ANONYMOUS SPEECH ON THE INTERNET: WHY CURRENT EFFORTS BY STATES TO REGULATE ANONYMOUS SPEECH FAIL CONSTITUTIONAL SCRUTINY, AND HOW COURTS SHOULD PROTECT FIRST AMENDMENT RIGHTS

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ABSTRACT

The legislatures in New York and Illinois have attempted to regulate the speech of individuals on the Internet and threaten to void their anonymity. The legislatures are trying to reach the actionable or harmful speech that often shows up on websites like Reddit.com. However, the bills have reached too far, and encompass much speech that is absolutely protected. This note argues that the right of anonymous speech on the Internet should be protected from government encroachment, and the proper way to protect the interests of individuals who are the subject of libelous or damaging speech should be through a re-working of current defamation tests advanced by the Supreme Court to ensure that speech is protected. Doing so balances the rights of individuals to speak freely while ensuring that those harmed have an avenue to recover for injuries.

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I. **Introduction**

States are attempting to curtail anonymous speech on the Internet. Their objective is clear; to limit damage of harmful speech on the Internet posted anonymously. However good the intentions of the legislators are, the proposed regulations would fail constitutional scrutiny under First Amendment Anonymous Speech doctrines and First Amendment Anonymous Association doctrines. The methods currently utilized by courts to identify anonymous posters allow an individual

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2. *Id.*

3. *See* discussion *infra* Part IV.

4. *See* discussion *infra* Part V.
proper remedies against defamatory speech, and the courts themselves should reevaluate current defamation rules due to an ever expanding presence of the Internet.\(^5\)

In October of 2012, Adrian Chen posted a story on the news blog Gawker.com where he named Michael Brutsch as the individual behind the online persona Violentacrez.\(^6\) Violentacrez was a well-known “troll”\(^7\) and moderator of the popular social message board Reddit.\(^8\) An initial reaction to the identification of an individual who preys on unsuspecting users who have a lower level of Internet sophistication as to the proper protections or protocols for securing their own information would be cheers, and a victory for the little guy.

That is what New York and Illinois are trying to do with their proposed bills.\(^9\) However, the bills reach too far, and do not take into account the constitutional rights of individuals like Violentacrez, or other users that these bills will reach.

The questions in this note do not revolve around why this person was named, even though the web service Violentacrez used prides itself on anonymity.\(^10\) This note explores: (1) What it means to be anonymous on the Internet; (2) Whether there is an individual right to remain anonymous on the Internet; and (3) How the government should move to protect individuals from harmful speech on the Internet.

\(^5\) See discussion infra Part VI.
\(^7\) Id.
\(^8\) Id.; About Reddit, REDDIT, http://www.reddit.com/about/ (last visited Jul. 11, 2013).
\(^10\) See Frequently Asked Questions, REDDIT, http://www.reddit.com/wiki/faq#wiki_will_you_remove_something_defamatory_about_me_or_22my_friend.22_from_reddit.3F (last visited Jul. 11, 2013) (removal of content by request); and Frequently Asked Questions, REDDIT, http://www.reddit.com/wiki/faq#wiki_is_posting_personal_information_ok.3F (last visited Jul. 11, 2013) (“reddit is a pretty open and free speech place, but it is not ok to post someone's personal information”).
In an effort to curb anonymous speech on the Internet, state legislatures in Illinois and New York have attempted to pass laws that require individuals to identify themselves to individual websites before posting comments on content provided by the websites. The proposed bills in Illinois and New York aim to change the way the courts currently review claims of individuals who wish to identify anonymous posters. Currently, courts require that the speech be identifiable, and defamatory on its face before granting an order to compel the revealing of the speaker’s identity. These bills place a tremendous power into the hands of any individual, without a required showing that the speech is identifiable and defamatory on its face before speech is censored, without review by a court.

After detailing the bills and current methods of identifying anonymous posters, this note will argue that the proposed bills will not pass constitutional muster under existing anonymous speech analysis, which has been recognized in various court cases. These bills are aimed directly at speech and are content-neutral towards the speech—which would require an intermediate level of review. However, when faced with a total ban on speech that is content neutral, courts often air on the side of caution and reject the laws. The state interests asserted in support of these proposed regulations are not

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12 Id.
14 S.B. S.6779; S.B. 1614.
15 See discussion infra Parts IV–V.
16 See discussion infra Part IV.
17 Content neutral analysis comes up in cases that involve secondary effects on speech when the government is attempting to regulate conduct. See United States v. O’Brien, 391 U.S. 367, 376 (1968) (“when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment Freedoms.”). Content neutral analysis also comes up in time, place, and manner restrictions. See Cox v. Louisiana, 379 U.S. 559, 569 (1965) (“narrow discretion which this Court has
substantial, and the method of regulation is not the least restrictive means of promoting that interest. A more likely scenario is that courts would reject these Bills under an overbreadth analysis.\textsuperscript{18}

This note argues that the type of speech that is at the heart of these bills— injurious or defamatory speech—should be regulated by courts rather than by legislature. In looking at the history and reasoning behind the landmark defamation case of \textit{New York Times Co. v. Sullivan},\textsuperscript{19} the same safeguards offered to journalists and newspaper corporations should be extended to anonymous Internet posters.\textsuperscript{20}

The government, at any level, should not be in the business of curtailing or regulating the speech of individuals on the Internet. Internet communities themselves have various methods and practices such as “doxxing” or “white knighting”\textsuperscript{21} that help regulate speech at the user level of the Internet experience. These communities are better equipped to decide what is proper and what is not proper in the course of open and free discussion.

The right to anonymous association is also a well-founded freedom extended to individuals through the First Amendment.\textsuperscript{22} By attempting to legislate the harm out of anonymous Internet speech, the regulations are overbroad and will affect many time-honored associations that not only respect, but also revel in the idea of anonymous speech.\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{18} See discussion \textit{infra} Part IV.
\item \textsuperscript{19} 376 U.S. 74 (1964).
\item \textsuperscript{20} See discussion \textit{infra} Part VI.
\item \textsuperscript{21} See discussion \textit{infra} Part II.
\item \textsuperscript{22} See discussion \textit{infra} Part V.
\item \textsuperscript{23} See discussion \textit{infra} Parts IV and V.
\end{itemize}
Specifically, this note aims to tackle the idea of anonymous speech on the Internet, and takes the stance that anonymous speech should be protected from government intrusion for three reasons: first, because the identity of the speaker is not the proper measure of the value of speech; second, because anonymous online speech that is actionable (defamatory, libelous, or slanderous) can be rectified through current means; and finally, because the various online communities can effectively police themselves by weeding out individual speakers who do not conform to the acceptable social norms within that community.

Part II of this note details the events surrounding the identification of Violentacrez and the fall-out from that disclosure. Part III outlines the proposed legislation in Illinois and New York, and compares the statutes to the current self-policing methods by which Internet communities use to expose anonymous posters on the Internet. Part IV details the constitutional issues surrounding the restriction of anonymous speech on the Internet. Part V investigates the inner workings of various web communities and justifies the right for individuals in those communities to associate anonymously, and Part VI takes a fresh look at the current defamation framework as a method to control this speech.

II. WHAT HAPPENED TO VIOLENTACREZ

“Put up again thy sword into his place: for all they that take the sword shall perish with the sword.”

24 A well-used parable warning people that what actions they chose in life, might be the same actions that bring them down. Perhaps it is a bit of karma, or poetic justice, that a man like Michael Brutsch was fingered as the individual who had spent so much of his online life taking advantage of individual Internet user’s lack of

24 Matthew 26:52 (King James).
sophistication and knowledge about security and their own anonymity. The outlandish antics of an individual like Violentacrez are clearly the actions and speech that New York and Illinois are trying to regulate.\textsuperscript{25}

In order to fully examine who Violentacrez was, and what his identification has meant to online communities, this note must first examine the community in which Violentacrez prospered, the content of that community, and the role of the moderator.

\textbf{A. What is Reddit?}

Violentacrez was a notorious contributor, innovator and moderator of Reddit.\textsuperscript{26} Reddit is a popular site where individuals can gather and participate in a variety of speech that at its core is anonymous, or as anonymous as an individual chooses that speech to be.\textsuperscript{27} The community is divided into smaller “subreddits” that aid participating individuals find information and discussions on topics in which the users may choose to take part.\textsuperscript{28}

One of the more popular features on Reddit is the “Ask Me Anything” subreddit.\textsuperscript{29} This series of topics exemplifies the idea of anonymity on Reddit. The idea is to put yourself out as an expert in a field through experience or study, and allow individuals to ask questions about your experience or expertise. The individual who begins the post can choose to answer any question submitted.\textsuperscript{30} The ultimate control of the identity of the “expert” is in the hands of the expert alone. Bill Gates, President

\textsuperscript{25} See discussion \textit{infra} Part III.
\textsuperscript{26} Chen, \textit{supra} note 6.
\textsuperscript{28} About Reddit, \textit{supra} note 8.
\textsuperscript{30} Id.
Obama, and Bear Grylls have all held popular question and answer sessions on Reddit through this method, but many more people have chosen to remain nameless, only sharing their predilection for child porn, or their ability as a master plumber.

By answering the questions on a variety of intimate or controversial topics, an individual is holding himself out as an expert in an attempt to educate the masses about particular segments of society, regardless of the attached stigma. For that reason, the community of Reddit does not see this as an individual trying to hide the individual’s identity.

Within Internet communities, there are a variety of citizens. There are the general users who want to take part in the discussion and possibly learn something new. There are the individuals who only participate to deride the personal choices of others who choose to hold themselves out, warts and all, for the world to see. There are the one-uppers who wait for an individual to tell a story only so they can let the world know that they too have had it bad, and in fact, they had it worse. Then there are the trolls. Violentacrez can best be described as a troll.

Trolls on sites like Reddit are not the gatekeepers and toll-takers of fairy tales. The trolls here are the individuals who wish to push the envelope; individuals who want to mock the sensibilities of the general public. Adrien Chen—the reporter who identified

33 I am a Plumber, Ask Me Anything.... AMA, REDDIT, http://www.reddit.com/r/IAmA/comments/zxgji/i_am_a_plumber_ask_me_anything_ama/ (last visited Jul. 11, 2013).
34 Chen, supra note 6 (in describing the trolling of Violentacrez: “many of Violentacrez’s most offensive subreddits were created just to enrage other Reddit users.”).
Violentacrez’ true identity—classified a troll as an individual who “exploits social
dynamics like computer hackers exploit security loopholes.”

The last part of his role on Reddit must be defined as well, the role of
“moderator”. The moderator has a variety of roles on different websites, on Reddit, the
moderator is the final arbiter of the content under the subreddit he chooses to publish, or
what others publish under the section he moderates. Violentacrez took this role to the
extreme, creating or moderating subreddits such as: “Chokeabitch”, “Rapebait”, “Hitler”,
“Incest” and “Jailbait” among others. Violentacrez made sure that content posted in the
subreddit remained on topic, ensuring that the pictures of underage girls in “Jailbait”
were actually underage girls, and that the content in the “Hitler” subreddit was related to
Hitler.

Reddit is not the only site on the Internet with this material, nor is this note aimed
at vilifying Reddit. Sections of Reddit are examples of speech that the Supreme Court has
classified as disgusting or “distasteful.” However, the class of speech is not a proper

35 Id.
36 What is a Forum Moderator, WISE GEEK, http://www.wisegeek.org/what-is-a-forum-moderator.htm (last
visited Jul. 11, 2013).
37 See generally Moderation, REDDIT, http://www.reddit.com/wiki/moderation (last visited March 13,
2013).
38 Chen, supra note 6 (In referring to Mr. Brustch: “[h]e has done this mainly through creating offensive
subreddits to troll sensitive users. Some of the sections Violentacrez created or moderated were called:
Chokeabitch, Niggerjailbait, Rapebait, Hitler, Jewmerica, Misogny, Incest.”).
39 Brown v. Entertainment Merchants Ass’n, 131 S.Ct. 2729, 2738 (2011) (“disgust is not a valid basis for
restricting expression”).
40 Cohen v. California, 403 U.S. 15, 21 (1971). The Court rejected the argument that “much has been made
of the claim that Cohen’s distasteful mode of expression was thrust upon unwilling or unsuspecting
viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from
otherwise unavoidable exposure to appellant’s crude form of protest.” Id. at 21. The court also stated, while
explaining that mere speech does not necessarily constitute “fighting words” that: “[w]e cannot lose sight
of the fact that, in what otherwise might seem a trifling and annoyance instance of individual distasteful
abuse of a privilege, these fundamental societal values are truly implicated.” Id. at 24
measure of the value of speech, nor is it the sole factor in determining the states right in proscribing speech.\textsuperscript{41}

Rather, Reddit shows what the power of anonymous speech can be. Individuals can choose to share as much of themselves as they want, and though there are various subreddits of offensive or tasteless material, there is a great deal of important, actual, and proper speech that goes on there as well.\textsuperscript{42}

\textbf{B. Doxxing and White Knighting}

When Adrian Chen introduced the world to Violentacrez’s true identity, Michael Brutsch was “doxxed.”\textsuperscript{43} “Doxxing” is the term given to Internet users who identify individuals through the Internet by exposing the individual’s web postings, usage, or other identifying features of their Internet life.\textsuperscript{44} The idea of “doxxing” is a negative action of the Internet, and targets range from anonymous individuals, known website trolls, and celebrities.\textsuperscript{45}

\textsuperscript{41} Id. at 21; Brown, 131 S.Ct. at 2738; Roth v. United States, 354 U.S. 476, 574 (1957) (Justice Black, dissenting) (“I reject too the implication that problems of free speech and of the press are to be resolved by weighing against the values of free expression, the judgment of the Court that a particular form of that expression has ‘no redeeming social importance.’”).


\textsuperscript{43} See generally Chen, supra note 6 (by identifying Mr. Brutsch as Violentacrez to the world, Mr. Chen was able to identify an individual who was trying to remain anonymous through Mr. Brutsch’s own postings and presence on the web).

\textsuperscript{44} Though “doxxing” is not defined in any traditional dictionaries, a simple google search of the term returns results from a variety of websites and news articles seeking to properly define the term. In order to be consistent with the various definitions, a simple definition of “culling information of an individual through public Internet posts, including text and photos, and attempting to identify that individual through those posts through their name, physical address, phone number, social security number, credit card numbers, or other identifying information.” See Doxxing, SOCIAL ENGINEERING, http://socialengineering. wikia.com/wiki/Doxxing (last visited Jul. 11, 2013); Dox, URBAN DICTIONARY, http://www .urbandictionary.com/define.php?term=dox (last visited Jul. 11, 2013); Doxxing, TUMBLR, http://www .tumblr.com/tagged/doxxing (last visited Jul. 11, 2013).

\textsuperscript{45} See Chen, supra note 6 (the outing of Violentacrez as a troll, and an individual); and Taylor Berman, Obama, Clinton, Biden, Jay-Z Doxxed: ‘Hackers’ Snag Financial Records, Socials, Credit Reports, (Mar.
The truth of the matter here is that anonymity on the Internet is little more than a farce. An individual, with the right motivation, and enough time can find out information about a user. Rather than attempting to curtail anonymous action and harm, the government should focus on the action of identifying a user who acts in a harmful way, and balance the right of an individual to remain anonymous with the injury suffered by the individual. In essence, the government should attempt to go after the conduct rather than actual speech.

Often times, when an individual is “doxxed” in an offending way, or when an attack on an innocent individual occurs, other users will jump at the chance to become a “white knight.” This is a reference to the individual coming to “save the day” and stand up for someone else when they seemingly have little or no interest in the outcome himself or herself.

Michael Brutsch, or Violentacrez, lived and died by the idea of exploiting the lack of awareness and the comfort and safety of Internet users through his body of work on Reddit. The price he paid was ultimately that of his own anonymity, and when that

12, 2013 8:20 A.M.) http://gawker.com/5990063/ (A group of individuals released a large amount of personal information relating to various celebrities to anyone who wished to visit a website hosted from a server in Russia.).

46 See e.g., Chen, supra note 6; Berman, supra note 45.

47 The Internet usage of “white knight” derives from other common uses of the phrase. In business, a “white knight” is an individual who comes to the rescue of “[a] company that is the target of a hostile takeover.” Business Glossary, THE GUARDIAN, http://www.guardian.co.uk/business/2007/apr/12/businessglossary159 (last visited Jul. 11, 2013). But possibly the most well-known use of a “white knight” being a savior comes from Lewis Carroll’s “Through the Looking Glass”. In that novel, a character called the “White Knight” saves Alice from his mortal enemy, the “Red Knight”. LEWIS CARROLL, Through the Looking Glass and What Alice Found There, in ALICE IN WONDERLAND 101, 179–91 (Norton Critical ed., 2nd ed. 1992) (1871).

48 See generally Chen, supra note 6.
became uncloaked, with it, his job. Anonymous speech is not always exercised in the most careful, tactful, or proper ways, as the incident with Violentacrez has shown.

III. GOVERNMENT ACTIONS AIMED AT INDIVIDUAL WEB SITES

Looking at the situation surrounding Mr. Brutsch, it is clear that some actions on the Internet should not go unpunished. The argument of this note is not that the Internet should be a free place for people to act without consequence, however, this note deals with the idea that the government does not need to take additional protective steps in order to curb the associated speech on the Internet. Bills proposed in the state legislatures of New York and Illinois have attempted such protective measures, and the bills as proposed have various constitutional shortcomings.

This section will first look at the proposed legislation in New York and Illinois. After detailing the provisions of this legislation, this section will look at the current process by which individuals can petition the court in order to have an anonymous poster revealed.

A. New York and Illinois Attempts to Curb Internet Anonymity

This section will outline the bills proposed before the New York and Illinois legislatures that aim to reduce the anonymity currently enjoyed by users on the Internet.\(^\text{50}\)

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The proposals are almost carbon copies of one another, and both aim to restrict the rights of “anonymous poster[s].”

Both bills require the removal of content by the individual “web site administrators”, unless the speaker chooses to supply their “IP address, legal name, and home address.” This effectively removes the courts as arbiters of justice from the specter of regulating and holding individuals responsible for speech that is actionable.

The identical bills, proposed nearly a year apart from each other reach not only the level of speech that is not protected, such as defamation, but any speech. Any individual could request that a post be removed regardless of the content of the speech, the aim of the speech, or the veracity of the speech. This is contrary to the current process by which anonymous posters can be identified through ISPs, not just in practice by switching the blame from the ISP to the website administrator, but removes the requirement that the individual attempting to curb speech identify that the speech itself is defamatory, and specify which parts are defamatory.

Using Reddit as an example, if these Bills were enacted, a likely scenario could be this: User 1 posts a message detailing an encounter with a financial advisor. User 1 asserts that the financial advisor took User 1’s investment money, and bought a boat.

51 “AN ACT to amend the civil rights law, in relation to protecting a person’s right to know who is behind an anonymous Internet posting.” S.B. S.6779. “Provides that a website administrator shall, upon request, remove any posted comments posted by an anonymous poster unless the anonymous poster agrees to attach his or her name to the post and confirms his or her IP address, legal name, and home address are accurate.” S.B. 1614.

52 “A web site administrator upon request shall remove any comments posted on his or her website.” S.B. S.6779(2); S.B. 1614.

53 “[U]nless such anonymous poster agrees to attach his or her name to the post and confirms that his or her IP address, legal name, and home address are accurate.” Id.

54 There are no limits or regulations of what the websites must take down beyond the requirement that once notified by an individual that a post should be taken down, the website must identify the poster, or if the poster wishes to remain anonymous, delete the comment or comments. See id.

55 Id.

56 Id.
rather than investing as planned and agreed upon. Financial Advisor comes across the post, sees the comments, and then requests that Reddit remove those comments, unless the poster reveals “his or her IP address, legal name, and home address.”57 As required by law, Reddit complies and User 1 does not wish to reveal his identify for a variety of reasons: embarrassment of being scammed, his status in his physical community as an individual, or maybe he is preparing a lawsuit and does not wish to complicate matters any longer.

Say Financial Advisor really did steal that money and buy a boat, now he would be free to find other unsuspecting victims.

B. Current Methods to Identify Anonymous Posters

In balancing the rights of an individual to remain anonymous against the right of an individual to bring a claim against another individual on a defamation suit has brought about three standards that different jurisdictions have adopted in order to allow the case to move forward. These tests all center on requiring the ISP to reveal the identities of an individual.58

The first test, formulated in Columbia Insurance Co. v. Seescandy.com,59 requires that the plaintiff:

(1) provide sufficient facts to identify the missing party “as a real person or entity who could be sued in federal court,” (2) identify steps the plaintiff has taken to locate the defendant, (3) establish that the suit would be able to withstand a motion to dismiss, and (4) file a discovery request

57 Id.
58 Kirtley, supra note 13, at 1483–88.
59 185 F.R.D. 573 (N.D. Cal. 1999).
and a “statement of reasons justifying the specific discovery requested with the court.”\textsuperscript{60}

This has been called the “motion to dismiss” test because the test itself requires that the initial claim be strong enough to survive a motion to dismiss before the identity of the individual is revealed. \textsuperscript{61} This process can best be described as a civil procedure approach to the problem, where the court is not necessarily interested in the speech itself, only identifying that there is an individual who did speak.

The next test comes from \textit{In re Subpoena Duces Tecum to America Online, Inc.}, \textsuperscript{62} which requires that “the plaintiff. . . satisfy the court by pleadings or evidence, that it had a legitimate good faith basis for its claim, and that the defendants’ identities were central to the claim.”\textsuperscript{63} The burden here is clearly on the plaintiff to show that the content of the speech itself was not just defamatory, but that there were damages that they could recover from this speech. \textsuperscript{64} Though this case was ultimately over-turned with the opinion in \textit{America Online, Inc. v. Anonymous Publically Traded Co.}, \textsuperscript{65} it remains a cited authority in anonymity cases, as the case was over-turned on other grounds. \textsuperscript{66} This case exemplifies the First Amendment approach, where a court goes to great lengths to ensure that the speech of an individual is protected, and a case only comes forward when the speech is actionable.

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\textsuperscript{60} Kirtley, \textit{supra} note 13, at 1483.  
\textsuperscript{61} \textit{Id.}  
\textsuperscript{62} 52 Va. Cir. 26 (2000).  
\textsuperscript{63} Kirtley, \textit{supra} note 13, at 1484.  
\textsuperscript{64} \textit{Id.}  
\textsuperscript{65} 542 S.E.2d 377 (Va. 2001).  
Another test is the “Summary Judgment Test,” which requires the plaintiff to not only show most of the same elements of the good faith test, but, identify the specific language that is alleged to be defamatory. This is the more widely adopted test, and combining the elements here with the good faith test has been seen in a variety of jurisdictions. In *Dendrite International v. Doe No. 3*, which brought about this test, an executive of a pharmaceutical company wanted to bring an action against individuals who posted anonymously on stock-trading websites claiming that the information contained was defamatory to him personally, and the company as well.

These tests all differ significantly from the proposed legislation. First, the speech in the tests is presumed to be truthful, and not defamatory, unless the plaintiff can show “good faith,” and identify the language that is defamatory. In the proposed legislation, that presumption disappears, any individual can have speech taken down, for any reason—even no reason at all—by simply requesting that the website administrator require the poster to identify themselves. This flies directly into the face of the reasoning in the *Dendrite* case where the court strained to ensure that the speech was defamatory in order to prevent companies from controlling the content of speech about practices, specifically on an investment message board, in order to ensure that the right of an individual to remain anonymous was not abridged simply because the company did not appreciate, agree, or particularly like the content of the speech.

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68 Id.
69 Id.
71 Id. at 140.
73 Id.
75 *Dendrite*, 775 A.2d at 760.
This is not to say that the legislature is in the wrong here by attempting to influence the tests and methods that courts apply when evaluating a law. Volumes of scholarly work have been devoted to this function of the legislature, however, in this case, the issue at hand is an individual’s First Amendment right to speak anonymously. When constitutional issues rise, legislatures alone cannot proscribe the specific rights of individuals and tests the court uses, save Congress through an amendment to the Constitution itself.

Under the current methods to identify anonymous posters, the financial advisor in the previous hypothetical would have to take additional steps in order to show that in good faith, the speech offered by User 1 was defamatory before the courts allow Financial Advisor to compel the identity of User 1. Financial Advisor would most likely not be able to survive any of the above tests. First, he would have to show his methods in attempting to identify User 1, and survive a motion to dismiss. In the second test, Financial Advisor would have to show that he suffered actual damage, and that he also had a good-faith claim. And finally, under Dendrite, Financial Advisor would have to show that his claim would survive summary judgment.

If Financial Advisor had in fact used the money to purchase a boat, he would not be able to survive under any of these tests.

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76 See e.g., Frank H. Easterbook, Statutes’ Domains, 50 U. Chi. L. Rev. 533, 533–34 (1983) (ability of state legislatures to influence the interpretations and approaches taken by the judicial branch).
77 See discussion infra Part IV.
78 Dickerson v. United States, 530 U.S. 428, 437 (2000) (“Congress may not legislatively supersede our decisions interpreting and applying the Constitution.”).
IV. CONSTITUTIONAL RIGHT OF AN INDIVIDUAL’S ANONYMOUS SPEECH ON THE INTERNET

The right of an individual to speak anonymously on the Internet has been widely written about and explained by many commentators over the years.\textsuperscript{79} The basic premise behind this theory is that the Supreme Court has many times acknowledged speech on an anonymous basis as being protected for a variety of reasons.\textsuperscript{80} This section will look at the historical justifications for individuals to speak anonymously. Finally, this section will compare the New York and Illinois bills to these current standards and argue that the in the event anonymous speech reaches defamation, the proper way to address the issue is through a modern reading of defamation law through court interpretation.

The First Amendment describes the theory of free speech as “[c]ongress shall make no law… abridging the freedom of speech.”\textsuperscript{81} Though not absolute, various restrictions have been placed on the speech of individuals.\textsuperscript{82} In order to do that, the state must overcome a variety of burdens depending on the speech the regulation reaches, and the way the regulation actually reaches the speech.\textsuperscript{83} The tests for determining whether an abridgment of speech is justified range from a reasonable relation to strict scrutiny.\textsuperscript{84}

\textsuperscript{79} A search on Lexis Advance for a paragraph containing the words “anonymous”, “Internet”, and “speech” returns 505 results for Law Reviews and Journals. The same search on WestlawNext returns 582 results. For examples, see Jennifer O’Brien, Putting a Face to A (Screen) Name: The First Amendment Implications of Compelling ISPS to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases, 70 FORDHAM L. REV. 2745 (2002); Susanna Moore, The Challenge of Internet Anonymity: Protecting John Doe on the Internet, 26 J. MARSHALL J. COMPUTER & INFO. L. 469 (2009); and Miguel E. Larios, Epublis: Anonymous Speech Rights Online, 37 RUTGERS L. REC. 36 (2010).

\textsuperscript{80} See e.g., Talley v. California, 362 U.S. 60, 65–66 (1960) (holding that a wholesale ban on anonymous pamphlets and leaflets was invalid); and McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 357 (1995) (holding that while a state could restrict anonymous speech, in order to do so when the speech is political the state must survive strict scrutiny).

\textsuperscript{81} U.S. CONST. amend. I.

\textsuperscript{82} See e.g., Gia B. Lee, First Amendment Enforcement in Government Institutions and Programs, 56 U.C.L.A. L. REV. 1691, 1696 (2009).

\textsuperscript{83} Id. at 1696–97.

\textsuperscript{84} See id. at 1697–02 (minimal review); Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1278 (2007) (strict scrutiny).
The Constitution is silent on the idea of anonymous speech. This section will work to define the idea of anonymous speech through a historical look at cases which help establish this idea, specifically *Talley v. California* and *McIntyre v. Ohio Elections Commission*.

Next this section will look at the idea of free speech and the Internet, as the Constitution is silent on the idea of the Internet as well. *Reno v. A.C.L.U.* established that First Amendment rights do extend to users on the Internet, and through that case, this section will argue that the right to anonymous speech should extend as well.

Finally, using those principles and cases as a background, this section will evaluate the proposed bills through current methods employed by courts to measure the restrictions upon free speech, ultimately showing that the bills, as proposed, will fail under a variety of measures employed by the courts to evaluate restrictions on speech.

A. The Right of an Individual’s Anonymous Speech – *Talley* and *McIntyre*

In *Talley*, an ordinance in the City of Los Angeles required any handbills distributed within the city contain the name of the author. Previously, the Court had dealt with regulations that banned the wholesale distribution of literature, and wholesale bans on the distributions of leaflets.

In those earlier cases, the Court found the ban on anonymous literature distribution to be invalid because literature was a “historic [weapon] in the defense of

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86 *Talley v. California*, 362 U.S. 60, 60–61 (1960) (“[n]o person shall distribute any hand bill in any place under any circumstances, which does not have … the name and address of … [t]he person”).
87 *Id.* at 62 (citing Lovell v. Griffin, 303 U.S. 444 (1938)).
88 *Id.* at 62–63 (citing Schneider v. New Jersey, 308 U.S. 147 (1939)).
specifically citing Thomas Paine’s pamphlets as being signed under a pseudonym. As to the ban on leaflets, the Court again struck down the ordinance, but this time the government asserted the interest of preventing fraud, littering, and disorderly conduct. The Court ultimately found this to be unpersuasive, finding that there are other avenues for the government to curtail this behavior. After this decision, the idea that anonymity was included under the free speech doctrine was formed. However, the court in *Talley* did not deem this right to be absolute. The theory of restricting anonymous speech was addressed in *McIntyre v. Ohio Elections Comm’ns.* Here, the Court struck down an Ohio statute that required individuals distributing election-related material to include their name and address.

The Court admitted that *Talley* was not absolute, and in doing so established a strict scrutiny standard in evaluating anonymity restrictions on speech that is political in nature. Because political speech is given ultimate protection under the First Amendment, it remains to be seen what standards regulations on other kinds of speech will be evaluated under.

Ohio asserted two interests in furthering this statute. First being the ability to require that there is an informed electorate. The court did not agree, stating that the “identity of the speaker is no different from other components of the document’s content

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89 *Id.* at 62 (quoting Lovell v. Griffin, 303 U.S. 444 (1938)).
90 *Id.* at 62, n. 3 (citing Lovell v. Griffin, 303 U.S. 444 (1938)).
91 *Id.* at 63 (citing Schneider v. New Jersey, 308 U.S. 147 (1939)).
92 *Id.*
93 *Id.*
95 *Id.* at 341–47.
97 *McIntyre*, 514 U.S. at 348.
that the author is free to include or exclude.” Additionally, the court noted that “[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she could otherwise omit.”

The second interest asserted by Ohio in abridging the right to anonymity was to prevent fraudulent and libelous statements. Much like the court found in Schneider v. State, the prevention of fraud and libel are not primarily served by requiring the disclosure of an individual’s identity, and these restrictions encompass both truthful and libelous statements.

These cases show that there is a right to anonymity found within the First Amendment that the Supreme Court is willing to uphold. The bills proposed in New York and Illinois strip this right from the users, and place the ability to identify speakers in the hands of anyone who happens to come across the website. Many of the interests behind the proposed bills would be those asserted by Ohio in McIntyre, especially the prevention of fraud and libel, which ultimately failed to persuade the Court.

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98 Id.
99 Id.
100 Id. at 348.
101 Id. at 349–53.
103 “AN ACT to amend the civil rights law, in relation to protecting a person’s right to know who is behind an anonymous posting.” S.B. S.6779.
104 McIntyre, 514 U.S. at 348.

The previous section dealt with the idea of anonymous speech, and how the court has extended the right of anonymity to speech. In Reno v. A.C.L.U., the court extended the protections of the First Amendment to the Internet.105

Reno dealt with provisions of the Communications Decency Act of 1996 (CDA) which placed various restrictions on the use of the Internet by minors and adults alike.106 The specific provisions challenged in Reno dealt with users who directed obscene or indecent images to minors, and users who allowed minors to observe “patently offensive” materials.107

The government argued that three prior cases gave them the power to regulate speech on the Internet.108 First, in Ginsburg v. New York,109 the Court allowed a regulation that banned the selling of obscene materials to minors.110 The Court in Reno distinguished the CDA from this on four levels.111 First, the CDA bars parents who legally access this material from sharing it with their children.112 Second, the CDA applies to commercial and non-commercial transactions alike.113 Third, the CDA does not define what is “patently offensive”, only mentioning language that “lacks serious literary, artistic, political, or scientific value.”114 Finally, the Court was not willing to buy the idea

106 Id.
107 Id. at 859–60 (outlining § 223(a) which criminalizes the transmission of images to a minor, and § 223(d) which criminalizes the display of images to minors).
108 Id. at 864.
110 Reno, 521 U.S. at 864 (citing Ginsberg v. New York, 390 U.S. 629 (1968)).
111 Id. at 865.
112 Id.
113 Id.
114 Id.
that while the regulation in *Ginsberg* dealt with those under 17, the CDA applied “to all those under 18 years” which included “an additional year of those nearest majority.”

The next case which the government asserted the right to regulate this speech was *FCC v. Pacifica Foundation*. The Court differentiated the CDA from *Pacifica* on three grounds. First, the regulations in *Pacifica* “targeted a specific broadcast that represented a rather dramatic departure from traditional program content”, while the restrictions imposed by the CDA do not have an agency evaluating the content and are imposed to all communications. Second, the CDA is a criminal statute that has punitive measures to violators, while *Pacifica* dealt with monetary fines. Lastly, the Court in *Pacifica* held that the broadcast medium had historically “received the most limited First Amendment protection”, while the Internet has no such history.

The final case that the government argued afforded them the ability to regulate speech on the Internet was *Renton v. Playtime Theatres, Inc.* which allowed the government to zone neighborhoods in order to keep adult theatres away from residences. The *Renton* Court held that restrictions on zoning are appropriate as long as the restrictions are not aimed at the content of the films, but the “secondary effects” which result from the presence of the theatres, specifically crime. These kinds of restrictions are considered “time, place, and manner” restrictions, which allow the

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115 *Id.* at 865–66.
116 *Id.* at 865–66.
118 *Reno*, 521 U.S. at 867.
119 *Id.*
120 *Id.*
121 *Id.*
122 *Id.*
124 *Reno*, 521 U.S. at 867.
125 *Id.* at 867–68.
government to regulate speech when the speech is only an offshoot of a legitimate interest which the government can restrict.\footnote{Geoffrey R. Stone, \textit{Content-Neutral Restrictions}, 54 U. CHI. L. REV. 46, 89 (1987) (quoting Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983)) (“government…may not enforce a time, place, or manner restriction unless the restriction is ‘narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication.’”).} The Court found that the CDA was not such a restriction, and was in fact aimed specifically at speech itself.\footnote{\textit{Reno}, 521 U.S. at 868.}

At this point, the Court had effectively found that the freedom of speech was guaranteed on the Internet. This was justified on four factors under which the CDA regulated the speech. First, the invasiveness of the Internet was not at the same level as radio or television.\footnote{\textit{Id.} at 869.} Second, the Internet is not as “scarce” as the broadcast mediums that the government once had the ability to restrict.\footnote{\textit{Id.} at 870.} Third, the CDA was both vague and unnecessarily broad in that it was content based, carried a criminal sanction, did not focus on commercial speech, and that the speech would most likely be judged by a national standard which would set the standard at a level of the communities most likely to be offended.\footnote{\textit{Id.} at 871–79.}

Finally, the Court severely restricted the right of the government to regulate the Internet in the same manner that the government can zone under the time, place, and manner standard.\footnote{\textit{Id.} at 879–81.} The government argued that under this standard that the CDA can censor this material because the speech can still be carried out on other sites, and through other methods.\footnote{\textit{Id.} at 879.} Because the aim of the statute is content-based, the government cannot do this kind of restriction.\footnote{\textit{Id.}}

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\begin{itemize}
  \item \footnote{Geoffrey R. Stone, \textit{Content-Neutral Restrictions}, 54 U. CHI. L. REV. 46, 89 (1987) (quoting Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983)) (“government…may not enforce a time, place, or manner restriction unless the restriction is ‘narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication.’”).}
  \item \footnote{\textit{Reno}, 521 U.S. at 868.}
  \item \footnote{\textit{Id.} at 869.}
  \item \footnote{\textit{Id.} at 870.}
  \item \footnote{\textit{Id.} at 871–79.}
  \item \footnote{\textit{Id.} at 879–81.}
  \item \footnote{\textit{Id.} at 879.}
  \item \footnote{\textit{Id.}}
\end{itemize}
Reno extended First Amendment protection to speakers on the Internet. Because of this, people like Violentacrez can engage in speech on a variety of topics, only have to worry if their speech falls into unprotected categories like: defamation, incitement, or obscenity. It would stand to reason that because Violentacrez has a right to speak freely on the Internet, that the right to do so anonymously would come along with it.

C. Content-Based and Content-Neutral Regulations

In Reno, the Court found the restrictions to be content-based. Because the restrictions were based on the content of the speech itself, the Court employed the idea of strict scrutiny. In this highest level of scrutiny, a statute that attempts to regulate speech is presumed unconstitutional, and the state must show a compelling interest in requiring the restriction. Because the government was not able to meet this standard, the provisions of the CDA contested in Reno were struck down.

Despite this, the proposed bills do not regulate speech based on the content of the speech. The proposed bills will generally move the test employed by the courts away from a standard of strict scrutiny. However, courts will employ strict scrutiny in cases where the class of speech is considered “core”, as was the case in McIntyre. In this

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135 See Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) (words that are likely to provoke an individual are not protected by the First Amendment).
136 See Miller v. California, 413 U.S. 15, 36 (1973) (“we…reaffirm the Roth holding that obscene material is not protected by the First Amendment”).
137 Reno, 521 U.S. at 885 (“we presume that governmental regulation of the content of speech is more likely to interfere with the free expression of ideas”).
138 Id.
139 See generally Fallon, Jr., supra note 84, at 1278.
140 Reno, 521 U.S. at 885.
141 The bills do not discriminate between types of speech, all speech is subject to an individual complaining, and therefore altering the speech. S.B. S.6779, 2012 S., 2012 Sess. (N.Y. 2012); S.B. 1614, 98th Gen. Assemb. (Il. 2013).
142 The court has drawn distinctions between political contributions and political expenditures. Finding that individual expenditures were “expressions” and political contributions “actions”, drawing a line that
case, Margaret McIntyre was charged with violating an Ohio statute that prohibited individuals from disseminating election-related literature without including their name and address.\textsuperscript{143} The court held that because this statute attempted to regulate “core political speech” that the proper review was strict scrutiny, requiring the statute to be narrowly tailored to a substantial state interest.\textsuperscript{144}

This is not to say that the actions of Violentacrez are political in nature. With these statutes, the state is attempting to regulate speech regardless of the content; all speech is subject to the same restrictions. The proposed bills sound closer to a content-neutral regulation rather than a content-based regulation. However, the content-neutral test used by the Courts would not be used to evaluate these bills, as the bills reach beyond time, place, and manner restrictions,\textsuperscript{145} and instead are aimed at speech itself, and in so doing encompass not only actionable speech, but protected speech as well.

The \textit{O’Brien} case developed a test concerning an incidental burden on speech that results from a content-neutral statute.\textsuperscript{146} The \textit{O’Brien} test requires that the government has the power to regulate in the field, the regulation advances an important state interest, the interest is unrelated to speech, and finally that the incidental effect on speech is no greater than necessary.\textsuperscript{147} Looking at the proposed bills, the government does have the power to regulate actions on the Internet,\textsuperscript{148} however, the bills would fail on at least two

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  \item Congress could regulate the latter, but needed to overcome strict scrutiny to regulate or restrict the former. See generally Buckley v. Valeo, 424 U.S. 1 (1976).
  \item Id. at 347. “When a law burdens core political speech we apply ‘exacting scrutiny’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.” Id.
  \item Id.
  \item The question was not clearly reached in the opinion, however the discussion centers on why the regulation was not a time, place, and manner restriction in \textit{Reno}, \textit{Reno}, 521 U.S. at 867–68. In a concurrence, O’Connor said the question should focus on whether or not “the CDA as a zoning law hinges
\end{itemize}
of the final three prongs of the test. The state does have an interest in protecting individuals who are the subject of defamatory,\textsuperscript{149} or incendiary speech,\textsuperscript{150} but courts have been reluctant to uphold restrictions that attempt to regulate such speech because often such regulations hinder protected speech.\textsuperscript{151}

The third prong requires that the interest be unrelated to speech.\textsuperscript{152} That can hardly be said with the restrictions in the proposed bills, as they are directed at speech in that they allow an individual to identify objectionable speech, without any reason, and the speech then would either be deleted or identifying details of the anonymous poster would be divulged.\textsuperscript{153}

Finally, the burden on speech would be much greater than necessary.\textsuperscript{154} The true effect of these bills would be to stop people from posting information all together if they simply knew that they could be identified at the whim of an uninterested bystander.

D. Overbreadth and Vagueness Analysis

A few years after the \textit{McIntyre} decision, the court heard \textit{Watchtower Bible v. Village of Stratton}.\textsuperscript{155} In this case, the city level attempted to regulate the activity of door-to-door sales through the adoption of an ordinance.\textsuperscript{156} Rather than applying a standard of

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{149} New York Times Co. v. Sullivan, 376 U.S. 254, 268 (1964).
\item\textsuperscript{150} Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969).
\item\textsuperscript{151} Because this statute is aimed at speech rather than conduct that is associated with speech, the proper analysis would probably be overbreadth analysis, the Court’s investigation of the \textit{O’Brien} test would probably end at this point. \textit{See} discussion \textit{infra} Part IV-D.
\item\textsuperscript{152} \textit{O’Brien}, 391 U.S. at 376.
\item\textsuperscript{154} \textit{See} discussion \textit{infra} Part IV–D.
\item\textsuperscript{155} 536 U.S. 150 (2002).
\item\textsuperscript{156} \textit{Id.} at 153–54.
\end{enumerate}
\end{footnotesize}
secondary effects or incidental burdens, the Court found that the statute overbroad because in attempting to protect citizens from fraudulent door-to-door sales, the statute covered more speech than was necessary. When the statute was found to be overbroad, the question of the statute being content-neutral or content-based was not reached. A statute is required to be aimed at the actual harms, rather than having a simple rational relation to some broad outcome. In a dissent, Rehnquist did argue that the statute should be evaluated as content-neutral rather than overbroad, and found the statute to be constitutional. The distinction between a statute being content-neutral or overbroad is that a content-neutral statute will restrict speech regardless of the content of the speech, but does so one of two ways. First, either the speech being restricted is done so in a time, place, or manner method, such as restrictions on times when protests can be held, or second, when the restriction has an incidental burden on speech. The bills here are not

157 "The secondary effects doctrine allows a court to characterize a speech regulation as content-neutral instead of content-based and apply intermediate scrutiny if the regulation is aimed at suppressing the 'secondary effects' of the speech and not the speech itself." Christopher J. Andrew, The Secondary Effects Doctrine: the Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent, 54 Rutgers L. Rev. 1175, 1175 (2002).

158 Incidental burdens on speech are regulated under the standard in United States v. O'Brien, in which Chief Justice Warren wrote: “This court has held that when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” United States v. O’Brien, 391 U.S. 367, 376 (1968) (emphasis added). See also, Christopher Thomas Leahy, The First Amendment Gone Awry: City of Erie v. PAP’S A.M., Ailing Analytical Structures, and the Suppression of Protected Expression, 150 U. Pa. L. Rev. 1021, 1034 (2002).

159 “The mere fact that the ordinance covers so much speech raises constitutional concerns. It is offensive—not only to the values protected by the First Amendment but to the very notion of a free society.” Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150, 165–66 (2002).

160 “Even if the interest in preventing fraud could adequately support the ordinance insofar as it applies to commercial transactions and the solicitation of funds, that interest provides no support for its application to petitioners, to political campaigns, or to enlisting support for unpopular causes.” Id. at 168.

161 “There is no support in our case law for applying anything more stringent than intermediate scrutiny to the ordinance.” Id. at 175 (Rehnquist, C.J., dissenting).


time, place, or manner restrictions, and are directly aimed at speech itself, which requires an overbreadth analysis.

As *Watchtower* shows, when statutes are broad and all-encompassing there is an additional analysis the courts use in evaluating the regulations. Rather than looking at the bills and the speech that the bills reach, the court will employ either an overbreadth or vagueness test.\(^{164}\) Simply reaching speech that is both actionable and allowed is not enough to show a statute as overbroad.\(^ {165}\) In *Broadrick v. Oklahoma*, the court established that a statute had to have a “substantial” effect on allowable speech while attempting to combat actionable speech.\(^ {166}\) The Court recognized that some speech is actionable, however, in attempting to curtail that speech, the ordinance or statute behind that interest could be too broad, and in effect curtail not only the actionable speech, but protected speech as well.\(^ {167}\)

The proposed bills would have a substantial effect on allowable speech. By allowing individual users to require that speakers identify themselves, the speakers would likely delete their posts, or refrain from posting. In *Silencing John Doe: Defamation & Discourse in Cyberspace*, Professor Lidsky details various times where companies have used the current methods to reach actionable speech in order to silence critics.\(^ {168}\) The current method of identifying anonymous posters offers the protection of the courts. By requiring that plaintiffs file defamation suits that will survive motions to dismiss,\(^ {169}\) the ability of individuals to indiscriminately reduce speech is greatly reduced. By taking

\(^{164}\) *Id.* at 165–66.

\(^{165}\) *See* *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 858–65 (1970).


\(^{167}\) *Id.*


\(^{169}\) *See* discussion *supra* Part III.
away these safeguards, as these bills do,\textsuperscript{170} any post could be subject to arbitrary and wanton censor by any individual with authority from the state.

Because these bills would be so broad, reaching speech that is not only actionable, but protected, they would fail on an overbreadth analysis. The example of Reddit and Violentacrez can show how these bills could be abused at the direction of third party speakers.

Violentacrez did post sexualized images of young girls on his “jailbait” subreddit. It would be moral, even legal, for an individual to identify him as the person using those images, as the Court has long held that child porn is not protected speech.\textsuperscript{171}

On the other hand, any user could post information in the politics subreddit about a candidate running for office, exposing a kickback scheme, or improper uses of campaign finance. These bills would not offer protection to that user who is advancing specific, protected goals under the First Amendment. Protected speech should always outweigh the interests of unprotected speech, and the Court will recognize that the interests of the many who post innocuously and freely outweigh the significant minority who choose to invade the privacy and take advantage of the naivety and lack of technological sophistication of other Internet users.

\textbf{E. Compelled Speech and Compelled Access}

Other methods courts use to evaluate speech are premised on the theories of compelled speech and compelled access to the speech of others. Compelled speech comes from the idea that the right to free speech under the First Amendment also carries with it


\textsuperscript{171} See \textit{e.g.}, New York v. Ferber, 458 U.S. 747, 756–66 (1982) (holding that states can proscribe the possession of child pornography, because the various asserted interests were compelling enough to overcome any individual’s First Amendment rights to possess such material).
the right of the inverse, the right not to speak.\textsuperscript{172} This comes up in the case of the proposed bills because the bills require additional speech to be added to the post in the form of the poster’s name and location.\textsuperscript{173} Compelled access comes up in the context that by requiring an addition to the speech of a user, the complainer under the bills have access to speech that is not theirs.\textsuperscript{174}

Compelled speech can be found in the case of \textit{West Virginia State Board of Education v. Barnette}, which struck down a statute in West Virginia requiring students to recite the pledge of allegiance.\textsuperscript{175} By requiring individuals to attach their name, IP address, and address to a post,\textsuperscript{176} the proposed bills would at the same time require the original poster to “forego any contrary convictions of their own”\textsuperscript{177} in choosing to add their names to the speech. \textit{McIntyre} held that the name of an individual is no different than any other content that a speaker could choose to include.\textsuperscript{178} That choice would be taken out of the hands of the speaker.\textsuperscript{179}

Compelled access to speech is also a consideration a court might measure with these bills. In \textit{Pacific Gas & Elec. Co. v. Public Util. Comm’n}, the Court disallowed a regulation that required an electric company carry a flier for another company who was in opposition to the business practices of PG&E inside of the monthly bills sent to customers.\textsuperscript{180} Though that case dealt with commercial speech,\textsuperscript{181} the theory that the

\textsuperscript{173} S.B. S.6779; S.B. 1614.
\textsuperscript{174} See e.g., Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding that a state could not require a television station to provide equal access to candidates for political office).
\textsuperscript{176} See S.B. S.6779; S.B. 1614.
\textsuperscript{177} Barnette, 319 U.S. at 633.
\textsuperscript{179} See S.B. S.6779; S.B. 1614.
government cannot give the right of others to add speech to your speech should shine forward under an analysis of the proposed bills. In the proposed bills, the speech of the aggrieved party is added to an individual’s speech.  

The Court invalidated the regulation on compelled access grounds for two reasons. First, the regulation gave competitors access to the facilities of PG&E—space on the bill—who could have an opposing opinion. Second, editorial control over the content of a message was removed from the primary speaker.

Running the proposed bills through this test easily comes to the conclusions that they do give access to those who may oppose the speakers message, and by allowing an individual to compel the identity of a user through a website, remove editorial control from the hands of the speaker.

V. ANONYMOUS ASSOCIATIONS AND INTERNET COMMUNITIES

An additional way that courts can review the statutes is through freedom of association. In 1958, the Court held in National Ass’n for Advancement of Colored People v. Alabama ex rel. Patterson (“Patterson”) that a state could not compel the National Association of Colored People (“NAACP”) to divulge their membership lists because members have the right “to associate freely with others.” Here, the Court found that the individuals who wished to engage in lawful activities had the right to

181 Id.  
182 See S.B. S.6779; S.B. 1614.  
184 Id.  
185 See S.B. S.6779; S.B. 1614.  
187 Id. at 466.
assemble anonymously, and in so doing the entity that they assembled under could not be compelled to identify them as individuals.\footnote{See generally Id.}

In adopting the right to associate anonymously, the Court required that Alabama pass strict scrutiny in compelling the NAACP to disclose their membership lists.\footnote{Id. at 463–66.} Here, New York and Illinois are attempting to do the same thing to the individual websites that allow users to post comments.\footnote{See S.B. S.6779, 2012 S., 2012 Sess. (N.Y. 2012); S.B. 1614, 98th Gen. Assemb. (Il. 2013).} The similarity is not absolute, as the civil rights movement involved much greater individual interests than the simple proposition of free speech on the Internet, but the rules found in cases protecting those great interests have reverberations into many different areas.

However, in finding this right to associate anonymously, the Supreme Court found it necessary to draw the line on anonymous assembly at lawful activities, rather than political, artistic, or some other traditional value-based speech. In \textit{Patterson}, the court distinguished this from the earlier decision of \textit{New York ex rel Bryant v. Zimmerman} because of an emphasis on the “nature of the organization” at hand, and allowed the state to reach the membership lists of organizations “which demanded an oath as a condition to membership to file with state officials.”\footnote{278 U.S. 63 (1928).}

\textquote{In its opinion, the Court took care to emphasize the nature of the organization which New York sought to regulate.”} \textit{Patterson}, 357 U.S. at 465.

\footnote{Id.}

Online speech comes in many forms. Some websites provide information about news and events on their own, and then allow people to comment on the story by
registering a username and account. Other websites exist solely through “user-generated-content.” These websites do not post any information on their own, rather they provide a platform for which users can add content through a variety of mediums in an effort to communicate with a large audience who has a similar interest.

There is no action by the website that requires an individual to identify themselves before—or while—creating the account, and all that is generally required is an email address or membership on some other social networking website. There is no “oath” required, only a click that says you will agree to the terms of service.

The question here comes down to the content of the speech itself. The bills proposed in New York and Illinois are clearly aimed at defamatory speech. However, in doing so, they will run into overbreadth issues under this analysis as well. Not all speech on the Internet is defamatory. Through these proposed bills, all speech is presumed defamatory, in that it will either be deleted or the identity of the poster will be made available without any showing at all, in clear disregard to the protections offered to anonymous posters in *Dendrite, America Online*, and *Seescandy.com*.

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195 Reddit would be an example of a web site that consists of user-generated-content because all the information contained within the pages is generated by users rather than the owners of the domain. Reddit, http://www.reddit.com (last visited Jul. 11, 2013).

196 Id.

197 To create an account on Reddit all that is needed is an individual to create a username, password, and complete a CAPTCHA box, which requires you to type a word or group of letters and numbers in a box to ensure that you are a person, not a robot. REGISTRATION, http://www.reddit.com/wiki/registration (last visited Jul. 11, 2013). An email address is not required. Id.

198 A terms of service agreement is not required on Reddit. Id. However, this is required on many other sites. See e.g., SITE GUIDELINES, http://honda-tech.com/showthread.php?t=2599445 (last visited Jul. 11, 2013).


200 See Id.
In *Patterson*, the court spoke about the power and the effect that threatening individuals who join a group on an anonymous basis would have on not only speech, but the ability of groups to peacefully form in order to redress issues.\footnote{“[W]e think it apparent that compelled disclosure of petitioner’s Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the organization.” *Patterson*, 357 U.S. 449, 462–63 (1958).} By removing any burden from the complainer, individuals with a bone to pick, or just for laughs, could bombard different social media sites, websites, message boards, or any site that allows user-generated-content with take-down requests, and the website would have to either identify the users or take the comment down.\footnote{S.B. S.6779; S.B. 1614.}

Often these websites become communities in and of themselves, especially the ones that consist mostly of user-generated content. Individuals choose to join websites because of the community, and the characters that make up these communities are able to police the actions of other members without government infringement. If speech does go too far in the community, “white knights” will stand up and protect the wronged individual. Or if speech is not acceptable for a certain community, moderators, or administrators can simply shut down the discussion itself, by “locking” or “closing” a discussion thread. Other commenters can add to the thread and debunk the thoughts or ideas. Reddit is a perfect example of the idea of a community or an association on the Internet.\footnote{See discussion *supra* Part II.}

One of the earliest justifications for allowing free speech has been the marketplace of ideas; that by discussing issues, the truth will come out.\footnote{“[T]here must be discussion, to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument: but facts and arguments, to produce any effect on the mind, must be brought before it.” *JOHN STUART MILL*, *ON LIBERTY*, 30 (Elibron Classics Series 2006) (1880).}
has created a utopia for these market-theory absolutists. People from all around the world can come together and discuss any topic at any time, and though their intentions are not always noble, they can, and often do, find the truth.

The court has long held that the “chilling effect”\textsuperscript{205} of a governmental action can prove dispositive the entire effort, solely based on the fact that the rights of individuals under the Constitution, especially those found in the original Bill of Rights, are superior to all but the strictest reasons of government infringement.\textsuperscript{206}

Reddit is nothing more than a community, an association that individuals can choose to join, or choose to ignore. Unlike the NAACP, the goal of Reddit is not equal rights through social justice.\textsuperscript{207} However, Reddit is also a far cry from the actions of the Klu-Klux-Klan, which was required to divulge membership lists due to the “nature of the organization.”\textsuperscript{208} The members of Reddit should be afforded the right to remain anonymous. The experience surrounding the doxxing of Violentacrez shows that Internet communities themselves can effectively “police” speech and postings that they find detrimental to the community. The government needs to tread lightly when dealing with speech. The maxim that an individual cannot “falsely [shout] fire in a crowded theatre”,\textsuperscript{209} has long held that community standards should gauge the power, acceptance,
and properness of speech. Internet communities should be offered this same protection, as they are just communities at the end of the day. When speech goes too far in the eyes of a community, the community will rise, and the truth will come out. Because of the nature of the community, and the ability of an individual to join a community on an anonymous basis, the States of Illinois and New York would have to establish a compelling state interest and show that the regulation is the least restrictive means in advancing that interest, and the States would be unable to do that.

VI. DEFAMATION AND THE INTERNET – HOW TO PROPERLY SOLVE THE ISSUES BEHIND THE BILLS

The bills here are aimed at preventing defamatory speech. In doing so, these bills sweep in great amounts of protected or justifiable speech as well. Because of their broad aim, courts would probably apply an overbreadth analysis. In protecting citizens against this speech, the state would have to assert an interest that goes beyond the level of fraud, crime, and invasion of privacy, the asserted interests that the village of Stratton attempted to argue.

Reading these bills however, brings about a different analysis from the traditional argument that an individual has a right to speak anonymously. Though the right to speak

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211 Again, in the realm of campaign finance reform, the Court has drawn distinctions which require the compelled identification of individual donors holding that the FEC regulations requiring that those producing campaign ads identify themselves because of an interest in the public of knowing who is behind the message. Citizens United v. Federal Elec. Comm’n, 130 S.Ct. 876, 913–17 (2010). This is distinct from the issues of general anonymity that this note deals with, in that though some of the speech on sites like Reddit may be political in nature, the bills reach far beyond just various subjects and silos of speech and affect all speech.
212 See discussion supra Part IV.
214 See discussion supra Part III.
215 See discussion supra Part IV.
anonymously is unquestionable in regards to political speech and other speech like artistic speech, such as literature,\textsuperscript{216} the statutes are aiming at a different issue.

The speech that the statutes wish to reach is defamatory speech.\textsuperscript{217} As a general statement, defamatory speech is not afforded First Amendment protections.\textsuperscript{218} However, through a series of cases beginning in 1964 with \textit{New York Times v. Sullivan}, the Supreme Court began carving out various protections for individuals who engage in defamatory speech when that speech is aimed at public figures.\textsuperscript{219}

In \textit{Sullivan}, a police chief in Alabama brought suit against the New York Times over the content of an ad that ran in the paper which mischaracterized the actions of the police and government officials in Alabama during the civil rights movement.\textsuperscript{220} In order to protect the newspaper industry from a litany of claims for every article printed, the court carved out the standard of “actual malice” where a public figure had to show that the defendant either knew or should have known that the information printed was false.\textsuperscript{221}

This standard continued to evolve over the years. In \textit{Gertz v. Robert Welch, Inc.},\textsuperscript{222} the Court held that when the matter at hand was a “public concern,” a private figure could recover actual damages without having to prove actual malice.\textsuperscript{223} But if they were able to show actual malice, a private plaintiff could recover presumed or punitive

\begin{itemize}
\item \textsuperscript{216} See \textit{Talley v. California}, 362 U.S. 60, 62–65 (1960).
\item \textsuperscript{217} S.B. S.6779; S.B. 1614.
\item \textsuperscript{219} See generally Christine Hancock, \textit{Orgins of the Public Figure Doctrine in First Amendment Defamation Law}, 50 N.Y.L. SCH. L. REV. 81, 81–82 (2005) (“Every plaintiff seeks to achieve the status of a private figure in order to argue for liability based on negligence.”).
\item \textsuperscript{220} \textit{New York Times}, 376 U.S. at 256.
\item \textsuperscript{221} “The constitutional guarantees require … a federal rule that prohibits a public official from recovering damages for [defamation] relating to his official conduct unless he proves that the statement was made with ‘actual malice’.” \textit{Id.} at 279–80; actual malice requires “knowledge that it was false or with reckless disregard of whether it was false or not.” \textit{Id.} at 280.
\item \textsuperscript{222} 418 U.S. 323 (1974).
\item \textsuperscript{223} \textit{Id.} at 348–49.
\end{itemize}
damages. In *Dun & Bradstreet v. Greenmoss, Inc.*, the court held that private plaintiffs could recover presumed and punitive damages if the matter at hand was a private matter.

Previous distinctions in defamation cases have centered on damages, rather than speech itself. Because access to the portals of speech is equal across the Internet, a new line should be drawn relating to the First Amendment rights of individual speakers.

It would seem that most of the speech that the legislatures of New York and Illinois are attempting to reach would fall into the category of private persons and private concerns. Because the speech falls at this level, a plaintiff would not have to prove actual malice, but would still have the hurdle of positively identifying the speaker as an individual.

The Internet has brought a great amount of change to culture and status of individuals. People no longer go to the traditional printed newspapers for their daily news. Beyond cable news networks, people gather news from sites like yahoo.com, or blogs like gawker.com, and even social networking and media sites like reddit.com and facebook.com.

The courts should not ignore this shift. When the *Sullivan* case was decided, people got their news once or twice a day via newspapers. The Internet has changed the landscape of the world, and has brought everyone much closer to one another in the sense that it is now much easier to conduct a conversation with an individual from another

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224 Id.
226 Id. at 755–62.
228 See generally Katherine D. Gotelaere, *Defamation or Discourse?: Rethinking the Public Figure Doctrine on the Internet*, 2 CASE W. RES. J.L. TECH. & INTERNET 1 (2011) (for a more exhaustive evaluation of current defamation standards in the age of the internet).
town, another state, or another country. The Internet has also brought a larger audience to
speakers, in Reno v. ACLU, the Supreme Court characterized an anonymous poster as
“a town crier with a voice that resonates farther than it could from any soapbox.”

The Internet not only allows an individual to speak about what is on their mind, but it also allows the individual about whom the post is aimed to respond directly to the speech. In deciding the line of cases that originated with Sullivan, the Supreme Court offered among the justifications for a higher threshold of public figures the idea that the seeking of the truth could be done in the press itself, as the public figures would have greater access to the press than a private individual.

On the Internet, all individuals have the right to redress their grievances on an equal footing with the offending poster, websites where this anonymous speech is open to any and all. The individual who runs the site, or the community at large are better able to determine the value of speech as a collective whole rather than any individual who may find fault with the speech for a variety of reasons. The editorial control should remain with the community or the individual who runs the site, and they should be allowed to control the flow of content, not an individual acting under the color of state power. The individual who has been attacked can also use the protection of anonymity in the discussion as well.

The effect of these bills is to allow a state-sponsored “doxxing” of an individual. The effect would have a “chilling effect” on not only speech that can be reached through

\[\text{References:}\]

230 Id. at 870
traditional defamation based analysis, but could cause problems for people who choose to allow themselves to be identified after a complaint on their speech.

With the current method of identifying anonymous users, there have been various abuses as well. In her article “Silencing John Doe: Defamation & Discourse in Cyberspace”, Larissa Lidsky illustrates various instances where lawsuits are brought against anonymous posters who post critical opinions about companies on investment related message boards. The companies are concerned about the possible impact of negative statements on their stock prices, and the motivation behind is not to further discussion and find the truth, but to effectively silence the user. This power was only afforded to corporations or the wealthy, but these bills attempt to shift the power of speech from the speaker to the target, where anyone’s speech or opinion can be quickly quashed by registering a simple complaint with the website administrator.

Because of the unique and changing nature of speech on the Internet, and the ability for individuals to abuse proposed restrictions upon the speech of others, courts should apply a strict scrutiny standard or overbreadth analysis to these bills. By requiring this, the states will have to show a compelling interest and that the bills are narrowly tailored to this interest. In Watchtower Bible, the court held that invasion of privacy, fraud and crime are not compelling state interests. On the other hand, the court also found that the statute prohibiting door to door sales was not narrowly tailored. The same should hold true for these bills. The stated purpose is to protect individuals against

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232 See Lidsky, supra note 168, at 945.
233 Id.
235 See generally Fallon, Jr., supra note 84, at 1278.
237 “The mere fact that the ordinance covers so much speech raises constitutional concerns.” Id. at 165.
defamatory speech,\textsuperscript{238} which would be akin to a crime or invasion of privacy, and the bills are so broad as to include all speech,\textsuperscript{239} even core political speech, which is afforded the highest protections available.\textsuperscript{240}

A new bright line should be drawn in defamation cases, rather than distinction between private victims and public victims, the distinction should reflect the current mores and standards of Internet speech and community standards. The current standards are no longer appropriate for today’s Internet world. A line should be drawn to include with the speech of writers and news information that is subject to editorial control, the speech of individual internet commenters. The writers who post with editorial control should be held to the former standards found in the line of cases of \textit{Sullivan} to \textit{Gertz} to \textit{Dunn}. In the case of anonymous commentators, who post to those stories or on other social websites where there is no editorial control over their content, a rule similar to the “actual malice” standard should apply to individuals seeking retribution for defamation related damages, the current protections offered to individuals through \textit{Dendrite}, \textit{America Online}, and \textit{Seescandy.com} all provide proper methods to identify anonymous posters who cross the line from protected speech to actionable speech.

\section*{VII. Conclusion}

Though the speech offered by Violentacrez may be repulsive to many, speech should not be limited by government action. In New York and Illinois, proposed bills aim to remove any burden of proof from a plaintiff in requiring that a speaker identify himself

\textsuperscript{238} S.B. 6779; S.B. 1614.
\textsuperscript{239} \textit{Id.}
\textsuperscript{240} \textit{See e.g.}, McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 357 (1995).
or herself, and require that the website where the comment was posted either remove the information, or reveal the true identity of an individual.241

Under current constitutional scrutiny, these bills, as written, would fail on both free speech and freedom of association grounds.

The current method of identifying anonymous speakers has built a strong balance between the constitutional rights of individuals who wish to remain anonymous, and the rights of those who feel they have been injured through defamatory statements online.

However, the issue does not stop there, courts should review the current defamation laws in respect to the changing nature of speech and interaction in the twenty-first century. Because of the protections and importance of speech and the changing culture, the rules brought forth in cases like Sullivan should be remolded to better represent the issues, needs, and landscape of today.

Violentacrez may not have engaged in speech that many people agree with, but his actions help show us the true value of every day speech.

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241 S.B. S.6779; S.B. 1614.