

2010

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Recommended Citation

Kirtley, Jane E., "Mask, Shield, and Sword: Should the Journalist's Privilege Protect the Identity of Anonymous Posters to News Media Websites?" (2010). *Minnesota Law Review*. 506.
<https://scholarship.law.umn.edu/mlr/506>

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Article

Mask, Shield, and Sword: Should the Journalist's Privilege Protect the Identity of Anonymous Posters to News Media Websites?

Jane E. Kirtley[†]

The editorial board of the *Daily Herald* in Wausau, Wisconsin, probably never thought it would ignite a national controversy when it named Dean Zuleger, the Administrator of Weston Village, as Person of the Year in December 2008.¹ But perhaps it should have. Within hours, angry Wausau residents began posting negative comments about the selection on the newspaper's website—anonymously, of course. They criticized Zuleger's weight, his \$118,000 (plus bonuses) salary, and his management style.² Not surprisingly, the *Wausau Daily Herald* shut down and removed the comments within a week.³

But Zuleger was not satisfied. Presumably smarting from the criticism, he decided to find out who was responsible for it. He contacted the newspaper and demanded that it identify the anonymous poster, whose screen name was "juanmoore."⁴ The editor of the 20,000 circulation *Wausau Daily Herald*⁵ gave Zuleger his critic's e-mail address, which the critic had provided when he registered to post comments on the site.⁶ Zuleger, in

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1. Ryan J. Foley, *Wis. Paper Faces Backlash for Outing Web Critic*, ABC NEWS, Sept. 17, 2009, <http://abcnews.go.com/US/wireStory?id=8603777>.

2. Posting of Jim Hopkins to Gannett Blog, *Timeline: Anatomy of a Disaster in Wausau, Wis.*, <http://gannettblog.blogspot.com/2009/04/timeline-anatomy-of-disaster-in-wausau.html> (Apr. 26, 2009, 00:19 PST).

3. *Id.*

4. Foley, *supra* note 1.

5. *See* Hopkins, *supra* note 2.

6. Foley, *supra* note 1.

turn, fired off an angry letter on official stationery in April 2009, demanding that the commenter, a businessman named Paul Klocko, stop posting personal attacks, "come out from behind the cloak," and meet him in person at his office.⁷

When Klocko complained to the *Daily Herald*, it apologized for its actions.⁸ And as a consequence, according to the Associated Press, the newspaper's corporate parent, Gannett Company, has "clarified" its policy on identifying anonymous commenters.⁹ It will do so only in cases where it is ordered to do so by a court, or when a comment threatens "imminent harm."¹⁰

Online commentators were quick to condemn the newspaper for providing the information to Zuleger. For example, on the Consumer Law & Policy Blog, Paul Levy wrote:

[L]o and behold, the paper just turned over one critic's identity. Not only without notice to the blog poster, apparently, but without even a subpoena or other court order.

There are, of course, [Internet Service Providers] who give up this information too easily, but you'd think that a newspaper, with its understanding of the importance of anonymous sources, would know better than that.¹¹

Should the *Daily Herald* have known better? Should it have treated its pseudonymous commenter as a type of confidential source, demanded a subpoena, and then gone to the mat to protect his identity? Or should it have at least notified Klocko that the angry Zuleger was eager to unmask him, and invited the poster to resist the demand if he cared to?

At least one commentator in the mainstream media says "no." In his *Miami Herald* column, Edward Wasserman, the Knight Professor of Journalism Ethics at Washington and Lee University, wrote: "[T]here's a powerful current in favor of giving anonymous posters exactly the same protection that journalists fight to win for confidential sources. And that's a bad idea."¹²

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Posting of Paul Levy to Consumer Law & Policy Blog, <http://pubcit.typepad.com/clpblog/2009/09/gannett-shamed-into-changing-policy-on-responding-to-request-to-identify-blog-comments.html> (Sept. 18, 2009, 18:07 EST).

12. Edward Wasserman, *Limit Anonymity for Internet Critics*, MIAMI HERALD, Sept. 28, 2009, <http://www.miamiherald.com/opinion/other-views/story/1255416.html>.

Although acknowledging that newspapers in other states, including Oregon, Montana, and Illinois, have fought to keep the identity of their anonymous commenters secret, Wasserman argues that “anonymous posters are nothing like confidential sources.”¹³ As a rule, he points out, news organizations know who their confidential sources are, and what their agendas and biases may be.¹⁴ They vouch for the credibility of their sources to their readers and viewers, and by relying on them, put their own credibility on the line. By contrast, the identities of posters are “truly unknown,” and “no one even tries to verify the information from the anonymous poster.”¹⁵ Wasserman concludes that “claiming for anonymous posters the protections that confidential sources deserve debases the currency, mak[ing] a whistleblower no different from a crank. As an ethical matter, it’s indefensible.”¹⁶

Constitutional law recognizes that speakers enjoy a qualified right to remain anonymous.¹⁷ But competing reputational, privacy, copyright, or law enforcement interests may outweigh that right.¹⁸ A news organization is not a government actor. It has no legal obligation to protect the First Amendment rights of others. Any contractual obligation it does have presumably would be limited to the undertakings set forth in the news or-

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *See, e.g.,* *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 200 (1999) (finding unconstitutional a requirement that petition circulators wear name badges); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (holding that a statutory provision prohibiting distribution of anonymous campaign literature violated the First Amendment). The high court has made clear that First Amendment protections apply to speech on the Internet. *See, e.g.,* *Reno v. ACLU*, 521 U.S. 844, 849 (1997).

18. *See, e.g.,* *Eldred v. Ashcroft*, 537 U.S. 186, 218–20 (2003) (noting that certain copyright protections do not infringe First Amendment rights); *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 738 (1970) (upholding a mailing ban in order to protect the privacy of the recipients). Because courts have concluded that the speech of alleged copyright infringers is of little value, unmasking anonymous infringers generally requires simply an allegation that the infringement occurred and that there is a “danger that the ISP will not preserve the information sought,” even if there is no lawsuit pending. *See* Ashley I. Kissinger & Katharine Larsen, *Shielding Jane and John: Can the Media Protect Anonymous Online Speech?*, *COMM. LAW.*, July 2009, at 4, 7 (quoting *Arista Records, LLC v. Does 1–9*, No. 2:07-CV-961, 2008 WL 2982265, at *5 (S.D. Ohio July 29, 2008)); *see also* 17 U.S.C. § 512(h) (2006) (discussing subpoena requirements).

ganization's Terms of Service or Privacy Policy.¹⁹ As for media ethics, the Code of Ethics of the Society of Professional Journalists, the largest voluntary association of its kind in the United States, cautions that journalists should "[a]lways question sources' motives before promising anonymity," "[c]larify conditions attached to any promise made in exchange for information," and "keep promises."²⁰ Who is right? Is it indefensible for a news organization to "out" an anonymous commenter? Or is it indefensible to resist?

This Article will examine the emerging law as courts consider whether to extend the journalist's privilege to protect anonymous "Jane and John Doe" posters on news organizations' websites. And it will consider the ethical as well as legal dilemmas that these cases raise for news organizations. Part I discusses the variety of legal tests that have emerged from the lower courts in balancing anonymous speech against other competing interests. Part II then discusses the phenomenon of greater interactivity in the new media and its consequences, both positive and negative. Part III explores the media ethics considerations arising from the protection of anonymous speech, and Part IV concludes by identifying some as yet unanswered questions.

I. STRIKING A BALANCE BETWEEN ANONYMOUS SPEECH AND OTHER COMPETING INTERESTS

Because First Amendment rights are not absolute, courts have struggled to balance the rights of an anonymous speaker to express her views against the competing rights of other individuals to seek redress for reputational injury or violations of personal privacy.²¹ The rough and tumble world of the Internet encourages robust debate and discussion, but also invites ad hominem attacks and unsubstantiated accusations by anonymous speakers. Individuals and corporations who wish to sue face a number of obstacles.

19. See, e.g., S.F. Chronicle, Privacy Policy (Dec. 29, 2008), <http://www.sfgate.com/pages/privacy/> [hereinafter S.F. Chronicle Policy]; Wall Street Journal, The Wall Street Journal and Barron's Privacy Policy, (Sept. 16, 2008), http://online.wsj.com/public/page/privacy_policy.html [hereinafter Wall Street Journal and Barron's Policy].

20. SOC'Y OF PROF'L JOURNALISTS, CODE OF ETHICS 1 (1996), available at <http://www.spj.org/ethicscode.pdf>.

21. See *supra* notes 17–18 and accompanying text.

The Communications Decency Act (CDA) immunizes Internet companies and website owners (ISPs) from liability for defamatory content posted by commenters,²² and has been broadly construed by the courts.²³ As a result, a potential plaintiff typically commences his lawsuit by filing a complaint against an anonymous "Jane or John Doe," and then asks a judge to issue a discovery subpoena to be served on a third party who owns the website, provides the poster with Internet service, or both.²⁴ It is also possible to sue the website or ISP, and then serve a discovery request on that defendant.²⁵ But in either case, the object is the same: to unmask the anonymous poster. The website will be asked for all "identifying information" regarding the anonymous or pseudonymous poster, including the Internet protocol (IP) address assigned to the poster's computer.²⁶ The IP address identifies the poster's ISP, which in turn, will be asked for the account information of the owner, including name, address and telephone number.²⁷

As scholars Larissa Lidsky and Thomas Cotter have noted, the Supreme Court has provided little guidance to lower courts attempting to develop a rubric to balance the conflicting rights of speakers and subjects in this context.²⁸ Accordingly, a variety of tests have emerged from the lower courts. A critical aspect of each test is how heavy a burden should be imposed on the plaintiff before he can force disclosure of the poster's identifying information.

22. See Communications Decency Act, 47 U.S.C. § 230(c) (2006).

23. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330, 335 (4th Cir. 1997) (noting immunity for internet service providers, even for actions occurring prior to the enactment of the CDA).

24. For example, in *Best Western International, Inc. v. Doe*, No. CV-06-1537, 2008 WL 4630313, at *1 (D. Ariz. Oct. 20, 2006), the plaintiff filed suit against John Doe defendants and then sought expedited discovery of third-party ISPs.

25. See, e.g., *Pub. Relations Soc'y of Am. v. Road Runner High Speed Online*, 799 N.Y.S.2d 847, 849 (Sup. Ct. 2005).

26. See, e.g., *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1089-91 (W.D. Wash. 2001).

27. See Nathaniel Gleicher, Note, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 327-29 (2008).

28. Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1538 (2007).

A. THE "MOTION TO DISMISS" TEST

One of the first cases to consider the Jane and Jon Doe issue was *Columbia Insurance Co. v. Seescandy.com*.²⁹ In this trademark infringement suit, See's Candy sought the identity of an anonymous "cybersquatter" who had registered multiple similar domain names in hopes of selling them back to the manufacturer.³⁰ The court held that the valid trademark interest asserted needed to be balanced against the "right to participate in online forums anonymously or pseudonymously."³¹ Recognizing that too lenient a standard would permit litigants to use the discovery process to harass anonymous speakers,³² the court established a test requiring the plaintiff to: (1) provide sufficiently specific 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 and a "statement of reasons justifying the specific discovery requested" with the court.³³

The court's test leaves open the question of how much evidence of an underlying claim would be required. However, some commentators have pointed out that despite its reference to simply "withstand[ing] a motion to dismiss,"³⁴ the court actually set a higher standard than would be required under Federal Rule of Civil Procedure 12(b)(6) by requiring the plaintiff to make some showing that an act giving rise to civil liability actually occurred and that the discovery is aimed at revealing specific identifying features of the person or entity who committed that act.³⁵

B. THE "GOOD FAITH" TEST

The earliest articulation of the "good faith" test arose in *In re Subpoena Duces Tecum to America Online, Inc.*³⁶ The plaintiff company (which, ironically, chose to proceed anonymously)

29. 185 F.R.D. 573 (N.D. Cal. 1999).

30. *Id.* at 576.

31. *Id.* at 578.

32. *Id.*

33. *Id.* at 578–80.

34. *Id.* at 579.

35. Kissinger & Larsen, *supra* note 18, at 6.

36. 52 Va. Cir. 26, 37 (Cir. Ct. 2000), *rev'd on other grounds sub nom.* Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

sought the identity of five John Does who it claimed had published defamatory factual misrepresentations and "confidential material insider information" on an Internet chat room forum.³⁷ Adopting a three-part test, the court required the plaintiff to satisfy the court by the pleadings or evidence, that it had a legitimate good faith basis for its claim, and that the defendants' identities were central to the claim.³⁸ Although recognizing the right to anonymous speech, the court concluded, without elaboration, that the company had met its burden.³⁹ This test is sometimes referred to as the "Virginia test."⁴⁰

A similar test which, when applied resulted in a different outcome, was adopted by the federal district court in *Doe v. 2TheMart.com Inc.*⁴¹ The court rejected a request to unmask a group of anonymous Internet posters who commented about the company on an Internet message board and were later sought as witnesses in a stockholders' derivative suit.⁴² This four-part balancing test, which resembles the qualified reporter's privilege recognized in many jurisdictions, requires a clear showing that: (1) the subpoena be issued in good faith and not for an improper purpose, (2) the information sought be relevant to a core claim or defense, (3) the identifying information be directly and materially relevant, and (4) the information be unavailable from any other source.⁴³ The court in this case found that the company defending the derivative suit had failed to demonstrate that the identities of the speakers were material to its case.⁴⁴

37. *Id.* at 27.

38. *Id.* at 37. In 2002, the Virginia General Assembly codified a version of the test. VA. CODE ANN. § 8.01-407.1(A)(1) (2007).

39. *In re Subpoena Duces Tecum to Am. Online, Inc.*, 52 Va. Cir. at 37. Subsequently, the Virginia Supreme Court reversed, finding it was unclear if the "Anonymous Publicly Traded Company" could exercise personal jurisdiction over the defendants in Indiana, where the underlying lawsuit was filed. *See Am. Online, Inc.*, 542 S.E.2d at 383. The court also held that the plaintiff company failed to meet its burden to demonstrate why it should be allowed to proceed anonymously. *Id.* at 385.

40. *See, e.g., Kissinger & Larsen, supra* note 18, at 7 (noting the Virginia test).

41. 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001).

42. *Id.* at 1097.

43. *Id.* at 1095.

44. *Id.* at 1097.

C. THE PRIMA FACIE OR SUMMARY JUDGMENT TEST

In *Dendrite International v. Doe No. 3*, a company that provided custom computer programming for the pharmaceutical industry claimed that a number of pseudonymous individuals defamed it by commenting on its quarterly report on a Yahoo! message board.⁴⁵ After the trial court denied Dendrite's motion for expedited discovery, a New Jersey appeals court affirmed, holding that the company had failed to demonstrate that its underlying claims had merit.⁴⁶ It noted that, in a defamation action, "[t]he complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action."⁴⁷ Specifically, the court required the plaintiff to notify anonymous posters that they are subject to a subpoena seeking their identity, to specify the exact statement alleged to be defamatory, and to produce sufficient evidence to support each element of the prima facie case.⁴⁸ The court must then balance the First Amendment right of anonymous speech against the strength of the plaintiff's prima facie case and the need for disclosure.⁴⁹ In this instance, the court found that Dendrite failed to produce sufficient evidence to support its case, particularly with regard to evidence of harm to its reputation.⁵⁰

The *Dendrite* test has been applied by several other state courts, including in New York⁵¹ and Pennsylvania.⁵² But perhaps the most significant adoption—and modification—of the test occurred when the Delaware Supreme Court decided *John*

45. 775 A.2d 756, 760 n.1, 762 (N.J. Super. Ct. App. Div. 2001).

46. *Id.* at 760.

47. *Id.*

48. *Id.*

49. *Id.* at 760–61.

50. *Id.* at 772.

51. *See, e.g.,* Ottinger v. Journal News, 36 Media L. Rep. 2018, 2019 (N.Y. Sup. Ct. 2008) (finding the four-part *Dendrite* test helpful in reaching its decision); Greenbaum v. Google, Inc., 845 N.Y.S.2d 695, 698 (Sup. Ct. 2007) ("The court agrees with these requirements [in reference to the *Dendrite* test] and has followed them here.").

52. Polito v. AOL Time Warner, Inc., No. Civ.A.03CV3218, 2004 WL 3768897, at *5 (Pa. Comm. Pl. Jan. 28, 2004) (discussing the *Dendrite* test). In addition to prima facie requirements, the Pennsylvania court required the plaintiff to demonstrate the relevance and necessity of the evidence sought to the underlying claim, that it was seeking the information in good faith and not for purposes of harassment, and that there were no alternative means to identify the anonymous speaker. *Id.* at *6.

Doe No. 1 v. Cahill.⁵³ This case arose when a town council member sued four anonymous defendants for defamation and invasion of privacy based on critical comments they posted on a political blog.⁵⁴ When he sought to unmask the John Doe, the trial court applied a “good faith” standard similar to the Virginia test, finding that the plaintiff had a good faith basis on which to obtain the identity of the poster.⁵⁵

But on appeal, the Delaware Supreme Court rejected that standard, finding it “insufficiently protective” of John Doe’s right to speak anonymously.⁵⁶ Citing the U.S. Supreme Court’s opinion in *Reno v. ACLU*,⁵⁷ where the Court compared an anonymous online commenter to “a town crier with a voice that resonates farther than it could from any soapbox” who “[t]hrough the use of Web pages . . . can become a pamphleteer,”⁵⁸ the *Cahill* court observed that blogs or chatrooms “can become the modern equivalent of political pamphleteering.”⁵⁹

Although acknowledging the need to balance the competing interests at stake in the case, the *Cahill* court feared that adopting the “good faith” standard could “chill potential posters from exercising their First Amendment right to speak anonymously.”⁶⁰ Accordingly, it chose to adopt its own version of the *Dendrite* test, but with a difference: “[B]efore a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process he must support his defamation claim with facts sufficient to defeat a summary judgment motion.”⁶¹ This standard, the court said, eliminated the need to require the plaintiff to set forth the exact statements complained of or to direct the court to balance the First Amendment rights against the strength of the prima facie case, both of which were already subsumed by the summary judgment requirements.⁶²

53. 884 A.2d 451 (Del. 2005).

54. *Id.* at 454. Among other things, John Doe No. 1 called Cahill a “divisive impediment” and suggested that he was mentally unstable and paranoid. *Id.*

55. *Cahill v. John Doe No. One*, 879 A.2d 943, 954–55 (Del. Super. Ct. 2005), *rev’d sub nom.* *John Doe No. 1 v. Cahill*, 884 A.2d 451 (Del. 2005).

56. *John Doe No. 1*, 884 A.2d at 454.

57. 521 U.S. 844 (1997).

58. *Id.* at 870.

59. *John Doe No. 1*, 884 A.2d at 456.

60. *Id.* at 457.

61. *Id.* at 460.

62. *Id.* at 461. *But see* *Mobilisa, Inc. v. John Doe 1*, 170 P.3d 712, 720

The court also reaffirmed the first part of the *Dendrite* standard, requiring plaintiffs to take reasonable steps to notify the defendants, and to refrain from acting until those defendants have had a reasonable opportunity to oppose the subpoena—which in this case meant that Cahill had an obligation to post a message on the same message board where the original defamatory statements had appeared.⁶³ Applying the new test, the court concluded that Cahill had failed to demonstrate that the defendant's statements were factual and capable of defamatory meaning.⁶⁴ The *Cahill* test has been cited frequently in both state and federal courts⁶⁵—but not consistently. Courts have variously interpreted the standard as more burdensome, or less burdensome, than *Dendrite*.⁶⁶

For example, in *Independent Newspapers, Inc. v. Brodie*, Maryland's highest court adopted the prima facie *Dendrite* test, concluding that the *Cahill* test “set[s] the bar too high . . . by requiring claimants to essentially prove their case before even knowing who the commentator was.”⁶⁷ By contrast, a California appeals court, describing the *Cahill* standard as more stringent than a “motion to dismiss test” but less stringent than the prima facie test, declined to “attach a procedural label, whether summary judgment or motion to dismiss,” to the required showing, but in any event, also adopted the *Dendrite* standard.⁶⁸

Whether the distinction is a meaningful one can be debated. But it has been suggested that the confusion engendered by the *Cahill* opinion has prompted courts to move away from the case's summary judgment formulation.⁶⁹ Nevertheless, in

(Ariz. Ct. App. 2007) (holding that the separate balancing requirement is necessary in order to allow the court to consider, for example, other factors that might weigh against disclosure, such as the availability of alternative sources, or the consequences of a discovery order on a particular speaker).

63. *John Doe No. 1*, 884 A.2d at 460–61.

64. *See id.* at 467 (holding that because a reasonable person would not interpret the statements as factual, they were incapable of being defamatory).

65. *See, e.g., Mobilisa, Inc.*, 170 P.3d at 724–26; *McMann v. Doe*, 460 F. Supp. 2d 259, 266–67 (D. Mass. 2006).

66. *Compare Krinsky v. Doe* 6, 72 Cal. Rptr. 3d 231, 243–45 (Ct. App. 2008) (less burdensome), *with Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 456–57 (Md. 2009) (more burdensome).

67. *Indep. Newspapers, Inc.*, 966 A.2d at 456–57.

68. *See Krinsky*, 72 Cal. Rptr. 3d at 243–45 (likening the *Cahill* test to a motion for summary judgment, but declining to adopt the test).

69. *See id.* at 242–44; Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1373, 1378 (2009) (noting

August 2009, the District of Columbia's highest court relied heavily on the *Cahill* decision when it articulated a new standard to be used in its jurisdiction.⁷⁰ *Solers, Inc. v. Doe* involved a libel and tortious interference suit brought by a software company claiming that it had been accused of using pirated computer programs against an individual who had submitted an anonymous tip to the Software & Information Industry Association (SIIA), a group that fights software piracy.⁷¹ SIIA filed a motion to quash.⁷² In its ruling, the District of Columbia Court of Appeals wrote that it was striving to balance the rights of the anonymous speaker against the right to reputation.⁷³ The new test required that a judge:

- (1) ensure that the plaintiff has adequately pleaded the elements of the defamation claim, (2) require reasonable efforts to notify the anonymous defendant that the complaint has been filed and the subpoena has been served, (3) delay further action for a reasonable time to allow the defendant an opportunity to file a motion to quash, (4) require the plaintiff to proffer evidence creating a genuine issue of material fact on each element of the claim that is *within its control*, and (5) determine that the information sought is important to enable the plaintiff to proceed with his lawsuit.⁷⁴

The appellate court then remanded the case to the district court.⁷⁵

II. INTERACTIVITY AND ITS CONSEQUENCES

As news organizations have experimented with ways to encourage their readers to interact with their online news products, one of the most popular options has been to allow readers to post comments adjacent to a news story.⁷⁶ Although this can

that most courts are moving towards a more balanced approach than the summary judgment standard).

70. *Solers, Inc. v. John Doe*, 977 A.2d 941, 950–56 (D.C. 2009) (describing the new test as “closely resembl[ing] the ‘summary judgment’ standard articulated in *Cahill*”).

71. *Id.* at 944–48.

72. *Id.* at 946.

73. *Id.* at 951 (citing *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001)).

74. *Id.* at 954.

75. *Id.* at 958–59.

76. Among the many newspaper examples are Los Angeles Times, <http://www.latimes.com> (last visited Apr. 13, 2010), San Francisco Chronicle, <http://sfgate.com> (last visited Apr. 13, 2010), The New York Times, <http://www.nytimes.com> (last visited Apr. 13, 2010), The Washington Post, <http://www.washingtonpost.com> (last visited Apr. 13, 2010), and USA Today, <http://www.usatoday.com> (last visited Apr. 13, 2010).

facilitate robust discussion and promote a “conversation” between journalists and their readers,⁷⁷ it has also encouraged “moronic, anonymous, unsubstantiated and often venomous [speech].”⁷⁸

This is particularly likely to occur when posters are permitted to use a pseudonym, or remain anonymous.⁷⁹ The usual compromise is to require users to register with the website, provide some form of identifying information such as a telephone number or home address, and to agree to abide by (or to at least indicate that they have read) the news organization’s Terms of Service and/or Privacy Policy.⁸⁰

In an attempt to inject some degree of civility in the conversation—despite the fact that, under the CDA’s provisions, the news organization probably cannot be held liable for “uncivil” or tortious posts, particularly if they do not moderate the comments⁸¹—news organizations nevertheless may specify that posting certain types of speech will violate their “community rules” and may result in removal of the comments and banning the poster from the site.⁸² *USA Today*’s “Community Rules” are typical:

By accessing and using [discussion forums and blogs], you represent and agree that you will not:

....

- Use the Site to post or transmit any unlawful, threatening, abusive, libelous, defamatory, obscene, vulgar, pornographic, profane or indecent information of any kind, including without limi-

77. See, e.g., Jane B. Singer & Ina Ashman, “*Comment Is Free, but Facts Are Sacred*”: *User-Generated Content and Ethical Constructs at The Guardian*, 24 J. MASS MEDIA ETHICS 3, 13 (2009) (quoting a print editor who described the relationship as conversational).

78. Andrew Alexander, *Channeling Online Rage*, WASH. POST, May 10, 2009, at A17.

79. There is a distinction between a poster being “pseudonymous”—known to the readers by an assumed name, often referred to as a “screen name” or “user name”—and being “anonymous”—using no unique identifier.

80. See, e.g., N.Y. Times, Terms of Service (June 10, 2009), <http://www.nytimes.com/ref/membercenter/help/agree.html#g> (requiring “certain registration information”); USA Today, USATODAY.com Terms of Service (Apr. 1, 2009), <http://www.usatoday.com/marketing/tos.htm> [hereinafter USA Today Terms of Service] (stating that users wishing to access discussion forums and blogs must provide identifying personal information).

81. See Communications Decency Act, 47 U.S.C. § 230(c)(1) (2006) (noting that an online provider of information is not deemed to have published the information of another user).

82. For a comprehensive examination of news organizations’ user agreements, see Victoria Smith Ekstrand, *Online News: User Agreements and Implications for Readers*, 79 JOURNALISM & MASS COMM. Q. 602, 603–11 (2002).

tation any transmissions constituting or encouraging conduct that would constitute a criminal offense, give rise to civil liability or otherwise violate any local, state, national or international law;

- Use the Site to post or transmit any information, software or other material that violates or infringes upon the rights of others, including material that is an invasion of privacy or publicity rights or that is protected by copyright, trademark or other proprietary right, or derivative works with respect thereto, without first obtaining permission from the owner or rights holder;

....

- Engage in personal attacks, harass or threaten, question the motives behind others' posts or comments, deliberately inflame or disrupt the conversation, or air personal grievances about other users.⁸³

The goal of encouraging discussion between readers and journalists is an elusive one. Although some reporters have enthusiastically embraced this opportunity to engage in dialog with their readers,⁸⁴ others have rejected it. For example, *The Plain Dealer* in Cleveland, Ohio, revised its commenting policy in October 2009.⁸⁵ John Kroll, director of training and digital development for Cleveland.com, announced that in the future, the website would "be better about enforcing [the] site's longstanding community rules" against "racist or otherwise hate-filled [speech]."⁸⁶ But he also acknowledged that:

[W]e're also doing something we should have done earlier: We're joining the online conversation. For too long, we at *The Plain Dealer* posted stories on cleveland.com and then turned away to focus on the next day's news. Now, we're encouraging our reporters and editors to pay attention to what you're saying, to answer your questions and respond to your complaints.⁸⁷

83. See USA Today Terms of Service, *supra* note 80.

84. See, e.g., Posting of Erin Rosa to Columbia Journalism Review, Starting Thoughts, New Media, New Opportunities, http://www.cjr.org/starting_thoughts/new_media_new_opportunities.php?page=all (Nov. 19, 2008, 14:17 EST) ("I can't even count the number of times I have gained valuable news tips from commenters, some of them leading to award-winning material.").

85. See John Kroll, *Plain Dealer Wants Comments—Without the Side Order of Bile*, CLEVELAND.COM, Oct. 12, 2009, http://blog.cleveland.com/updates/2009/10/plain_dealer_wants_comments_-.html (describing the *Plain Dealer*'s new policy of removing abusive comments).

86. *Id.*

87. *Id.* In an interview with Poynter Online, Kroll admitted "[he] was embarrassed to tell [readers] that most likely no one read their suggestions. . . . I don't think there is any point in suggesting that there is any real interactivity on the site if readers can ask legitimate questions and not get answers most of the time." Patrick Thornton, *Plain Dealer Creates New Comment Policy, En-*

The new policy raises the question: what is the relationship between a reporter and an anonymous online commenter? Is it akin to the traditional relationship between a reporter and a source? And, if so, does it trigger legal or ethical obligations to protect that individual's anonymity?

A. CONTRACTUAL OBLIGATIONS

The Privacy Policy and/or Terms of Service for most news organization websites specify that the organization reserves the right to disclose users' identifying information for various purposes.⁸⁸ For example, the Terms of Service of STLtoday.com, the website of the *St. Louis Post-Dispatch*, states: "We have the right to disclose any information that we believe necessary to comply with any law, regulation or governmental request or that information that could prevent or assist in the resolution of any criminal, illegal, or inappropriate activity."⁸⁹ Similarly, the Privacy Policy of the *Wall Street Journal* and *Barron's* specifies that as a general rule, the news organizations will not share personally identifiable information or related data outside of Dow Jones, except under enumerated "Special Circumstances."⁹⁰ These include the need: "to protect the legal rights of Dow Jones . . . to protect the safety and security of visitors to our websites; to protect against fraud or for risk management purposes; or to comply with the law or legal process."⁹¹

The Privacy Policy of SFGate.com, the website of the *San Francisco Chronicle*, provides:

We may disclose Personal Information to government authorities, and to other third parties when compelled to do so by government authorities, at our discretion, or otherwise as required or permitted by law, including but not limited to in response to court orders and subpoenas. We may also disclose Personal Information when we have reason to believe that someone has committed, or will commit, unlawful acts or acts that endanger the health or safety of another; is causing in-

courages Staffers To Interact, POYNTER ONLINE, Oct. 14, 2009, <http://www.poynter.org/column.asp?id=101&aid=171683>.

88. Different websites use different terminology. These include "Terms of Service," "Privacy Policy," and "Use Policy Agreement." Although the terminology is often used interchangeably, as will be seen in *Sedersten v. Taylor*, No. 09-3031-CV-S, 2009 WL 4802567, at *2-4 (W.D. Mo. Dec. 9, 2009), discussed *infra*, these distinctions can be legally significant.

89. *St. Louis Post-Dispatch*, Terms of Service (Nov. 2, 2009), <http://www.stltoday.com/help/user-agreement>.

90. See *Wall Street Journal* and *Barron's* Policy, *supra* note 19.

91. *Id.*

jury to, or interference with, our rights or property, other users of the Web Site, or anyone else that could be harmed by such activities.⁹²

And the Privacy Policy of the *Minneapolis Star Tribune* simply states:

We also reserve the right to disclose Personally Identifiable Information when deemed necessary or appropriate to comply with the law, respond to claims, protect our computer systems and customers, ensure the integrity and operation of our business and systems, or protect the rights, property or safety of startribune.com, its affiliates, or others.⁹³

In contrast to the often dense and lengthy user agreements of other news organizations, the *Minnesota Independent*, an online-only newspaper supported by the American Independent News Network,⁹⁴ reduces its privacy policy to two sentences: "The *Minnesota Independent* does not share personal registration information with third-party entities not affiliated with The American Independent News Network. Your information will remain private and will be used only in aggregate (not personally identifiable) terms for site evaluation purposes."⁹⁵

These policies, despite encouraging users to provide news organizations with a variety of information, make clear that the organizations will be the ones to decide what will be disclosed—and under what circumstances. In other words, as attorney Eric P. Robinson cautions:

[Y]ou're subject to the policies of the platform(s) you use to host your material, including whether the stated policies (you know, the terms of use/service and privacy policy that you are bound by, even if you never read them) are actually followed. In other words, when platforms . . . invite you to make yourselves at home in their house, they get to set—and change—the rules.⁹⁶

92. See S.F. Chronicle Policy, *supra* note 19.

93. Star Tribune, Privacy Policy for StarTribune.com (May 18, 2009), <http://www.startribune.com/help/11484516.html>.

94. The American Independent News Network also supports news sites in Colorado, Iowa, Michigan, New Mexico and Washington, D.C. See The Am. Indep., Organization History, <http://tainews.org/about> (last visited Apr. 13, 2010).

95. Minn. Indep., Privacy Policy, <http://minnesotaindependent.com/policies> (last visited Apr. 13, 2010).

96. Posting of Eric P. Robinson to Citizen Media Law Project, *Mi Casa Es Su Casa—But I Set the Rules*, <http://www.citmedialaw.org/blog/2009/mi-casa-es-su-casa-%E2%80%94i-set-rules> (Sept. 21, 2009).

B. ETHICAL OBLIGATIONS VERSUS STATUTORY LEGAL PROTECTIONS

Given the expansive nature of most Terms of Service and Privacy Policies, therefore, it might seem surprising that a news organization would even undertake to notify an anonymous commenter when it received a demand to unmask the commenter's identity—much less to fight back against the request. But in a growing number of cases, news organizations have done just that.⁹⁷ And in many instances, they have turned to their states' journalist "shield laws,"⁹⁸ arguing that the anonymous commenter is the equivalent of a confidential source, the disclosure of whose identity cannot be compelled.⁹⁹

However, it is important to note that the journalist shield laws create a privilege—nearly absolute in a few cases, qualified in others. They do not create a legal obligation for journalists to shield information that they choose to disclose.¹⁰⁰ Never-

97. See, e.g., *Beal v. Calobrisi*, No. 08-CA-1075 (Fl. Cir. Ct. Oct. 9, 2008), available at http://www.newsroomlawblog.com/uploads/file/Beal_v_Calobrisi.pdf; *Doe v. TS*, No. CV08030693, 2008 WL 5683406 (Or. Cir. Ct. Sept. 30, 2008).

98. Thirty-seven states and the District of Columbia currently have some form of shield law. CAL. CONST. art. I, § 2(b); ALA. CODE § 12-21-142 (LexisNexis 2005); ALASKA STAT. §§ 09.25.300 to -25.390 (2008); ARIZ. REV. STAT. ANN. § 12-2237 (2003); ARK. CODE ANN. § 16-85-510 (2005); CAL. EVID. CODE § 1070 (West 2009); COLO. REV. STAT. § 13-90-119 (2008); CONN. GEN. STAT. ANN. § 52-146t (West Supp. 2009); DEL. CODE ANN. tit. 10, §§ 4320 to -4326 (1999 & Supp. 2008); D.C. CODE ANN. §§ 16-4701 to -4704 (LexisNexis 2008); FLA. STAT. ANN. § 90.5015 (West 1999); GA. CODE ANN. § 24-9-30 (1995); 735 ILL. COMP. STAT. ANN. §§ 5/8-901 to -909 (West 2003); IND. CODE ANN. §§ 34-46-4-1 to -2 (LexisNexis 2008); KY. REV. STAT. ANN. § 421.100 (LexisNexis 2005); LA. REV. STAT. ANN. §§ 45:1451 to -1459 (1999); ME. REV. STAT. ANN. tit. 16, § 61 (Supp. 2009); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (LexisNexis 2006); MICH. COMP. LAWS ANN. § 767.5a (West 2000); MINN. STAT. §§ 595.021 to -.025 (2008); MONT. CODE ANN. §§ 26-1-901 to -903 (2009); NEB. REV. STAT. §§ 20-144 to -147 (2007); NEV. REV. STAT. ANN. § 49.275 (LexisNexis 2006); N.J. STAT. ANN. §§ 2A:84A-21, :84A-21a, :84A-21.1 to -21.13 (West 1994); N.M. STAT. ANN. § 38-6-7 (West 2003); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2009); N.C. GEN. STAT. § 8-53.11 (2009); N.D. CENT. CODE § 31-01-06.2 (2009); OHIO REV. CODE ANN. §§ 2739.04, 2739.11 to -.12 (LexisNexis 2008); OKLA. STAT. ANN. tit. 12, § 2506 (West 2009); OR. REV. STAT. ANN. §§ 44.510 to -.540 (West 2003 & Supp. 2009); 42 PA. CONS. STAT. ANN. § 5942 (West 2000); R.I. GEN. LAWS §§ 9-19.1-1 to -1.3 (1997); S.C. CODE ANN. § 19-11-100 (Supp. 2009); TENN. CODE ANN. § 24-1-208 (2000); TEX. CODE CRIM. PROC. ANN. art. 38.11 (Vernon Supp. 2009); WASH. REV. CODE ANN. § 5.68.010 (West 2009); Hawaii Act of July 2, 2008, H.B. No. 2557 (to be codified at HAW. REV. STAT. § 621); UTAH R. EVID. 509.

99. See *infra* Part II.B.1-6.

100. See, e.g., *Small v. United Press Int'l, Inc.*, No. 84 Civ. 7320, 1989 U.S. Dist. LEXIS 12459, at *3 (S.D.N.Y. Oct. 19, 1989) (noting that the journalist

theless, in several cases in different states, news organizations chose to invoke their state shield laws and to fight subpoenas seeking the identifying information for anonymous commenters on their websites.

1. *Doty v. Molnar* (Billings Gazette) (Montana)

Russ Doty, a candidate for the Montana Public Service Commission, filed a libel and false light invasion of privacy suit against his opponent, Brad Molnar, for statements Molnar had allegedly posted anonymously on the *Billings Gazette* website—an accusation Molnar denied.¹⁰¹ Doty contended that even if the comments had not been posted by Molnar, the identities of all the posters should be revealed anyway so that they could serve as witnesses in his case.¹⁰²

The newspaper filed a motion to quash, arguing at the September 3, 2008 hearing that the state's shield law¹⁰³ should be interpreted to apply to the anonymous commenters on its website, contending that the identities of these individuals were covered by the statute's absolute prohibition on compelled disclosure of the identity of any "source of . . . information."¹⁰⁴ The *Gazette* also proffered an affidavit from the editor, Steve Pro-sinski, who stated that allowing anonymous commentary was a "core service and integral part" of the newspaper's services to its community.¹⁰⁵

Doty, on the other hand, argued that the anonymous comments did not constitute "news" because they were submitted

privilege attaches to the journalist, not the source of the information); *State v. Ventura*, 720 N.E.2d 1024, 1027 (Ohio Ct. Com. Pl. 1999) ("[T]he reporter shield laws do not prevent disclosure; rather, they permit nondisclosure."). *But see* *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670–72 (1991) (holding that the First Amendment did not insulate a news organization from a cause of action based on promissory estoppel when it revealed the identity of a source who had been promised confidentiality as a condition of revealing information to a reporter).

101. See Transcript of Motion to Quash at 19–24, *Doty v. Molnar*, No. DV 07-022 (Mont. Dist. Ct. Sept. 3, 2008), available at <http://www.citmedialaw.org/threats/doty-v-molnar-subpoena-billings-gazette> ("Hearing and Oral Ruling on Billings Gazette Motion to Quash" hyperlink).

102. See *id.* at 22.

103. MONT. CODE ANN. §§ 26-1-901 to -903.

104. See Transcript of Motion to Quash, *supra* note 101, at 3–4, 26 (quoting MONT. CODE ANN. §§ 26-1-901 to -903).

105. Greg Tuttle, *Judge: Anonymity Protected*, BILLINGS GAZETTE, Sept. 3, 2008, http://billingsgazette.com/news/local/article_ca51da32-2b56-54d6-9dae-2be9cd5f1543.html.

after the story had been published online.¹⁰⁶ He urged the court to apply a multipart test articulated by a federal district court in a defamation case in Arizona.¹⁰⁷ But instead, the judge ruled from the bench that the Montana shield law required that the subpoena be quashed, finding that the law was broad enough to include the identities of the posters.¹⁰⁸

2. *Doe v. TS* (Portland Mercury and Willamette Weekly) (Oregon) and *Beal v. Calobrisi* (Northwest Florida Daily News) (Florida)

Less than a month after the Montana rulings, judges in Oregon and Florida applied their states' shield laws¹⁰⁹ to strike down, respectively, a motion and a subpoena seeking to compel revelation of information identifying anonymous commenters.¹¹⁰ In the Oregon case, a commenter using the pseudonym "Ronald" expressed support in a comment to a blog about mayoral candidate Sho Dozono, because, he wrote, Dozono had severed ties with a local businessman whom he called a "cantankerous [sic] obnoxious dishonest new money pig."¹¹¹ The businessman, Terry Beard, filed a libel suit against "Ronald" and subpoenaed both the *Portland Mercury* and the *Willamette Weekly*, which had carried similar anonymous comments on its website.¹¹² Clackamas County Court Judge James Redman issued a letter ruling quashing the subpoenas, finding that the

106. See Transcript of Motion to Quash, *supra* note 101, at 16–17 (noting that shield laws are not designed "to protect people who come on-line later on and make some kind of comment").

107. See *id.* at 8–14 (applying the multipart test to the facts of the pending motion). The test cited by Mr. Doty is found in *Best Western International, Inc. v. Doe*, No. CV-06-1537, 2008 WL 4630313, at *5 (D. Ariz. July 25, 2006).

108. See Transcript of Motion to Quash, *supra* note 101, at 30.

109. FLA. STAT. ANN. § 90.5015 (West 1999); OR. REV. STAT. ANN. §§ 44.510 to .540 (West 2003 & Supp. 2009).

110. See *Beal v. Calobrisi*, No. 08-CA-1075, at 2 (Fla. Cir. Ct. Oct. 9, 2008) (granting defendant's motion to quash subpoena), available at http://www.newsroomlawblog.com/uploads/file/Beal_v_Calobrisi.pdf; *Doe v. TS*, No. CV08030693, 2008 WL 5683406, at *2 (Or. Cir. Ct. Sept. 30, 2008) (denying plaintiff's motion to compel).

111. Posting of Ronald to Blogtown, PDX, http://blogtown.portlandmercury.com/2008/01/busy_day_at_city_hall_part_2.php (Feb. 1, 2008, 23:08 PST); see also Posting of Amy J. Ruiz to Blogtown, PDX, Busy Day at Town Hall, Part II, http://blogtown.portlandmercury.com/2008/01/busy_day_at_city_hall_part_2.php (Jan. 31, 2008, 17:22 PST).

112. See *TS*, 2008 WL 5683406, at *1 (denying plaintiff's motion to compel the identifying information of anonymous posters to the *Portland Mercury* and *Willamette Week* websites).

Oregon shield law protected the commenter's identity because it fell within the definition of "information" protected by the statute, since it was a reaction to the blog topic and thus sufficiently related to protected "news gathering."¹¹³ He noted, however, that his ruling might have been different had the comment been "totally unrelated" to the original blog post.¹¹⁴

The Florida case involved a subpoena served to the "Records Custodian/Webmaster" for the *Northwest Florida Daily News* in Okaloosa County, seeking identifying information for an anonymous poster to its site.¹¹⁵ The presiding judge ruled that both the nonparty Webmaster and the newspaper had a qualified privilege against compelled disclosure of the commenter's e-mail and IP address under the Florida shield law,¹¹⁶ and that the plaintiff had failed to demonstrate that the information sought was relevant, material, and could not be obtained from other sources, or that there was a compelling interest requiring disclosure.¹¹⁷

3. *Vinogradov v. Montana State University-Bozeman* (Bozeman Daily Chronicle) (Montana)

In her lawsuit against Montana State University, a professor filed a motion seeking to depose the *Bozeman Daily Chronicle's* employees who were most knowledgeable about the identities of individuals who had viewed or posted comments about her.¹¹⁸ The professor claimed that deposing the newspaper's employees was "vital" to her ability to discover the identity of persons who could have defamed her.¹¹⁹ The newspaper filed a motion to quash, arguing that the information sought was protected under the Montana shield law.¹²⁰ The court did not reach

113. *See id.*

114. *Id.*

115. *See Beal*, No. 08-CA-1075, at 1.

116. FLA. STAT. ANN. § 90.5015 (West 1999).

117. *See Beal*, No. 08-CA-1075, at 2; *see also* FLA. STAT. ANN. § 90.5015(2)(a)–(c) (discussing the required showing by a party seeking to overcome the journalist's privilege).

118. *See Vinogradov v. Mont. State Univ.-Bozeman*, No. DV-03-49, at 1 (Mont. Dist. Ct. June 5, 2009), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-06-05-Vinogradov%20Ruling%20on%20Motion%20to%20Perpetuate.pdf>.

119. *See id.* at 1–2.

120. *See id.* at 3.

the privilege issue, finding that Vinogradov's motion was procedurally insufficient.¹²¹

4. *Alton Telegraph v. Illinois* (The Telegraph) (Illinois)

A different outcome resulted when law enforcement authorities investigating the murder of a child subpoenaed the *Alton Telegraph* seeking the names, addresses, and IP addresses of individuals who had posted comments on a story detailing the arrest of a suspect.¹²² Some of the comments accused the murder suspect of child abuse and arson.¹²³

The newspaper moved to quash the subpoena in September 2008, arguing that the Illinois shield law¹²⁴ would protect the identity of the commenters as "sources" of information, and that information from an online poster is no different from written or telephoned "tips."¹²⁵ The *Telegraph* further argued that the prosecutor had failed to exhaust alternative sources or to demonstrate that the information sought was essential to protect the public interest.¹²⁶

But in May 2009, Judge Richard Tognarelli disagreed, ruling that the prosecution had overcome the statute's qualified privilege because the investigation of the murder of a child was clearly in the public interest and because the government had already conducted 117 interviews to try to obtain the information elsewhere.¹²⁷

Even though the court applied the shield law, Judge Tognarelli observed that the five commenters, who had posted their remarks in response after the article appeared online, could not be considered "sources" under the shield law.¹²⁸ Judge Tognarelli added that it was clear that the reporter did not use information obtained from them in preparing the original article, and that the comments themselves had been made without input from the reporter.¹²⁹ He expressed skepticism that forcing the newspaper to reveal information about the identity

121. See *id.* at 5.

122. See *Alton Tel. v. Illinois*, No. 08-MR-548, 2009 WL 3334286, at *1 (Ill. Cir. Ct. May 15, 2009).

123. See *id.* at *1-2.

124. 735 ILL. COMP. STAT. ANN. 5/8-901 to -909 (West 2003).

125. Motion to Quash Subpoena to the *Alton Telegraph* at *1-2, *Alton Tel.*, 2008 WL 7003415 (Ill. Cir. Ct. Sept. 29, 2008) (No. 08-MR-548).

126. See *id.* at *3.

127. See *Alton Tel.*, 2009 WL 3334286, at *4.

128. *Id.*

129. See *id.*

of those who post unsolicited online comments would make other members of the public reluctant to express opinions or provide information to reporters in the future.¹³⁰ Nevertheless, he struck down the subpoena as to three of the five commenters, finding that their comments were not sufficiently relevant to the underlying investigation.¹³¹

5. Abilene Reporter-News (Texas)

In June 2009, a Taylor County District Court judge ruled that the *Abilene Reporter-News* would not be compelled to disclose the identity of anonymous individuals who had posted comments about a murder case to defense counsel, who apparently was concerned that they might be called as jurors in the case.¹³² Press reports stated that the newspaper cited both the state shield law¹³³ as well as the First Amendment rights of the commenters.¹³⁴ Although the defense counsel argued that the defendant's right to a fair trial should trump the news organization's statutory privilege, Judge K. Lee Hamilton ruled that the shield law, which protects "confidential or nonconfidential unpublished information" as well as its source would apply to the identities of the commenters.¹³⁵

6. Las Vegas Review-Journal (Nevada)

On June 7, 2009, Thomas Mitchell, editor of the *Las Vegas Review-Journal*, reported that a story published in May concerning an ongoing federal tax evasion trial¹³⁶ had attracted nearly one hundred comments, some of them critical of the fed-

130. *See id.*

131. *See id.*

132. *See* Patrick File, *Subpoenas To Unmask Anonymous Internet Users Continue To Challenge News Media and Courts*, SILHA BULL. (Silha Ctr. for the Study of Media Ethics and Law, Minneapolis, Minn.), Summer 2009, at 1, available at <http://www.silha.umn.edu/news/summer2009.php> [hereinafter *Subpoenas To Unmask Anonymous Users*]; Posting of Daralyn Schoenewald to Abilene Reporter-News Online, Judge Rules Names of ARN Online Commenters Do Not Have to be Turned Over, <http://www.reporternews.com/news/2009/jun/19/hearing-held-over-need-to-reveal-arn-commenters/> (June 19, 2009, 10:33 CST).

133. TEX. CODE CRIM. PROC. ANN. art. 38.11 (Vernon Supp. 2009).

134. *See* Schoenewald, *supra* note 132.

135. *See Subpoenas To Unmask Anonymous Users*, *supra* note 132 (quoting Judge K. Lee Hamilton).

136. *See* United States v. Kahre, No. 2:05-cr-121, 2009 WL 1361319 (D. Nev. May 12, 2009).

eral prosecutor, Assistant U.S. Attorney J. Gregory Damm.¹³⁷ A week after the story appeared, the newspaper received a grand jury subpoena from Damm's office demanding every record pertaining to the comments, including all identifying information.¹³⁸ Mitchell reported that the subpoena advised, "[y]ou have no obligation of secrecy concerning this subpoena; however, any such disclosure could obstruct and impede an ongoing criminal investigation."¹³⁹

Mitchell went on to observe that the newspaper does not require users to register in order to post comments, adding that "[a] person could use a fictitious name and e-mail address, and most do."¹⁴⁰ But he also wrote that trying to fight the federal subpoena would be expensive and probably unsuccessful because there is no federal shield law.¹⁴¹

On June 17, the newspaper reported that the federal attorneys had agreed to limit the subpoena to two commenters whose remarks "might be construed as threatening to jurors or prosecutors."¹⁴² Mitchell was quoted in the story as saying that he was satisfied with the narrower subpoena, adding that "[w]e will give them what we have, which frankly isn't much, since most postings are anonymous."¹⁴³

Ironically, the Nevada state shield law is regarded as one of the most protective in the United States, conferring an absolute privilege from disclosure of sources and information in any proceeding.¹⁴⁴ The statute, however, would not apply in a federal grand jury proceeding.¹⁴⁵

137. See *id.* at *1; Thomas Mitchell, *Subpoena Seeks Names—and Lots More—of Web Posters*, LAS VEGAS REV. J., June 7, 2009, <http://www.lvrj.com/opinion/47141327.html>.

138. See Mitchell, *supra* note 137.

139. *Id.*

140. *Id.*

141. *Cf. id.* (suggesting that limiting the scope of the information sought may be difficult).

142. One of the comments called the jurors "dummies" and said they "should be hung" if they ruled in favor of the government. Joan Whitely, *U.S. Prosecutors Narrow Subpoena*, LAS VEGAS REV. J., June 17, 2009, <http://www.lvrj.com/news/48240147.html>. The other wanted to bet that one of the prosecutors would not reach his next birthday. *Id.*

143. *Id.*

144. See, e.g., *Diaz v. Eighth Judicial Dist. Court*, 993 P.2d 50, 54 (Nev. 2000).

145. Federal Rule of Evidence 501 provides that the federal common law of privilege applies to actions based on federal law. See FED. R. EVID. 501; *von Bulow v. von Bulow*, 811 F.2d 136, 141 (2d Cir. 1987).

C. FEDERAL PROTECTION TO SHIELD ANONYMOUS POSTERS?

In her 2003 article on early cases involving anonymous Internet speakers, Victoria Smith Ekstrand observed that the developing test for unmasking digital speakers resembled the three-part test articulated by Justice Potter Stewart in his dissenting opinion in the seminal reporter's privilege case, *Branzburg v. Hayes*.¹⁴⁶ Similarly, Megan Sunkel analogized ISPs under the CDA "safe haven" to journalists who are subpoenaed to reveal confidential sources.¹⁴⁷ She urged courts to use the *Branzburg* analysis on a case-by-case basis when deciding whether disclosure of an anonymous source should be compelled.¹⁴⁸ Specifically, this would require a showing that the information sought is relevant, goes to the heart of the plaintiff's claim, and is unavailable from any other source.¹⁴⁹

The narrow holding in *Branzburg* determined that journalists who witness criminal activity and are called before a grand jury to testify about it have no constitutional privilege to withhold the identity of confidential sources.¹⁵⁰ Some courts, however, adopted a qualified privilege in other contexts.¹⁵¹ For instance, federal appeals courts around the country recognized a qualified privilege in civil cases to which the journalist was not a party,¹⁵² in libel suits,¹⁵³ and even in grand jury investigations.¹⁵⁴ A "qualified testimonial privilege" was similarly suggested in a 1975 law review article by James Goodale, then-executive vice president of the *New York Times*, who had acted as the newspaper's counsel in *Branzburg*.¹⁵⁵ By the mid-1980s, most of the circuits had adopted such a privilege.¹⁵⁶

146. See 408 U.S. 665, 725-52 (1972) (Stewart, J., dissenting); Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL'Y 405, 425-26 (2003).

147. See Megan M. Sunkel, *And the I(SP)s Have It . . . But How Does One Get It? Examining the Lack of Standards for Ruling on Subpoenas Seeking To Reveal the Identity of Anonymous Internet Users in Claims of Online Defamation*, 81 N.C. L. REV. 1189, 1197, 1213-14 (2003).

148. See *id.* at 1215-19.

149. See *Branzburg*, 408 U.S. at 709; Sunkel, *supra* note 147, at 1218-19.

150. See *Branzburg*, 408 U.S. at 682.

151. See, e.g., *Baker v. F & F Inv.*, 470 F.2d 778, 783 (2d Cir. 1972); *Cervantes v. Time, Inc.*, 464 F.2d 986, 992-93 (8th Cir. 1972); *Bursey v. United States*, 466 F.2d 1059, 1076-77 (9th Cir. 1972).

152. See *Baker*, 470 F.2d at 783.

153. See *Cervantes*, 464 F.2d at 992-93.

154. See *Bursey*, 466 F.2d at 1076-77.

155. See James C. Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 741-43 (1975). Referring to

But then, in the early years of the twenty-first century, federal judges in several circuits began to question the wisdom of recognizing a constitutionally based privilege. Notably, Seventh Circuit Judge Richard A. Posner, scorning what he characterized as an “audacious” argument that *Branzburg* created some kind of constitutional privilege, wrote that “[w]e do not see why there needs to be special criteria merely because the possessor of the documents or other evidence sought is a journalist.”¹⁵⁷

Posner’s opinion, although construing a case that did not involve confidential sources, nevertheless lit the slow fuse that would explode what some had come to regard as the “myth” of a constitutionally based reporters privilege.¹⁵⁸ The Judith Miller case, arising from the decision of a *New York Times* reporter to defy a subpoena issued by a grand jury investigating the unauthorized disclosure of the identity of CIA operative Valerie Plame, prompted federal courts in the District of Columbia to reexamine the scope of the privilege.¹⁵⁹ They concluded that none existed, at least in the circumstances of that case.¹⁶⁰ Miller spent eighty-five days in jail before agreeing to testify after her source released her from her promise of confidentiality.¹⁶¹

The fragile house of cards threatened to collapse in other cases as well. Some arose in criminal proceedings, either seeking journalists’ eyewitness observations of criminal activity,¹⁶² or demanding that they reveal the identity of sources who had

the five-justice majority as a plurality, Goodale argued that an “enigmatic” concurring opinion by Justice Lewis Powell accepted the Stewart test. *See id.* at 715–18.

156. *See, e.g.,* United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986); LaRouche v. Nat’l Broad. Co., 780 F.2d 1134, 1139 (4th Cir. 1986); Zerilli v. Smith, 656 F.2d 705, 714–15 (D.C. Cir. 1981); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 597 (1st Cir. 1980); Miller v. Transamerican Press, Inc., 621 F.2d 721, 725–26 (5th Cir. 1980); Riley v. City of Chester, 612 F.2d 708, 713–15 (3d Cir. 1979); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977); Farr v. Pitchess, 522 F.2d 464, 468 (9th Cir. 1975).

157. McKevitt v. Pallasch, 339 F.3d 530, 532–33 (7th Cir. 2003).

158. *See, e.g.,* Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Innates: The Misguided Pursuit of a Reporter’s Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385, 437 (2006).

159. *See In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 965–66 (D.C. Cir. 2005).

160. *See id.* at 972–73.

161. *See* Susan Schmidt & Jim VandeHei, *N.Y. Times Reporter Released from Jail*, WASH. POST, Sept. 30, 2005, at A1.

162. *See, e.g., In re Grand Jury Subpoena, Joshua Wolf*, 201 F. App’x 430, 432–33 (9th Cir. 2006).

provided unauthorized access to information sealed by court order.¹⁶³ Others involved civil Privacy Act¹⁶⁴ lawsuits brought against the federal government, claiming that personal information was leaked to the press in violation of the statute.¹⁶⁵ In each case, the subpoenaing entity claimed that the news media were not the target, but rather the conduit making it possible to identify the violator of the prohibition against disclosure of information, thereby eliminating any possibility that the reporters could assert the Fifth Amendment as grounds for refusing to testify.¹⁶⁶

Faced with the prospect of jail, fines, or both, the news media reluctantly concluded that the time had come to turn to Congress for a remedy: a federal shield law.¹⁶⁷ A variety of bills were introduced in both houses, protecting journalists from being forced to reveal confidential sources in the majority of circumstances, and creating a qualified privilege for news gathering materials that would not disclose a confidential source.¹⁶⁸ Exceptions would include situations where disclosure was necessary to prevent an "act of terrorism" or other significant harm to national security, imminent death or significant bodily injury, or to identify persons who had disclosed trade secrets or certain personal or financial information protected by federal law.¹⁶⁹

But the drafters of the bills struggled to describe exactly who would be covered by the statute. Attempts to craft a definition in terms of institutional affiliation met with howls of protest from the blogosphere.¹⁷⁰ Adopting a "functional" approach,

163. See, e.g., *In re* Special Proceedings, 373 F.3d 37, 40 (1st Cir. 2004); *In re* Grand Jury Subpoenas, 438 F. Supp. 2d 1111, 1113 (N.D. Cal. 2006).

164. 5 U.S.C. § 552a (2006).

165. See, e.g., *Lee v. Dep't of Justice*, 413 F.3d 53, 55 (D.C. Cir. 2005); *Hatfill v. Gonzales*, 505 F. Supp. 2d 33, 36–37 (D.D.C. 2007).

166. See *Lee*, 413 F.3d at 59–61; *Hatfill*, 505 F. Supp. 2d at 42.

167. See, e.g., Editorial, *Toward a Federal Shield Law*, N.Y. TIMES, May 3, 2007, at A22 ("This measure of protection is long overdue.").

168. See, e.g., Free Flow of Information Act, S. 448, 111th Cong. § 2 (2009); Free Flow of Information Act, H.R. 985, 111th Cong. § 2 (2009).

169. S. 448 §§ 4–5; H.R. 985 § 2(a)(3).

170. See, e.g., Posting of Robert A. Arcamona to Protecting the Source, <http://protectingthesource.blogspot.com/2009/10/hyper-local-journalists-home-cookin.html> (Oct. 9, 2009, 14:54 EST); Posting of Clothilde Le Coz to MediaShift, <http://www.pbs.org/mediashift/2009/10/why-bloggers-and-citizen-journalists-deserve-a-shield-law287.html> (Oct. 14, 2009); Posting of Michael Lindenberger to Citizen Media Law Project, *Federal Shield Bills Offer Rival Takes on Who's a Journalist; Bloggers Could Be Left Unprotected*, <http://www.citmedialaw.org/blog/>

some of the bills defined the “covered person” as one who is “engaged in journalism,” further defined as the “gathering, preparing, collecting, photographing, recording, writing, editing, reporting or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.”¹⁷¹

The bills were vigorously opposed by the Bush Administration’s Justice Department,¹⁷² and, much to the media’s surprise and chagrin, initially failed to attract unqualified support from the Obama Administration as well.¹⁷³ But by December 2009, it appeared that a compromise had been reached that satisfied the intelligence community as well as the media interests.¹⁷⁴ The Senate bill, protecting persons “engaged in journalism,”¹⁷⁵ was voted out of the Senate Judiciary Committee fourteen to five.¹⁷⁶ Assuming the bill passes in the full Senate, it will still have to be reconciled with the House version. But Senator Arlen Specter told the Associated Press that the Senate bill “creates a fair standard to protect the public interest, journalists, the news media, bloggers, prosecutors and litigants.”¹⁷⁷ Of course, just because a blogger is protected by the shield law does not mean there is any guarantee that the identity of an anonymous poster also would be. Whether this kind of information would be protected under a federal shield law remains an open question.

D. STANDING TO ARGUE ON BEHALF OF AN ANONYMOUS POSTER’S CONSTITUTIONAL RIGHTS

In the absence of a shield law or favorable common law precedent, would a news organization have standing to chal-

2009/federal-shield-bills-offer-rival-takes-whos-journalist-bloggers-could-be-left-unprotected (Feb. 23, 2009).

171. S. 448 § 8(5); H.R. 985 § 4(2).

172. See *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. 20, 23–28 (2007) (statement of Rachel L. Brand, Assistant Att’y Gen., Office of Legal Policy).

173. Posting of Cristina Abello to The Reporters Committee for Freedom of the Press, Obama Administration Publicly Dissatisfied with Senate’s Federal Shield Bill, <http://www.rcfp.org/newsitems/index.php?i=11049> (Oct. 1, 2009, 17:05 EST).

174. Associated Press, *Senate Committee Passes Shield Law*, N.Y. TIMES, Dec. 11, 2009, at A23.

175. See S. 448 § 8(2)(A).

176. See Associated Press, *supra* note 174.

177. Jim Abrams, *Senate, White House Agree on Reporter Protections*, ABC NEWS, Oct. 30, 2009, <http://abcnews.go.com/Business/wireStory?id=8957954>.

lenge a subpoena seeking a poster's identity on the ground that disclosure would threaten that individual's First Amendment rights? Although there are few cases on this issue, some commentators suggest that "the trend among those courts presented with the question is to hold that entities such as newspapers, ISPs and website hosts may, under the principle of *jus tertii* standing, assert the rights of their readers and subscribers."¹⁷⁸

In a case of first impression, a Pennsylvania federal district court ruled that a newspaper had standing to assert the rights of commenters to post anonymous comments on its media website.¹⁷⁹ The case arose after the *Pocono Record* published a story about a workplace sexual harassment and retaliation lawsuit that attracted reader comments which, the plaintiff claimed, suggested personal knowledge of the parties or circumstances involved in the suit.¹⁸⁰ When the plaintiff subpoenaed the newspaper for identifying information, the court granted the motion to quash.¹⁸¹

The court concluded that the relationship between the newspaper and the commenters allowed the *Pocono Record* to assert their First Amendment rights, particularly because of the difficulty they would have in doing so without also unmasking themselves.¹⁸² The court observed that the newspaper "will zealously argue and frame the issues before the Court."¹⁸³

On the merits, the court utilized the "good faith" standard from *2TheMart.com*,¹⁸⁴ determining that although the subpoena was issued in good faith and sought relevant information, that same information would be available through "normal, anticipated forms of discovery," such as depositions of other employees.¹⁸⁵ The opinion noted that application of the standard allowed it "to resolve the present issue on narrow grounds" and did not require it to "determine the full extent of the First Amendment right to anonymity" in the case.¹⁸⁶

178. Kissinger & Larsen, *supra* note 18, at 4–5.

179. *Enterline v. Pocono Med. Ctr.*, No. 3:08-cv-1934, 2008 WL 5192386, at *4 (M.D. Pa. Dec. 11, 2008).

180. *Id.* at *1.

181. *Id.* at *6.

182. *Id.* at *3–4.

183. *Id.* at *4.

184. *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001).

185. *Enterline*, 2008 WL 5192386, at *5.

186. *Id.* at *4.

A year later, a federal district court in Missouri went even further when faced with a similar question.¹⁸⁷ Plaintiff John D. Sedersten filed a civil lawsuit against the City of Springfield, Missouri, its police chief, and another former police officer, Morris Taylor, claiming that he had been physically assaulted by Taylor at the Greene County jail on May 29, 2008, and that the City and police chief should have known that Taylor was dangerous and that his employment jeopardized the health and safety of inmates at the jail.¹⁸⁸ The local newspaper, the *News-Leader*,¹⁸⁹ published an article online on August 1, 2009, discussing the county prosecutor's decision to drop the criminal assault charges against Taylor.¹⁹⁰ A pseudonymous poster, using the screen name "bornandraisedhere," posted the following comment criticizing the county's prosecuting attorney:

Yep, it's Darrell Moore doing his finest work. Here is Taylor who did [ten] years of good service for the city and then goes serves [sic] our country. He tries to get help for some problems when he gets back but goes unheard and is put back on the streets. Then he make [sic] a mistake and lets his emotions get the best of him. His whole career is over. Then the alleged victim is unwilling to testify but Moore and his staff still wants [sic] to use him as an example. All in the meanwhile one of the prosecutors [sic] family members get [sic] numerous felony counts of selling drugs dropped. Way to run that office.¹⁹¹

Sedersten subpoenaed the *News-Leader*, demanding that it disclose the identity of "bornandraisedhere."¹⁹² His motion to compel argued that this information might help him establish that the City knew about "Taylor's dangerous proclivities," because "if 'bornandraisedhere' knew about Taylor's issues, certainly Chief Rowe and other city officials knew or should have known."¹⁹³ Sedersten contended that his need for the informa-

187. *Sedersten v. Taylor*, No. 09-3031-CV, 2009 WL 4802567, at *3 (W.D. Mo. Dec. 9, 2009).

188. Suggestions in Opposition to Plaintiff's Motion to Compel Production of Documents at 2, *Sedersten*, 2009 WL 4802567 (No. 6:09-CV-03031), available at <http://www.citmedialaw.org/threats/sedersten-v-springfield-news-leader>.

189. The *News-Leader* is published by Gannett Missouri Publishing, a subsidiary of the same company that owns the *Wausau Daily Herald*. See Citizen Media Law Project, *Sedersten v. The Springfield News-Leader* (Dec. 16, 2009), <http://www.citmedialaw.org/threats/sedersten-v-springfield-news-leader>.

190. Dirk VanderHart, *Charges Dropped Against Taylor*, SPRINGFIELD NEWS-LEADER, Aug. 1, 2009, at A5.

191. *Sedersten*, 2009 WL 4802567, at *1.

192. *Id.*

193. Suggestions in Support of Plaintiff's Motion to Compel Production of Documents Requested in Subpoena at 4-5, *Sedersten*, 2009 WL 4802567 (No. 6:09-CV-03031), available at <http://www.citmedialaw.org/threats/sedersten-v-springfield-news-leader>.

tion trumped the First Amendment rights of anonymous speech.¹⁹⁴

Significantly, Sedersten relied on the *News-Leader's* Terms of Service and Privacy Policy to bolster his demands, making the novel argument that because the user agreements granted the newspaper a license in any material posted, and reserved to it the right to use personal information “in any way and for any purpose” and to disclose it to third parties, the pseudonymous poster had waived the First Amendment right to anonymous speech by posting a comment to the website.¹⁹⁵ In its brief opposing the motion to compel, the *News-Leader* countered that the Terms of Service “relate only to the use of posted *material*—not the identity of the poster.”¹⁹⁶ Conceding that the comment itself was not protected from disclosure, the newspaper contended, “it is the anonymity of the poster that the First Amendment protects.”¹⁹⁷

The *News-Leader* went on to argue that, rather than constituting a waiver, the Privacy Policy and the registration procedure of the newspaper were specifically intended to protect a poster from being “haled into court as a witness or a defendant simply by posting a comment.”¹⁹⁸ Its registration procedure does not even require a user to provide a first or last name, or an address or telephone number, because, the newspaper claimed, “doing so would only serve to chill the free exchange of ideas and opinions that the *News-Leader's* online forums seek to promote.”¹⁹⁹

In his opinion denying the motion to compel, District Judge Gary A. Fenner, while acknowledging that anonymous speech does not enjoy absolute protection, nevertheless concluded that because the posting involved political speech, the request for disclosure would be subject to heightened scrutiny.²⁰⁰ He distinguished this subpoena of this nonparty poster from the line of cases permitting compelled disclosure of the identity of a potential libel defendant.²⁰¹ Citing the test from *2TheMart.com*,

194. *Id.* at 1–7.

195. *Id.* at 5.

196. Suggestions in Opposition to Plaintiff's Motion to Compel Production of Documents, *supra* note 188, at 10.

197. *Id.*

198. *Id.* at 11.

199. *Id.*

200. *Sedersten v. Taylor*, No. 09-3031-CV-S, 2009 WL 4802567, at *2 (W.D. Mo. Dec. 9, 2009).

201. *Id.*

Fenner ruled that Sedersten had failed to meet his burden.²⁰² Although the judge found that Sedersten was probably seeking the identifying information in good faith, he rejected the argument that the information was central to the case, finding that it was merely cumulative.²⁰³

But more importantly, the court rejected the waiver argument.²⁰⁴ There is a presumption against waiver of constitutional rights, Fenner wrote, and anyone who does so by contract “must be made aware of the significance of the waiver.”²⁰⁵

In this case, Plaintiff relies upon two sentences in a two-page document in which the overarching theme is that information provided by a user of the site may be used for various commercial purposes. Nothing on the face of the privacy policy even hints a user may be waiving his or her constitutional right to anonymous free speech by posting comments or materials on the *News-Leader's* website. Given the presumption against waiver and the boiler-plate language Plaintiff relies upon, it cannot be said that the anonymous poster was aware he or she may be waiving the right to free speech, let alone the significance of such waiver.²⁰⁶

III. THE ETHICS OF PROTECTING AN ANONYMOUS POSTER'S IDENTITY

As many of these cases illustrate, news organizations that host websites recognize that permitting anonymous (or pseudonymous) postings encourages robust debate and helps promote the First Amendment interest of “protect[ing] unpopular individuals from retaliation—and their ideas from suppression.”²⁰⁷ As *News-Leader* executive editor Don Wyatt stated in the affidavit accompanying the brief opposing the compelled disclosure of a user's identity, “these forums are designed to promote the free exchange of ideas and opinions. . . . The *News-Leader* does not require users' personal information because it recognizes the value of anonymous speech.”²⁰⁸

On the other hand, as Cleveland *Plain Dealer* columnist Connie Schultz points out:

Anonymity on the Web offends most journalists I know, and not just because their own names go on everything they write. It breaks every

202. *Id.*

203. *Id.*

204. *Id.* at *3.

205. *Id.*

206. *Id.*

207. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

208. Suggestions in Opposition to Plaintiff's Motion to Compel Production of Documents, *supra* note 188, at ex. A.

rule newspapers have enforced for decades in letters to the editor, which require not only a name and a city of residence, but contact information to confirm authorship.²⁰⁹

Media ethics scholars also have expressed concern. As a general proposition, journalists are—or at least, should be—reluctant to grant anonymity to news sources. The Society of Professional Journalists' Code of Ethics advises reporters to "[i]dentify sources whenever feasible. The public is entitled to as much information as possible on sources' reliability Always question sources' motives before promising anonymity."²¹⁰

And yet, as *New York Times* executive editor Bill Keller has said, prohibiting the use of any anonymous sources by reporters "is high-minded foolishness. Without the option of protecting sources, with recourse only to an increasingly redacted public record, the coverage of government and other powerful institutions would tend more and more toward press-conference stenography."²¹¹

Which brings us back to the question: are anonymous posters equivalent to confidential news sources? A newsroom lawyer would probably argue that no one who voluntarily posts to a newspaper's website could expect confidentiality. Anonymous commenters should be bound by the terms of the applicable user agreement, thus precluding any claim either for breach of contract or under a theory of promissory estoppel if the identifying information was disclosed to a third party— notwithstanding judicial skepticism that a user could be expected to have read, digested, and consented to them.²¹² And judges might follow the lead of Illinois Judge Tognarelli, who declined to equate those who post comments anonymously after an article is published with those who serve as confidential sources during the news-gathering process.²¹³

209. Connie Schultz, *Web Sites' Anonymity Brings out the Worst in Some Posters*, THE PLAIN DEALER, Sept. 27, 2009, http://www.cleveland.com/schultz/index.ssf/2009/09/web_sites_anonymity_bringsout.html.

210. SOC'Y OF PROF'L JOURNALISTS, *supra* note 20, at 1.

211. See GENE FOREMAN, THE ETHICAL JOURNALIST 214 (2010).

212. But see Ekstrand, *supra* note 82, at 608 (questioning whether these "adhesion contracts" serve public policy interests).

213. See *Alton Tel. v. Illinois*, No. 08-MR-548, 2008 WL 7003415, at *5 (Ill. App. Ct. May 15, 2009). In his opinion, Judge Tognarelli cited an earlier Illinois appellate case, *People v. Slover*, 323 Ill. App. 3d 620, 624 (App. 2001), for the proposition that "the legislature clearly intended the privilege to protect more than simply the names and identities of witnesses, informants, and other persons providing news to a reporter." *Id.*

Many reporters and editors do, nevertheless, consider themselves morally, if not legally, obligated to protect the anonymity of online posters, and as this discussion has demonstrated, are prepared to fight hard to avoid disclosing identifying information. Returning to the Society of Professional Journalists' Code of Ethics, this could simply be an extension of the principle requiring journalists to "act independently," and to avoid the appearance of taking sides in a dispute or assisting the government in an investigation.²¹⁴ Or it could hearken back to the perceived ethical duty of journalists to promote not only their own rights under the First Amendment, but those of their readers as well.

One editor who attempted to argue this point ended up spending thirteen days in jail—albeit long before the era of anonymous online commentary.²¹⁵ In 1996, Bruce Anderson, editor of an alternative weekly newspaper in Boonville, California, was found in contempt after he refused to surrender to prosecutors the original copy of a letter to the editor written by a criminal defendant for use as evidence in his murder trial.²¹⁶ Anderson had published the text of the letter in the newspaper, but the trial judge in Mendocino County ruled that only the original letter could be introduced as evidence.²¹⁷

Anderson refused, claiming that he should be protected by the California shield law and that if he provided the document to the government, other readers would be discouraged from submitting their own letters.²¹⁸ His lawyer, according to the *New York Times*, argued that "[o]ur position is that anything that interferes with the free and private exercise of the letters-to-the-editor concept has what the courts call a chilling effect and that's the free-speech issue."²¹⁹ Anderson's brother, Rob, was quoted as saying: "You don't like the authorities fishing around in your letters file . . . It has an intimidating effect on your correspondence."²²⁰

But that argument did not persuade the trial judge. Because the letter had already been published, it was not pro-

214. SOC'Y OF PROF'L JOURNALISTS, *supra* note 20, at 1.

215. See Carey Goldberg, *Eccentric Editor Is Jailed over Letter in Paper*, N.Y. TIMES, June 3, 1996, at A10.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

tected by California's shield law, which only covers reporters' notebooks and confidential notebooks.²²¹ The California Supreme Court, with one justice dissenting, refused to hear Anderson's appeal.²²²

The *New York Times* story about the case included this observation:

It may seem curious that such a fuss would be made over a letter that was meant to be public anyway, but the explanation lies in the nature of *The Anderson Valley Advertiser*, an utterly independent-minded, often potentially libelous publication that specializes in no-holds-barred political discussion, often by way of anonymous letters.²²³

That sounds remarkably like the situation for many news websites today.

IV. THE WISDOM OF SHIELDING ANONYMOUS POSTERS

Media ethicist Patrick Lee Plaisance has asked whether "new electronic forms of communication pose fundamentally new ethical questions."²²⁴ He adds that "[l]egal and moral responsibility is often difficult to assess because of the open, democratic, and often anonymous nature of online postings, bulletin boards, and other types of cyberspace forums."²²⁵ As a matter of principle, if not of legal obligation, many news organizations have chosen to protect the identity of their anonymous posters. But the decision to do so is fraught with complications.

In their article, *Shielding Jane and John: Can the Media Protect Anonymous Online Speech?*, attorneys Ashley I. Kissinger and Katharine Larsen ask a series of important questions:

An evaluation of whether the company is well positioned to advocate for a particular poster's right to anonymity raises numerous questions. Is the company in possession of information that could identify the poster? Does the company have the legal, financial, and practical ability to oppose the subpoena? Do business considerations weigh in favor of asserting the rights of the poster? What type of speech is at issue? What test will a court in that jurisdiction apply to account for the First Amendment right of the poster? Can and should the poster be notified of the subpoena? Does the poster's identity come within the ambit of a state shield law? Even if it does, should that law be in-

221. *Id.*

222. *Anderson v. Mendocino County Superior Court*, No. S053554, 1996 Cal. LEXIS 2774, at *1 (Cal. May 22, 1996).

223. See Goldberg, *supra* note 215.

224. PATRICK LEE PLAISANCE, *MEDIA ETHICS: KEY PRINCIPLES FOR RESPONSIBLE PRACTICE* 127 (2009).

225. *Id.*

voked? What other grounds can be asserted in support of a motion to quash?²²⁶

To these questions, we could add several others. How likely is it that courts in other states, with different types of shield laws (or no shield laws at all) will take the expansive view of the Montana and Oregon courts?²²⁷ Will that question turn on their interpretation of specific statutory language or case law, as judges are asked to decide whether anonymous commenters are confidential sources, or whether their identities can be considered confidential information? Will judges focus on the nature of the relationship between the poster and the news organization, and whether users have any reasonable expectation that their identities will be kept secret?

Assuming there is a privilege, whose privilege is it, anyway? Limited case law has held that the privilege belongs to the reporter, or to the news organization, or both, but not to the source.²²⁸ This authority holds that the source cannot waive the privilege if the news organization wishes to assert it, or perhaps more pertinently, that the source cannot use the privilege to protect information that the news organization chooses to reveal.²²⁹ A news organization facing a subpoena for this information might hesitate to be the test case to determine the contours of the privilege in a particular jurisdiction, not least because of concerns that an adverse ruling could affect the viability of a reporter's shield in other contexts. As one long-time practitioner and expert in the law of reporter's privilege has observed:

While protections for anonymous Internet speakers are important in the digital age, it is dubious that anonymous posters should be protected by more stringent tests than anonymous journalistic sources as is often the case. Indeed, a reporter appears to have a stronger imperative than an Internet service provider to maintain confidentiality: she is not only guarding her source's anonymity, but also represents the interest of the public in protecting the reporter-source relationship and the newsgathering process, in order to foster the free flow of information via the press.²³⁰

226. Kissinger & Larsen, *supra* note 18, at 9.

227. See *supra* text accompanying notes 101–08, 110–14.

228. See, e.g., *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *Palandjian v. Pahlavi*, 103 F.R.D. 410, 413 (D.D.C. 1984); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 89 F.R.D. 489, 494 (C.D. Cal. 1981); *State v. Boiardo*, 416 A.2d 793, 798 (N.J. 1980).

229. See, e.g., *Cuthbertson*, 630 F.2d at 147; *Palandjian*, 103 F.R.D. at 413; *L.A. Mem'l Coliseum Comm'n*, 89 F.R.D. at 494; *Boiardo*, 416 A.2d at 798.

230. James C. Goodale et al., *Reporter's Privilege: Recent Developments 2008–2009*, in 2 COMMUNICATIONS LAW IN THE DIGITAL AGE 2009, at 129 (PLI

Despite the Supreme Court's ruling in *Cohen v. Cowles Media Co.* that the First Amendment would not preclude an "outed" source from suing under a promissory estoppel theory,²³¹ it seems unlikely, given the nature of most user agreements, that a viable claim could be made that a news organization has a legal duty to assert a journalist's privilege in order to protect an anonymous commenter.²³² So it would appear from a legal perspective, at least, that a news organization with a tightly crafted user agreement would have nothing to fear from the courts by simply surrendering identifying information in response to a subpoena from a litigant or a prosecutor.

Which brings us back to our starting point: absent a legal duty and a clear privilege, why would, or should, news organizations attempt to invoke a privilege to protect anonymous posters online? The pragmatic answer would be: to encourage more traffic to the website and to avoid the harsh invective of the blogosphere, as experienced by the *Wausau Daily Herald*²³³ and the *Las Vegas Review-Journal*.²³⁴ But perhaps the better answer is that invoking the privilege is what journalists instinctively do. Protected by the First Amendment themselves, they value it. They recognize that their ability to do their jobs depends on their right to keep some information confidential. They also recognize that the right to speak freely and anonymously is essential to public discourse. The fact that it is now taking place in the online environment does not change that principle.

Of course, the question that remains is whether pseudonymous posts on a news website genuinely enhance political discussion and debate. Clearly, many online commenters are hardly the heirs of Thomas Paine or the authors of the Federalist Papers who used the pseudonym "Publius" to conceal their identities and to focus attention on the merits of their argu-

Intellectual Property, Course Handbook Series No. G-987), available at WL 987 PLI/Pat 113.

231. 501 U.S. 663, 670–72 (1991).

232. But see ELLIOTT C. ROTHENBERG, *THE TAMING OF THE PRESS: COHEN V. COWLES MEDIA COMPANY* 249 (1999) (arguing that the Cohen decision could represent "a necessary and overdue restoration of balance" between the relative power of the media and the public).

233. See *supra* text accompanying notes 1–11.

234. See *supra* text accompanying notes 136–41.

ments.²³⁵ But who is to say that their “outrageous” speech is not worthy of protection?²³⁶ And if the speech is worthy of protection, it follows that the identities of the speakers must be as well. Whether the courts will decide that the news media will be their primary sword, or shield, to prevent that unmasking remains to be seen.

235. See *Talley v. California*, 362 U.S. 60, 65 (1960) (“[A]nonymity has sometimes been assumed for the most constructive purposes.”).

236. Cf. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53–54 (1988) (holding that defendant magazine had a First Amendment right to publish outrageous caricatures of public officials).