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Anonymous Speech on the Internet

Brian C. Murchison*

Introduction

The U.S. legal community is engaged in a serious but inconclusive dialogue on issues relating to anonymous speech on the Internet. To be sure, several basic questions relevant to Internet speech have been settled: in a 1997 case, the Supreme Court determined that strict scrutiny applies to Internet content regulation,[1] and in a 1995 case, the Court recognized a First Amendment right of anonymous speech.[2] Yet the 1995 case did not arise in an Internet setting, and the scope of expressive freedom in certain Internet scenarios remains disputed. Over the past ten years, courts and commentators have grappled with anonymous blogging cases, proposing a spectrum of legal standards for pre-trial discovery of bloggers' identities.[3] As experience accumulates, this legal doctrine should stabilize, and doctrine affecting related issues should emerge as well. This paper argues that the stabilizing process will depend on clear analysis of the relevant First Amendment value. The truth-seeking value should guide the formulation of rules for anonymous Internet speech.

Such rules are increasingly necessary as the Internet becomes society's central pathway of communication and harms arising from that pathway become common. Part of the challenge for courts may be the dazzling variety of creators, receivers, and subjects of anonymous speech. Can a jurisprudence develop that fairly accommodates this diversity? The anonymous speakers in recent high-profile U.S. cases include a voter accusing an elected official of paranoia; a fashion student impugning the sexual morals of a Vogue model; jurors blogging about an ongoing trial or revealing later how jurors deliberated; a college student berating her home town

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[1] Reno v. ACLU, 521 U.S. 844 (1997).

[2] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

[3] See e.g., Lyrissa Barnett Lidsky & Thomas F. Cotter, Authorship, Audiences, and Anonymous Speech, 82 Notre Dame L. Rev. 1537 (2007); Nathaniel Gleicher, Note, John Doe Subpoenas: Toward a Consistent Legal Standard, 118 Yale L.J. 320 (2008).

for its conventionality and prejudice; a public employee blogging about the failings and stresses of government. These speakers hardly fit the negative stereotype of the pajama-clad blogger/podcaster vapidly flooding the web with talk, nor do they precisely conform to the positive image of the citizen journalist dutifully relaying facts that mainstream media have ignored. Perhaps the only generalization that can apply to such speakers is that they are amateurs – in the sense of being new to public or semi-public participation, perhaps not anticipating the potential audience and impact of a posted comment or observation, and certainly lacking the experience necessary to avoid litigation.[4] Like budding tennis players over-hitting the ball, at least some anonymous web participants enter the vibrant new market of ideas with rackets swinging and slicing at full strength, only to find themselves accused of defamation, invasion of privacy, breach of confidence, infliction of emotional distress, or other wrongs.

In the U.S., the thrust of discussion has been that legal rules for this developing area must protect the participatory impulse yet allow for at least a measure of accountability. In reflecting on what that measure should be, this paper examines three scenarios. The first is the most familiar: a party believes that an anonymous blogger has defamed or otherwise injured him, but the party cannot pursue a tort claim because he does not know the blogger's identity. The legal task is to formulate a test for obtaining a judicial order that would force a website or Internet service provider to disclose the blogger's identity and thus enable the plaintiff to bring his claim.

The second scenario is less familiar but flows from the test applicable to the first. Since that test is likely to be highly speech-protective, the second scenario involves a party who has been defamed or otherwise injured but cannot meet the test for obtaining the blogger's identity. The party therefore resorts to self-defensive counter-speech, even language that infringes a common-law interest of the blogger or of a third party. How far can this party go without risking liability?

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[4] Cf. Megan Richardson & Julian Thomas, *What's New? 'Private' Expressions in Public Spheres* (discussing web speakers as amateurs in the sense of lacking expertise and experience "in the matter of establishing and maintaining their anonymous and pseudonymous character").

The third scenario relates to the first two and is based on a recent English decision, *Author of a Blog v. Times Newspapers Ltd.*[5] If a party discovers an anonymous blogger's identity and plans to make it public – either self-defensively while rebutting the blogger's content, or simply to provide information thought to be newsworthy – the blogger who learns that he is about to be unmasked may petition a court to enjoin the disclosure. How should the court rule? Presumably the blogger insists that his future dispatches will cease or at least be adversely affected by the disclosure, yet even the chance of a shut-down would not likely rebut the strong presumption against prior restraint in U.S. law.

This paper urges courts to reflect on the relevant First Amendment value in fashioning frameworks for each scenario. Of the four values, or valued functions, generally associated with expressive freedoms of speech and press, the one most identified with the informational potential of the Internet is the search for truth.[6] That value generates doctrine protecting opinion as well as true and false speech, depending on context and competing interests. The paper posits that consideration of the truth-seeking value is the element missing from much of the commentary and judicial decision-making thus far. Creating satisfactory frameworks for each of the three scenarios may well depend on getting this consideration right.

1. Scenario #1: Forcing Disclosure of a Blogger's Identity

Chroniclers link the rise of the Web to perceived limitations of traditional media. In the days following the events of September 11, 2001, "many [in the U.S.] looked to the Web for a sense of connection and a dose of truth" that seemed unavailable elsewhere.[7] The sense of connection was important to both Internet commentators and their readers, making possible a

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[5] [2009] EWHC 1358 (9B).

[6] The speech values of self-realization, democratic self-governance, truth-seeking, and adaptability to change are discussed in Thomas I. Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877 (1963). President Lee Bollinger of Columbia University has written, "In today's discourse about free speech, the dominant value associated with speech is its role in getting to the truth, or the advancement of knowledge." Lee C. Bollinger, The Tolerant Society 45 (1986).

[7] Scott Rosenberg, Say Anything: How Blogging Began, What It's Becoming, and Why It Matters 7 (2009).

surprising new experience of "tell[ing] the story together."[8] And the "dose of truth" was provided by copious "eyewitness accounts and personal diaries of the aftermath" of the attacks, providing a "rude honesty that [had not often made] its way through the mainstream media's good-taste filter."[9] Connectedness and joint truth-seeking would become hallmarks of web use, even if the continuous cascade of speech on all possible topics ultimately has produced as much "pettiness and discord" as harmony and enlightenment.[10]

Eric Boehlert's lively book, *Bloggers on the Bus*,[11] details the impact of blogs on the 2006 and 2008 U.S. national elections. It recounts how "liberal bloggers," marginalized by what many regarded as the conservative dominance of talk radio, and eager to "drive Fox News out of the mainstream of American media," found their niche on a new medium – the web – and collectively "expanded well beyond the traditional role of journalist or commentator."[12] Many sought "to stitch together a kind of coherent narrative from the liberal perspective, which wasn't there before."[13] Boehlert reports that in the 2008 campaign, bloggers (whether anonymous or not) not only expressed viewpoints but also uncovered and disseminated facts that captured national attention. For example, one blogger exposed a McCain-endorsing pastor's bizarre interpretation of the Holocaust,[14] while another published candidate Barack Obama's comments, made in a supposedly off-the-record meeting with campaign donors, that unemployment had made many "small-town" Americans "bitter," causing them to "cling to guns or religion."[15] In these and other instances, Internet writers engaged in basic fact-finding and reporting of news. Others focused on commentary, exercising "the power of explanation." As one put it, "Explaining is defining, and if you do it effectively, it can be very powerful. And with the blogs,

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[8] Id.

[9] Id.

[10] Id. at 73.

[11] Eric Boehlert, Bloggers on the Bus (2007).

[12] Id. at 5.

[13] Id. at 51.

[14] Id. at 107-09.

[15] Id. at 168-69.

we've got a place to do it now."[16]

With power and prominence comes potential for liability. Although both plaintiffs and defendants have sought to unmask anonymous speakers, most of the cases involve efforts by plaintiffs in civil actions. These include public officials suing detractors for on-line defamation, usually comments about an official's job performance or fitness for office;[17] private plaintiffs suing anonymous commentators for offensive factual assertions, often sexual in nature, posted on a bulletin board or blog;[18] corporations or their officers suing bulletin-board speakers for defamatory statements about business performance or officers' actions;[19] ex-employees suing employers for unlawful discharge or other acts, and seeking evidence from anonymous third parties who have posted online comments concerning the litigation.[20] In other cases, civil *defendants* seek an anonymous speaker's identity, maintaining that the information would provide, or lead to, important evidence for the defense.[21]

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[16] Id. at 102-03 (quoting Rachel Maddow).

[17] E.g., Doe v. Cahill, 884 A.2d 451 (Del. 2005) (city councilman suing anonymous political critic); Greenbaum v. Google, Inc., 18 Misc. 3d 185, 845 N.Y.S.2d 695 (Supreme Court, N.Y. County 2007) (school board member suing anonymous commentators for postings about member's policy positions).

[18] E.g., Doe I & Doe II v. Individuals, 561 F.Supp.2d 249 (D. Conn.) (female law students suing anonymous posters for sexual and other comments on website); Cohen v. Google, Inc., slip. op., Supreme Court of New York (Aug. 17, 2009) (professional model suing anonymous poster for sexual and other comments on website).

[19] E.g., Dendrite International, Inc. v. Doe, 775 A.2d 756 (Sup. Ct. N.J. 2001) (corporation suing anonymous commentators who responded to quarterly report by posting unflattering assertions about the business's performance and practices); Krinsky v. Doe 6, 159 Cal. App. 4th 1154 (Cal. Ct. App. 2008) (corporate officer suing anonymous contributor to message-board); Independent Newspapers, Inc. v. Brodie, 966 A.2d 432 (Md. 2009) (business owner suing anonymous posters of critical comments on newspaper's internet discussion forum); Solers, Inc. v. Doe, 977 A.2d 941 (D.C. Ct. App. 2009) (privately held company suing anonymous user of a trade association's "website reporting form" through which user accused company of illegalities).

[20] E.g., Chang v. Greenwald, Superior Court of California, Sept. 9, 2009 (in employment action brought by police officer discharged from university, trial judge denies blogger's motion to quash subpoena seeking identities of persons whose postings on blog indicated knowledge of facts relevant to employment action).

[21] E.g., Lefkoe v. Jos. A. Bank Clothiers, Inc., 577 F.3d 240 (4th Cir. 2009) (defendant corporation in securities fraud litigation seeking identity of anonymous individual who hired law firm to relay to corporation allegations

The cases in which plaintiffs seek a blogger's identity have at least three aspects in common: fierce rhetoric from both sides about what a case is "really" about; arguments about whether anonymous speakers are adequately protected by existing rules of civil procedure; and, if the answer to the latter question is negative, arguments about the appropriate scope of First Amendment protection.

The first clash in most of the cases is rhetorical, with defendants insisting that the case concerns a censorious plaintiff's effort to "silence" a legitimate speaker, and plaintiffs countering that the case actually concerns a malicious speaker's attempt to defame and then "hide behind" constitutional privilege. Each narrative ends with a legal demand. The anonymous defendant's reference to being "silenced" asks the court not to order identification automatically but to consider the plaintiff's actual need for the information and the consequences of exposure for the defendant. The plaintiff's reference to "hiding behind privilege" urges the court to respect the plaintiff's right of access to the courts by permitting the plaintiff to discover the defendant's identity and to proceed with a lawsuit whose elements are already shaped by the First Amendment. The parties in effect accuse each other of abusing power: the defendant accuses the plaintiff of setting in motion a frightening legal spectacle of identity exposure and potential financial loss, and the plaintiff accuses the cloaked defendant of sending hurtful speech to unlimited receivers by the mere press of a button. Though dramatically effective, each narrative undercuts itself by omitting a sense of the public's interest in how the question of anonymity should be resolved, perhaps because of the difficulty in calculating, much less in articulating, the public's interest in anonymous speech.

The anonymous blogger cases also have involved a second clash: whether the question presented by an application for discovery of a blogger's identity is fundamentally procedural, requiring application of ordinary rules, or substantive, requiring "heightened," First Amendment-based analysis. The debate plays out between lawyers invoking craft and prudence, [22] and

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concerning corporation's financial reporting; when corporation delayed earnings report in order to investigate, stock price fell).

[22] Michael S. Vogel, Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards, 83 Or. L. Rev. 795, 799 (2004).

academics offering theory and doctrine.[23] Judges caught in the crossfire sometimes borrow from both perspectives, recognizing that procedural rules incorporate substantive First Amendment standards. In *Cohen v. Google*,[24] where a professional model sought an order forcing Google to identify a blogger who had accused the model of lewd practices and dishonesty, a New York judge ordering disclosure noted that state law "generally applicable to a[n] application for pre-action disclosure which requires a prima facie showing of a meritorious cause of action, and the legal requirements for establishing a meritorious cause of action for defamation, appear to address the constitutional concerns raised in this context."[25]

Most courts, however, seek a distinct constitutional framework and so confront a third battle, this one concerning the appropriate balance between anonymous speech and common-law interests in reputation, privacy, and confidentiality. In *Doe v. Cahill*,[26] a city councilman sued four John Doe defendants for postings on a newspaper-sponsored internet blog. The language asserted that the councilman had been "divisive," that he suffered from "character flaws, not to mention an obvious mental deterioration," that he was "a prime example of failed leadership" in need of "ousting," and that he was "as paranoid as everyone in the town thinks he is."[27] To serve process, the councilman petitioned a court for leave to depose the newspaper for the relevant Internet Protocol address. The councilman then obtained an order requiring Comcast, the owner of the addresses, to disclose the blogger's identity. Notified by Comcast, the blogger moved for a protective order. The case ultimately reached Delaware's high court, where the justices considered a number of standards for pre-suit discovery of an anonymous speaker's identity.

The court ruled that a plaintiff must meet a summary judgment standard in order to obtain a judicial order forcing disclosure. Two less demanding showings formulated in other jurisdictions – a good faith standard, and a motion to dismiss standard – were rejected as setting

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[23] Lidsky & Cotter, supra note 3, at 1600 n.281.

[24] 2009 WL 2883410 (N.Y. Sup. 2009).

[25] Id.

[26] 884 A.2d 451 (Del. 2005).

[27] Id. at 454.

"the bar too low."[28] On the ground that the First Amendment requires that a libel plaintiff bear a heavier burden in order to protect a defendant speaker's right to speak anonymously, the court adopted a requirement that the plaintiff "introduce evidence creating a genuine issue of material fact for all elements of a defamation claim within the plaintiff's control."[29] The court ultimately dismissed the case because the statements at issue constituted non-actionable opinion.

Besides disapproving less rigorous standards, *Cahill* rejected a step that would have added significantly to the plaintiff's burden: "balanc[ing] the First Amendment right of anonymous speech against the strength of the prima face case presented and the necessity of disclosure."[30] Maintaining simply that "the summary judgment test is itself the balance," *Cahill* concluded that no further balancing could be justified.[31] Applying the summary judgment test, the court held that the speaker's First Amendment right to remain anonymous in expressing views about a public official's fitness for office was not overcome by the councilman's interest in vindicating his reputation since an essential element of the plaintiff's prima facie action for libel, one that was "within the plaintiff's control," was lacking.[32]

Despite assigning a significant showing to plaintiffs in such circumstances, *Cahill* has been criticized for under-protecting anonymous Internet speech by failing to add the balancing factor. A student commentator has asserted that without this balancing, known as "*Dendrite* balancing" for a New Jersey decision adopting it, *Cahill*'s framework is "too easy on plaintiffs who wish to unmask anonymous [speakers]."[33] At least some academics agree. Despite praising *Cahill* for its "general" consistency with their preferred approach, Professors Lidsky and Cotter maintain that *Dendrite* balancing is necessary "as a final piece of insurance that defendant's right to speak anonymously is not too lightly compromised."[34]

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[28] Id. at 462.

[29] Id. at 463.

[30] Id. at 460 (citing Dendrite, supra note 19, 775 A.2d at 760-61).

[31] Id. at 461.

[32] Id. at 467.

[33] Jonathan D. Jones, Cybersmears and John Doe: How Far Should First Amendment Protection of Anonymous Internet Speakers Extend?, 7 First Amend. L. Rev. 421, 429 (2009).

[34] Lidsky & Cotter, supra note 3, at 1602.

This call for *Dendrite* balancing is unwise for several reasons. First, it jarringly transplants to the Internet context a test that several U.S. judges have proposed for use in a quite different setting: a sub-set of reporter's privilege/confidential source cases. In these cases, the government, when investigating a potentially criminal leak of classified information to a journalist, asks the journalist to name her source; when the journalist declines, the government seeks a judicial order. Because the customary inquiry for judicially ordered disclosure of a confidential source, i.e., whether the source's identity is centrally relevant to the investigation and whether alternative avenues of finding the source have been exhausted, would almost invariably yield a pre-ordained affirmative answer to both questions, necessitating compelled disclosure, two prominent federal judges – Judge Sack of the U.S. Court of Appeals for the Second Circuit, and Judge Tatel of the U.S. Court of Appeals for the D.C. Circuit – have proposed that a final balancing test be conducted by courts to ensure that no First Amendment interest is slighted.[35] Although that test makes sense in criminal leak cases and is included in legislation now before Congress,[36] importing it into a potentially much larger set of cases whose outcomes are *not* pre-ordained is difficult to justify, even as a "final piece of insurance." *Cahill*'s summary judgment standard itself incorporated First Amendment analysis, i.e., the opinion inquiry from the Supreme Court's decision in *Milkovich v. Lorain Journal Co.*,[37] and the need for anything more is unclear.

Even if additional insurance were considered desirable, the unguided nature of the Sack-Tatel inquiry in the Internet/John Doe context poses problems. On what basis would a court calculate the "news value" of a blogger's speech, and compare that value to the content's

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[35] See Judge Tatel's concurrence in In Re Grand Jury Subpoena Judith Miller, 438 F.3d 1141, 1174-75 (D.C. Cir. 2006), and Judge Sack's dissent in New York Times Co. v. Gonzales, 459 F.3d 160, 185-86 (2d Cir. 2006).

[36] See S.448 (Federal Free Flow of Information Act, February 13, 2009) (including provision under which court compelling reporter's testimony would be required to make a finding, inter alia, that "nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information").

[37] 497 U.S. 1 (1990).

harm?[38] In *Cahill*, the harm and value of the posted statements were hardly amenable to clear calculation. It may be that *Dendrite* balancing in *Cahill* would simply amount to a more searching version of *Milkovich* analysis – a question of whether the statements were factual in nature and thus subject to litigation. In any event, it is hard to see how the balancing could be conducted, except very impressionistically, in a defamation action involving anonymous speech. Without addressing this flaw, *Dendrite* asks courts to guess at the news value of specific statements in the process of weighing a speaker's interest against the "strength" of a plaintiff's case.[39]

Moreover, the *Cahill* framework as it stands is consistent with a core First Amendment value: the truth-seeking value of speech, which broadly protects dissemination of and access to "information [that] is needed or appropriate to enable the members of society to cope with the exigencies of their period."[40] Evocations of this value are common in Supreme Court

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[38] In Matter of Ottinger v. Non-Party the Journal News, 7/15/2008 NYLJ 30 (col. 1) (Westchester County Supreme Court), a New York trial judge purported to balance as provided in *Dendrite*, but its analysis consisted of a single sentence: "Applying the fourth prong of *Dendrite*, the court finds that the balance in this case weighs in favor of the petitioners." The lack of analysis arguably is a function of the fourth prong's lack of criteria.

[39] *Compare* Justice Marshall's cautionary remarks in *Rosenbloom v. Metromedia*, where he doubted that judges possess the "extraordinary prescience" to "somehow pass on the legitimacy of interest in a particular event or subject," and to determine "what information is relevant to self-government." 403 U.S. 29, 79 (1971) (Marshall, J., dissenting, joined by Stewart, J.). A majority echoed Marshall's concerns in *Gertz v. Robert Welch*, 418 U.S. 323 (1974), where Justice Powell, writing for the Court, noted that "we doubt the wisdom of committing the task [of labeling as public or private the subject matter of press stories] to the conscience of judges." Id. at 346. Later, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,472 U.S. 749 (1985), a plurality thought better of it and took up the task of characterizing news stories in libel actions as implicating private or public concern. Even so, neither the Supreme Court nor the lower federal courts have shown any eagerness to take on this task beyond the rudimentary distinctions made in confidential source cases. *Dendrite* invites judges to expand their function dramatically by declaring news value in advance of trial and without standards.

[40] Thornhill v. Alabama, 310 U.S. at 102. The truth-seeking value, one scholar has noted, concerns the "open-ended pursuit of knowledge" through speech -- the exploration of all ideas "relevant to our understanding of the world, whether or not those ideas are political in nature." Robert Post, Reconciling Theory and Doctrine in First Amendment Jurisprudence, in Eternally Vigilant: Free Speech in the Modern Era 153, 161, 163 n.44. (Lee C. Bollinger & Geoffrey R. Stone, eds. 2002).

discussions, from Justice Holmes' observation that "the best test of truth is the power of the thought to get itself accepted in the competition of the market,"[41] to Justice White's statement that the First Amendment's "purpose" is to "preserve an uninhibited marketplace of ideas," including "social, political, esthetic, moral, and other ideas and experience."[42] Like Holmes himself, the truth-seeking value is skeptical, favors experimentation, and has no appetite for or illusion about discovering ultimate truth in any philosophical or religious sense. It denotes an incremental and collective search for social fact, perhaps akin to the process described by Justice Frankfurter: "The history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths."[43] The outlook is traceable to John Stuart Mill, for whom truth "resembles a scientific proposition, which provides a legitimate basis for experimentation until it is successfully challenged and replaced by another proposition that better fits the data."[44] As a Mill biographer put it, "Disproof of any opinion, by way of a new experience, had to be a constant possibility, according to Mill."[45] Another commentator wrote: "Mill's concern with self-development and moral progress is a strand in his philosophy to which almost everything else is subordinate."[46]

The U.S. Congress has considered the Internet a medium for such experimentation through speech, noting that it not only provides a forum for "a true diversity of political discourse" but also creates "opportunities for cultural development, and myriad avenues for intellectual activity."[47] Accordingly, the value of Internet speech can be seen as its contribution to the "open-ended pursuit of knowledge" in the Millian sense, and Internet speech is part of that pursuit when, true or false, it is subject to evaluation and response by others. As Professor Jane Singer has written, some bloggers – including those dubbed citizen journalists – resemble

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[41] Abrams v. United States, 250 U.S. 616, 630 (Holmes, J., dissenting).

[42] Red Lion Broadcasting Co. v. F.C.C, 395 U.S. 367, 390 (1969).

[43] Dennis v. United States, 341 U.S. 494 (1951).

[44] Keith Werhan, Freedom of Speech: A Reference Guide to the United States Constitution 33 (2004).

[45] Richard Reeves, John Stuart Mill: Victorian Firebrand 165-66 (2007).

[46] Id. at 278 (quoting Alan Ryan, The Philosophy of John Stuart Mill 255 (1988)).

[47] Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (quoting "specific statutory findings" of Section 230(a)(3) of the Communications Decency Act of 1996).

traditional journalists in that both "are committed to truth," yet bloggers "have quite different ideas of how best to attain it and what to do with it."[48] While old-school journalists see truth "as the information that has survived the rigorous scrutiny (ideally) of a journalistic process in which verification determines veracity," bloggers "offer a space for all comers to post what they know or think; to receive a hearing; and to have their ideas publicly debated, modified, and expanded or refuted." For bloggers, truth "emerg[es] from shared, collective knowledge – from an electronically enabled marketplace of ideas."[49]

In adopting the summary judgment standard for anonymous blogger cases, *Cahill* arguably relies on the truth-seeking value and demonstrates the value's range and limits. *Cahill* notes that anonymity serves the search for truth by both the speaker and the public receiving the speech: unsigned expression enters public discourse on its own and therefore avoids the skewing attributable to prejudice or bias based on irrelevant classifications of identity. Like early anonymous pamphleteers, Internet speakers fit well into original notions of a marketplace of ideas where content, not the authorship, of facts and opinions is central to the probing, positing, and revising of a developing culture. At the same time, the truth-seeking value recognizes that at least a measure of accountability is necessary to secure trust in that marketplace – trust sufficient for members of the public to participate in and take seriously the marketplace itself. Arguably *Cahill* rejected *Dendrite* because the latter's open-ended balancing would work against a predictable, trust-building role for accountability in the scheme of the truth-seeking value. The summary judgment standard, on the other hand, serves accountability not by uncovering a speaker's identity under all circumstances but by doing so when a plaintiff has a credible, supportable claim.

Besides calling for *Dendrite* balancing in defamation cases brought by a public official against anonymous bloggers, commentators have made the even less persuasive argument that *Dendrite* balancing is needed to protect free speech when private plaintiffs sue anonymous

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[48] Jane B. Singer, Contested Autonomy: Professional and Popular Claims on Journalistic Norms, 8 Journalism Studies 79, 85 (2007).

[49] Id.

bloggers for defamation.[50] In *Does I and II v. Individuals*,[51] two female students at Yale Law School sued twenty-eight John Does who had posted statements about them on Auto Admit, a website frequented by law students and known for its free-wheeling chat about a range of topics. In the Yale Law case, bloggers asserted that one or both women had sexually transmitted diseases and engaged in promiscuous behavior, among much else. As one observer noted, the anonymous statements were "sadistic, ... subjecting the women to what can only be called cyber-stoning, in which participants vied to hurl the biggest rock."[52] When the women sued and sought their attackers' identities, the district court adopted a multi-pronged framework. The court indicated that *Dendrite* was part of the framework, but the any balancing by the court was not apparent. One blogger relied on the argument that succeeded in *Cahill*, that the statements in context were non-actionable opinion: "AutoAdmit is well known as a place for inane discussion and meaningless derogatory postings, such that one would not take such a statement seriously."[53] The court rejected the argument, noting that "not everyone who searched Doe II's name on the internet, or who came across the postings on AutoAdmit, would be aware of the site's alleged reputation."[54] The court ordered the website to disclose the bloggers' names.

The decision has been criticized as exposing a blogger's identity even where the defamation claim was "suspect at best,"[55] essentially an argument that the challenged statements were protected hyperbole. With explicit *Dendrite* balancing, it is argued, the Yale Law case would have been properly thrown out on the ground that the "value" of hyperbole, even if offensive, outweighed the "seriousness" of any claimed harm. The argument seems to ask for a second round of *Milkovich* analysis. Moreover, it fails for advocating an element that, as discussed above, gives courts unguided discretion and is inconsistent with the truth-seeking value. The Yale Law case as decided was correct.

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[50] E.g., Jones, supra note 33, at 443 (claim brought by Yale Law women is "suspect at best," and Dendrite balancing is needed to prevent chill).

[51] 561 F.Supp.2d 249 (D. Conn. 2008).

[52] David Margolick, Slimed Online, Conde Nast Portfolio (March, 2009).

[53] 561 F.Supp.2d at 256 n.7 (recounting Doe's argument).

[54] Id.

[55] Jones, supra note 33, at 443.

Interestingly, the truth-seeking value works in tandem with the self-governance value. *Cahill* and the Yale Law case recognize this value diversity: that the pre-action issue of identity disclosure concerns the truth-seeking value, whereas the substantive law of defamation stems from the even more protective self-governance value. Accountability -- in the sense of identity disclosure and a summons to court -- is a function of the truth-seeking value, the value that permits some (but not all) speech to be challenged at law. Once in court, the defendant invokes the freedoms established expansively pursuant to self-governance value in cases such as *New York Times Co. v. Sullivan* and its progeny, a matrix of rules designed to ensure an all-but-unhindered flow of information.

2. Second Scenario: Talking Back to the Blogger

Although this paper maintains that the *Cahill* approach is preferable to *Dendrite*, the latter approach seems ascendant among courts and commentators.[56] In *Dendrite* jurisdictions, a person who has been defamed may shrink from the difficulty and cost of attempting to discover an anonymous blogger's identity. Unable to sue, the defamed person's recourse is "more speech" – resorting to self-help on the very blog where the original defamation appeared. It is not hard to imagine the defamed person's considerations in deciding what to do: on the one hand, responding would draw attention to the defamation, likely spread it further, and certainly send a signal that the statement has gotten under the skin of the defamed person. On the other hand, a decision not to respond allows the statement to go unchallenged, perhaps signaling that the statement has some truth or that it has done no harm.

In a case like *Cahill*, the utility of a response is questionable. Recall that the blogger had posted a nebulous charge of mental incompetence; it is unlikely that the city councilman would gain much by asserting that he is mentally fine or not "paranoid." In the Yale Law case, it is conceivable that the targets would want to post a statement of outrage – but not that they would care to dignify statements about promiscuity and STDs with any kind of "reply" in the sense of a point-by-point refutation. The decision to "reply" more likely arises in cases in which a

[56] Ashley I. Kissinger & Katherine Larsen, Shielding Jane and John: Can the Media Protect Anonymous Online Speech?, 26 Comm. Lawyer 4, 6 (No. 3, July 2009).

nameless speaker appears to have inside information about a business or other work setting and repeatedly asserts or strongly implies facts that the targeted person feels compelled to answer for purposes of self-defense.[57]

A reply of sorts actually triggered a lawsuit by a partially cloaked speaker in *Moreno v. Hanford Sentinel, Inc.*[58] The plaintiff, a college student, used her MySpace page to post an "ode" criticizing the petty provincialism of her home town and high school, telling them, "Envy me [for leaving home], for that's all you can do...Talk nonsense...because you are nothing." The student signed the ode with simply her first name, but her photo on the website allowed identification. The ode prompted an unusual response by her former high school principal: he sent the posting to the local newspaper, which published it as a letter to the editor with her full name as the signature. Appended to the ode was a reply, seemingly by the newspaper: "It saddens us to know that a product of this community, a community that takes such pride in its youth, would have such negative thoughts of what was once their home."[59] Stunned by the fall-out of her outing by the principal and newspaper, the college student sued them for invasion of privacy and intentional infliction of emotional distress. Although the privacy claim was dismissed because the original MySpace posting of the ode made it "public," a jury found the principal's conduct outrageous in the second cause of action but awarded no damages.[60] *Moreno* provides a compelling case study of the inexperience of at least some Internet speakers, the hurt feelings and potentially tortious counter-speech that can follow negative postings, the dubious application of old doctrine to new media, and the rough justice of juries.

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[57] Likely scenarios would be cases such as *Public Relations Society of America v. Road Runner High Speed Online*, 8 Misc.3d 820, 799 N.Y.S.2d 847 (2005), where a speaker made factual assertions in anonymous emails about a manager's performance, or *Butler University v. Doe*, *see University Sues Student Blogger*, http://www.insidehighered.com/news/2009/10/16/butler , where an anonymous blogger asserted that specific university administrators "lied" about a personnel decision.

[58] 172 Cal. App.4th 1125 (Cal. Ct. App. 2009).

[59] See http://media.fresnobee.com/smedia/2010/09/15/11/OdeToCoalinga.source.prod_affiliate.8.pdf (reprinting Moreno's ode as letter to editor with signature and response).

[60] John Ellis, *Coalinga Grad Loses MySpace Rant Lawsuit*, *http://www.fresnobee.com/2010/09/20/2085862/ex-student-loses-myspace-rant.html* (September 20, 2010).

The risks of replying to anonymous speech can be further illustrated by the following hypothetical. Imagine a place of employment: a trade association for the cable television industry ("Cable Media Association," or "CMA"). A summer intern, one of ten employed at CMA but the only member of the Mormon faith among them, believes that he is being "frozen out" by other interns due to his religious affiliation. Late on a Friday afternoon, he complains about his depression and sense of isolation to Mary Thomas, a junior manager at CMA, who among other duties is in charge of the summer internship program. The intern, Raymond, says he thinks the other interns are prejudiced against him and his religion. He also confides that part of his unhappiness is the fact that he has just received word from home that his parents are separating. Mary is very sympathetic and offers encouragement and support. She does not contact her supervisor that day but thinks that she will tell her supervisor sometime the following week that there is an issue or at least a question about unfriendly interns. A social event takes place that evening on the premises. Raymond attends and drinks too much, as do other interns, one of whom gets into a noisy disagreement with Raymond about football teams. Raymond looks annoyed by the disagreement, and the other intern apologetically reaches out and grabs Raymond's hand. The other intern's grip is unexpectedly strong, and Raymond recoils and stumbles over a chair, falling down in front of everyone. Raymond accuses the other intern of public humiliation. The following week, Raymond demands that the other intern be fired from the internship. Ultimately the matter is resolved through mediation.

Later an anonymous blogger posts a message on a widely read "Interns in Business" bulletin board on the Internet. The posting says that "the Cable Media Association is against Mormons, it does not welcome Mormons, and one of its managers, Mary Thomas, showed her bias by doing nothing for a Mormon intern named Raymond when he complained of isolation." The posting continues that Raymond had been "publicly shamed" at an office party and that the incident "showed bias in the company's culture." The posting concludes, "The manager's inaction made possible this bad public incident, and CMA ought to be ashamed."

Assume that Mary is devastated by the criticism and horrified that it appeared on an Internet bulletin board posting that names her and challenges her professionalism. She worries that the allegations will affect her reputation in the workplace. When she confronts Raymond, he

denies authorship of the statement but indicates that he thinks it is essentially true. She then talks to an attorney about bringing legal action. The attorney advises against a lawsuit, explaining that *Dendrite* controls, making it difficult to discover the blogger's identity, and that a court would likely follow the maxim that the First Amendment is all about "more speech." Nerve-wracked and against her better judgment, Mary posts the following reply on the same bulletin board where the original message appeared: "What the blogger says about me and the culture of CMA is a lie. All of us who work here are dedicated to a friendly workplace where somebody's race or religion doesn't matter at all. Has anybody figured out that there are two sides to this story, and that maybe this young intern was hyper-sensitive? And that maybe he fell on his face because he'd had one too many beers? And now is embarrassed and wants this blog to get a little even? The intern came to me not just about other interns at CMA but about his home situation, which is very troubled & has nothing to do with how his summer is going at CMA. I thought his family issues were his main problem, and I counseled him in a caring way. I was happy that he came to me. It's a lie that I wasn't concerned and 'did nothing' for him. We don't have a 'Mormon problem' at CMA." She signs off, "Mary Thomas."

Now assume Raymond sues Mary for her posted reply. First, he alleges libel – that her posted reply defames him by stating that he was hyper-sensitive in thinking there was bias at CMA, that he was intoxicated at the office party, that he was responsible for the anonymous posting and wanted to "get even." Second, Raymond alleges invasion of privacy for the statement that he sought counseling from Mary about family issues. Finally, he alleges breach of confidence based on a relationship of counseling that he had with Mary.

Can Mary be held liable for her posted reply? The question is important because it relates to the scope of freedom to reply to an anonymous blogger's speech rather than bring a legal claim. Answering the libel claim, Mary may invoke (among other defenses) the common-law privilege of reply, which courts also reference as "the privilege to speak in self-defense or to defend one's reputation."[61] The Restatement of Torts (Second) recognizes this as a conditional privilege that can be invoked "when the person making the publication reasonably believes that his interest in his own reputation has been unlawfully invaded by another person and that the

[61] Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1559 (4th Cir. 1994).

defamatory matter that he publishes about the other is reasonably necessary to defend himself."[62] A reply of this kind is protected even if it is "'uninhibited, robust, and wide open,'"[63] and it can include a "statement that [the original speaker] is an unmitigated liar."[64] Moreover, the fact that the person does not know the identity of the blogger or his source is not fatal: case law suggests that "the privilege is not limited to replies to known attackers."[65]

In *Foretich v. Capital Cities/ABC, Inc.*, the United States Court of Appeals for the Fourth Circuit noted that the privilege is lost if abused in any of the following ways: if the reply "includes substantial defamatory matter that is irrelevant or non-responsive to the initial attack;" if the reply "includes substantial defamatory matter that is disproportionate to the initial attack; or if the reply's publication is "excessive," in the sense of "addressed to too broad an audience."[66] Mary's reply was arguably both responsive to the initial attack and relevant; moreover, impugning motives is fair game.[67] To be disproportionate, a reply must be "truly outrageous;" honest indignation and strong words do not cross the line.[68] Lacking "excessive enthusiasm or ceremonial flair,"[69] Mary's reply could be defended as proportionate. And because the initial statements were blogged on the Internet, her rejoinder could hardly be seen as "excessive" in terms of audience size. The reply would almost certainly be privileged, and no showing of common-law malice to overcome the privilege likely would be forthcoming.

But a successful defense in the libel action does not mean that Mary can, should, or will avoid all liability. As noted, Raymond's action for public disclosure of private facts focuses on Mary's statement that his parents were separating. Even if this information is known to some who are in Raymond's and his parents' circle of close friends, it is "private" for purposes of this

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[62] Restatement (Second) of Torts § 594 cmt. k (1977).

[63] 37 F.3d at 1560 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[64] Id. at 1562 (citing Prosser & Keeton on the Law of Torts, § 115, at 825 (5th ed. 1984)).

[65] Novecon Ltd. v. Bulgarian-American Enterprise Fund, 190 F.3d 556, 569 (D.C. Cir. 1999).

[66] 37 F.3d at 1559.

[67] Id. at 1560.

[68] Id. at 1562.

[69] Id.

tort,[70] and its posting on an Internet bulletin board surely constitutes providing "publicity."[71] If Mary's reply is considered highly offensive to a reasonable person, and not reasonably related to a matter of legitimate public concern, Raymond may complete his prima facie case. Widespread electronic disclosure of information about the marital problems of a couple who are not in the public eye is arguably highly offensive to a reasonable person, and any nexus between that information and the issue of religious bias in the workplace is remote at best. However, the Restatement of Torts, Second, provides that "[t]he rules on conditional privileges to publish defamatory matter [including the reply right] apply to the publication of any matter that is an invasion privacy."[72] In a 2002 case, the Supreme Court of Nevada rejected a claim for public disclosure of private facts in a workplace setting, citing the defendant's privilege to reply.[73] However, because cases applying the privilege in the privacy context are few, it is hard to predict whether disclosure concerning a couple's plans to separate would be considered "proportionate" to the blogger's own charge of incompetence and bias. A trial judge might wisely leave application of the elements and privilege to a jury. Even if a jury finds for Mary, a reviewing court considering the fact that Raymond sought counseling from Mary might conclude on policy grounds that she had no privilege to publicize Raymond's private matters, even in self-defense.

A claim for breach of confidence, on the other hand, appears to be the more appropriate setting for such a policy choice. However, the confidentiality action has had little traction in the United States,[74] and its doctrinal content is undeveloped.[75] Scholars continue to support its

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[70] Daniel J. Solove, The Future of Reputation: Gossip, Rumor, and Privacy on the Internet 177 (2007).

[71] Id. at 181 (noting that online posting "transforms gossip into a widespread and permanent stain on people's reputations," and that even postings on "an obscure blog" can appear "in a google search under a person's name").

[72] Restatement (Second) of Torts § 652G (1977).

[73] State v. Eighth Judicial District Court, 42 P. 3d 233 (Nev. 2002).

[74] Neil M. Richards & Daniel J. Solove, Privacy's Other Path: Recovering the Law of Confidentiality, 96 Geo. L. J. 123 (2007).

[75] One commentator considered three doctrinal models: first, a "general duty" of nondisclosure arising "whenever personal information is received from another in confidence;" second, a duty of nondisclosure attaching only to fiduciary relationships; and third, a duty situated between the other two, attaching to "nonpersonal relationships

wider recognition, and perhaps the action's focus on a violation of trust between parties will resonate in an Internet age. In Raymond's case, a key first question would be whether the manager-intern relationship is within the set of relationships giving rise to a duty of confidentiality. If it is, the claim would center on an alleged violation of trust by Mary in disclosing -- on a highly accessible blog -- that the intern's family was breaking up.[76] Mary's vague phrasing may limit any compensatory damages, and her motivation may save her from imposition of punitive damages. She may try to argue that Raymond was either the author of the blog or the source and thereby waived any claim of breach of confidence. She may even be able to invoke a privilege comparable to the "right of reply" discussed above. Despite the paucity of cases, one commentator notes, "A party may be permitted to breach a confidence to the extent necessary to defend himself against a charge of incompetence, protect himself against fraud, or perhaps collect fees..."[77]

However, policy support for liability would be strong: Mary accepted the role of counselor, and a court might determine that a minor's reliance on a counseling relationship outweighs other considerations, even waiver and self-defense. If this possibility, along with all the uncertainties of applying the "emerging" action for breach of confidence, had been conveyed to Mary when she sought a lawyer's advice, she likely would have refrained from mentioning Raymond's family troubles in the first place. At the same time, she would have seen that the truth of Raymond's family troubles was the most compelling fact in her self-defense – that, with no mention of those troubles, any "reply" would fall flat. Legalities aside, she may also have decided that professionally she should say nothing, concluding that both she and Raymond expected the conversation about his family to be confidential. So it is likely that with further

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customarily understood to carry an obligation of confidence." Alan B. Vickery, Note, Breach of Confidence: An Emerging Tort, 82 Colum. 1426, 1456-62 (1982).

[76] As noted, U.S. cases are few. In one noted federal case, a student sued her professor for breaching confidentiality by widely circulating written charges of sexual harassment that the student had lodged against the professor. The court found that the interest in confidentiality of student complaints was a legitimate consideration in the university's decision to suspend the professor, despite his invocation of the First Amendment right of academic freedom. Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2001).

[77] Vickery, Emerging Tort, supra note 75, at 1465.

counsel from her attorney and further reflection of her own, she would have remained silent, or at best posted a much shorter, far less revelatory message: "There are two sides to this story."

The Raymond-Mary hypothetical is meant to suggest that "more speech" may not be a practical alternative for one defamed by an anonymous blogger. Where specific facts are at issue, and where a target of anonymous defamation would face legal problems in furnishing a truthful and effective reply, the better part of valor may well be silence. How common such situations are is unknown, but as courts consider *Dendrite*'s onerous showing, they should keep in mind that the option of "more speech" may not exist in some settings for vulnerable targets of anonymous bloggers.

Scenario #3: Moving a Court to Gag Disclosure of the Blogger's Identity

A third scenario concerns the place of prior restraint in protecting the anonymity of bloggers, specifically whether a blogger can enlist the injunctive power of the courts to protect his identity even when a third party has lawfully and independently discovered his identity and wishes to publish it.

A recent English case provides the factual setting. In *Author of a Blog v. Times Newspapers Ltd.*,[78] a police officer's anonymous blog, "Night Jack," became famous in the United Kingdom. He wrote about his work and related policy issues. He refrained from revealing names or settings, and claimed to write nothing about cases that were pending or reporting restrictions.[79] In May 2009, a Times reporter contacted the officer and said that he had discovered that the officer was writing the blog and that the Times would publish that information. An agreement was reached that there would be no publication in the next edition, but on receiving word that publication would take place the day following that edition, the officer applied to the court for an interim injunction.

The officer argued that his identity was "confidential and private"; that his authorship of the blog was "information about his 'private' writing activities – divorced from the 'public' content of the Blog itself"; that anonymity was part of his "exercise of personal autonomy"; that

[78] [2009] EWHC 1358 (9B).

[79] Claimant's Skeleton Argument for Hearing 4 June 2009, ¶ 3.1(b).

unmasking him would "deter him (and other bloggers) from expressing themselves in the future" and thus impede the free flow of information; that exposing his identity would subject him to possible discipline; that any of The Times' justifications for publishing based on the public interest were "flimsy" at best; and that the court must enjoin publication.[80]

The Times argued that the reporter arrived at the blogger's identity by using "publicly available materials, patience, and simple deduction"; that no breach of confidence or violation of a reasonable expectation of privacy had occurred; that "there was a public interest in the public['s] knowing the identity of the author of the Blog" in order "to assess the weight to attach" to its content; and that a public interest existed "in disclosing alleged breaches by the [officer] of Police Regulations by writing the Blog."[81]

Justice Eady employed a two-part inquiry for analysis of claims based on privacy invasions in contravention of Article 8 of the European Convention on Human Rights and Fundamental Freedoms: first, whether the applicant for injunction demonstrates a reasonable expectation of privacy; if so, second, whether "there is some countervailing public interest such as to justify overriding that prima facie right."[82] In the first part, noting "a significant public element in the information sought to be restricted,"[83] Justice Eady concluded that the information lacked the required "quality of confidence"[84] and that the applicant lacked a reasonable expectation of privacy because "blogging is essentially a public activity rather than a private activity."[85] Although this finding was conclusive of the case, Justice Eady addressed the second part, finding a countervailing public interest in the newspaper's disclosure of the information.[86] On the specific matter of whether an injunction should issue, Justice Eady concluded that it was unlikely that the applicant would succeed at trial "in restraining The Times from publishing his

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[80] Id. at ¶ 9.

[81] Defendant's Skeleton Argument for Hearing 4 June 2009, at ¶ 7, 8, 9.

[82] Judgment, supra note 89, at ¶ 7.

[83] Id. ¶ 9.

[84] Id. at ¶ 33.

[85] Id. at ¶ 11.

[86] Id. at ¶ 33.

identity" on a theory either of confidentiality or privacy.[87]

From a U.S. perspective, these facts implicate several legal strands. The first and most obviously relevant strand is the strong presumption against prior restraint. In case law interpreting and applying the First Amendment, prior restraint carries a heavy burden of justification – perhaps the heaviest burden to be found in the U.S. law of free speech and press. From the historic case of *Near v. Minnesota* in 1932,[88] to the Pentagon Papers case of 1971,[89] the Court has disfavored even temporary restraining orders issued to permit parties to present arguments and the court to deliberate. Lower court decisions have followed the Court's lead, finding that countervailing interests lacked sufficient weight to justify prior restraint. In *In Re Providence Journal*,[90] a federal appellate court found that a trial judge erred in restraining the press from publishing information that first had been unlawfully gathered by the U.S. government and years later disclosed to several media outlets in response to a petition under the Freedom of Information Act. The trial judge restrained publication for two days pending a hearing, justifying the temporary order in part on the ground of privacy. The appellate court found this restraint not only unconstitutional but "transparently invalid": the privacy interest was patently inadequate as justification.[91]

This tradition may seem to involve case-by-case balancing of interests. Yet its essence is to look at the timing of the restraint – whether previous or subsequent to publication – and if previous, to presume to a virtual certainty that the restraint violates free speech. Questioning this formalism, some scholars have called for revision of the Court's all but unyielding approach, in favor of a subtle practice of balancing. Dean John Jeffries, for example, criticizes the Court's dichotomy, arguing that prior restraint and subsequent penalty are functionally indistinct because they have the same impact on speech. Jeffries questions "the broad and categorical

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[87] Id. at ¶ 32.

[88] 283 U.S. 697 (1932).

[89] New York Times Co. v. U.S., 403 U.S. 713 (1971) (per curiam).

[90] 820 F.2d 1342 (1st Cir. 1986), mod. on reh., 820 F.2d 1354 (1st Cir. 1986).

[91] Id. at 1350.

condemnation of injunctions as a form of 'prior restraint.'"[92]

Perhaps this moderating perspective lay behind *People v. Bryant*,[93] in which the Colorado Supreme Court upheld a prior restraint of an alleged rape victim's *in camera* testimony in a widely-covered criminal case's preliminary hearing. In *Bryant*, involving criminal allegations against a national sports figure, the victim had given sworn testimony about her sexual history in a closed pre-trial proceeding pursuant to the state's rape shield law. When a court reporter inadvertently emailed transcripts of the sealed testimony to members of the press, the trial judge ordered the recipients not to publish the contents. A newspaper sought relief in the state's high court on the ground of prior restraint – but to no avail. The Colorado Supreme Court acknowledged that the order was a prior restraint but upheld it, maintaining that the victim's sworn testimony about her sexual conduct, some or all of which might not even be admissible in the trial, was intensely private, that her interest in privacy was of the "highest order," and that the extraordinary remedy of an injunction was warranted on the facts.[94] The U.S. Supreme Court declined review.

Because *Bryant* stands almost alone in upholding an injunction against press publication on the ground of privacy, the decision is not likely a harbinger of things to come. The case explicitly depends on certain facts: (a) the rape shield statute, which for the court magnified the weight of the privacy interest; (b) the worldwide notoriety of the underlying criminal case, ensuring an unlimited audience for any news about the victim; (c) the fact that the private information was sworn testimony from a proceeding held *in camera*, giving it extra credibility if disseminated; and (d) the likelihood that the prior restraint would be effective, since the testimony had been sent to only a few outlets and had not been further disseminated. But even if *Bryant* on its facts is good law, it is hard to see how it could support a privacy-justified prior restraint in *Night Jack*, where there was no threatened exposure of highly intimate conduct, and no assurance that a non-disclosure order would be effective in keeping the information secret.

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[92] John C. Jeffries, Jr., Rethinking Prior Restraint, 92 Yale L. J. 409, 433 (1983).

[93] 94 P. 3d 624 (Colo. 2004).

[94] Id. at 635-37.

On the other hand, perhaps the relevant inquiry in the U.S. would not be the *Bryant* inquiry at all. That case asked whether the victim's interest in *privacy of conduct* was sufficient to rebut the law's heavy presumption. Perhaps the real question in *Night Jack* is whether the blogger's *privacy of speech*, or more precisely, the blogger's *right to speak anonymously*, is a sufficient interest. The right to speak anonymously on matters of public concern is a right to control the content of one's speech – to decide for oneself whether to include one's name or not in communicating with a few others or with the public. Thus, the proper analogy may not be between the *Night Jack* blogger and the victim in *Bryant*, but between the *Night Jack* blogger and a confidential source. Both the blogger and source provide information, often information of public concern, without self-disclosure. On this analysis, the question is whether a prior restraint is constitutional when it protects speech, i.e., guards the anonymity of the blogger as a continuing source of information of public concern. A similar question could arise if a news entity planned to identify another news entity's confidential source, and the source sought an injunction from a court in advance of publication. Both sides could voice familiar First Amendment arguments: the news entity seeking to publish could argue that no court can legitimately decide an outlet's content absent a threat of "direct, immediate, and irreparable harm to the Nation or its people," and the source could argue generally that news sources will dry up and the "free flow of information" be greatly impeded if "outing" is permissible. Both arguments would cite the truth-seeking value of free expression.

In resolving the impasse, the Supreme Court would likely emphasize the specific evil – prior restraint of pinpointed information – rather than the general evil that might result from not imposing the prior restraint – the drying up of a source. And the Court's principal reason would center on the prong that brings a pragmatic consideration into the calculus: effectiveness. Because the Times reporter was capable of "deducing" the blogger's identity from publicly available information, others presumably could make the same deduction. The same information could emerge from another source. A prior restraint against the Times therefore would be ineffective in maintaining the secret so as to enable the blog to continue as before. And because the subject matter of the postings was clearly of public concern, it is likely that the court would defer to the newspaper's judgment that publication of the poster's identity, deducible from

available information, was beyond the power of the court to block.

Yet the advent of the Internet and the remarkable economic decline of the institutional press in the United States may be further complicating factors, as evidenced by a recent federal appellate case featuring a concurrence by Judge J. Harvie Wilkinson, perhaps the First Amendment's most sensitive expositor in the U.S. judiciary. Like the *Night Jack* case, *Andrew v. Clark*[95] involved speech about the workings of the police and the relationship of police and citizens from the perspective of an insider. A police officer, Major Andrew, was discharged for taking his concerns to the press after another police officer used deadly force against a suspect and an internal investigation was (in Major Andrew's view) unsatisfactory. Concurring with the panel's decision that the Major's discharge may have violated his First Amendment rights, Judge Wilkinson noted the decline of newsgathering organizations with beat reporters who would specialize in journalism about law enforcement. "The staffs and bureaus...of newspapers and television stations alike have been shuttered or shrunk" due to "the advent of the Internet and the economic downturn," causing "traditional news organizations throughout the country to lose circulation and advertising revenue to an unforeseen extent."[96] As a result, "substantial reports on matters of critical public policy are increasingly shortchanged," and "intense scrutiny of the inner workings of massive public bureaucracies charged with major public responsibilities is in deep trouble."[97] In this context, scrutiny of public institutions such as the police is "impossible without inside sources" such as police officers themselves."[98] Judge Wilkinson concluded, "It is vital to the health of our polity that the functioning of the ever more complex and powerful machinery of government not become democracy's dark lagoon."[99]

Given the cogency of Judge Wilkinson's concerns, the Supreme Court taking up the *Night Jack* case surely would recognize that the blog consists of "core" speech and may even

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[95] 561 F.3d 261 (4th Cir. 2009).

[96] Id. at 272 (Wilkinson, J., concurring).

[97] Id. at 273.

[98] Id.

[99] Id.

acknowledge the changing nature of the news industries. Even so, it is unlikely that the Court would abandon its prior restraint precedents and uphold an order prohibiting the Times from publishing facts that are in its possession and that in its news judgment should be published. Behind the Court's intolerance of prior restraint is the truth-seeking value, which follows Mill's belief in the capacity of citizens engaging in the give-and-take of free discourse over time to sort through such speech and identify facts relevant to social progress. The *Night Jack* blogger's own invocation of the truth-seeking value would carry weight, but it is probable that the Court would regard its prior restraint tradition as "prior" to the blogger's own concerns.

Conclusion

An anonymous blogger's constitutional right of anonymity should give way in a civil suit only when a plaintiff can survive the blogger's motion for summary judgment. This test fairly accommodates competing interests of freedom and accountability. Some suits will fail, as in *Cahill*, others will continue, as in the Yale Law action. The summary judgment test provides the sort of balance that the electronic marketplace of ideas, informed by the truth-seeking value, requires for public credibility. Tests more onerous than summary judgment for identifying bloggers may discourage prospective plaintiffs from seeking relief, and counter-speech may not be practical given the threat of liability.

Bloggers who seek prior restraint to protect their anonymity may offer forceful arguments, especially when, like the *Night Jack* blogger and Major Andrew, their communications contribute to public understanding of serious issues. But prior restraint should remain as it is: almost entirely off-limits in U.S courts. The truth-seeking value is better aligned with opposing prior restraint -- even of false or tortious speech -- than with seeking it. In the long term, the public is better served by a legal culture that preserves the dichotomy between prior restraint and subsequent punishment, furthering the Millian project of experiment, proof, and disproof in the search for social fact.