal of power in the hands of the government. It makes it difficult for individuals to speak out about unpopular issues, especially issues that are unpopular to the government.[94] Attacking or punishing the tools that provide anonymity, whether online tools such as Tor or real-world tools such as masks, is an overbroad measure, and exacerbates a fundamental imbalance of power between individuals and their government.[95]

As A. Michael Froomkin has pointed out, "the debate about anonymity . . . is in effect a debate about the degree of political and economic freedom that will be fostered, or tolerated, in a modern society."[96] Given how few individuals are actually untraceable both offline and online—most people register information with third parties such as their ISPs, and in the real world, forensic evidence is increasingly accurate—a blanket ban on anonymity sacrifices traditionally held freedoms for perhaps unnecessarily heightened security concerns.[97] Many criminals will likely not be deterred from using anonymity-protecting tools if we ban the tools, and many individuals will be swept into the ban who need the protection anonymity provides.

II. SUPREME COURT DOCTRINE

The Supreme Court has not always been protective of anonymity, just as it has not always provided strong First Amendment protections. But in a series of cases starting in the 1960s, the Supreme Court recognized that anonymity is protected by the First Amendment. However, Supreme Court doctrine leaves a number of important questions unanswered, with implications for both online real name policies and anti-mask laws.

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[94] Boudin, *supra* note 45, at 2155 (Authors that choose to remain anonymous often do so to avoid retaliation for speaking out about unpopular issues.).

[95] *Id.* at 2166 (noting that the Court's decision in *Talley* reasoned that ordinances were often overly broad, despite achieving the state's interest).

[96] Froomkin, *Flood Control*, *supra* note 12, at 401–02.

[97] *Id.* at 424 (discussing the scenarios in which users register for Internet services with credit cards).

A. Supreme Court Cases

In 1928, the Supreme Court held that a Ku Klux Klan's membership list was not protected from disclosure to the state.[98] The value of transparency to the state was worth more than the Klan's interest in keeping membership lists private. The Court reasoned that the state was entitled to be informed about associations within its territory.[99]

However, in 1958 the Supreme Court distinguished the 1928 case by referring to the violent historical nature of the Klan's activities.[100] The Court found in *NAACP v. Alabama ex rel. Patterson* that Alabama failed to provide sufficient justification for revealing an NAACP membership list of "rank-and-file" members.[101] The Court linked privacy with freedom of association, explaining that the "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[102] On many past occasions, revealing the identity of NAACP members had caused them to be subject to "manifestations of public hostility."[103] The state failed to demonstrate an interest "sufficient to justify the deterrent effect . . . [on] their constitutionally protected right of association."[104]

In 1960, the Supreme Court articulated a broader anonymous speech right, disaggregated from freedom of association, in *Talley v. California*.[105] Talley challenged a Los Angeles ordinance that required persons distributing handbills to print their name and address on the cover of the handbill.[106] California argued that the ordinance was intended to identify individuals responsible for fraud, false advertising, and libel. However, the ordinance applied

[98] People of New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 77 (1928).
[99] *Id*. at 65.
[100] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 465 (1958) (reasoning that the Klan in *Zimmerman* historically partook in "acts of unlawful intimidation and violence").
[101] *Id*.
[102] *Id*. at 462.
[103] *Id*.
[104] *Id*. at 463.
[105] 362 U.S. 60, 64 (1960).
[106] *Id*. at 60.

to all handbills, not just fraudulent bills.[107] The Court in *Talley* found the ordinance to be unconstitutional on its face.[108]

Talley's two-pronged support for anonymity is founded on an understanding of the First Amendment as protecting democratic self-governance.[109] The *Talley* Court structured its argument around the example of anonymous political pamphleteering.[110] The Court reasoned that (1) banning anonymity interferes with a First Amendment freedom of distribution,[111] and (2) laws that deter discussion by creating a fear of reprisal violate the First Amendment.[112] The *Talley* understanding of the First Amendment's protection of anonymity is founded on the example of anonymous individuals criticizing the more powerful government; those individuals distribute information, and are deterred by fears of reprisal. *Talley* followed on *NAACP* by building on the connection between freedom of association and anonymity to find that laws that give rise to a fear of reprisal based on identification, either as part of a group or as an individual, should not be permitted.

By contrast, the Court in the 1995 decision *McIntyre v. Ohio* departed in its reasoning from both *Talley* and *NAACP*. The *McIntyre* Court based its protection for anonymous speech on a literary rather than political understanding of the First Amendment.[113] The *McIntyre* Court conceived of anonymity as an editorial choice.[114] Anonymity is a means of expressing oneself, and an author has the freedom to decide whether or not to disclose

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[107] *Id*. at 64.

[108] *Id*. at 65.

[109] *See* Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2362–63 (2000) (explaining that the purpose of the First Amendment is to "preserve an uninhibited marketplace of ideas" and to function as the "guardian of our democracy," which both are supported by the theory of self-government).

[110] *See Talley*, 362 U.S. at 537.

[111] Lovell v. City of Griffin, Ga., 303 U.S. 444, 452 (1938).

[112] *See Talley*, 362 U.S. at 537, 538.

[113] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995) (Stevens, J.) (holding that Ohio's statutory prohibition against distribution of any anonymous campaign literature is a law "abridging the freedom of speech" within the meaning of the First Amendment).

[114] *Id*. at 341, 372

his or her true identity.[115] An author may choose to be anonymous because of fear of retaliation, concern about social ostracism, or a desire to protect his or her privacy; the Court implied that the precise reason does not in fact matter.[116] The Court found that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."[117]

In *McIntyre*, the Court had the option of addressing anonymity solely as an extension of political speech. It did not.[118] The Court found that requiring an author to identify herself "is a direct regulation of the content of speech."[119] The description of anonymity as an editorial choice allowed the Court to characterize a ban on anonymity as compelled speech.[120] Requiring an author to disclose his or her name was compelled speech, which is unconstitutional absent a compelling state interest.

Only at the end of the opinion did the Court in *McIntyre* return to the core of the *Talley* argument, that anonymity allows democratic participation by protecting the unpopular individual against the populace at large.[121] "Anonymity is a shield from the tyranny of the majority."[122] And anonymity exemplifies the purpose of the First Amendment: "to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."[123]

The Court suggested in *McIntyre* that a legitimate state interest could give rise to legitimate regulation of anonymity.[124] For example, the state has an interest in preventing fraud and libel, so

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115 *Id*. at 342.
116 *Id*. at 341–42.
117 *Id*. at 342.
118 *See* Lee Tien, *Who's Afraid of Anonymous Speech?* McIntyre *and the Internet*, 75 OR. L. REV. 117, 128–31 (1996).
119 *McIntyre*, 513 U.S. at 345.
120 *Id*. at 349, 379.
121 *See id*. at 357.
122 *Id*.
123 *Id*.
124 *Id*. at 353 ("[A] State's enforcement interest might justify a more limited identification requirement.").

anonymous speech might be less protected in those contexts.[125] But because Ohio also had a narrower prohibition on false statements made during political campaigns, the identity disclosure requirement in *McIntyre* was found overbroad.[126] The Court explained that the state "cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented."[127]

In 2002, the Supreme Court again addressed anonymous speech in *Watchtower Bible v. Village of Stratton*.[128] The Village of Stratton required individuals engaging in door-to-door advocacy to first register with the mayor and receive a permit.[129] Registrants were required to list their name and home address, and permits were routinely granted, though could be denied for incomplete information or for fraud.[130] The Jehovah's Witnesses brought the case without having applied for a permit, explaining that such an application would violate their First Amendment rights.[131]

The Court in *Watchtower Bible* explicitly acknowledged *McIntyre* as having recognized "the right to distribute pamphlets anonymously."[132] The Court also referred to a broader category of protection: the "protection accorded to anonymous pamphleteering or discourse."[133] This protection is not absolute, "particularly when the solicitation of money is involved."[134] Thus, the Court must strike a balance between legitimate government interests and the effect of the regulations on First Amendment rights.[135]

[125] See *id*. at 344, 349 (citing a California ordinance, which deals with false advertising, and an Ohio statute, which deals with false statements made in reference to political campaigns, as instances where state interest in preventing fraud and libel may override anonymous free speech).
[126] *See id*. at 351.
[127] *Id*. at 357.
[128] *See* Watchtower Bible v. Vill. of Stratton, 536 U.S. 150, 153 (2002).
[129] *See id*. at 154–55.
[130] *See id*. at 155 n.4.
[131] *See id*. at 157–58.
[132] *Id*. at 159
[133] *Id*. at 160.
[134] *Id*. at 162.
[135] *Id*. at 163.

The Court did not engage in lengthy analysis of why or how the First Amendment protects anonymity. It instead used the fact that there are a "significant number of persons who support causes anonymously" in support of its finding that the ordinance was overly broad.[136]

The Court found that the excessive breadth of the ordinance raised serious constitutional concerns, despite the legitimacy of the Village's articulated interests.[137] The Village argued that the ordinance served three interests: "the prevention of fraud, [the prevention of] crime, and the protection of privacy."[138] The Court recognized these as important interests.[139] Later in the opinion, the Court recognized additional state interests in protecting the integrity of a ballot-initiative process, and preventing fraudulent commercial transactions.[140] The Court held, however, that the Village failed to strike an appropriate balance between the amount of speech covered by the ordinance and the government interests it purported to serve, and that the ordinance was not adequately tailored to the Village's stated interests.[141] The Court stated that the overbreadth alone did not render the ordinance invalid, but the lack of tailoring in combination with the overbreadth did.[142] It did not matter whether the anonymous speech itself was of high or low value, since the regulation was both overbroad and inadequately tailored to state interests.[143]

The Court warned in *Watchtower* against using registration requirements as a work-around for speech regulations.[144] If a particular kind of speech itself cannot be made a crime, then

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136 *Id*. at 166.

137 *See id*. at 165–66.

138 *Id*. at 164–65.

139 *Id*. at 165.

140 *See id*. at 167.

141 *See id*. at 168.

142 *See id*.

143 In reviewing past cases, the Court observed that religious pamphleteering in particular has been recognized as high-value speech with a claim to freedom of speech and freedom of the press. *See id*. at 161. The Court did not suggest, however, that lower value speech would not be protected; the high value of the speech was not the deciding factor—the overbreadth and lack of tailoring of the ordinance were the key features in the decision. *Id.* at 168.

144 *See id*. at 164.

governments may not work around that restriction by punishing speech solely because one has failed to register in advance of speaking.[145] The Court found that the registration requirement imposes "an objective burden" on citizens, and bans "a significant amount spontaneous speech."[146] Quoting *Thomas v. Collins*, the Court noted that "[a]s a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly."[147] The Court in *Watchtower* adds that it is "offensive . . . to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so."[148] Registration of identity operates like a prior restraint, preventing speaking unless a license has been obtained or a tax paid.[149]

The most interesting suggestion in *Watchtower* is the Court's acknowledgment that anonymity may be contextual rather than absolute. Even though the door-to-door petitioners would be revealing their faces to individuals, they still "maintain their anonymity" because their faces but not their identities are revealed.[150] This conclusion treats anonymity as a communicative tool employed by speakers within the context of a relationship. In the anti-mask context, this recognizes that anonymity is a selective disguise directed towards an audience, and does not require perfect obfuscation for First Amendment protection to be afforded. Similarly, the online context does not require perfect anonymity for First Amendment protection to be afforded to a speaker—it requires contextual anonymity.[151]

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[145] *See id.*

[146] *Id.* at 167.

[147] *Id.*

[148] *Id.* at 165–66.

[149] *Id.* at 167–68 (finding that "the regulation is analogous to the circulation licensing tax the Court invalidated in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936)").

[150] Watchtower Bible v. Vill. of Stratton, 536 U.S. 150, 167 (2002) ("The fact that circulators revealed their physical identities did not foreclose our consideration of the circulators interest in maintaining their anonymity.").

[151] *See* HELEN NISSENBAUM, PRIVACY IN CONTEXT 3 (2010) (describing privacy as "context-relative informational norms").

The most recent Supreme Court case on anonymity is the Court's 2010 decision in *Doe v. Reed*.[152] *Reed* addresses the tension between disclosure and privacy in the context of electoral law.[153] Washington State allows its voters to circulate and sign referendum petitions to challenge existing laws.[154] Under state law, if the referendum petition achieved a critical mass of signatures, the referendum would be placed on the ballot, so the signature also functions as a vote.[155] Washington State's Public Records Act (PRA) made such referendum petitions publicly available.[156] Doe sought an injunction against such disclosure, with respect to a petition against a state law extending benefits to same-sex couples.[157]

The question before the Court was whether disclosure of referendum petitions in general—rather than this particular petition—violates the First Amendment, under a facial challenge to the Public Records Act.[158] The Court concluded that disclosure of referendum petitions "does not as a general matter violate the First Amendment," although disclosure of this particular petition might, in an as-applied challenge not yet brought before the Court.[159]

The "electoral context" was central to the Court's decision in *Reed*.[160] Noting that states are allowed "significant flexibility in implementing their own voting systems," and observing that the PRA is not a prohibition on speech but a disclosure requirement, the Court chose "exacting scrutiny" as the appropriate standard of review.[161] Exacting scrutiny "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."[162] The Court found a substantial relation

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[152] 130 S. Ct. 2811 (2010).
[153] *Id.* at 2824.
[154] *Id.* at 2815.
[155] *See id*. at 2817.
[156] WASH. REV. CODE § 42.56.070(1) (2008).
[157] *Reed*, 130 S. Ct. at 2813, 2816.
[158] *Id*. at 2817.
[159] *Id*. at 2822.
[160] *Id*. at 2818.
[161] *Id*.
[162] *Id.* (quoting Citizens United v. Federal Election Comm'n, 130 S. Ct. 876, 914 (2010)).

between a sufficiently important governmental interest—the "State's interest in preserving the integrity of the electoral process"—and the disclosure requirement.[163]

Thus in *Reed*, under a less protective standard of review imported from the electoral context, the Court recognized that state interests can trump the anonymity right. In addition to or as subparts of the state's interest in the integrity of the electoral process, the Court recognized the State's "important interest" in preventing fraud, and promoting transparency and accountability.[164] It refused to reach the State's more generally asserted "informational interest."[165]

The Court explained that the plaintiffs could have prevailed under the First Amendment if they had shown "a reasonable probability that the compelled disclosure . . . will subject them to threats, harassment, or reprisals from either Government officials or private parties."[166] The plaintiffs, however, failed to show specific harm caused by referendum petitions in general, which they would have to do in order to win a facial challenge. Instead, they focused on harm related to the specific petition at issue.[167] Thus, the Court explained that while the plaintiffs had failed at the broad facial challenge, this did not foreclose the possibility of success in a narrower challenge.[168]

The centrality of the election context in *Reed* cannot be overemphasized. In the majority opinion, Justice Roberts distinguished between the majority's application of exacting scrutiny and Justice Thomas's dissenting opinion by pointing out that Justice Thomas had chosen to employ strict scrutiny.[169] The

[163] *Id*. at 2819. In greater detail, this interest was described as an interest in "preserving the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability." *Id*.
[164] *Id.*
[165] *Id*.
[166] *Id*. (quoting Buckley v. Valeo, 424 U.S. 1, 74 (1976)).
[167] *Id.* at 2821.
[168] *Id*.
[169] *Id*. at 2820, n.2 (Roberts, C.J.) (stating that "Justice Thomas's contrary assessment of the relationship between the disclosure of referendum petitions generally and the State's interests in this case is based on his determination that strict scrutiny applies

lower standard of exacting scrutiny applies in the electoral context because of the required deference to states in implementing their voting systems, and the importance of disclosure specifically in this context.[170]

One observation in *Reed* is of particular interest. The majority found that signing a petition is fully protected speech, even though it is also a "legally operative legislative act."[171] This is relevant for online anonymity because online anonymity both serves as an "operative act" of concealing identity, and is at a very basic level speech. There remains a question of whether an automatically-generated "Anonymous" handle would be considered speech by the speaker. Arguably, if the person at some point chose not to enter a handle, that would be equivalent to typing "Anonymous" as the handle, and therefore would be operative speech under *Reed*.

Finally, the concurrences in *Reed* show some interesting turmoil around *McIntyre*. Justice Scalia clearly still believes that *McIntyre* was wrongly decided,[172] but acknowledges that the case recognized a "right to 'speak' anonymously."[173] Justice Stevens, with Justice Breyer, believes that *McIntyre* did not create a special separate right to speak anonymously—it dealt with a specific burden on the more general right to speak.[174] This split will likely arise again in the next Supreme Court case on anonymity.

Although it is not a case about anonymity per se, the recent Supreme Court case of *U.S. v. Alvarez* has significant implications for pseudonymous and anonymous speech.[175] In *Alvarez*, the Court was asked to recognize false speech as an exception to the First Amendment.[176] Alvarez had lied about having received a Medal of Honor; this lying was penalized under the Stolen Valor Act.[177] The Court found that false speech is not one of the

rather than the standard of review that we have concluded is appropriate") (citation omitted).

[170] *See id*. at 2818.

[171] *Id*.

[172] *Id*. at 2831 n.4 (Stevens, J., concurring).

[173] *Id*. at 2832 (Scalia, J., concurring).

[174] *Id*. at 2831 n.4 (Stevens, J., concurring).

[175] *See* 132 S. Ct. 2537 (2012).

[176] *Id*. at 2539–40.

[177] *Id*. at 2539 (citing 18 U.S.C. §§ 704(b) and (c) (2006)).

recognized historical exceptions to the First Amendment, and therefore lying is protected by the First Amendment.[178] Specific sub-types of false speech, such as fraud and defamation, are exceptions to the First Amendment because they create a "legally cognizable harm."[179] False statements to courts or Government officials, or impersonating an officer, are exceptions to the First Amendment because they concern the "integrity of Government processes."[180]

If *Alvarez* had been decided differently, and held that false speech is an exception to the First Amendment, then anonymity and especially pseudonymity might be regulable as false statements about one's identity. This would have placed *Alvarez* in direct conflict with *McIntyre*. Instead, *Alvarez* indicates that the current Court is extremely speech-protective, and disinclined to create new exceptions to the First Amendment.[181] Writing under a pseudonym will presumably be protected under *Alvarez*, because lying about one's identity should be no less protected than any other kind of lie, barring an exceptional state interest.

Thus the question that remains is not whether anonymity is protected, but how much protection it receives, and how to handle anonymity that also serves a noncommunicative function. If anonymity is used to defame somebody, or is part of speech that is "integral to criminal conduct," or is used to propagate obscenity, it will presumably at some point lose First Amendment protection.[182] Then there remains a question—debated in the Stevens and Scalia concurrences in *Reed*—of whether there is a right to anonymous speech, or protection for anonymity as a corollary of the right to speak more generally.[183] *McIntyre* suggests that all anonymity-through-speaking is an editorial choice and thus protected as speech, but *Talley* suggests that anonymity is based on freedom of distribution, and freedom of association.

[178] *Id*.
[179] *See id*.
[180] *Id*. at 2546.
[181] *See id.* at 2545–46.
[182] *See id*. at 2539 (listing categories of unprotected speech).
[183] *See id*. at 2831 n.4 (describing both Justices' interpretations).

B. Open Questions

Commentators appear to agree that First Amendment protection for anonymity is not absolute.[184] From this point, however, scholars vary significantly both in how strong they understand First Amendment protection for anonymity to be, and which Supreme Court cases they identify as the foundation of anonymity analysis. The points of consensus and differentiation center on the following discussions: (1) whether the First Amendment protects only core political speech; (2) whether broad disclosure requirements are constitutional; (3) what kinds of compelling state interests might overcome First Amendment protection; (4) whether election law cases are exceptions to or illustrative of the balancing rule; and (5) how much of a showing of retaliation, if any, is necessary to establish the First Amendment right. Finally, there is an open question about untraceability: has the Court ever considered the harm to law enforcement that arises from complete untraceability?

The majority of commentators focus their analysis on *Talley*, *McIntyre*, and *Watchtower Bible* as the sources of a First Amendment anonymity right. The primary question appears to be how broadly the right to anonymous speech extends from political speech to other kinds of speech.[185] Anonymous political speech is clearly protected. Are other kinds of anonymous speech equally deserving of First Amendment protection?

This focus on the speech's value might stem from an agreement among commentators that the anonymity right is not

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[184] *See, e.g.*, Susan W. Brenner, *The Privacy Privilege: Law Enforcement, Technology, and the Constitution*, 7 J. TECH. L. & POL'Y 1, 1 (2002) ("The First Amendment protects the privacy of *certain* acts.") (emphasis added); Ekstrand, *supra* note 37, at 407 ("The protections for anonymous speech are not absolute."); Choi, *supra* note 5, at 520 ("[A]dvocates consistently refer to anonymity as a fundamental human right, regardless of how limited or uncertain it may be."); Lidsky & Cotter, *supra* note 27, at 1537–38 ("[T]he First Amendment, as interpreted by the United States Supreme Court, confers upon authors a right to speak anonymously or pseudonymously . . . . But this right to speak anonymously is not absolute.").

[185] *See, e.g.*, Ekstrand, *supra* note 37, at 413 ("While many commentators agreed that the kind of anonymous political speech published by Mrs. McIntyre deserved the highest level of First Amendment protection, they expressed concern about whether *McIntyre* protected other kinds of speech and under what circumstances it should.").

absolute.[186] They thus perceive a need for a balancing test between the value of the anonymous speech and state interests. The balancing test view of protection for anonymity weighs the quality of the speech being protected against the nature of the state interest being propagated. The first point of division between commentators is whether the speech must be "core" First Amendment speech to be protected.[187] This leaves open the question of whether nonpolitical anonymous speech is protected by the First Amendment.

The other half of the balancing equation concerns what constitutes a sufficiently compelling state interest. Again, several commentators point to the regulation of fraud, false advertising, and libel as sufficient state interests for the regulation of anonymous speech, if a statute is adequately tailored to those interests.[188] Analogously, associational privacy could be overcome by the state interest in forbidding discrimination in places of public accommodation.[189] Earlier cases on anonymity leave open the possibility that obscenity, commercial solicitation, and the advocacy of unlawful conduct might be exceptions as well.[190]

The state interest alone is not enough, however; others point out that the regulation must be narrowly tailored to it.[191] Thus commentators disagree over whether a compelling state interest might allow regulation of all anonymous speech, in the form of imposing real-name policies, or whether real-name policies are not viable because they will never be narrowly tailored.

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[186] *See, e.g.*, Froomkin, *Anonymity and its Enmities*, *supra* note 1, at ¶ 58 ("Nevertheless, the right to privacy in one's political associations and beliefs can be overcome by a compelling state interest.").

[187] Froomkin, *Flood Control*, *supra* note 12, at 427 ("Doctrinal discussions of permissible restrictions on the freedom of speech commonly divide the discussion into 'political' and 'non-political' speech, and the sketch which follows adopts this convention."); Lidsky & Cotter, *supra* note 27, at 1541 ("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, 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.").

[188] *See, e.g.*, Talley v. California, 362 U.S. 60, 66 (1960).

[189] *See* Froomkin, *Flood Control*, *supra* note 12, at 429.

[190] *See* Choi, *supra* note 5, at 537.

[191] *See, e.g.*, Ekstrand, *supra* note 37, at 411.

The biggest challenge pro-anonymity commentators appear to face in anonymity case law is the body of election law cases.[192] Some distinguish these cases as specific to the electoral context, arguing that there is a long American tradition of anonymous speech, but an equally compelling tradition of transparency in political proceedings.[193] I agree that the election law cases are distinguishable.

This brings us to a final question regarding existing case law: whether an anonymous speaker must make a showing of retaliation in order to prevail, or if a court may conclude without evidence that a chilling effect may occur. This is actually a broader question about First Amendment chilling effects doctrine, which, while often cited, is woefully underexplored.[194] Froomkin, for example, recognizes that when dissidents demonstrate a credible fear of retaliation for what they say, they are usually protected.[195] In *NAACP*, the Court pointed out that the NAACP made a strong concrete showing that its members would experience retaliation. In *Doe v. Reed*, the Court explained that the facial challenge failed because the Does had failed to make a showing of retaliation for all disclosures. In both *Talley* and *McIntyre*, however, the Court did not appear to ask for a showing of retaliation.

As for untraceability, the Supreme Court has never engaged in discussion of how traceable and untraceable anonymity differ. The state arguably has a stronger interest in preventing untraceable anonymity, because completely untraceable anonymity precludes law enforcement.[196] There are two possible explanations for the Court's failure to consider the spectrum of traceability. First, there may have been no difference between traceable and untraceable anonymity in the days before good forensics; all anonymity might have been functionally untraceable, or too costly to trace absent a

192 *See, e.g.*, Doe v. Reed, 586 F.3d 671 (9th Cir. 2009), *aff'd sub nom*. John Doe No. 1 v. Reed, 130 S. Ct. 2811 (2010) (holding that, in general, the disclosure of referendum petitions does not violate First Amendment speech protection).

193 Boudin, *supra* note 45, at 2164.

194 Lidsky, *Silencing John Doe*, *supra* note 36, at 888 n.169.

195 Froomkin, *Flood Control*, *supra* note 12, at 429 (noting that the Supreme Court tends to be "highly solicitous of the need of dissidents and others to speak anonymously when they have a credible fear of retaliation for what they say").

196 *See* Choi, *supra* note 5, at 526–28.

witness. Conversely, the Court may never have had to consider truly untraceable anonymity because each of its subjects—Talley and McIntyre—had in fact been traced. First Amendment anonymity served in those cases to provide a curtain of additional obscurity, not to prevent law enforcement from finding identity if necessary through other means.[197]

However, the Court in *Watchtower* specifically addressed a blanket ban against untraceable (or less traceable) anonymity.[198] The Village required canvassers to register with the government prior to engaging in door-to-door advocacy, and to provide a list of which homes would be visited.[199] Presumably, if anything occurred during canvassing, the government could easily trace the perpetrator through the list of names and locations. The Court did not state that this type of registration requirement is always unconstitutional, but required legitimate state interests and tailoring to those interests before such a registration requirement could be constitutional.[200] General registration burdens an enormous amount of speech, untailored to a state interest, and all spontaneous speech would be presumptively illegal.[201]

III. ANTI-MASK LAWS AND CASES

In light of the open questions left by Supreme Court doctrine on anonymity, anti-mask laws and case law illuminate a great deal about the scope of legal protection for anonymity. The cases show both how courts treat anonymity in the real world, and how courts might treat blanket real-name policies online.

Anti-mask case law displays courts struggling with fundamental questions about anonymity, including the question of when anonymity implicates First Amendment rights. Some courts treat mask-enabled anonymity as conduct rather than speech; some look to the content of the masks to determine if the mask-wearing

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197 Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CAL. L. REV. 1 (2013).
198 *See* Watchtower Bible v. Vill. of Stratton, 536 U.S. 150 (2002).
199 *Id.* at 155.
200 *See id.* at 168.
201 *Id.* at 167.

is expressive; others observe that anonymity is inherently entwined with expression and freedom of association. Courts, like *Doe* scholars, also differ as to their underlying intuitions about anonymity's nature. Some courts assume that anonymity is inherently threatening; others assume that it is fundamentally important to a free society.

This section additionally observes that there is a circuit split developing in anti-mask case law. Previous scholars have characterized this split as evidence of legal realism at work—"the KKK loses, but Iranian students win."[202] The situation is both more nuanced and more interesting.

This Part opens with an overview of the different kinds of anti-mask statutes. Some statues are broader than others, and thus more strongly implicate freedom of expression. It then turns to the case law in an effort to distinguish between those cases that uphold anti-mask statutes and those that find them problematic. Courts vary in their treatment of the nexus between anonymity and expression, their treatment of mask-wearing as symbolic speech, and their intuitions about anonymity itself.

As a consequence of these variations, different courts have imposed different burdens on defendants and on the state. In some cases, courts require defendants to show evidence of past retaliation in order to find a nexus between anonymity and expression; in others, they do not. In some cases, courts require the state to show evidence of a link between anonymity and the state interest in preventing crime; in others, they do not. A common holding, even among a number of the cases upholding anti-mask statutes, is that anti-mask statutes as written are often too broad. This has significant implications for proposed online real-name policies.

[202] *See* A. Michael Froomkin, *The Metaphor is the Key: Cryptography, The Clipperchip, and the Constitution*, 143 U. PA. L. REV. 709, 822 n.478 (1995) (addressing the "mixed reception" of strict liability antimask statutes very briefly) [hereinafter Froomkin, *The Clipperchip*].

A. Anti-Mask Statutes

Many states have passed anti-mask statutes, but states vary widely in what behavior they criminalize. Other scholars have noted some of the variations, but none appear to have outlined the complete spectrum.[203] This article finds that anti-mask statutes are more varied than previous scholarship suggests.

State anti-mask laws arose primarily in response to the actions of the Ku Klux Klan.[204] A number of anti-mask laws were therefore enacted in the early 1950s.[205] However, an early 1845 New York anti-mask law arose out of demonstrations and riots by anti-rent protestors disguised as Indians.[206]

Many states criminalize all mask-wearing in public.[207] This type of statute is typically subject to a list of exceptions for customary uses of masks, such as mask-wearing on Halloween or en route to masquerades. Within this category of statute, states differ as to which exceptions are permitted. But this type of statute functionally creates a strict liability crime: if you wear a mask in public, you violate the statute.

Several states, by contrast, penalize mask-wearing when the wearer's intent is to conceal identity.[208] Rather than creating a strict liability crime, this requires an additional showing of intent

[203] *See* Wayne R. Allen, *Klan, Cloth and Constitution: Anti-Mask Laws and the First Amendment*, 25 GA. L. REV. 819, 821 (1991) (describing two types of statutes: a general anti-mask statute, and a statute that criminalizes mask-wearing with the intent to deprive somebody of their civil rights); Stephen J. Simoni, Note, *Who Goes There?—Proposing a Model Anti-Mask Act*, 61 FORDHAM L. REV. 241, 242 (1992) (describing two types of statutes: a general statute, and a statute that criminalizes wearing a mask with the intent to commit a crime); Evan Darwin Winet, *Face-Veil Bans and Anti-Mask Laws: State Interests and the Right to Cover the Face*, 35 HASTINGS INT'L & COMP. L. REV. 217, 231–33 (2012) (employing the same two classifications as Simoni).

[204] Allen, *supra* note 203, at 827.

[205] *See* Jeanine Bell, *Policing Hatred: Police Bias Units and the Construction of Hate Crime*, 2 MICH. J. RACE & L. 421, 430–31 (1997); *see, e.g.*, REV. STAT. ANN. § 14:313 (West 1986); OKLA. STAT. tit. 21, § 1301 (1981).

[206] *See* People v. Aboaf, 187 Misc. 2d 173, 183, 721 N.Y.S.2d 725, 733 (Crim. Ct. 2001) (discussing N.Y. PENAL LAW § 240.35(4) (LexisNexis 2012)).

[207] *See, e.g.*, MINN. STAT. ANN. § 609.735 (West 1987) (banning public mask-wearing except if "incidental to amusement or entertainment").

[208] *See, e.g.*, CAL. PENAL CODE § 185 (LexisNexis 2012) (criminalizing wearing a mask in public places with the intent to conceal identity).

by the state. Functionally, however, it can allow for the arrest of anybody wearing a mask, and the showing of intent might not be particularly difficult given that most masks obscure identity.

A third category of statutes bolsters the intent requirement, criminalizing wearing a mask for the purpose of depriving another person of civil rights. The federal anti-mask law exemplifies this type of statute; the federal law allowed for federal prosecution of the KKK when they attempted to interfere with individuals' right to vote.[209]

Connecticut has created a fourth type of statute, which penalizes wearing a mask with the intent to subject somebody to rights deprivation while in fact violating a separate provision on rights deprivation.[210] This hybrid statute requires both intent (wearing the mask with the intent to perform rights deprivation) and action (actually depriving somebody of their rights).[211]

The fifth type of anti-mask statute requires more than intent to conceal one's identity, and arguably more than intent to violate somebody's rights, but less than action; it criminalizes wearing a mask for the purpose of committing a crime.[212] This changes the crime from being wearing a mask, per se, to using a mask with the intent that it serve as a criminal tool.[213]

The sixth type of statute criminalizes wearing a mask during the actual commission of a crime.[214] This varies from the fifth type of statute. The fifth type would allow arrest of a mask-wearer before a crime, but requires a showing of intent to commit a crime. The sixth requires the actual commission of a crime, but not necessarily the intent to use the mask as a tool.[215]

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[209] *See* United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330, 349 (D.C. La. 1965) (holding that "the Civil Rights Act of 1957 applies to . . . interfering with the right to register as well as interfering with the right to vote").

[210] CONN. GEN. STAT. § 53-37(a) (2011) (criminalizing the deprivation of a person's civil rights by a person is wearing a hood, mask, or other device designed to conceal their identity).

[211] *Id.*

[212] *See, e.g.*, LA. REV. STAT. ANN. § 14:313 (1986) (criminalizing mask-wearing with the intent to conceal identity).

[213] *See, e.g.*, 720 ILL. COMP. STAT. 5/12-2(c)(4) (2012).

[214] *Id.*

[215] *Compare id.*, *with* LA. REV. STAT. ANN. § 14:313 (West 1986).

The variation in anti-mask statutes suggests that legislatures, like courts, struggle with determining when anonymity is functional and when it is expressive. Some statutes assume that all mask-wearing is fundamentally functional in nature. All mask-wearing can thus be banned, unless the wearer adds some additional expressive element, such as religious significance.

On the other end of the spectrum, however, some states criminalize mask-wearing only when the mask has been used in the commission of a crime, suggesting that anonymity is understood to have social value, until it becomes clearly functionally harmful. When used in the commission of a crime, anonymity becomes primarily functional in nature, and the statute interest in preventing harm overrides any expressive interest in the mask.

Between these two poles, some states ban mask-wearing only when the wearer intends for the mask to serve an identity-concealing function, or to aid in the commission of another offense. The civil rights-related anti-mask laws fall into this middle category. The mask need not actually be used as a criminal tool, but the burden of showing intent rests with the state, not the wearer.

B. Anti-Mask Case Law

Most of the anti-mask statutes challenged in court have been the first type of statute, which establishes general liability for mask-wearing in public, subject to a list of exceptions.[216] This indicates that where masking is clearly done in service of a nefarious purpose, petitioners deem it unlikely that a court will strike down the statute. A number of courts have found general anti-mask statutes unconstitutionally overbroad, recognizing that they cover an impermissible amount of expressive conduct. However, a number of courts have also upheld the constitutionality of general anti-mask laws.

The split appears to have arisen for the most part around the question of when anonymity is conduct and when it is expressive. Strangely, however, a few courts have found that anonymity is expressive but still upheld the statutes. These courts conclude that

216 *See* Simoni, *supra* note 203, at 243–44.

anonymity is a particularly bad kind of expression that states can permissibly ban because it is frightening. After the Supreme Court's holding on true threats in *Virginia v. Black*, this line of reasoning should no longer be considered good law.[217]

For our purposes, it is helpful to read these cases with an eye towards what assumptions the court makes about the default nature of anonymity. Is it conduct? Does it have a nexus with expression, and if it does, what is the burden of proof as to that nexus? If anonymity is expression, is it protected expression, or a threat in and of itself? Courts have split widely on their answers to these questions.

Where courts have struck down or limited anti-mask laws, it has been for a number of reasons. Some find the laws overbroad, and some find the laws too vague. Some find that masks are symbolic speech, and the statute fails the *O'Brien* test. Some have found that anonymity is conduct, but implicates freedom of speech and association under *NAACP* and *Talley*. One recent case treated anonymity as a First Amendment right in itself, under *McIntyre*.[218] These cases show that despite a recent Second Circuit decision upholding New York's anti-mask law, there is a history of jurisprudence recognizing a link between anonymity and free expression in the context of anti-mask laws. Courts that have upheld anti-mask statutes find that the statutes primarily regulate conduct and not speech; that mask-wearing is not symbolic speech; or, similarly, that there has been an insufficient showing of a nexus between mask-wearing and freedom of association.

1. The Earliest Cases

The earliest anti-mask cases came down long before the Supreme Court began considering a First Amendment right to anonymity in the 1960s. The earliest cases primarily concerned the scope of anti-mask statutes, and what the statutes meant when they criminalized individuals for being "masked" or "in disguise."

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[217] *See* Virginia v. Black, 538 U.S. 343, 362 (2003) (finding that a statute banning cross burning with intent to intimidate violates the First Amendment).

[218] Am. Knights of the Ku Klux Klan v. City of Goshen, 50 F. Supp. 2d 835, 844 (N.D. Ind. 1999).

These cases understandably did not address the First Amendment, but they are nonetheless helpful for understanding the purpose and scope of anti-mask laws. Early cases limit the scope of anti-mask laws, refusing to apply the laws to partial or unintentional disguises. This shows that even early courts recognized the need for limits on anti-mask laws. These cases also show that anti-masks laws are, in the eye of courts, proxies for regulation of anonymity rather than a bans on expressive disguise.

In the 1871 case *Dale v. Gunter*, the Supreme Court of Alabama rejected charges filed against a person concealed in bushes. The man was charged with being a "person in disguise."[219] The court explained that being in the bushes was a position, while being in disguise entailed wearing a dress or mask "intended to conceal the person who wears it."[220] What is interesting about this interpretation is that it reads in an element of intent: the wearer must intend to be concealed.[221] Later courts and other statutes do not always require intent to conceal.[222]

Several early challenges to anti-mask laws contended that the laws were void for vagueness because they did not adequately define the term "mask" or "disguised." These cases address whether being "disguised" covers partial disguises such as makeup, or covers only complete anonymity. In *Anderson v. Texas*, the Court of Criminal Appeals of Texas found that the term "mask" was not too vague. However, the portion of the statute criminalizing disguising oneself in a manner as to "render [the offender's] identification impossible, or more difficult" to identify was too indefinitely framed.[223] Two subsequent Texas cases similarly upheld the term "mask" against a void-for-vagueness challenge.[224] A 1969 Texas case, *Garcia v. Texas*, clarified that the anti-mask law applied only to disguises that made it impossible

[219] Dale v. Gunter, 46 Ala. 118, *9 (Sup. Ct. Ala. 1871).
[220] *Id.*
[221] *Id.*
[222] *See infra* Part III.A.3.
[223] 21 S.W.2d 499, 453 (Tex. Crim. App. 1929).
[224] Dellinger v. State, 28 S.W.2d 537, 539 (Tex. Crim. App. 1930); *see also* Caldwell v. State, 75 S.W.2d 259, 260 (Tex. Crim. App. 1934).

to identify the defendant.[225] Thus courts have equated masking oneself with fully obscuring one's identity, or making oneself anonymous. These cases show that courts understood anti-mask statutes to be prohibitions on anonymity, not prohibitions on dressing up.

Even in these early cases, it is apparent that courts were aware that anti-mask laws could be too broad. A 1912 New York court reversed a conviction where a defendant was arrested in front of a theater wearing makeup and women's clothes and charged with vagrancy for being "in disguise."[226] The court explained that "if this conviction of this young man be allowed to stand, there is no reason why the disguised circus 'barker,' the midway 'ballyhoo,' or even the masquerader at the ball could not be convicted of vagrancy under this statute, each for having indulged in his own particular antics; and such a conviction, although perhaps it might be deemed righteous by many, would be going far beyond anything conceived by the Legislature."[227]

Although the *O'Brien* standard for symbolic speech had not yet been established, this court appears to recognize the value in expressive conduct. An anti-mask statute applied too broadly would implicate a variety of expressive conduct that occurs in everyday social life. Interestingly, this case does not restrict the scope of the statute to a ban on anonymity; it recognizes that some forms of anonymity, such as that enjoyed by masqueraders at the ball, can be expressive, and thus would not appropriately be covered by the anti-mask statute.

It is thus clear that early courts, even before the Supreme Court connected anonymity to the First Amendment, perceived a line between regulable and unregulable behavior affected by anti-mask laws.[228]

[225] 443 S.W.2d 847, 848 (Tex. Crim. App. 1969).
[226] People v. Luechini, 136 N.Y.S. 319, 320–21 (1912).
[227] *Id.*
[228] *See id.*

2. Cases Finding Anti-Mask Laws Unconstitutional

A number of courts have subsequently found anti-mask laws unconstitutional under the First Amendment. Courts that find anti-mask statutes unconstitutional have done so for a variety of reasons. Several cases focus on the nexus between anonymity and freedom of expression and association. Several courts instead find that the state has failed to show a significant state interest in regulating anonymity, by failing to produce evidence of the connection between anonymity and other criminal conduct. One court found that the anti-mask statute targeted speech, not conduct, and thus should be subject to strict scrutiny, which it failed.

Two courts in 1978 found anti-mask laws to be unconstitutional under the First Amendment.[229] Both cases addressed masked protests by groups mobilizing against the Shah of Iran.[230] Both described anonymity not as a First Amendment right in itself, but as essential to the exercise of First Amendment rights under *NAACP v. Alabama*.[231] The earlier case hinged on the direct chilling effect on speech and the use of masks as symbolic speech, while the latter case instead addressed the statute's overbreadth and vagueness.[232]

In *Aryan v. Mackey*, students claimed that a university regulation that prevented them from protesting the Shah of Iran while masked violated the First Amendment.[233] The university had granted a demonstration permit, but barred the students from wearing masks while demonstrating.[234]

The students in *Aryan* made two First Amendment claims.[235] The first was what the court called a "non-communicative claim" about the function of anonymity: without the masks, the students

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[229] Aryan v. Mackey, 462 F. Supp. 90, 94 (N.D. Tex.1978); Ghafari v. Mun. Ct. for the S.F. Jud. Dist. of S.F., 87 Cal. App. 3d 255, 259 (Cal. Ct. App. 1978).

[230] *Aryan*, 462 F. Supp. at 91; *Ghafari*, 87 Cal. App. 3d at 258–59.

[231] *Aryan*, 462 F. Supp. at 92; *Ghafari*, 87 Cal. App. 3d at 261.

[232] *Compare Aryan*, 462 F. Supp. at 92 (finding an anti-mask statute unconstitutional because it interfered with an individual's ability to exercise their First Amendment rights), *with Ghafari*, 87 Cal. App. 3d at 265 (finding an anti-mask statute unconstitutional because it is "overbroad and vague").

[233] *Aryan*, 462 F. Supp. at 91.

[234] *Id.*

[235] *Id.*

claimed they feared reprisal and would be afraid to demonstrate.[236] The second claim was that the masks themselves had "become symbols of protests against the Shah's regime."[237]

The court recognized that the First Amendment "does not grant the right to anonymity."[238] However, the court added, citing *Talley* and *NAACP*, that "First Amendment questions arise . . . when there is such a nexus between anonymity and speech that a bar on the first is tantamount to a prohibition on the second."[239]

The court did not require the students to prove that they would in fact be persecuted. Instead, the court reasoned that it was apparent under the circumstances that identifiable students would withdraw from protected activity out of fear of consequences if they were not afforded anonymity.[240] The court therefore found that mask-wearing "is so closely connected to the speech that a loss of the activity results in a loss of the expression itself."[241] The University failed to show that the regulation would further its interest in preventing violence on campus, so the court found that the regulation failed.

Concerning the second claim—that the masks were symbolic speech—the *Aryan* court stated without examination that the masks "have become a symbol of opposition to a regime which is of such a character that its detractors believe they must disguise their identity to protect themselves."[242] Then, as with the first claim, the court pointed out that the University had failed to supply a single concrete fact regarding the causal connection between the regulation of masks and the prevention of potential violence.

Thus the *Aryan* court found that mask-wearing both had a significant nexus with free expression as conduct, and was symbolic speech. Because the state failed to show a concrete state interest by linking mask-wearing to violence through evidence, the regulation was found to be unconstitutional.

[236] *Id.* at 90.
[237] *Id.*
[238] *Id.* at 92.
[239] *Id*.
[240] *Id.* (quoting NAACP v. Alabama, 357 U.S. 449, 462 (1958)).
[241] *Id*.
[242] *Id*.

A second 1978 case also granted First Amendment protection to mask-wearing, finding that the anti-mask statute at issue was overbroad.[243] In *Ghafari v. Municipal Court for San Francisco Judicial District of San Francisco*, which came down a few months after *Aryan* in December 1978, the California Court of Appeal considered the constitutionality of the California anti-mask statute.[244] Iranian nationals had been arrested for picketing with leaflets placed between their glasses and faces.[245] The California statute is a general anti-mask statute prohibiting partially or completely concealing one's face with intent to conceal identity, with a list of exceptions.[246] It was originally enacted in 1923.[247]

The appellants contended that the anti-mask statute was facially overbroad.[248] They claimed that the statute prohibited anonymity where freedom of speech, peaceful assembly, and free association might be involved. This ban was not required by a compelling state interest, nor implemented in the least restrictive manner.

Like the court in *Aryan*, the court in *Ghafari* did not require the appellants to show that identification would result in reprisals.[249] Instead, the court recognized that appellants had alleged fear of retaliatory measures and that they would not have participated in the demonstrations if they had not been able to protect their anonymity.[250] The court found this allegation adequate, and

[243] *See* Ghafari v. Mun. Ct. for S.F. Jud. Dist. of S.F., 87 Cal. App. 3d 255, 265 (Cal. Ct. App. 1978) (holding a California anti-mask statute unconstitutional under the First Amendment).
[244] *Id.* at 258.
[245] *Id.* at 258–59.
[246] *Id.* at 259–60.
[247] *Id.* at 260.
[248] *Id.*
[249] *See generally id.* (The Court in *Ghafari* struck down the state's anti-mask statute as unconstitutionally overbroad and vague. In doing so, the Court did not require appellants to provide evidence that they had a fear of reprisals when choosing to engage in anonymous protesting.); *see also* Aryan v. Mackey, 463 F. Supp. 90, 92 (N.D. Tex. 1978) (where, instead of requiring petitioners to provide evidence of reprisals, the Court simply accepted the general rule reached in *NAACP v. Alabama*, 357 U.S. 449, 462–63 (1958), that to compel disclosure of one's identity may dissuade persons from exercising their freedom of speech for fear of reprisals).
[250] *Ghafari*, 87 Cal. App. 3d at 259.

recognized the potential for a chilling effect if masking were not allowed. This chilling effect stemmed from the appellants' perception, not from concrete proof of past or future reprisals in Iran.

Like the court in *Aryan*, the court in *Ghafari* recognized that even though the appellants did not assert an absolute right to anonymity, "anonymity is essential to the exercise of constitutional rights," citing *NAACP*.[251] The court found the anti-mask statute to be overbroad, because it inhibited the exercise of free speech and exposed speakers to retaliation.[252]

In part, the court came to this finding because of the existence of a similar but narrower California law, which criminalized the wearing a mask for the purpose of concealment or evading discovery.[253] The narrower provision served a legitimate law enforcement function.[254] The court explained that "the wearing of a mask per se does not affect adversely any legitimate state interest," so banning the wearing of a mask with no criminal purpose served no legitimate law enforcement function and was constitutionally overbroad.[255] The *Ghafari* court also found that the amusement and entertainment exceptions in the statute were inherently vague, and violated the equal protection clause because they favored amusement and entertainment over other protected First Amendment expression.[256] The court did not even reach the question of whether the masks were symbolic speech.[257]

The *Ghafari* court thus focused on overbreadth and the nexus between anonymity and free expression. It did not find it necessary to determine whether masks were symbolic speech. Anonymity itself could receive protection without embodying additional expressive value through symbolism.

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251 *Id*. at 260 (citing *NAACP*, 357 U.S. at 462); *see also Aryan*, 463 F. Supp. at 92 (explaining that while the First Amendment does not grant a right to anonymity, constitutional questions nevertheless arise where there is a nexus between anonymity and speech).

252 *Ghafari*, 87 Cal. App. 3d at 259, 262.

253 *Id.* at 261–62.

254 *Id.* at 262.

255 *Id.*

256 *Id*. at 265–66.

257 *Id*. at 266 n.5.

A 1981 case similarly found the Florida anti-mask statute to be overbroad, but not under the First Amendment.[258] The Supreme Court of Florida in *Robinson v. State* found that the Florida anti-mask statute deprived the appellant of due process because it was overbroad.[259] The Florida statute, which addressed all masks, with exceptions, was found to be "susceptible of application to entirely innocent activities . . . so as to create prohibitions that completely lack any rational basis."[260] The court did not reach the First Amendment arguments.

Two cases in the 1990s found anti-mask statutes unconstitutional under the First Amendment. These cases focused on mask-wearing as symbolic speech, rather than the nexus between anonymity and free expression.

In 1990, a district court found a Tennessee city ordinance banning masks to be unconstitutional under the First Amendment.[261] The City of Pulaski had passed an ordinance banning masks in parades after the Ku Klux Klan initially requested to parade downtown on Martin Luther King, Jr. Day.[262] The district court found the ordinance unconstitutional. First, the court found that the ordinance allowed too much latitude to officials for denial of permits.[263] Second, it found that particularly in "the context of parades and demonstrations, certain masks and disguises may constitute strong symbolic political expression that is afforded protection by the First Amendment."[264] The ordinance was thus constitutionally overbroad, because it could be used to stifle symbolic expression.[265] The court cited a Seventh Circuit case in which the wearing of military uniforms in a parade had been similarly found to be clear symbolic expression.[266]

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[258] Robinson v. State, 393 So. 2d 1076, 1077 (Fla. 1981).
[259] *Id.*
[260] *Id.* at 1077.
[261] Ku Klux Klan v. MLK Worshippers, 735 F. Supp. 745, 751 (D.C. Tenn. 1990).
[262] *Id.* at 747.
[263] *Id.* at 749.
[264] *Id.* at 751 (citations omitted).
[265] *Id.*
[266] *Id.* (citing Collin v. Smith, 578 F.2d 1197, 1200 (7th Cir. 1978)).

In 1997, another court found mask-wearing to be symbolic speech and thus protected by the First Amendment.[267] A man wore a ninja mask to a local government meeting in protest of the Commission's attempt to ban public participation in the meetings. The mayor told him to take the mask off. Everybody knew the man's identity, and nobody appeared to be afraid of him. The court found that the mask-wearing was symbolic speech, because even though the man had not conveyed a very specific message, the Supreme Court has never required symbolic speech to be very particularized. The court also found that the government interest was not strong: the trial court, supported by the record, found that the mask-wearing was not disruptive of the meeting and did not inspire fear. Because the city failed to establish a content-neutral basis that served a substantial government interest for regulating expressive conduct, exacting scrutiny was required and the prohibition of the ninja mask was unconstitutional.

Perhaps the strongest First Amendment protection for mask-wearing is found in *American Knights of the Ku Klux Klan v. City of Goshen*.[268] Rather than asking whether mask-wearing is symbolic speech, or examining a nexus between anonymity and free expression, the court in *Goshen* recognized a freestanding right to anonymity established in *McIntyre*. That right was violated by a city's anti-mask ordinance.

The district court in *Goshen* addressed a city ordinance prohibiting the wearing of a mask in a public place for the purpose of disguising one's identity.[269] While recognizing that the KKK's white hood and mask carry special significance during religious ceremonies and that the mask is "an essential part of their uniform and organizational identity," the court did not base its finding on symbolic speech.[270] Rather, the court held that the ordinance "by prohibiting the wearing of masks for the purpose of concealing

[267] Dayton v. Esrati, 707 N.E.2d 1140, 1144–47 (Ohio Ct. App. 1997).
[268] Am. Knights of the Ku Klux Klan v. City of Goshen, 50 F. Supp. 2d 835 (N.D. Ind. 1999).
[269] *See id.* at 836.
[270] *See id.* at 837, 844.

identity in public, burdens the free speech and association rights."[271]

The record before the court in *Goshen* showed "harassment, threats of violence, job firings, and other retaliation" for membership in the AKKKK.[272] The city had also conceded that at least some AKKKK members wore masks to conceal identity and retain anonymity.[273] Thus, the court found that under *NAACP*, *Buckley v. Valeo*, *Talley*, and *McIntyre*, there could be no doubt that the anti-mask statute would, as in *Talley* "tend to restrict freedom to distribute information and thereby freedom of expression."[274]

The *Goshen* court showed the obvious influence of *McIntyre* in deciding that the anti-mask ordinance governed speech, not conduct.[275] The court made it clear that the anti-mask ordinance was "not content neutral," because prohibiting anonymity "is a direct regulation of the content of speech or expression."[276]

Applying the "exacting scrutiny" used by the Supreme Court in *McIntyre*, the court found that the city's ordinance was not narrowly tailored to serve a compelling state interest.[277] As in *Aryan*, the court in *Goshen* found that the government's record did not support a connection between the ordinance and the asserted interest of preventing violence and apprehending criminals.[278]

One year after *Goshen*, another district court considered a city's anti-mask ordinance and found it unconstitutional, but without declaring that the anti-mask ordinance was a content-based

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[271] *Id*. at 840.
[272] *Id.* at 838.
[273] *See id.*
[274] *Id*. at 840 (quoting Talley v. California, 362 U.S. 60, 64–65 (1960)) (citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); Buckley v. Valeo, 424 U.S. 1 (1976); NAACP v. Alabama, 357 U.S. 449 (1958)).
[275] *See id.* at 844.
[276] *Id*. at 842.
[277] *Id.*
[278] *See id.* at 842; *see also* Aryan v. Mackey, 462 F. Supp. 90, 93–94 (1978) (finding no concrete facts that the demonstrators should have feared violence as the demonstration was peaceful).

regulation.[279] The district court granted in part and denied in part the Klan's request for permanent injunctive relief.[280] The city's ordinance imposed criminal penalties for concealing one's identity in a public place, when coupled with certain intent requirements.[281]

The court decided that the Klan's hoods constituted a form of protected symbolic speech.[282] However, unlike the district court in *Goshen*, this district court did not find that the city's anti-mask ordinance was content-based.[283] The ordinance regulated conduct. The court explained that the ordinance's requirement of different kinds of intent contemplated affirmative conduct of some kind, and that affirmative conduct could itself be legitimately proscribed by the government.[284] Where the ordinance regulated mask-wearing with the intent to avoid identification, no additional affirmative conduct was required but the government could still regulate because of its legitimate interest.[285]

However, the court took issue with the section of the ordinance that prohibited the wearing of a mask "with the intent to intimidate, threaten, abuse or harass any other person."[286] The court found this section problematic from a First Amendment perspective because an individual could violate it "by engaging in protected First Amendment activity while wearing a mask."[287] Thus, the court found the ordinance overbroad on its face, and unconstitutionally vague.[288]

In summary, courts finding anti-mask statutes problematic have done so under a variety of justifications. Some focus on mask-wearing as symbolic speech. Others focus on the nexus between anonymity and freedom of expression. A number of courts find the statutes facially overbroad or vague.

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[279] Church of the Am. Ku Klux Klan v. City of Erie, 99 F. Supp.2d 583 (W.D. Pa. 2000).
[280] *Id.* at 585.
[281] *Id.*
[282] *See id*. at 587.
[283] *See id.*
[284] *Id.* at 589.
[285] *See id.* at 591.
[286] *Id.*
[287] *Id.*
[288] *Id.* at 592.

Courts do not always require challengers to make a showing of retaliation; they often infer from the circumstances that the petitioners' fear of retaliation is viable. Courts rejecting anti-mask statutes often instead require the state to prove a connection between anonymity and bad behavior, in order to show a substantial government interest in regulating anonymity. Where the state fails to make that showing, the statute is found unconstitutional. Finally, one district court in *Goshen* found that an anti-mask statute regulates content rather than conduct, and thus merits strict scrutiny.

These cases show, apart from *Goshen*, that arguing over *McIntyre* is almost beside the point. Courts have recognized First Amendment values to anonymity long before *McIntyre*, and continually refer to the anonymity protection established in *Talley*. Anonymity can have a significant nexus with free expression, freedom of association, and freedom of distribution; and the masks themselves may be symbolic speech. Second, these courts do not presume that anonymity is evil in and of itself. The state must make a showing of an additional state interest beyond preventing anonymity for the regulations to be constitutional. Third, courts do not always require a showing of retaliation in order to find that there might be a chilling effect.

3. Cases Upholding Anti-Mask Laws

The previous subsection showed that both state and federal courts have overturned anti-mask laws and ordinances in California, Florida, Texas, Tennessee, Indiana, and Ohio.[289] An equally significant number of courts have, however, upheld anti-mask statutes against constitutional challenges.

Most courts upholding anti-mask regulations begin with a finding that the anti-mask statute regulates conduct, not speech. Some find that the mask-wearing at issue is not symbolic speech

289 *See* Am. Knights of the Ku Klux Klan v. City of Goshen, 50 F. Supp. 2d 835, 840 (N.D. Ind. 1999); Ku Klux Klan v. MLK Worshippers, 735 F. Supp. 745, 751 (M.D. Tenn. 1990); Aryan v. Mackey, 462 F. Supp. 90, 94 (N.D. Tex. 1978); Robinson v. State, 393 So. 2d 1076, 1077 (Fla. 1981); Dayton v. Esrati, 707 N.E.2d 1140, 1144–47 (Ohio Ct. App. 1997); Ghafari v. Mun. Ct. for the S.F. Jud. Dist. of S.F., 87 Cal. App. 3d 255, 259 (Cal. Ct. App. 1978).

because it fails to convey a particularized message, or because other portions of the costume can convey the same message without a need for the mask.

Some of these cases recognize the possibility of a nexus between anonymity and expression, independent of symbolic speech, but explain that the defendants failed to show a viable fear of retaliation and thus failed to establish that nexus. A few cases note that anonymity is expressive but is inherently threatening and thus the state interest in banning it is high. However, it is important to note that even those cases that uphold anti-mask laws often do so by narrowing the statutes' scope.

Courts have upheld anti-mask statutes and ordinances in New York, Georgia, the Seventh Circuit, and Virginia. The New York case law is the most substantial, culminating in a recent Second Circuit case.

The New York anti-mask law is a general anti-mask law, banning the wearing of masks with exceptions for protected conduct.[290] It is one of the earliest anti-mask laws, and was originally enacted in 1845 to address anti-rent protestors who dressed as "Indians" while rioting. The protesters killed several law enforcement officers who attempted to serve writs on them, prompting legislation.[291]

The New York law bans being disguised, with exceptions, including an exception for entertainment. Individuals who are peacefully assembled for entertainment are permitted to obtain a permit from the police to wear masks or disguise themselves in public.[292] In the 1967 case *Schumann v. State of New York*, the district court refused to grant a temporary injunction against enforcement of the New York anti-mask law, explaining that the plaintiffs, a pantomime theater group protesting U.S. involvement in war, had never actually applied for a permit exempting themselves from the statute's coverage.[293]

[290] *See* N.Y. PENAL LAW § 240.45(4) (McKinney 2010).
[291] People v. Aboaf, 721 N.Y.S.2d 725, 733 (N.Y. Crim. Ct 2001).
[292] N.Y. PENAL LAW § 240.35(4) (McKinney 1989).
[293] 270 F. Supp. 730, 733 (S.D.N.Y. 1967).

In the 2001 case *People v. Aboaf*, a New York trial court found that New York's anti-mask law was constitutional, but subjected the law to a limiting construction.[294] The defendants in *Aboaf* were self-described anarchists arrested while participating in a demonstration in Union Square Park, wearing bandanas covering their faces except for the eyes and forehead.[295] The court first stated that the New York anti-mask law clearly regulates conduct, not speech.[296] It then explained that to successfully make a First Amendment challenge under freedom of association, the defendants must show undisputed evidence that establishes "the requisite nexus between compelled disclosure of the identities of individuals and resulting recriminations."[297] Because the defendants had failed to show evidence of a pattern of harassment that would be mitigated through anonymity, the court found that they could not link their anonymity to freedom of association. By requiring the defendants to show a pattern of harassment, however, the New York court departed from what other courts did earlier in *Aryan* and *Ghafari*.

Despite finding that freedom of association had not been implicated in this case, the court recognized that the New York anti-mask statute might be overbroad. To avoid First Amendment problems, the *Aboaf* court construed the law to prohibit the wearing of masks when done "for no legitimate purpose."[298] The court recognized that a mask can be worn "for communicative purposes" (symbolic speech), and that anonymity can be "a necessary corollary to freedom of association."[299] The court thus recognized that mask-wearing could implicate the First Amendment as symbolic speech, or when anonymity has a nexus with free expression. To protect both of these types of expression, the court limited the New York law to apply only to the wearing of masks when not done for a legitimate purpose.

[294] *Aboaf*, 721 N.Y.S.2d at 734 (holding that New York's anti-mask statute was not overbroad or unconstitutional as applied).
[295] *Id.* at 727.
[296] *Id.* at 728.
[297] *Id.* at 729 (citing Fed. Election Comm'n v. Hall-Tyner Election Campaign Committee, 678 F.2d 416 (2d Cir. 1982)).
[298] *Id.* at 733.
[299] *Id.*

Three years later, in the first anti-mask state law to reach a Court of Appeals, the Second Circuit upheld New York's anti-mask law in *Ku Klux Klan v. Kerik*.[300] Ku Klux Klan members applied for a parade permit, and were informed by the police department that their plan to wear masks would violate New York's anti-mask law.[301] The Second Circuit found that the mask-wearing at issue was not symbolic speech.[302] The Second Circuit explained that here, the expressive force of the mask was redundant with the costume.[303] Because the mask had no independent expressive value from the rest of the KKK uniform, the mask was not symbolic speech.

In addition to this narrow holding, the Second Circuit evidenced a broad limited interpretation of the First Amendment right to anonymous speech.[304] The court narrowly interpreted the First Amendment right to anonymity established by the Supreme Court in *NAACP*, *Talley*, and *McIntyre* as a right only against the compelled disclosure of one's name.[305] The Second Circuit explained that the Supreme Court "never held that freedom of association or the right to engage in anonymous speech entails a right to conceal one's appearance in a public demonstration."[306] It explicitly rejected the argument "that the First Amendment is implicated every time a law makes someone—including a member of a politically unpopular group—less willing to exercise his or her free speech rights."[307]

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300 *See* Church of the Am. Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197, 211 (2d Cir. 2004).
301 *Id.* at 200.
302 *See id.* at 205.
303 *See id.* at 206, 208 ("[M]erely that where, as here, a statute banning conduct imposes a burden on the wearing of an element of an expressive uniform, which element has no independent or incremental expressive value, the First Amendment is not implicated, and a balancing of interests under *United States v. O'Brien* . . . is unnecessary.") (citing United States v. O'Brien, 391 U.S. 367 (1968)).
304 *See id.* at 209.
305 *See id.* at 208 (citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); Talley v. California, 362 U.S. 60 (1960); NAACP v. Alabama, 357 U.S. 449 (1958)).
306 *Id.* at 209.
307 *Id.*

This second point reaches further than any cases before it.[308] It ignores the overbreadth and vagueness worries addressed by other courts.[309] And it ignores the "nexus between anonymity and expression" observed in both *Aryan* and *Ghafari*.[310] Limiting Supreme Court case law to the disclosure of names rather than identity also ignores the Supreme Court's reasoning in *Talley*. In *Talley*, the Supreme Court explicitly connected anonymity to the First Amendment by explaining that public discussion could be deterred through "identification and fear of reprisal."[311] Facial recognition can be equivalent to compelling the disclosure of a name; identification can often be made with a face as easily as through a name, especially in an age of biometric scanning and facial recognition software.

After *Kerik*, the New York Supreme Court considered the appeal of eleven defendants from *Aboaf* in *People v. Bull*.[312] The court noted that *Kerik* controlled, so the "defendants' constitutional overbreadth and vagueness arguments" both failed.[313] The court also pointed out that the trial court's ruling in *Aboaf* that limited the New York statute to the wearing of masks "for no legitimate purpose" had been overruled by *Kerik*.[314]

At the core of the Second Circuit decision in *Kerik* was its strange conclusion that mask-wearing was not symbolic speech.[315] The Second Circuit took its reasoning from a 1992 district court case from the Eastern District of Virginia.[316] This case, *Hernandez v. Superintendent*, is important because it created the *Kerik* way of analyzing whether mask-wearing is expressive conduct.

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308 *See id.* (holding that "the plaintiffs' right to anonymous speech is not implicated").
309 *See* State v. Miller, 260 Ga. 669, 673–74 (1990).
310 Aryan v. Mackey, 462 F. Supp. 90, 92 (1978); *see also* Ghafari v. Mun. Ct. for S.F. Jud. Dist. of S.F., 87 Cal. App. 3d 255, 260 (Cal. Ct. App. 1978)
311 Talley v. California, 362 U.S. 60, 65 (1960).
312 People v. Bull, 784 N.Y.S.2d 270, 272 (Sup. Ct. NY 2004).
313 *Id.*
314 *Id.* (citing People v. Aboaf, 187 Misc. 2s 173 (N.Y. City Crim. Ct., 2001)) *aff'd sub nom.* People v. Bull, 784 N.Y.S.2d 270).
315 Church of the Am. Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197, 207 (2d Cir. 2004) (citing Hernandez v. Superintendent, 800 F. Supp. 1344, 1351 (E.D. Va. 1992)).
316 *Hernandez*, 800 F. Supp. at 1353.

Like the Second Circuit in *Kerik*, the Virginia district court held in *Hernandez v. Superintendent* that mask-wearing by the Ku Klux Klan was not expressive conduct.[317] The court explained that the burden rests on the petitioner to demonstrate that the conduct is in fact symbolic speech, and here the petitioner failed.[318] The court found that the detachable mask was an optional part of the Klan uniform; the petitioner's companion was not wearing the mask, and the petitioner could not articulate a particularized message, saying only that the mask was "part of the symbolic symbol of the Klan."[319] The court found that because the mask contributed nothing to the message already conveyed by the rest of the Klan costume, it did not convey a particularized message.[320]

This is a strange reading of the *O'Brien* test. A "particularized message" does not mean a "nonredundant message." For example, if one wears a t-shirt with a picture of a peace sign, and a hat with the same image, there is nothing in *O'Brien* to indicate that each piece of clothing would not be separately protected by the First Amendment. The *Hernandez* court and *Kerik* court strangely appear to import the time, place, and manner test's requirement that regulation leave an alternative avenue for expression.[321] The *Hernandez* court reasoned that because the message in the Klan mask could be expressed in an alternate method—through the rest of the costume—the mask itself was not expressive conduct.[322] This has never, however, been the standard for expressive conduct. For First-Amendment-protected expression, the Supreme Court's decision in *Cohen v. California* makes it clear that the specific means of communication is protected because the speaker's choice of medium itself is often expressive.[323]

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317 *Id.* at 1351.
318 *Id.* at 1350.
319 *Id.*
320 *Id.* at 1351.
321 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (noting that time, place and manner restrictions must be "content-neutral . . . [and] narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication") (citations omitted).
322 *Hernandez*, 800 F. Supp. at 1351.
323 Cohen v. California, 403 U.S. 15, 26 (1971).

Georgia courts took a different approach to upholding anti-mask laws. Instead of declaring that mask-wearing was not symbolic speech, as did New York and Virginia, Georgia courts found that mask-wearing can constitute expression unworthy of First Amendment protection when it puts the viewer in a state of legitimate fear. Thus Georgia courts have limited the general anti-mask statute to apply only when mask-wearing provokes "a reasonable apprehension of intimidation, threats or violence."[324]

The Supreme Court of Georgia in *State v. Miller* in 1990 found that the Georgia anti-mask statute did not violate the First or Fourteenth Amendments.[325] The Georgia statute, established in 1951 after increased threats from the Ku Klux Klan,[326] was a general anti-mask statute with exceptions and no evident intent requirement.[327] Despite finding the statute constitutional, the court narrowed it by reading in a requirement of intent to conceal one's identity and restricting the statute's application to circumstances where the mask-wearing provoked fear.

The court explained that while "under certain circumstances, anonymity may be essential to the exercise of constitutional rights," anonymity has also been assumed for bad purposes.[328] Thus, "[a]nonymity is neither an absolute social good, nor an absolute constitutional right."[329]

The court found the statute to be content-neutral because it proscribed "a certain form of menacing conduct."[330] If Klan members could show that they experienced reprisals when their identities were revealed, they could show that the anti-mask law impacted their freedom of expression. But the Klan here failed to show proof of reprisals against its members.[331]

324 State v. Miller, 398 S.E. 2d 547, 552 (Ga. 1990).
325 *Miller*, 398 S.E.2d at 552–53.
326 *Id.* at 550.
327 *Id.* at 556 (Smith, J., dissenting) (noting that the majority opinion does not require criminal intent for conviction under the Georgia anti-mask statute).
328 *Id*. at 552.
329 *Id.*
330 *Id*. at 551.
331 *Id*. (holding that "the record in this case is devoid of any proof of any injury to or loss of a job by members of the Klan").

The court did not base its decision, however, on the conclusion that mask-wearing is not expressive conduct.[332] Instead, it "assume[d] without deciding that Miller's wearing a mask was conduct 'sufficiently imbued with elements of communication to implicate the First Amendment.'"[333] But even under that assumption, the state's interest in anonymity's functionality and the negative nature of anonymity overrode any First Amendment interest by the Klan. The court concluded that anonymity in general is a bad thing, deserving of regulation by the state.[334] "A nameless, faceless figure strikes terror in the human heart. . .The face betrays not only identity, but also human frailty."[335] Based on this understanding of anonymity, the *Miller* court narrowed Georgia's general anti-mask statute into a new type of anti-mask statute. The Georgia statute, after *Miller*, is directed specifically at "intimidating or threatening mask-wearing behavior" with intent to conceal identity.[336]

Since *Miller*, two things have happened to alter Georgia case law. First, Georgia readdressed the statute in *Daniels v. State* in 1994, and further narrowed its construction.[337] Second, the Supreme Court came down with a more restrictive First Amendment standard for regulating threats in *Virginia v. Black* in 2003 that impacts the viability of the Georgia interpretation.[338]

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[332] *Id.* at 549–50 (finding that the Anti-Mask Act statute was supported by a valid government interest, the Court did not need to decide whether appellant's mask-wearing constituted symbolic speech).

[333] *Id*. at 550 n.2 (quoting State v. Johnson, 109 S. Ct. 2533, 2540 (1989)).

[334] *See id.* at 552 ("[A]nonymity has often been assumed for the most pernicious purposes. Anonymity is [not] an absolute social good."); *id.* at 551 ("The state's interests furthered by the Anti-Mask Act lie at the very heart of the realm of legitimate governmental activity.").

[335] *Id.* at 550.

[336] *See id.* at 553.

[337] Daniels v. State, 448 S.E.2d 185, 188–89 (Ga. 1994) (holding that conviction under the Georgia anti-mask statute required not only intent to conceal one's identity as required by *Miller*, but additionally the intent to threaten, intimidate, or provoke the apprehension of violence. This added requirement thus narrowed the scope of the statute).

[338] Virginia v. Black, 538 U.S. 343, 359 (2003) (holding that, with regard to the First Amendment, a state may permissibly regulate "statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals").

In the 1994 case *Daniels v. State*, the Supreme Court of Georgia returned to the anti-mask statute addressed in *Miller*.[339] Daniels, who lived on his Social Security income and collected and recycled aluminum cans as a supplemental form of income, found a discarded football helmet and green wrestling mask in the trash and wore them to entertain neighborhood children playing in the street.[340] A police officer arrested Daniels because he witnessed Daniels wearing the mask while addressing two young girls.[341] Daniels argued that the state had failed to produce evidence sufficient to convict, and the court agreed.[342]

The court returned to the *Miller* construction of the Georgia anti-mask law, which required proof of intent to conceal identity, and applied only to mask-wearing conduct that provokes a reasonable apprehension of intimidation, threats, or violence.[343] The court in *Daniels* restated *Miller* to criminalize mask-wearing that the wearer knows provokes a reasonable apprehension of intimidation, threats, or violence; or mask-wearing when the wearer has been criminally negligent with respect to creating that same fear. The court explained that the accused must (1) intend to conceal his or her identity, and (2) either intend to threaten, intimidate, or provoke the apprehension of violence, or be criminally negligent of the same.[344] Because all evidence pointed to the fact that Daniels intended to entertain his subjects rather than intimidate or threaten them, the state had produced insufficient evidence to convict him under the statute.[345]

Presumably, *Miller* must also be affected by the Supreme Court's 2003 decision on cross-burning and true threats in *Virginia v. Black*. The Supreme Court held that for regulation of a threat to be constitutional, the threat must be a "true threat."[346] A true threat consists of "a threat [directed] to a person or group of persons with

339 *Daniels*, 448 S.E.2d at 187.
340 *Id.* at 186.
341 *Id.*
342 *Id.* at 187.
343 *Id.* (quoting State v. Miller, 398 S.E.2d 547, 552 (Ga. 1990)).
344 *Id*. at 189.
345 *Id.*
346 Virginia v. Black, 538 U.S. 343, 344 (2003) (citing Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam)).

the intent of placing the victim in fear of bodily harm or death."[347] Thus the "intimidating or threatening mask-wearing behavior"[348] banned in *Miller* must be intended to make the threatened person fear bodily harm or death.[349] It is unlikely that much mask-wearing causes people to fear bodily harm or death.

Nonetheless, this idea that there is a legitimate state interest in banning anonymity because anonymity is inherently frightening received traction in other courts as well. The Seventh Circuit considered the constitutionality of an anti-mask rule in *Ryan v. County of DuPage*.[350] The defendant Ryan challenged a rule against wearing masks in a local courthouse.[351] Ryan had entered the courthouse wearing an air filtration mask as an act of protest, because bad air quality had previously resulted in closure of the courthouse due to workers falling ill.[352] The Seventh Circuit first explained that "[t]he wearing of a mask inside a courthouse implies intimidation."[353] Anonymity itself communicates a threat.[354] Then the Seventh Circuit pointed out that Ryan never explained a particularized message attached to the mask; he had said that he was wearing it for medical reasons.[355]

The Seventh Circuit in *Ryan* reviewed previous anti-mask cases.[356] It conceded that previous courts appeared divided over whether prohibitions against being masked in a public place violate the First Amendment.[357] The Seventh Circuit explained, however, that none of these cases suggested that prohibiting masks within a courthouse was constitutionally questionable.[358] In an attempt to resolve the existing conflict, the court reasoned that the previous cases that had found anti-mask statutes to be unconstitutional–

[347] *Id.* at 360.
[348] *Miller*, 398 S.E.2d at 553.
[349] *Black*, 538 U.S. at 360.
[350] 45 F.3d 1090 (7th Cir. 1995).
[351] *Id.* at 1092.
[352] *Id.* at 1091.
[353] *Id.* at 1092.
[354] Hernandez v. Commonwealth, 12 Va. App. 669, 673 (Va. Ct. App. 1991).
[355] *Ryan*, 45 F.3d at 1093.
[356] *See id.* at 1095.
[357] *Id.*
[358] *Id.* at 1096.

Ghafari and *Aryan*—involved individuals who feared violent retaliation if they were not masked.[359] Thus the Seventh Circuit rejected Ryan's claim for three reasons: the mask was not symbolic speech, there was no proven nexus between anonymity and freedom of association, and anonymity communicates intimidation to viewers.

The West Virginia Supreme Court of Appeals also considered anonymity's inherently intimidating nature.[360] In 1996, the court concluded in *State v. Berrill* that the West Virginia anti-mask statute had been constitutionally applied.[361] West Virginia has a general mask statute, with exceptions.[362] To convince a board of education to change the high school red devil mascot, Mr. Berill attended a county board meeting dressed in a devil costume with a mask.[363] Witnesses from the meeting said they were frightened.[364]

The *Berill* court primarily followed the reasoning in *Miller*.[365] It quoted *Miller* for the proposition that masking itself is inherently frightening.[366] It also pointed out that the focus of the statute is conduct: the statute bans "the concealment of identity, and any limitation on speech [was] merely a secondary effect."[367] The court explained that Berrill had "alternate" means for "articulating his concerns that would not have concealed his identity and thus violated the statute."[368] Finally, the court pointed out that Berrill's message resulted in "chaos [rather] than understanding," so it was not a particularized message likely to be understood.[369]

Thus courts have upheld the constitutionality of anti-mask statutes in New York, Virginia, West Virginia, Georgia; and the Seventh Circuit found an anti-mask regulation in a courthouse to be constitutional. These courts have upheld these anti-mask laws

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359 *Id.* at 1095.
360 *See* State v. Berrill, 474 S.E.2d 508 (W. Va. 1996).
361 *See id.* at 509.
362 *See* W. VA. CODE § 61-6-22 (1992).
363 *See Berrill*, 474 S.E.2d at 509.
364 *See id.* at 510.
365 *See id.* at 514–15.
366 *See id.*
367 *Id*. at 515.
368 *Id.*
369 *Id.* at 516.

by finding that the statutes regulate conduct, not speech; that mask-wearing is not sufficiently expressive; or that defendants fail to show a nexus between anonymity and protected expression or association. However, it is striking that a number of these cases do attempt to limit the scope of the anti-mask statutes. Georgia employed a narrowing interpretation, and a New York trial court did so as well. The Second Circuit decision in *Kerik* may be the most prominent anti-mask case, but it also appears to be an outlier in its decision that the Supreme Court protection for anonymity is limited to compelled disclosures of names.

4. Is Masking Inherently Bad? Other Cases on Intent

In a number of these cases, the question is raised of whether being masked is by itself inherently bad, or whether a defendant must have an additional intent to conceal herself or do some additional bad thing. Even the difference in the types of state statutes reflects this tension between different conceptions of anonymity. As we saw in *Miller* and *Daniels*, Georgia courts have read in several additional elements of intent.[370] The district court in *City of Erie* explained that intent must be illustrated by conduct.[371] By contrast, *Hernandez*, *Ryan*, and *Kerik* all described mask-wearing as inherently threatening and not requiring additional intent.[372]

Two additional cases about masks address intent in interesting ways, though these cases do not address First Amendment claims. In *State v. Bryant*, the Supreme Court of Tennessee struggled with the state's law dictating that masked entrance onto private property shall be considered prima facie evidence of the accused's intention to commit a felony.[373] The court held that the statute's creation of prima facie evidence was permissive only, not a mandatory presumption.[374] Permissive inference is unconstitutional as applied

370 *See* Daniels v. State, 448 S.E.2d 185, 188 (Ga. 1994); State v. Miller, 260 Ga. 669, 673 (1990).
371 *See* Church of the Am. Ku Klux Klan v. City of Erie, 99 F. Supp.2d 583, 591 (W.D. Pa. 2000).
372 *See Kerik*, 356 F.3d at 205–06; 45 F.3d 1090, 1092 (7th Cir. 1995); Hernandez v. Commonwealth, 12 Va. App. 669, 673 (Va. Ct. App. 1991).
373 State v. Bryant, 585 S.W.2d 586, 589 (Sup. Ct. Tenn. 1979).
374 *See id.*

to a given defendant only if it is irrational for the juror to find the presumed fact.[375] So the statute was not unconstitutional on its face; it was just a question of whether it was constitutional as applied.[376] The court then explained that the jury instructions must make clear that the jury may, but need not, draw the inference suggested by the statute.[377] Since the jury instructions did not make this clear, the court reversed and remanded.[378] This holding shows that a jury cannot be told that masked entrance onto a property always means the accused intended to commit a felony; the jury must be told that they are allowed but not required to make that presumption about the accused's intent.

A more recent Massachusetts case, *Commonwealth v. Santos*, explained that intent to disguise oneself was a required element of a Massachusetts statute in which wearing a mask is an aggravating factor to the crime of armed or unarmed robbery.[379] The court considered whether evidence had been insufficient for a juror to find that the defendant had been "masked" or "disguised."[380] The defendant had been wearing a baseball hat and sunglasses, and a band-aid on his face.[381] The court found that the question should not have been put to the jury, because what the defendant was wearing did "not suggest or even remotely imply an intention or conscious effort to conceal identity."[382] This case shows consistency with earlier mask cases, in finding that one must intend to be disguised to be convicted under anti-mask laws, and shows that sometimes there is a burden on the state to establish that intent.

C. Conclusions about Anti-Mask Cases

The case law on anti-mask laws teaches us a number of things that we can bring into the context of online speech. First, courts recognized First Amendment values in anonymity before *McIntyre*,

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375 *See id.*
376 *See id.*
377 *See id.* at 589–90.
378 *See id.* at 590.
379 Commonwealth v. Santos, 672 N.E.2d 562, 564 (Mass. App. Ct. 1996).
380 *See id.*
381 *See id.*
382 *Id.* at 564.

under *Talley*. Anonymity as a function can have a nexus with free expression, and masks can be symbolic speech.

Second, it is not clear that courts always require an actual showing of reprisals for anonymity to be considered to have a substantial nexus with free expression. The 1978 cases of *Aryan* and *Ghafari* did not require a showing of reprisals.[383] They allowed the courts to assume that the chilling effect would occur, based on claims made by the appellants and not refuted by the state or a university.[384] Other courts do require evidence, but there is by no means a consistent requirement.

Third, the cases evidence a variety of underlying intuitions about anonymity and mask-wearing. These reactions range from a statement that anonymity does not per se adversely affect any legitimate state interest in *Ghafari*, to observing that mask-wearing inherently creates a climate of fear, in *Miller*.[385] The underlying understanding of the nature of anonymity is frequently the basis for whether additional intent is required. However, after the Supreme Court's decision in *Virginia v. Black*, it is clear that a state cannot regulate mask-wearing solely because it is frightening to other people.[386]

Fourth, courts handle the division between anonymity's functional aspects and communicative aspects interestingly.[387] The First Amendment claim does not hinge solely on whether the mask is expressive conduct.[388] In *Aryan*, the fact that masks serve a function actually did not destroy the First Amendment argument; it bolstered it.[389] Because mask-wearing permits free speech and association, it is protected under *NAACP*.[390] But the functional

[383] *See* Aryan v. Mackey, 462 F. Supp. 90, 93–94 (N.D. Tex. 1978); Ghafari v. Mun. Ct. for S.F. Jud. Dist. of S.F., 87 Cal. App. 3d 255, 261 (Cal. Ct. App. 1978).
[384] *See Aryan*, 462 F. Supp. at 93–94; *Ghafari*, 87 Cal. App. 3d at 261.
[385] *See* State v. Miller, 260 Ga. 669, 672 (Ga. 1990); *Ghafari*, 87 Cal. App. 3d at 262.
[386] *See* Virginia v. Black, 538 U.S. 343, 362 (2003) (finding that a statute banning cross burning with intent to intimidate does not violate the First Amendment).
[387] *See, e.g.*, *Aryan*, 462 F. Supp. at 92.
[388] *See id.* at 92.
[389] *See id.*
[390] *See id.* at 91 (citing NAACP v. Alabama, 357 U.S. 449, 462–63 (1958)).

element of anonymity is used in other cases to justify not applying the First Amendment at all.[391]

Finally, it is worth noting how widely the splits between courts are developing. Both state and federal courts have declared the anti-mask laws of California, Florida, and Texas unconstitutional.[392] City ordinances have also been overturned, in Tennessee and Indiana.[393] Georgia's statute has been upheld, but with a vastly limiting construction that may now turn out after *Virginia v. Black* to prevent the application of the law entirely.[394] However, the Second Circuit refused to extend the right to anonymity past disclosure requirements by the state, and described anti-mask laws as regulating function, only.[395] And the Eastern District of Virginia agreed.[396]

IV. ANTI-MASK CASE LAW APPLIED TO REAL NAME POLICIES ONLINE

This Part brings lessons from the real world into the discussion of anonymity online. The Supreme Court has established that door-to-door petitioners may not be subject to identity registration requirements in the real world.[397] The question is whether this rule changes online, where speech can be truly untraceable.[398] Untraceable online speech implicates a strong state interest in law enforcement, arguably stronger than the state's interest in registering door-to-door petitioners offline. Could the government in the United States constitutionally require that all online speakers

[391] *See, e.g.*, State v. Miller, 398 S.E.2d 547, 552–53 (Ga. 1990).
[392] *See* Aryan v. Mackey, 462 F. Supp. 90, 94 (N.D. Tex.1978); Robinson v. State, 393 So. 2d 1076, 1077 (Fla. 1981); Ghafari v. Mun. Ct. for the S.F. Jud. Dist. of S.F., 87 Cal. App. 3d 255, 259 (Cal. Ct. App. 1978).
[393] *See* Am. Knights of the Ku Klux Klan v. City of Goshen, 50 F. Supp. 2d 835, 840 (N.D. Ind. 1999); Ku Klux Klan v. MLK Worshippers, 735 F. Supp. 745, 751 (M.D. Tenn. 1990).
[394] *See Miller*, 398 S.E.2d at 550.
[395] *See* Church of the Am. Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197, 208 (2d Cir. 2004).
[396] *See* Hernandez v. Superintendent, 800 F.Supp. 1344, 1351 (E.D. Va. 1992).
[397] *See* Watchtower Bible v. Vill. of Stratton, 536 U.S. 150, 168 (2002); Talley v. California, 362 U.S. 60, 63 (1960).
[398] *See* Brenner, *supra* note 184, at 4.

register their identities, justifying that registration requirement with a strong state interest in law enforcement?

This question is not merely a hypothetical; online real name policies have received considerable attention from governments in recent years, even in the United States. This Part addresses online real name policies, and asks whether the *Doe* literature addresses them. Concluding that the *Doe* scholarship does not adequately address the prospect of online real name policies, this Part brings to bear the anti-mask case law discussed in Part III.

A. *Real Name Policies*

Online real-name policies require self-identification while speaking, or the registration of identity with either the government or some layer in the communicative infrastructure such as an Internet Service Provider (ISP). These policies vary in whether they primarily address traceability, or directly prohibit anonymity.

Policies that prohibit anonymity apply to all layers of the communication stack: the individual cannot speak without self-identifying to everyone. Policies that address traceability do not mandate that an individual speak under his real name; instead, they require the individual to register identity with at least one party, so that if he commits a crime or a tort, law enforcement will be able to find him. The Tor-enabled "Silk Road" of illicit anonymous online activities has prompted much discussion of banning untraceable anonymity in the interest of preventing terrorism and other crimes.[399]

In 2003, South Korea began enacting real name commenting laws, which were first applied on political websites.[400] The South Korean government enacted these laws in the name of increasing civility, and preventing harm to individuals from insidious

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[399] See Nicolas Christin, *Traveling the Silk Road: A Measurement Analysis of a Large Anonymous Online Marketplace* (Carnegie Mellon University Working Paper, 2012), *available at* http://arxiv.org/abs/1207.7139 (arguing that illegal Internet marketplaces, frequented by anonymous users, make it difficult for law enforcement agents to track the purchasing of weapons and narcotics).

[400] Gregory Ferenstein, *Surprisingly Good Evidence that Real Name Policies Fail to Improve Comments*, TECHCRUNCH (July 29, 2012), http://techcrunch.com/2012/07/29/surprisingly-good-evidence-that-real-name-policies-fail-to-improve-comments.

anonymous comments.[401] In 2007, South Korea temporarily required that all websites of a certain size mandate the use of real names by their viewers and commenters.[402] Users were required to verify their identities by submitting their Resident Registration Numbers (RRNs), which are roughly equivalent to social security numbers.[403] The policy proved to have surprisingly little impact on cleaning up abusive commentary—a change of .09%, in a study done by the Korean Communications Commission.[404] But it resulted in a security breach in which identity information for thirty-five million users was stolen from two popular websites.[405] South Korea decided to abandon the "real-name system" in August 2011.[406]

In early 2012, China decided to expand its online accountability regulations, requiring users of microblogging services to use their own names.[407] Unlike in South Korea, this policy does not require a user to display her real name while speaking.[408] Instead, the user's national identification information is stored in her account.[409] China's policy is an example of a real-name policy targeting dissidents, but not civility.[410] Some argue that while this identification requirement is bad, it may be better than the other alternative, which is banning the technology of microblogging altogether.[411]

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[401] *Id.*

[402] Timothy Lee, *South Korea's "Real Names" Debacle and the Virtues of Online Anonymity*, ARS TECHNICA (Aug. 15, 2011, 02:45 PM), http://arstechnica.com/tech-policy/2011/08/what-south-korea-can-teach-us-about-online-anonymity.

[403] *Id.*

[404] Ferenstein, *supra* note 400.

[405] Xeni Jardin, *South Korea to Abandon "Real Name" Internet Policy*, BOING BOING (Aug. 12, 2012, 12:09 AM), http://boingboing.net/2011/08/12/south-korea-to-abandon-real-name-internet-policy.html.

[406] *Id.*

[407] J. Angelo Racoma, *China to Enforce Real Name Policy for Microblogging, Claiming "Online Accountability*, CMSWIRE (Jan. 23, 2012), http://www.cmswire.com/cms/social-business/china-to-enforce-real-name-policy-for-microblogging-claiming-online-accountability-014211.php.

[408] *Id.*

[409] *Id.*

[410] *Id.*

[411] J. Angelo Racoma, *China to Enforce Real Name Policy for Microblogging, Claiming "Online Accountability*,*"* CMSWIRE (Jan. 23, 2012), http://www.cmswire.com/

Calls for real-name policies are increasingly the routine after high-profile criminal acts. In Germany, the Interior Minister argued for real-name policies, alleging that the recent Norwegian shooter had been inspired by a pseudonymous anti-Muslim blogger.[412] In the wake of the recent Aurora, Colorado shooting, the AMC theater chain banned masks in their movie theaters.[413] The reasoning was that costumes "make other guests feel uncomfortable."[414]

The discussion is playing out in the private sphere as well. Out of a combination of business interests and civility concerns, Google+ and Facebook require the use of real names, and newspapers are turning to real-name commentary policies.[415]

However, the advent of new video obscuring technology recognizes the necessity of anonymity for dissident behavior.[416] As we increasingly move towards video as a form of communication, online anonymity takes on new forms. YouTube now provides a face-blurring tool for online videos, to protect dissidents in oppressive regimes.[417] Anti-mask laws may in fact be more than an analogue—they may have direct online application to the obscuring of identity in online videos.

The question of state-mandated real-name policies has come up several times in the United States. Mandatory key escrow was discussed during the Clinton era, in debate over the controversial Clipper Chip.[418] Froomkin pointed out that mandatory key escrow would chill "speech by persons who seek to remain either secure or

cms/social-business/china-to-enforce-real-name-policy-for-microblogging-claiming-online-accountability-014211.php?pageNum=2.

412 Lee, *supra* note 402.

413 *AMC Bans Masks, Fake Weapons in Theaters*, CBSCHICAGO (July 20, 2012), http://chicago.cbslocal.com/2012/07/20/amc-bans-masks-fake-weapons-in-theaters.

414 *Id.*

415 Kaminski, *supra* note 29, at 14.

416 Eyder Peralta, *To Help Dissidents, YouTube Introduces Face-Blurring Tool*, NPR (July 18, 2012), http://m.npr.org/news/Technology/156987232.

417 Neal Ungerleider, *YouTube Introduces Face-Blurring Tool*, FAST COMPANY (July 18, 2012), http://www.fastcompany.com/1843123/youtube-introduces-face-blurring-tool.

418 *See* Froomkin, *The Clipperchip*, *supra* note 202, at 809.

anonymous when speaking, whether for fear of retribution or other reasons."[419]

More recently, two identical New York legislative proposals—Senate Bill 6779 and Assembly Bill 8688—would require web administrators to take down any online postings to which the writer has not attached his name.[420] If the anonymous poster agrees to attach his or her name and confirms the accuracy of his or her IP address and home address, then the posting can remain up.[421]

The New York laws may have been proposed by referring to an anti-mask case. As discussed above, in *Kerik*, the Second Circuit held that wearing a mask was not protected by the First Amendment.[422] The New York legislature may have reasoned that the two online real name policy proposals would be constitutional, relying on *Kerik*.

B. The Doe Literature

Most scholarly work on online anonymity does not address real name policies; it concerns the establishment of a standard for unmasking online defendants through the civil subpoena process. Cases about this standard are often referred to as *Doe* or *Dendrite* cases, after an early New Jersey case that established a prominent version of the subpoena standard.[423]

In a *Doe* case, a civil plaintiff argues to the court that their case necessitates the revelation of the identity of the anonymous defendant.[424] The process usually involves two steps of subpoenas: one to the Online Service Provider (OSP), or website, to get the identifying number (or Internet Protocol address) used by

[419] *Id.* at 813.

[420] *See* Gene Policinski, *N.Y. Bills Would Squelch Anonymity Online*, FIRST AMENDMENT CENTER (May 24, 2012), http://www.firstamendmentcenter.org/n-y-bills-would-squelch-anonymity-online.

[421] Tecca, *N.Y Senate Bill Seeks to End Anonymous Internet Posting*, YAHOO! NEWS (May 24, 2012), http://news.yahoo.com/blogs/technology-blog/york-senate-bill-seeks-end-anonymous-internet-posting-162549128.html.

[422] *See* Church of Am. Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197, 208 (2d Cir. 2004).

[423] Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 759 (N.J. Super. Ct. App. Div. 2001).

[424] *See, e.g.*, Ekstrand, *supra* note 37, at 405.

the anonymous speaker; and a second to the Internet Service Provider (ISP) to connect that identifying number with an individual's account and real name.[425] The scholarly literature on *Doe* primarily concerns the establishment of an appropriate procedural standard for these unmaskings, coupled with concern that these subpoenas have been used by large companies and others to chill defendants' speech through the subpoena process without bringing legitimate cases to fruition.[426]

Whatever the disagreements about the details, the consensus among scholars is that First Amendment "protections for anonymous speech are not absolute."[427] This protection as applied to *Doe* cases has famously been referred to as a "qualified privilege."[428]

To understand what this means in the *Doe* context, it may help to look to the different forms of the reporter's privilege, which has been compared by some to the *Doe* or *Dendrite* standard.[429] A few reporter's shield statutes—including the first such statute, which was enacted in Maryland in 1896—provide "an absolute shield to reporters from forced disclosure of their confidential sources."[430] Once the privilege is recognized, a reporter is shielded from disclosure "even when subpoenaed to testify before a grand jury."[431] However, most state laws provide a qualified reporter's privilege, not an absolute privilege.[432] In a typical state shield statute, a party may overcome the reporter's privilege by showing that the information "is relevant and material to the unresolved issues," "cannot be obtained from alternative sources," and that a "compelling interest exists for requiring disclosure of the information."[433]

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[425] *See* Gleicher, *supra* note 28, at 328.
[426] *See* Lidsky, *Silencing John Doe*, supra note 36, at 859–60.
[427] Ekstrand, *supra* note 37, at 407.
[428] *Id.* at 425.
[429] *See* Hanamirian, *supra* note 90, at 120, 134.
[430] *Id*. at 129.
[431] *Id.*
[432] *Id.*
[433] *Id*. at 130.

It took time for the reporter's privilege standard to be imported into the *Dendrite* context, where it was modified to be arguably more protective.[434] One scholar suggested using the opinion privilege and other First Amendment defenses to protect the identity of online John Does accused of libel by big companies.[435] A 2003 article acknowledged that "the new guidelines [used by courts] look much like the law of reporter's privilege."[436] In fact, an interview with Paul Levy, the attorney credited with building the *Dendrite* test, indicates that he deliberately crafted the standard out of the reporter's privilege.[437] In 2007, two scholars made a forceful argument for why the privilege standard should be used in the *Doe* cases.[438]

More recent articles have focused on the discrepancy between the emerging subpoena standards and attempted to offer a unifying standard. There are between seven and ten recognized tests for online John Doe subpoenas.[439] Perhaps the most famous, the *Dendrite* test, requires the plaintiff to (1) notify the anonymous speaker of the subpoena; (2) identify the allegedly actionable speech; and (3) state a prima facie cause of action, producing

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[434] *Id.* at 134 (noting that "[a] recent New Hampshire Supreme Court opinion, juxtaposing the Dendrite standard with the state's qualified reporter's privilege analysis, demonstrates that, at least in the core area of defamation cases, anonymous posters may have the legal upper hand").

[435] *See* Lidsky, *Silencing John Doe*, *supra* note 36, at 919 (noting that "[t]he First Amendment extends a privilege to statements that do not imply an assertion of objective fact, either because such statements 'cannot "reasonably [be] interpreted as stating actual facts"' or because such statements are not provably false. This privilege, the opinion privilege, has the potential to protect Internet discourse from wealthy and powerful plaintiffs who attempt to use defamation law to intimidate their online critics into silence").

[436] Ekstrand, s*upra* note 37, at 409.

[437] Hanamirian, *supra* note 90, at 121–22 (quoting Paul Levy as having said, "We created our [*Dendrite*] standard out of your source cases").

[438] *See* Lidsky & Cotter, *supra* note 27, at 1599–1600.

[439] *See, e.g.*, Gleicher, *supra* note 28, at 337 (noting that "[o]ver the past decade, courts have adopted at least seven standards for evaluating John Doe subpoenas"); *see also* Ashley I. Kissinger & Katharine Larsen, *Protections for Anonymous Online Speech*, PRACTISING LAW INSTITUTE, COURSE HANDBOOK, 815, 826–39 (2011) (surveying legal protections for anonymous online speakers and listing over ten distinct tests for unmasking an anonymous poster).

sufficient evidence to support each element.[440] The court then balances the strength of the case and the necessity for disclosure against the defendant's First Amendment right of anonymous free speech.[441]

Variations on the *Dendrite* test operate on at least six axes.[442] These include varying standards of requirements for: notice, argument strength, relevance of the identity, specificity on the actionable speech, and exhaustion of other resources.[443] Some courts do not employ a balancing test.

On the other side of the debate, several scholars have suggested that no additional procedural protection is necessary for online Does.[444]

What is interesting about the *Doe* or *Dendrite* scholarship is its general consensus that the First Amendment requires a balancing test of speech against a prima facie case. There is little discussion, however, of how courts might protect online anonymity outside of the subpoena context.

1. How Past Commentators Have Handled Anti-Mask Laws

At least three authors writing about online anonymous speech have addressed the anti-mask cases. Most of these treatments, however, have been very brief. Two scholars simply reserved anti-mask laws for future evaluation, summing up the cases as follows: the anti-mask laws "may chill some speech but may conceivably be justified as anti-intimidation measures."[445]

Both Froomkin and Susan W. Brenner give more time to anti-mask cases. Brenner describes masks as "a good real world analogue for anonymity achieved via cyberspace."[446] She explains

[440] *See* Dendrite Int'l, Inc. v. Doe, No. 3, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001).
[441] *See id.*
[442] Gleicher, *supra* note 28, at 343 (displaying a chart of cases and the factors weighed by each court).
[443] *Id.*
[444] *See, e.g.*, Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OR. L. REV. 795, 855–56 (2004).
[445] Lidsky & Cotter, *supra* note 27, at 1590 n.237.
[446] Brenner, *supra* note 184, at 1.

that masks permit a person to conceal identifying information in the real world, just as technologies enable identity obfuscation online.

Brenner briefly summarizes anti-mask case law as indicating that the First Amendment protects the wearing of masks under two circumstances: when "the masks themselves have expressive content or whenever 'there is such a nexus between anonymity and speech that a bar on the first is tantamount to a prohibition on the second.'"[447] As discussed above, the scope of First Amendment protection from anti-mask laws is broader; the nexus between anonymity and speech need not be as strong as Brenner suggests. Courts have used additional justifications for protecting mask-wearers, by finding that anti-mask laws regulate the content of speech, and have found that masks can be symbolic without conveying a highly particularized message.[448] The spectrum of anti-mask law is also more complex, since a number of courts chose not to give First Amendment protection to mask-wearing at all.

Brenner suggests that one possible approach to online anonymity would be to mimic a particular category of anti-mask laws and "criminalize on-line anonymity when it is used, or intended to be used, for the purpose of engaging in illegal acts."[449] This could be done by outlawing the use of online anonymity for committing a crime, or by making the use of online anonymity an aggravating factor in sentencing.[450]

While Brenner's use of the anti-mask statutes suggests one resolution to the problem of regulating anonymity online, it does not address the constitutionality of real-name policies. One could extrapolate from Brenner's summary of the First Amendment arguments that online anonymity would be protected only (a) if the mask is expressive, or (b) where the speaker can show that banning the mask would be equivalent to banning the speech.[451] Brenner's analysis does provide one firm conclusion: that a policy penalizing

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[447] *Id*. at 146–47 (quoting Aryan v. Mackey, 462 F. Supp. 90, 92 (N.D. Tex. 1978)).
[448] *See infra* Part III.B.
[449] Brenner, *supra* note 184, at 147–48.
[450] *Id*. at 148–49.
[451] *Id*. at 146–47.

the use of anonymity for criminal acts only would probably be constitutional.[452] She does not discuss how this might be done in practice.

There is another aspect worth noting about Brenner's discussion of anti-mask cases. For Brenner, there is a significant difference between online and real-world anonymity. The central question for Brenner is "whether the legal guarantee of anonymity, crafted in the context of real world conduct, and the limitations on that conduct, should encompass cyberworld conduct that is not subject to those limitations."[453] In other words, Brennan believes that real-world anonymity is almost always traceable, where online anonymity can be untraceable.[454] Brenner's response to the question about whether the difference between online and offline anonymity matters is to both reject the conclusion that no protection should be given to online anonymity, and to reject the conclusion that unlimited protection should be given to online anonymity.[455] She reasons that the best approach is to address the use of online anonymity for criminal purposes only; this suggests that blanket real-name policies would not be acceptable to her.[456]

Froomkin has addressed the strict liability of general anti-mask statutes from a legal realist's perspective. He points out that the Ku Klux Klan often loses, while protesting students win. Where lower courts have upheld anti-mask laws because of the state interest in preventing the crimes of violence and intimidation associated with mask-wearing, they have balanced a history of violence associated with mask-wearers against the First Amendment, rather than actual contemporaneous threats.[457]

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[452] *Id*. ("Treating on-line anonymity as analogous to the wearing of masks in the commission of criminal acts provides a clear standard for differentiating improper uses of anonymity from proper uses. To achieve a conviction under this approach, the prosecution would have to prove that the defendant purposely assumed anonymity, or sought anonymity, for the purpose of committing a crime."). *Id.* at 150.

[453] *See* Brenner, *supra* note 184, at 144.

[454] *Id.* at 142–43.

[455] *Id.* at 144.

[456] *Id.* at 147–48.

[457] *See* Froomkin, *The Clipperchip*, *supra* note 202, at 821–22.

Froomkin concludes that the "constitutionality of anti-mask laws remains largely unsettled."[458]

2. Why this Treatment Is Not Enough

There is thus a relatively sparse treatment of anti-mask laws in the legal literature on online anonymity. As indicated above, commentators vary in their understanding of Supreme Court case law, leaving a significant number of doctrinal holes for anti-mask cases to potentially fill.

For one, there is the question of whether *McIntyre* and *Talley* protect only high-value political speech. Two scholars advocate recognizing the *Doe* privilege only "in cases involving political or other core speech."[459] The *Dendrite* cases would indicate that this approach is not applied in practice, since courts apply the *Doe* privilege regardless of whether the defendant makes high-value political speech.[460] The value of the speech, however, might arise in the suggested balancing test, where courts might take the value of the speech into account when determining the strength of the First Amendment protection.

There is also a question of whether speakers must show a likelihood retaliation to establish their right to anonymous speech.[461] The *Dendrite* formula presumes that speakers do not need to show retaliation to be protected. This may be in part because the focus of the *Dendrite* test is geared towards determining whether the plaintiff's case is real or strategic.[462] It does not require the defendant to show a probability of retaliation; it requires the plaintiff to show that the suit itself is not vindictive.[463]

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[458] *Id*. at 822–23.

[459] *See* Lidsky & Cotter, *supra* note 27, at 1589–90 ("[L]egislatures and courts should recognize a privilege to speak anonymously in cases involving political or other core speech; a privilege that can only be overcome upon an exacting showing of need by either the State or private litigants.").

[460] *See supra* Part IV.B.

[461] *See supra* Part IV.B.

[462] Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 767–68 (N.J. Super. Ct. App. Div. 2001).

[463] Doe No. 1 v. Cahill, 884 A.2d 451, 455 (Del. 2005) (applying a good faith standard in order to obtain Doe's identity).

More generally, the *Dendrite* scholarship leaves open the question of how the qualified privilege of anonymous speech will play out in a nonprocedural context. Will it matter to the First Amendment's qualified protection of anonymity if anonymity is untraceable?

It is also worth revisiting the anti-mask cases to counter potential arguments that anti-mask cases wholeheartedly support real-name policies. Because the dominant anti-mask case is the Second Circuit's recent decision in *Kerik*,[464] it may be tempting for scholars to conclude that anti-mask cases provide little to no support against real name policies.[465] However, as discussed, there is significant disagreement in courts over the scope of First Amendment protection for mask-wearers, with substantial support for an expressive right to anonymity.[466] And while legal realism certainly does play a role—courts do sometimes cast a cold eye on the Ku Klux Klan—there is substantial legal reasoning in these cases that can be of value when turning to an analysis of real-name policies.

C. *What Anti-Mask Doctrine Adds*

Part III's analysis of anti-mask case law demonstrated a number of points of interest in evaluating online real name policies. The anti-mask cases indicate a judicial atmosphere often recognizes that anonymity is a First Amendment right or a right closely entwined with free expression. Despite the breadth of the court split in anti-mask cases, there is a generally common understanding that anonymity is valuable and should in at least

[464] 356 F.3d 197 (2d Cir. 2004).

[465] *See, e.g.*, Marc Jonathan Blitz, *The Dangers of Fighting Terrorism with Technocommunitarianism: Constitutional Protections of Free Expression, Exploration, and Unmonitored Activity in Urban Spaces*, 32 FORDHAM URB. L.J. 677, 714 (2005) ("The best account of *Kerik* is that, while the First Amendment does give people a right to remain unidentified in many circumstances, it does not give them a right to become unidentifiable and untraceable. This distinction between anonymity and untraceability parallels the distinction that exists in the wiretapping context between the right to avoid being wire-tapped (without probable cause) and the right to make one's telephone facilities 'wire-tap proof.'").

[466] *See, e.g.*, Aryan v. Mackey, 463 F. Supp. 90, 92 (N.D. Tex. 1978) (holding that masks worn by protestors were expressive and should be protected under the First Amendment).

some circumstances be protected as a speech right or as an aspect of speech. Even before *McIntyre*, anonymity was thus recognized as a function that has a nexus with free expression, and as a medium for speech that otherwise would not be heard.

If speakers are required to show harm before their First Amendment right to anonymity could be protected, then real name policies would be constitutional as applied to many, since not every speaker can show harm. However, the anti-mask cases show that a number of courts have felt perfectly comfortable assuming that chilling effects will occur, in the absence of a specific showing by individuals.[467]

Anti-mask cases also instruct us that the state should not be permitted to include the nature of anonymity as part of state interests, to be balanced against the speaker's First Amendment rights. As the anti-mask cases show, courts often invoke the "intimidating" nature of anonymity as a stand-in for showing that the speaker in fact had intent to carry out a threat.[468] After *Virginia v. Black*, this cannot be an adequate state interest in the absence of a true threat or other real harm. Thus, courts should be cautioned against allowing states to regulate anonymity because it is inherently bad, and should look instead to showings of a real, concrete state interest. This counsels towards narrowly tailored statutes, supported by a state showing of a concrete compelling interest linked to anonymity, rather than a blanket prohibition on anonymity generally.

Anonymity's inherent functionality should not get in the way of protecting against real-name policies. In the anti-mask cases, anonymity's functionality was itself seen as a distributive method cementing the nexus between anonymity and speech, rather than exempting anonymity from the coverage of the First Amendment.[469] Moreover, the Supreme Court's recent statements about elocutionary acts in *Doe v. Reed* indicate that it will be

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[467] *See, e.g.*, *Aryan*, 462 F. Supp. at 92.

[468] *See, e.g.*, State v. Miller, 398 S.E.2d 547, 553 (Ga. 1990).

[469] *See, e.g.*, *Aryan*, 462 F. Supp. at 92.

reluctant to exempt speech from First Amendment coverage solely because that speech also serves a non-expressive function.[470]

Wholesale online registration requirements should thus be unconstitutional as overly broad. In large part, I arrive at this conclusion out of a concern for unequal distribution of power between the state and its citizens. This rationale is behind the Supreme Court's earlier bans on government licensing and in-person registration requirements.[471]

Where the state has significantly stronger interests, however, a narrowly tailored real-name policy might be permissible. Thus, a real-name policy for commercial speech might be constitutional. A real-name policy that specifically targeted fraud could be constitutional. For libel cases, however, the fact that outcomes are usually in defendants' favor counsels against crafting an overly broad registration requirement in the name of preventing libel, sacrificing a First Amendment right for cases that are rarely won.[472]

Several anti-mask cases suggest that masked speech is just one method of speaking, and speakers can be required to express themselves through other means than masking, as long as those other means are available. The Supreme Court in *Reno v. ACLU* explained that subjecting online regulations to such a time, place, and manner analysis is particularly dangerous. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[473]

V. REAL MASKS AND REMOTE BIOMETRIC IDENTIFICATION

This Article has discussed the implications of case law on real masks in the real world for real name policies online. This Part switches tacks. It turns out that recently developed online *Doe*

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470 *See* Doe v. Reed, 130 S. Ct. 2811, 2812 (2010).

471 *See* Watchtower Bible v. Vill. of Stratton, 536 U.S. 150, 162 (2002); Talley v. California, 362 U.S. 60, 63, 65 (1960).

472 *See* Froomkin, *Silencing John Doe*, *supra* note 12, at 861.

473 Reno v. ACLU, 521 U.S. 844, 880 (quoting Schneider v. State of N.J. (Town of Irvington), 308 U.S. 147, 163 (1939)).

case law has implications for the regulation of masks in the real world.

Part III identified a significant split in the anti-mask case law. Some courts recognize that general anti-mask statutes impinge on freedom of expression; others do not. The convergence of *Doe* case law suggests that courts now may be more willing to recognize an underlying right to anonymity that could also be more consistently applied offline.[474]

Real world anonymity has increasing significance.[475] Since September 2001, the federal government has increased its efforts to compile and employ biometric information, through technologies such as facial recognition technology.[476] When partnered with increased video surveillance, these technologies allow the government to "ascertain the identity (1) of multiple people; (2) at a distance; (3) in public space; (4) absent notice and consent; and (5) in a continuous and on-going manner."[477] In February 2012, Congress mandated that the Federal Aviation Administration speed up the certification process for law enforcement agencies to obtain access to unmanned aerial vehicles (UAVs), colloquially known as drones.[478] Drones, like other aircraft, are capable of carrying high-end video cameras; but drones are also significantly less expensive than other aircraft, sparking fears of ubiquitous aerial video surveillance by the government.[479]

Ubiquitous video surveillance coupled with remote biometric identification may significantly chill expressive activity in the real

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474 *See, e.g.*, Doe v. Reed, 586 F.3d 671, 681 n.10 (9th Cir. 2009), *aff'd sub nom*. John Doe No. 1 v. Reed, 130 S. Ct. 2811 (2010); Dendrite Int'l, Inc. v. Doe, No. 3, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995); Talley v. California, 362 U.S. 60 (1960).

475 *See* Blitz, *supra* note 465, at 714.

476 *See* Donohue, *supra* note 9, at 415 ("Facial recognition represents the first of a series of next generation biometrics, such as hand geometry, iris, vascular patterns, hormones, and gait, which, when paired with surveillance of public space, give rise to unique and novel questions of law and policy.").

477 *Id*. at 415.

478 *See* FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, 126 Stat. 11 (2012).

479 *See* M. Ryan Calo, *The Drone as Privacy Catalyst*, 64 STAN. L. REV. ONLINE 29 (2011), *available at* http://www.stanfordlawreview.org/online/drone-privacy-catalyst.

world. While the Supreme Court recently ruled that warrantless location tracking through installation of a GPS device onto a car violates the Fourth Amendment, earlier Fourth Amendment jurisprudence on aerial surveillance states that no warrant is necessary for aerial surveillance.[480]

The *Doe* jurisprudence teaches us that the First Amendment, in addition to the Fourth Amendment, should protect individuals who choose to mask themselves in public in order to participate in expressive or associational activity. It should not just be limited to people who wear symbolic masks.

For example, if a stockbroker participates in an Occupy Wall Street rally, the First Amendment should protect her decision to hide her identity under a Guy Fawkes mask not just because the mask is symbolic, but because she concertedly wishes to be anonymous. The Guy Fawkes mask is likely protected by the First Amendment under the *O'Brien* test, having become associated with an "anti-establishment message [that] has been embraced by the Wall Street occupiers."[481] However, broader First Amendment concerns should protect the wearing of any mask, even a minimally symbolic one. Without a mask, the stockbroker's identifiability could provide leverage to those who wish to retaliate against her in the future by imperiling her career.[482] The concern sparked by such identifiability is that "government spying could lead to a world in which the government could run a search through the database to find something—just one thing—you wish it had not seen."[483] This concern could significantly chill expressive activity.

[480] United States v. Jones, 132 S. Ct. 945 (2012). *But see* Florida v. Riley, 488 U.S. 445 (1989) (finding that helicopter surveillance at four hundred feer did not constitute a search under the Fourth Amendment).

[481] *See* Tim Murphy, *Guy Fawkes Gets a Last Laugh, 500 Years Later*, N.Y. TIMES (Oct. 27 2011), *available at* http://www.nytimes.com/2011/10/30/fashion/guy-fawkes-mask-is-big-on-wall-street-and-halloween.html (noting that "it was the 'hactivist' collective, Anonymous, that imbued [the mask] with real-life symbolism").

[482] *See id.* (quoting unemployed stockbroker Sid Hiltunen who attended an Occupy Wall Street rally: "If you want to show your support but are afraid you'll lose your job, just wear a mask").

[483] Priscilla Smith, *Much Ado About Mosaics: How Original Principles Apply to Evolving Technology in* United States v. Jones, 14 N.C. J. L.& TECH (forthcoming 2013), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2233561, at 21.

The *Doe* case law recognizes that identifiability can chill expression, regardless of the symbolism inherent in the mask. Anti-mask case law, by contrast, is limited by its frequent focus on the *O'Brien* test. In anti-mask case law, courts often focus on whether the mask is symbolic enough to deserve First Amendment protection. The *Doe* case law, however, implies a broader understanding of anonymity's expressive implications.

The *Doe* subpoena standard establishes a version of First Amendment due process for unmaskings. First Amendment due process requires heightened process where First Amendment rights are implicated.[484] The most famous version of First Amendment due process is the ban on prior restraints. Under the doctrine of prior restraints, the government usually may not ban speech before a judicial determination that a law has been violated.[485] Even potentially obscene material, which is not protected by the First Amendment, is subject to heightened process protections until a court determines that it is in fact obscene.[486]

Similarly, the *Doe* standard requires heightened process compared to a usual subpoena, requiring notice to the defendant and showing of a prima facie case, and often balancing the First Amendment right to anonymity against the strength of the case. The *Doe* standard thus resembles the prior restraint doctrine by requiring a showing of some crime or tort before a First-Amendment-protected activity can be banned. This suggests that expressive anonymity, like other speech, may be banned only when a state shows that a distinct crime has been committed, as demonstrated by the state or private actor. The *Doe* standard thus suggests that general anti-mask statutes are not constitutional, while more targeted state statutes banning anonymity that enables other crimes are acceptable

Permitting states to ban mask-wearing in the real world implicates expressive anonymity, even when the mask is not

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[484] *See generally* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998) (explaining that preliminary injunctions are usually considered unconstitutional under the First Amendment, but not in the copyright context).

[485] *See* Near v. Minnesota, 283 U.S. 697, 722–23 (1931).

[486] *See* Freeman v. Maryland, 380 U.S. 51, 58–60 (1965).

symbolic and there is no clear fear of retaliation. Anonymity may be expressive when the mask wearer is attempting to hide her identity en route to an associational or expressive event. Anonymity may also be expressive when the mask wearer is exercising her freedom to peaceably assemble. Anonymity could even be expressive when the mask wearer shows that she is wearing the mask specifically in order to be anonymous, using the mask to declare to people around her that "I am unknown." The state should not be permitted to arrest a protestor solely because she has covered her face. The *Doe* standard suggests, again, that the protester may be unmasked only if the state can show evidence that she has committed a distinct crime.

There is a recent example of mask use that specifically addresses real world anonymity as an expressive tool. In early 2013, artist Adam Harvey created a line of "Stealth Wear" clothing, including an "anti-drone hoodie" that masks thermal imaging used by drones to spot people.[487] The clothing, including an "anti-drone scarf," was created as a commentary on increased government use of surveillance technologies. But if it were to be worn in the real world, such a face-covering scarf might violate general anti-mask laws because it intentionally conceals the face. It does not fall into a customary exception, such as a Halloween costume or a costume for a masked ball. Stealth Wear is clothing designed specifically to create the kind of anonymity that people could once achieve by walking in a large group through a large city. As surveillance becomes more and more common, anti-mask statutes should be looked at with greater scrutiny, and courts should apply the First Amendment to them with an eye to the idea that masks need not be symbolic speech for mask-wearing to constitute expressive anonymity.

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[487] *See* Ryan Gallagher, *The Anti-Surveillance Clothing Line that Promises to Thwart Cell Tracking and Drones*, SLATE (Jan. 11, 2013, 2:57 PM), http://www.slate.com/blogs/future_tense/2013/01/11/stealth_wear_adam_harvey_s_clothing_line_safeguards_against_surveillance.html).

VI. WHAT THE INTERNET AND FREEDOM OF ASSEMBLY HAVE IN COMMON

Ultimately, the core of the expressive right to anonymity is about power. Individuals have more power when they organize as an anonymous group against a government than when they act as easily identifiable individual targets. And historically, large assemblies in real physical space have functionally enabled most of their participants to remain anonymous.[488] Anonymous speech has also permitted assemblies to start, by protecting channels of information distribution that are accessible by and to all people.

The Supreme Court has not ignored the connection between anonymity and assembly.[489] In *Talley*, the Court noted that "a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly."[490] Assembly thrives on spontaneity, and is fed by particular forms of communication, both of which are protected by anonymity. The *Talley* Court relatedly noted the historic value of the medium of pamphleteering.[491] Pamphlets have been "historic weapons in the defense of liberty,"[492] part of a right to express oneself in the street in an orderly fashion by "handbills and literature as well as by the spoken word."[493] Pamphleteering is a way of communicating ideas to the broadest possible group, in a public space, and as such is both a precursor to assembly and entwined with assembly in public spaces.

This historical metaphor—of anonymous handbills passed out to one's peers in the street—is highly salient online. The Internet

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488 *See* Blitz, *supra* note 465, at 679 (describing the historical "unparalleled individual freedom one gains in urban anonymity").

489 Blitz, supra note 465, at 684 (explaining that "modern First Amendment law places meaningful limits on the control that governmental authorities may exercise over streets, parks, and other public spaces central to urban life. It also stringently protects the anonymity that individuals may retain in such public spaces—for example, when they distribute unsigned leaflets or present controversial views to strangers on a public street. These limits suggest there are constitutional boundaries on the extent to which governments may transform urban spaces (and other public spaces) in which their citizens live").

490 *Id.*

491 *See* Talley v. California, 362 U.S. 60, 65 (1960).

492 Lovell v. City of Griffin, Ga., 303 U.S. 444, 452 (1938).

493 Jamison v. State, 318 U.S. 413, 416 (1943).

can be an empowering technology for individuals who wish to gather groups, whether virtual or real, to criticize the powerful majority, since the broadcasting ability online is in the hands of anybody who posts.[494] After decades of big media, the Internet is "capable of becoming a radically democratizing tool" because it offers "cheap one-to-many communication."[495] As one author noted, the "promise of the Internet is empowerment: it empowers ordinary individuals with limited financial resources to 'publish' their views on matters of public concern . . . allowing more democratic participation in public discourse."[496] From a cultural democratic view of the First Amendment, then, the fact that anonymous speech is taking place online should afford it significant First Amendment protection.[497]

The Supreme Court has in other places linked anonymity to populist distribution methods. In *Watchtower*, the Court emphasized the democratic nature of the particular method of distribution, finding that past cases "discuss extensively the historical importance of door-to-door canvassing and pamphleteering as vehicles for the dissemination of ideas,"[498] a method that is "essential to the poorly financed causes of little people."[499] The Court found that door-to-door anonymous pamphleteering was worth protecting as a particularly valuable avenue for speech by the non-elite.

The same argument could be made about online speech: it is one of the few avenues of distribution of expression that is open to "little people," rather than controlled by big media conglomerates. In recognizing the significance of protecting a particular distributive method because of its accessibility to non-elites, the Court in *Watchtower* laid the groundwork for a heightened—or at least equal—protection for online forums. It also laid the

[494] Froomkin, *Flood Control*, *supra* note 12, at 408 (stating that "given the ability to broadcast messages widely using the Internet, anonymous e-mail may become the modern replacement of the anonymous handbill").
[495] *Id.* at 412.
[496] Lidsky, *Silencing John Doe*, *supra* note 36, at 860–61.
[497] Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 101, 101 (2009).
[498] Watchtower Bible v. Vill. of Stratton, 536 U.S. 150, 162 (2002).
[499] *Id.* at 163 (quoting Martin v. City of Struthers, 319 U.S. 141, 144–46 (1943)).

groundwork for scrutiny of how anonymity interacts with access to one-to-many communication in the real world.

Anonymity thus has played and continues to play a significant role in both online and offline assembly and the related topic of one-to-many communication. The historical use of anonymity to protect pamphleteers and door-to-door canvassers should show how much political organization benefits from protection for anonymity. The rise of the hactivist group Anonymous in both the offline and online worlds demonstrates this continuing link between mass information dissemination, assembly, and anonymity both online and offline.[500]

CONCLUSION

Anti-mask case law provides insights about online real name policies; and *Doe* case law gives us insights onto anti-mask laws. The two bodies of law reinforce each other, suggesting that there is a longer judicial history about and more robust judicial development of protection for anonymity than many scholars believe exists. Courts may thus be more amenable than previously suggested to protecting anonymity as a way of protecting free expression and association. This amenability is particularly important as both online and offline expression becomes increasingly traceable, and states attempt to reinforce that traceability through law. Pure anonymity, both physical and virtual, will become increasingly expressive as citizens choose to employ it specifically to enable themselves to communicate and associate unobserved.

[500] *See, e.g.*, Somini Sengupta, *The Soul of the New Hactivist*, N. Y. TIMES (Mar. 17 2012), http://www.nytimes.com/2012/03/18/sunday-review/the-soul-of-the-new-hacktivist.html.