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REVISITING THE "ANONYMOUS SPEAKER PRIVILEGE"

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Over the past few years federal and many state courts have generally adopted a new discovery privilege. This privilege protects against the disclosure of the identity of a "John Doe" defendant whose anonymous online speech has given rise to a claim of defamation, copyright infringement, or other civil wrongdoing. The privilege can be overcome, but only if the plaintiff meets a higher evidentiary standard than is required by the ordinary rules of pleading. That higher standard requires the plaintiff to prove the existence of a prima facie case, at least, if not more. In some instances, the plaintiff must submit to the court sufficient evidence to survive a motion for summary judgment before he can discover the identity of the alleged wrongdoer. This Article argues that this discovery privilege, derived from the principle that the First Amendment prohibits governments from requiring identification as a precondition to speech, does not, in fact, follow from that principle. But a discovery privilege against the disclosure of the identity of a John Doe defendant does fit squarely within the First Amendment's long-standing "associational privilege." This Article discusses how the associational privilege can and should be adapted to fit the online world.

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I. INTRODUCTION

The Federal Rules of Civil Procedure permit discovery of "nonprivileged matter that is relevant to any party's claim or defense."[1] In most civil lawsuits, the identity of the defendant is most certainly relevant, if for no other reason than to effect service of process. Nonetheless, with increasing frequency, a plaintiff may be barred from obtaining discovery of the identity of a "John Doe" defendant—or at least confront a significant barrier to that discovery—when the lawsuit arises from that John Doe's "anonymous" speech.[2] This barrier was erected by the creation of a discovery privilege to protect anonymous online speech.

With few real exceptions,[3] the federal courts—and many state courts—during the last decade have adopted special rules governing the compelled disclosure of the identity of a John Doe defendant in private civil lawsuits when that John Doe is alleged to have committed some wrongdoing online, such as defamation, infringement of intellectual property, stock manipulation, tortious interference with contractual or prospective economic relations, or fraud.[4] Specifically, the plaintiff must make some showing of the evidentiary sufficiency of her claims above and beyond the standard requirements of the rules of pleading.[5] Because online

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[1] FED. R. CIV. P. 26(b)(1).

[2] *See infra* Part II.

[3] *See, e.g.*, Façonnable USA Corp. v. Does 1–10, 799 F. Supp. 2d 1202 (D. Colo. 2011) (finding no basis in the Constitution, Supreme Court decisions, or the Rules of Civil Procedure for any new discovery privilege against the disclosure of the identity of an anonymous online speaker, but nonetheless assessing the merits of the plaintiff's claims against a higher standard than would ordinarily be required by those Rules).

[4] The identity of an online speaker may be sought for other reasons; for example, because the speaker is believed to have evidence relevant to the case, or to determine whether the speaker is or may have been acting as an agent or employee of the named defendant at the time of the events at issue. However, the discussion herein focuses on disclosing the identity of an anonymous defendant.

[5] Reno v. ACLU, 521 U.S. 844, 870 (1997).

speech is treated no differently from speech in the "real world,"[6] these new rules also, presumably, apply to any anonymous John Doe speaker. But because of the common—indeed, almost universal—practice of using a pseudonym or fictitious name on the Internet, this body of law has been developed almost exclusively in cases arising from online speech.

These relatively new standards for obtaining discovery are the product of a deceptively "straightforward equation" derived from established Supreme Court precedent: The First Amendment protects anonymous speech; online speech is to be accorded the same degree of First Amendment protection as speech in other media; and, therefore, anonymous speech online is entitled to some degree of protection.[7] That protection is provided by the anonymous speaker's right to assert a "qualified privilege" to remain anonymous.[8] A plaintiff seeking to expose the identity of an anonymous online speaker can overcome the privilege because "the right to speak anonymously is not absolute . . . ."[9] However, the assertion of the privilege demands a heightened showing by the plaintiff of the validity of the claim that would not be required by the ordinary rules of discovery.[10]

Despite the appealing simplicity of this First Amendment calculus, this Article argues that one of the components of this straightforward equation is inapposite. The courts are relying on

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[6] *Id.*

[7] *See, e.g.*, *In re* Anonymous Online Speakers, 661 F.3d 1168, 1173 (9th Cir. 2011) (holding that "it is now settled that 'an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment' " (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 343 (1995))); Arista Records, L.L.C. v. Doe 3, 604 F.3d 110, 118 (2d Cir. 2010) (stating that "[t]he Supreme Court has recognized that the First Amendment provides protection for anonymous speech").

[8] *E.g.*, Lefkoe v. Jos. A. Bank Clothiers, Inc., 577 F.3d 240 (4th Cir. 2009).

[9] Best W. Int'l, Inc. v. Doe, No. CV-06-1537-PHX-DGC, 2006 U.S. Dist. LEXIS 56014 at *9 (D. Ariz. July 25, 2006).

[10] Amy P. Nickerson, Comment, *Coercive Discovery and the First Amendment: Towards a Heightened Discoverability Standard*, 57 UCLA L. REV. 841, 846 (2010).

the *Talley v. California*[11] line of cases, which struck down laws requiring the disclosure of identity as a precondition to speech. These cases do not, however, support the new discovery privilege as it is currently deployed.[12] Imposing what is tantamount to a summary judgment standard before the defendant can even be identified errs in both reach and rationale.

This Article further proposes that another body of First Amendment law—arising from *NAACP v. Alabama ex rel. Patterson*[13]—can and should be substituted for *Talley* and its progeny in the equation. Unlike *Talley*, these cases bear directly on the issue presented by the anonymous online defendants—whether there is a First Amendment discovery privilege protecting anonymous speech—and unambiguously hold that there is such a privilege, and that it arises from the First Amendment right of association.[14] This is the privilege that the anonymous online speaker can assert.

But the contours of the "associational privilege" differ markedly from the prevailing anonymous speaker privilege. In order to align the anonymous speaker privilege with its true provenance, the standards for asserting it must be substantially revised. The burden should shift from the plaintiff back to the defendant, who must make a prima facie showing of entitlement to invoke the privilege with evidence that the disclosure of identity

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[11] 362 U.S. 60 (1960).

[12] Another scholar has reached the same conclusion, but for different reasons than are proposed in this Article. *See* Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards*, 83 OR. L. REV. 795 (2004). Most of the scholarly articles do not focus on the First Amendment underpinnings for the discovery privilege, but instead propose variations on the standards for applying it. *See, e.g.*, Nathaniel Gleicher, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320 (2008); Erik P. Lewis, Note, *Unmasking "ANON12345": Applying An Appropriate Standard When Private Citizens Seek the Identity of Anonymous Internet Defamation Defendants*, 2009 U. ILL. L. REV. 947 (2009); Lyrissa B. Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537 (2007).

[13] 357 U.S. 449 (1958).

[14] *Id.* at 466.

would have an adverse effect on the defendant's associational rights.

The anonymous speaker privilege needs a substantial redirection not only because of the shaky jurisprudential basis for the privilege as it has been constructed, but also because the policy considerations that originally justified the creation of the privilege have been undermined by the realities of today's Internet. Early advocates of the privilege extolled anonymous speech on the grounds that "Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas."[15] It has been argued by many, however, that unbounded anonymous online speech is particularly dangerous, rather than worthy of special protection.[16] Thus, for example, "[o]nline, bigots can aggregate their efforts even when they have insufficient numbers in any one location to form a conventional hate group. They can disaggregate their offline identities from their online presence, escaping social opprobrium and legal liability for destructive acts."[17] This Article does not take sides in this dispute, but it does presume that anonymous online speech is not an unalloyed good to be protected at any cost.

Further, as discussed below, there are costs associated with according anonymous speakers a discovery privilege. In *Doe v. Cahill*,[18] the Supreme Court of Delaware imposed a barrier to discovery so high that it essentially mandates that the plaintiff satisfy the summary judgment test just to have his day in court. According to *Cahill*, "before a defamation plaintiff can obtain the identity of an anonymous defendant through the compulsory discovery process he must support his defamation claim with facts

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[15] Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001).

[16] Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 63 (2009).

[17] *Id.*; *see also* Vogel, *supra* note 12, at 822 ("The general right to speak anonymously on the Internet is substantially different from the asserted right to remain anonymous when anonymity is being used as a shield protecting tortious or illegal conduct. The rapidity with which false information, trade secrets, and the like can be spread over the Internet creates a serious hazard, a hazard which must be weighed in determining the proper judicial approach to these situations.").

[18] 884 A.2d 451, 460 (Del. 2005).

sufficient to defeat a summary judgment motion."[19] Federal courts also apply the summary judgment standard in some circumstances.[20] The result is that persons who have suffered real injury from actual wrongdoing may be deprived of their day in court because they cannot discover the identity of the wrongdoer[21] based on a preliminary, "unregulated judicial 'gut check' " of the merits of the plaintiff's claims.[22]

The anonymous speaker privilege, like other discovery privileges, is "in derogation of the search for truth" and should therefore not be "lightly created nor expansively construed."[23] Thus, the nature and extent of the anonymous speaker privilege should be determined by the strength of the First Amendment rights supporting the privilege. It is important, then, to ensure that the First Amendment well supports the anonymous speaker privilege.

If the instances in which defendants could assert the anonymous speaker privilege were few and far between, this issue would perhaps be of little concern. But because so much speech today occurs over the Internet—e-mail, blogs, webinars, podcasts, and the mammoth social networking sites—and so much of it is anonymous, or at least pseudonymous, suits against John Doe online speakers are more likely to proliferate than diminish. Ensuring that the privilege against compelled disclosure is well-grounded in precedent, and that the standards for protecting that privilege are carefully crafted to balance all the rights at issue is, therefore, imperative.

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[19] *Id.*

[20] *Cf. In re* Anonymous Online Speakers, 661 F.3d 1168, 1176–77 (9th Cir. 2011) ("Because *Cahill* involved political speech, that court's imposition of a heightened standard is understandable.")

[21] *See generally* Lewis, *supra* note 12.

[22] *See* Vogel, *supra* note 12, at 809. As the author notes, the "gut check" is usually "unregulated" because the trial court's decision to allow or disallow discovery is not often subject to appellate review. *See id.* at 809–10.

[23] United States v. Nixon, 418 U.S. 683, 710 (1974), *superseded by statute*, FED. R. CIV. P. 104(a), *as recognized in* Bourjaily v. United States, 483 U.S. 171 (1987).

This Article attempts to better map established, pre-Internet jurisprudence onto the world of the anonymous John Doe defendant "speaking" online. Part II explores the evolution of the anonymous speaker privilege in the district courts, focusing on its theoretical foundation; describes the few circuit court decisions on the privilege; and discusses the practical effects of the privilege on the civil justice process. Part III analyzes the straightforward equation from which the anonymous speaker privilege has been derived and argues that the equation is faulty. Part IV explains how the associational privilege encompasses a privilege against disclosure of the identity of a John Doe defendant and explores how the traditional privilege should be updated and revamped to apply in the Internet world. As revisited and revised, the anonymous speaker privilege would be better grounded in First Amendment law, less of a departure from existing rules of discovery, and more sensitive to providing aggrieved plaintiffs their rightful day in court.

II. THE ANONYMOUS SPEAKER PRIVILEGE IN THE FEDERAL COURTS

A decade after it first appeared in a reported decision, the anonymous speaker privilege has become a firmly embedded discovery rule in the Federal courts. As would be expected for a rule of discovery, the privilege was first articulated and developed in the district courts.[24] The privilege has also been generally sanctioned by the circuit courts that have addressed it, but the specific First Amendment precedent supporting the privilege was not an issue for decision in any of these cases.[25]

The privilege is qualified and can be overcome.[26] What the party seeking disclosure must show to overcome the privilege has been the subject of more debate than the existence of the privilege itself. Pursuant to well-established First Amendment law, the

[24] *See* Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001).

[25] *See, e.g.*, *In re* Anonymous Online Speakers, 661 F.3d at 1173.

[26] *See, e.g.*, *id.*

standard for overcoming the privilege depends on the nature of the speech.[27] Anonymous commercial speech receives little, if any, special protection. How the privilege can be overcome when the anonymous is noncommercial is less certain. But whichever standard is applied, the plaintiff bears the initial burden of meeting "heightened" pleading requirements in order to unmask the John Doe defendant.[28]

A. *The Anonymous Speaker Privilege Develops in Federal District Courts*

One of the earliest cases in which a federal court considered the issue of compelled disclosure of an anonymous online speaker, and a case often cited for the proposition that First Amendment rights are implicated,[29] is *Columbia Insurance Co. v. Seescandy.com.*[30] The plaintiff, licensee of various trademarks for See's Candy Shops, Inc. ("See's") alleged, *inter alia*, that the domain names "seescandy.com" and "seecandys.com" infringed its trademarks and requested the issuance of a temporary restraining order.[31] The plaintiff had not, however, been able to identify the person(s) who had registered the domain names, and the court expressed its reluctance to enter an order that "could only be in effect for a limited time and would be unlikely to have any effect on defendant whom plaintiff has not yet located."[32] *Sua sponte*, the court considered whether it would be appropriate to allow the plaintiff to proceed against a John Doe defendant and engage in pre-service discovery to identify the putative defendant.[33] The court concluded that though this procedure was "disfavored," it was within the district court's discretion to allow it, particularly in

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[27] *Id.* at 1177.

[28] *Id.* at 1174.

[29] *See, e.g.*, Sony Music Entm't, Inc. v. Does 1–40, 326 F. Supp. 2d 556, 562 (S.D.N.Y. 2004) (citing *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999), *inter alia*, for the proposition that "[i]t is well-settled that the First Amendment's protection extends to the Internet").

[30] 185 F.R.D. 573 (N.D. Cal. 1999).

[31] *Id.* at 575.

[32] *Id.* at 577.

[33] *See id.*

order to determine whether the court had *in personam* jurisdiction.[34] The court in *Seescandy.com* buttressed its conclusion with the following observations:

> With the rise of the Internet has come the ability to commit certain tortious acts, such as defamation, copyright infringement, and trademark infringement, entirely on-line. The tortfeasor can act pseudonymously or anonymously and may give fictitious or incomplete identifying information. Parties who have been injured by these acts are likely to find themselves chasing the tortfeasor from Internet Service Provider (ISP) to ISP, with little or no hope of actually discovering the identity of the tortfeasor.[35]
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> In such cases the traditional reluctance for permitting filings against John Doe defendants or fictitious names and the traditional enforcement of strict compliance with service requirements should be tempered by the need to provide injured parties with an [sic] forum in which they may seek redress for grievances.[36]

But the court also acknowledged a countervailing consideration: "the legitimate and valuable right to participate in online forums anonymously or pseudonymously."[37] The court did not specifically derive this right from the First Amendment, but the "open communication and robust debate"[38] that anonymity on the Internet can foster harkens to First Amendment jurisprudence. To fairly balance these considerations, the court required the plaintiff to show the following before discovery could ensue: (1) identification of the missing party with sufficient specificity that the court could determine that the defendant was a real person or entity who could be sued in federal court; (2) identification of all previous steps taken to locate the defendant; and (3) that the suit could withstand a motion to dismiss.[39]

The first explicit reference in a federal court decision to the First Amendment rights of anonymous online speakers appeared in

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[34] *Id.* at 577–78.
[35] *Id.* at 578 (footnote omitted).
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* at 578–79.

2001 in *Doe v. 2TheMart.com, Inc.*,[40] a shareholder derivative class action. The plaintiff subpoenaed an internet service provider ("ISP") to obtain the identity of several anonymous posters to an Internet "bulletin board."[41] One anonymous poster moved to quash on the grounds that compelling his "unmasking" would violate his First Amendment rights.[42] The movant was a third party witness, and the rules of discovery generally give third parties greater protection from the burdens of discovery than a party to the case.[43] However, the court's analysis of the First Amendment implications of compelling the disclosure of the identity of an anonymous online speaker did not refer to the relationship of the speaker to the lawsuit.[44] Therefore, the *2TheMart.com* analysis is a key component of the evolution of the new privilege.[45]

In considering the validity of the First Amendment defense, the court in *2TheMart.com* relied on a straightforward equation,[46] as this Article describes the analysis. Thus, first: "A component of the First Amendment is the right to speak with anonymity."[47] The

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[40] 140 F. Supp. 2d 1088 (W.D. Wash. 2001). Prior to this decision, as noted by the court, a Virginia state court judge reached the conclusion that anonymous online speakers were protected by the First Amendment. *See In re* Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. 26, 34 (Va. Cir. Ct. 2000), *rev'd and remanded on other grounds*, America Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377 (Va. 2001).

[41] *See In re* Subpoena Duces Tecum to America Online, Inc., 52 Va. Cir. at 34. A "bulletin board"—more commonly referred to today as a message board or chat room—is an online site devoted to a specific topic that is generally determined by the administrator or creator of the board or chat room. *See* Musetta Durkee, Note, *The Truth Can Catch the Lie: The Flawed Understanding of Online Speech in* In re Anonymous Online Speakers, 26 BERKELEY TECH. L.J. 773, 811 (2011).

[42] *See In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. at 34.

[43] *See* 2TheMart.com, Inc., 140 F. Supp. at 1095.

[44] *Id.*

[45] In contrast, the court adopted a higher standard for disclosure in *2TheMart.com* than that in *Seescandy.com* because of the different relationship of the online speaker to the lawsuit. *See id.*

[46] *Id.*

[47] *Id.* at 1092.

court cited *Buckley v. American Constitutional Law Foundation*,[48] *McIntyre v. Ohio Elections Commission*,[49] and *Talley v. California*[50] for this "well established" proposition.[51] Second, the *2TheMart.com* court, citing *Reno v. ACLU*,[52] asserted: "First Amendment protections extend to speech via the Internet."[53] And, finally: "The right to speak anonymously extends to speech via the Internet."[54]

The *2TheMart.com* court further noted that the degree of protection afforded by the First Amendment would depend on the type of speech at issue, or the height of the hurdle facing the party seeking disclosure would vary, depending on the nature of the speech.[55] In accordance with established Supreme Court precedent, "core" political speech should be afforded the highest protection.[56] But the effort to obtain the identity of the poster of non-core but protected speech at issue in the case—comments on a company's financial performance—would only have to survive "normal strict scrutiny."[57] The court held that "normal strict scrutiny," at least for a non-party witness, would comprise consideration of four factors: (1) the subpoena seeking the

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[48] 525 U.S. 182, 200 (1999) (invalidating, on First Amendment grounds, a Colorado statute requiring initiative petition circulators to wear identification badges).

[49] 514 U.S. 334, 357 (1995) (overturning an Ohio law that prohibited the distribution of campaign literature that did not contain the name and address of the person issuing the literature).

[50] 362 U.S. 60, 65 (1960) (invalidating a California statute prohibiting the distribution of handbills not containing the name and address of the preparer).

[51] *2TheMart.com*, 140 F. Supp. 2d at 1092. The court cited *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), for the proposition that the court's exercise of its subpoena power must be limited when it impacts First Amendment rights, but did not further explore the role *Patterson* and its progeny may play in the protection of anonymous speech. *See 2TheMart.com*, 140 F.Supp.2d at 1092.

[52] 521 U.S. 844, 870 (1997).

[53] *2TheMart.com*, 140 F. Supp. 2d at 1092.

[54] *Id.*

[55] *See id.* at 1093–95.

[56] *Id.* at 1093.

[57] *Id.*

information was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source.[58]

Two years later a similar issue was addressed by the court in *In re Verizon Internet Services, Inc.*[59] In this District of Columbia case, Verizon moved to quash a subpoena served by the Recording Industry Association of America pursuant to section 512(h) of the Digital Millennium Copyright Act.[60] The subpoena sought the identity of anonymous users of Verizon's Internet services who had allegedly infringed copyrights by downloading songs over the Internet.[61] Verizon objected to complying with the subpoena on the grounds, *inter alia*, that section 512(h) violated the First Amendment rights of Internet users.[62] In addressing this objection, based on the very same precedent cited in *2TheMart.com*,[63] the court in *Verizon* reached the same conclusion: Anonymous online speech is entitled to First Amendment protection.[64] The court also concluded, however, that because the "speech" at issue allegedly constituted copyright infringement, which is not protected by the First Amendment, the anonymous expression of that speech would be accorded "minimal" protection,[65] which was satisfied by the

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[58] *Id.* at 1095.

[59] 257 F. Supp. 2d 244 (D.D.C. 2003), *rev'd on other grounds*, Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229 (D.C. Cir. 2003), *cert. denied*, 534 U.S. 924 (2004).

[60] *Id.* at 246; 17 U.S.C. § 512(h) (2006).

[61] 257 F. Supp. 2d at 246.

[62] *See id*.

[63] *Id.* at 259. The court referenced *Patterson* in similar fashion as did the court in *2TheMart.com*. That is, in a footnote, the court noted precedent for "some limitations on the subpoena power when its invocation affects First Amendment rights involving anonymity." *Id.* at 259 n.17 (citing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461 (1958)). But the court did not explore the right to anonymity set forth in that Supreme Court case. This exploration will be undertaken in Part III.

[64] *See In re Verizon*, 257 F. Supp. 2d at 259.

[65] *Id.* at 260.

procedural requirements of section 512(h). In particular, the court noted, "in order to obtain a subpoena [pursuant to the statute], the copyright owner must, in effect, plead a prima facie case of copyright infringement."[66]

Shortly after *Verizon*, a similar case was decided in the Southern District of New York. In *Sony Music Entertainment, Inc. v. Does 1–40*,[67] the plaintiffs subpoenaed an ISP seeking the identity of anonymous users who had allegedly infringed copyrighted material using "peer-to-peer" file sharing.[68] The ISP objected on, *inter alia*, First Amendment grounds. As in *Verizon*, the court reasoned that the First Amendment protects anonymous speech, including anonymous speech on the Internet.[69] The court also agreed with *Verizon* that the John Does' First Amendment rights were entitled to only "limited" protection, but for a different reason: Downloading and sharing computer files is arguably "expressive," but not the type of "true expression" or "political expression" that would be subject to full protection.[70] In order to give that limited protection to the file sharers, the court considered five factors in deciding whether the identity of the John Doe defendants should be disclosed: (1) the plaintiff's ability to establish a prima facie claim, (2) the specificity of plaintiff's discovery request, (3) the availability of alternative means to obtain the subpoenaed information, (4) the central need for discovery to advance plaintiff's claim, and (5) defendants' expectation of privacy.[71]

After *Sony*, the federal district courts almost unanimously viewed a subpoena to disclose the identity of an anonymous online speaker as implicating the speaker's First Amendment rights.[72] For

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[66] *Id.* at 263.
[67] 326 F. Supp. 2d 556 (S.D.N.Y. 2004).
[68] *Id.*
[69] *Id*. at 562.
[70] *Id*. at 564.
[71] *Id*. at 564–67.
[72] A faint dissent was voiced in Faconnable USA Corp. v. John Does 1–10, 799 F. Supp. 2d 1202, 1204 (D. Colo. 2011).

example, in *Highfields Capital Management v. Doe*,[73] in which the plaintiff sought to disclose the identity of the owner of an Internet screen name who had allegedly infringed the plaintiff's trademark, the District Court for the Northern District of California, citing *Seescandy.com*,[74] stated: "What defendant seeks to protect through his motion to quash is the right to express most effectively and anonymously, without fear of expensive adverse consequences, his views about matters in which many other members of the public are interested."[75] Similarly, in *Best Western International, Inc. v. Doe*,[76] the plaintiff sought to disclose the identity of online posters of statements that allegedly disclosed confidential information, were defamatory, and in breach of fiduciary duty. The District Court for the District of Arizona began its analysis of the objection to that disclosure on the premise that anonymous online speech was entitled to First Amendment protection,[77] as did the District Court for the Eastern District of Pennsylvania in *Raw Films, Ltd. v. John Does 1–15.*[78]

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[73] 385 F. Supp. 2d 969 (N.D. Cal. 2005).

[74] The court also cited *Dendrite Int'l, Inc. v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001). In developing standards for protecting the new discovery privilege, the federal courts relied on several state court cases, including not only *Dendrite* but also *In re Subpoena Duces Tecum to America Online, Inc*., 52 Va. Cir. 26, 34 (Va. Cir. Ct. 2000), and *John Doe No. 1 v. Cahill*, 884 A.2d 451, 457 (Del. 2005). But both the federal and state courts employed the same rationale for creating these standards—the First Amendment protects anonymous online speech—and relied on the same Supreme Court precedent for formulating that rationale. *See, e.g.*, *Dendrite*, 775 A.2d at 765. Because it is this underlying equation that is the focus here, the state court decisions are here noted, but not specifically analyzed.

[75] *Highfields*, 385 F. Supp. 2d at 974–75.

[76] No. 06-1537, 2006 U.S. Dist. LEXIS 56014, at *7 (D. Ariz. Jul. 25, 2006).

[77] *Id.* at *7–8.

[78] No. 11-7248, 2012 U.S. Dist. LEXIS 41645, at *17 (E.D. Pa. Apr. 27, 2012). *See also* Doe I, & Doe II v. Individuals, 561 F. Supp. 2d 249, 253–54 (D.C. Ct. App. 2009) (stating that in ruling on a motion to quash, "Doe 21 has a First Amendment right to anonymous Internet speech"); Fodor v. John Doe, 3:10-CV-0798-RCJ(VPC), 2011 U.S. Dist. LEXIS 49672, at *7–8 (D. Nev. Apr. 27, 2011) ("The court must weigh the rights of the harmed party to expose an anonymous online speaker against the anonymous speaker's First Amendment right of free speech."); *In re* Rule 45 Subpoena, No. MISC 08-

What the party seeking disclosure must show to overcome the privilege has been the subject of more debate than the existence of the privilege itself. While the issue was relatively novel, and precedent slight, courts developed differing standards for balancing discovery rights and First Amendment rights.[79] Now, however, a consensus is beginning to emerge.[80] Many of the district courts that have addressed the anonymous speaker privilege when it has been asserted to protect noncommercial speech apply the standard devised by the court in *Sony*[81] or the comparable test developed by the New Jersey Supreme Court in *Dendrite International, Inc. v. Doe*.[82] The key requirement of each approach is a showing of a prima facie case and a "heightened" need for the information sought.[83] When the speech at issue is "purely expressive,"[84] which

347(ARR)(MDG), 2010 U.S. Dist. LEXIS 40653, at *22–23 (E.D.N.Y. Feb. 5, 2010) (recommending that motion to quash be granted because the anonymous online speech at issue "is purely expressive and thus entitled to heightened First Amendment protection"); Salehoo Grp. v. ABC Co., 722 F. Supp. 2d 1210, 1214 (W.D. Wash. 2010) ("Subpoenas seeking the identity of anonymous individuals raise First Amendment concerns.").

[79] *See In re* Anonymous Online Speakers, 661 F.3d 1168, 1175 (9th Cir. 2011) (describing the many and sometimes conflicting standards).

[80] *See, e.g.*, *Salehoo*, 722 F. Supp. 2d at 1214 ("The case law, though still in development, has begun to coalesce around the basic framework of the test articulated in *Dendrite Int'l, Inc. . . . .*"*)*; *accord*, Koch Indus. v. Does 1–25, No. 2:10CV1275DAK, 2011 U.S. Dist. LEXIS 49529, at *26 (D. Utah May 9, 2011).

[81] Sony Music Entm't, Inc. v. Does 1–40, 326 F. Supp. 2d 556, 562 (S.D.N.Y. 2004).

[82] 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

[83] *See id.* at 760. The *Dendrite* test also requires that the anonymous defendant be given notice that the plaintiff is seeking to unmask his identity. Federal cases applying the general framework of *Sony* or *Dendrite* include *Raw Films, Ltd. v. Does*, No. 11-7248, 2012 U.S. Dist. LEXIS 41645, at *22 (E.D. Pa. Mar. 23, 2012); *Cornelius v. DeLuca*, No. 1:10-CV-027-BLW, 2011 U.S. Dist. LEXIS 27213, at *8 (D. Idaho Mar. 15, 2011), *vacated and remanded on other grounds, SI03, Inc. v. Bodybuilding.com, L.L.C.*, 441 Fed. Appx. 431 (9th Cir. 2011); *In re Rule 45 Subpoena*, 2010 U.S. Dist. LEXIS 40653 at *22; Fodor v. Doe, 2011 U.S. Dist. LEXIS 49672 at *8; *Doe I*, & *Doe II*, 561 F. Supp. 2d at 254–55; and *Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 380, 385 (2005). *But see* Directory Assistants, Inc. v. Does 1–10, No. MC 11-00096-PHX-FJM, 2011 U.S. Dist. LEXIS 128292, at *5 (D. Ariz. Nov. 4, 2011) (holding that the

it was not in *Sony*, the court may apply the "most exacting standard" for overcoming the discovery privilege that has yet been articulated:[85] the "summary judgment" standard adopted by the Delaware Supreme Court in *Cahill*.[86] Whatever standard is applied, the anonymous speaker need not prove anything to assert the privilege; the initial burden is on the plaintiff.[87]

B. *Anonymous Speaker Privilege Addressed by Federal Courts of Appeals*

Pre-Internet cases involving the compelled unmasking of an anonymous speaker by means of discovery are scarce: the Sixth and Fourth Circuits each decided one. The many district court decisions on the privilege in the last few years reflect the extent to which anonymous communication via the Internet has become the

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privilege can be overcome if the plaintiff meets the "heightened" pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009)).

[84] Whether or not the speech at issue has been properly characterized as "purely expressive" or "intermediate" is not an issue undertaken in this Article.

[85] *In re* Anonymous Online Speakers, 661 F.3d 1168, 1176 (9th Cir. 2011).

[86] 884 A.2d 451, 461 (Del. 2005). Federal courts that have applied the "summary judgment" standard include *Quixtar, Inc. v. Signature Mgmt. Team, LLC*, 566 F. Supp. 2d 1205, 1216 (D. Nev. 2008); *Ecommerce Innovations, L.L.C. v. Does 1–10*, 2008 U.S. Dist. LEXIS 99325, at *3 (D. Ariz. Nov. 25, 2008); and *Best Western Int'l, v. Doe*, No. CV-06-1537-PHX-DGC, 2006 U.S. Dist. LEXIS 56014, at *11 (D. Ariz. July 25, 2006). It should be noted, however, that the summary judgment standard employed in regard to the anonymous speaker privilege is akin to the prima facie standard because the plaintiff cannot demonstrate the absence of a disputed issue of fact before it has obtained discovery of all the relevant facts in the case. Thus, a court applying the "summary judgment" standard explained: "[A] plaintiff at an early stage of the litigation may not possess information about the role played by particular defendants or other evidence that normally would be obtained through discovery. But a plaintiff must produce such evidence as it has to establish a prima facie case of the claims asserted in its complaint." *Best Western*, 2006 U.S. Dist. LEXIS 56014, at *12.

[87] A different rule may apply if the party objecting to disclosure does not admit to having been the anonymous speaker. *See* Matrixx Initiatives, Inc. v. Doe, 138 Cal. App. 4th 872, (6th Cir. 2006).

norm.[88] Because discovery disputes are not generally appealable on an interlocutory basis,[89] and because the vast majority of cases settle before trial,[90] relatively few of these decisions on the anonymous online speaker privilege have reached the appellate level in the short period of time the privilege has been widely invoked. Examining the few decisions by the courts of appeal, it can be concluded that the courts have sanctioned a general discovery privilege of anonymity based on the First Amendment, though without directly identifying the specific body of First Amendment law that supports the privilege. Instead, the focus has been on the standards for overcoming the privilege.

In the Sixth Circuit case, *NLRB v. Midland Daily News*,[91] the National Labor Relations Board sought an order compelling a newspaper to comply with a subpoena seeking the production of documents that would identify the source of an anonymous advertiser. A local union had filed an unfair labor practices claim against the advertiser, and the NLRB issued the subpoena in its investigation of the claim.[92] The district court denied the requested relief, and the Sixth Circuit affirmed.[93] The court neither based its analysis or holding on the fact that the discovery would "unmask" an anonymous speaker; nor did it discuss any First Amendment right to speak anonymously. Instead, it simply noted there was "no dispute" that an advertisement placed by someone who desired to remain anonymous constituted "lawful commercial speech."[94] The court then applied settled authority that commercial speech was

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[88] *See* Salehoo Grp, v. ABC Co., 722 F. Supp. 2d 1210, 1214 (W.D. Wash. 2010) ("With the expansion of online expression, the use of subpoenas to unmask anonymous Internet speakers in connection with civil lawsuits is on the rise.").

[89] *See, e.g.*, *In re Anonymous Speakers*, 661 F.3d at 1175.

[90] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 462 (2004) (showing in a study that less than two percent of federal civil lawsuits go to trial).

[91] 151 F.3d 472 (6th Cir. 1998).

[92] *Id.* at 473.

[93] *Id.* at 473–74.

[94] *Id.* at 475.

entitled to First Amendment protection against "unwarranted government regulation."[95] The court concluded that compelling compliance with the subpoena would be "unwarranted" because, on one hand, forcing disclosure "may discourage anonymous employment advertisements generally and thereby chill the lawful commercial speech of periodicals and employers nationwide," and, on the other, the underlying claim lacked "any factual support" and the NLRB had not "implemented a less intrusive means to conduct its investigation."[96]

In the other pre-Internet case, *Lefkoe v. Jos. A. Bank Clothiers, Inc.*,[97] a securities fraud class action, a nonparty witness claimed a First Amendment right to remain anonymous. The witness objected to a subpoena for deposition on this ground.[98] Although the district court in Massachusetts, where the subpoena had issued, rejected the objection, the court entered a protective order precluding the deposing attorneys from disclosing the identity of the witness, even to their clients.[99] After the deposition, the defendant in the action moved for an order unsealing the deposition and allowing further discovery from the John Doe witness. The district court granted partial relief, allowing the attorneys to disclose the identity of the witness to the parties and pursue discovery but precluding the parties from making the information known to the public.[100] Ruling on an interlocutory appeal, the Fourth Circuit relied in part on *McIntyre*, stating that: "The First Amendment does appear to include some aspect of anonymity in protecting free speech."[101] However, "[c]ourts have typically protected anonymity under the First Amendment when claimed in connection with literary, religious, or political

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[95] *Id.* at 474 (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980) (emphasis omitted)).

[96] *Id.* at 475.

[97] 577 F.3d 240 (4th Cir. 2009).

[98] *Id.* at 242.

[99] *Id.* The witness did not appeal the decision of the district court in Massachusetts. *Id.*

[100] *Id.*

[101] *Id.* at 248.

speech."[102] Because the speech at issue constituted "commercial speech," it was entitled only to a "limited measure of protection," that would be overcome by "a substantial governmental interest in disclosure so long as disclosure advances that interest and goes no further than reasonably necessary."[103] Because the party seeking disclosure demonstrated that discovery of the Doe client's identity and information from it would provide "relevant and useful"[104] information, the governmental interest in disclosure outweighed the "qualified privilege"[105] and the court affirmed the district court's order.[106]

The anonymous speaker privilege asserted to protect noncommercial anonymous speech captured the Second Circuit's attention in *Arista Records, LLC v. Doe 3*.[107] Plaintiff recording companies alleged that John Doe defendants infringed copyrights by downloading and distributing music and issued a subpoena to the defendants' ISP to obtain their identities. The Doe defendants moved to quash on the grounds, *inter alia*, that disclosure would violate First Amendment rights.[108] The district court affirmed the magistrate judge's denial of the motion, Doe 3 appealed, and the court of appeals in turn also affirmed.[109] On the question whether an anonymous speaker privilege exists, the court, citing *Buckley*,[110] *McIntyre*,[111] and *Patterson*,[112] simply stated: "To the extent that anonymity is protected by the First Amendment, a court should

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[102] *Id.* (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342–43 (1995); Watchtower Bible & Tract Soc'y v. Vill. of Stratton, 536 U.S. 150, 166–67 (2002); Buckley v. Am. Constitutional Law Found., Inc, 525 U.S. 182, 197–204 (1999)).

[103] *Id*. at 248–49 (citations omitted).

[104] *Id.* at 249.

[105] *Id.* at 248.

[106] *Id.* at 249.

[107] 604 F.3d 110 (2d Cir. 2010).

[108] *Id.* at 113.

[109] *Id.* at 116.

[110] 525 U.S. 182, 199–200 (1999).

[111] 514 U.S. 334, 341–42 (1995).

[112] 357 U.S. 449, 462, 466 (1958).

quash or modify a subpoena designed to breach anonymity."[113] In evaluating the lower courts' decision not to quash, the court rather generally referred to "the qualified privilege" at issue.[114] The court found no abuse of discretion in the district court's application of the *Sony Music Entertainment*[115] standard for determining whether the plaintiff could overcome the privilege.[116]

Subsequently, in *In re Anonymous Online Speakers*,[117] the Ninth Circuit considered a petition for a writ of mandamus filed on behalf of three online speakers—not parties to the lawsuit—whose identity the district court ordered be disclosed after a deponent refused to name them. According to the plaintiff, statements made by these speakers in various online forums supported its claim against the defendant for tortious interference.[118] The court began its analysis with the familiar litany recited by the district courts: *Talley* and *McIntyre* establish that the First Amendment protects anonymous speech, and speech on the Internet "stands on the same footing" as other speech.[119] As the Second Circuit had referenced *Patterson*[120] in its analysis, the Ninth referred to *Perry v. Schwarzenegger*,[121] a case involving the interplay between compelled disclosure during discovery and First Amendment associational rights. The court distinguished *Perry* because that case involved a discovery request for political campaign information, not commercial speech—as in the case at bar—and did not involve an anonymous speaker.[122] Accordingly, the Ninth Circuit did not reach the issue of whether or how *Perry* would bear on a case involving the compelled disclosure of anonymous political speech. Nor did the court otherwise explore the First

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[113] Arista Records, L.L.C. v. Doe 3, 604 F.3d 110, 118 (2nd Cir. 2010).
[114] *Id.* at 119.
[115] Sony Music Entm't, Inc. v. Does 1–40, 326 F. Supp. 2d 556 (S.D.N.Y. 2004).
[116] *Arista Records*, 604 F.3d at 119.
[117] 661 F.3d 1168 (9th Cir. 2011).
[118] *Id.* at 1172.
[119] *Id.* at 1173.
[120] 357 U.S. 449 (2001).
[121] 591 F.3d 1147 (9th Cir. 2010).
[122] *In re Anonymous Online Speakers*, 661 F.3d at 1174.

Amendment basis for an anonymous speaker privilege.[123] Instead, the opinion turns on what standard should be employed to overcome the privilege.

In this regard, the court expressed some misgivings about imposing new evidentiary requirements on the plaintiff.[124] After summarizing the different standards used for evaluating the sufficiency of the plaintiff's case, the court noted:

> Interestingly, in each of these cases, the initial burden rests on the party seeking discovery and requires varying degrees of proof of the underlying claim. In *Perry* [*v. Schwarzenegger*], however, we evaluated the First Amendment political associational rights separately from the underlying claims and adopted a "heightened relevance standard" requiring plaintiffs to "demonstrate[ ] an interest in obtaining the disclosures . . . which is sufficient to justify the deterrent effect . . . on the free exercise . . . of [the] constitutionally protected right of association."[125]

It was not necessary for the court to pursue this observation—and decide whether "heightened relevance" would be sufficient to overcome the privilege—because the plaintiff had met the new evidentiary requirements and discovery had been ordered. In regard to the summary judgment standard the district court had applied, the Ninth Circuit did not agree that this was appropriate given that this "highest level" should be reserved for political speech, and the speech at issue was not "expressly political."[126] The error was harmless, however, because the plaintiff, having cleared the highest bar—the district court had ordered disclosure—would necessarily have cleared the lower bar, as well.[127]

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[123] In its unreported decision in *SI03, Inc. v. Bodybuilding.com, LLC*, 441 F.App'x 431 (9th Cir. 2011), the court remanded for further proceedings to determine what standard should be applied given that it was unclear, on the record, whether the speech at issue was commercial or noncommercial. As in *In re Anonymous Speakers*, the court did not in this case address the First Amendment foundations for the privilege. *See id.*

[124] *In re Anonymous Online Speakers*, 661 F.3d at 1176.

[125] *Id.* (citations omitted).

[126] *Id.* at 1176–77.

[127] *Id.* at 1177. Given the outcome, the court did not have to categorize the speech as "commercial" or "noncommercial."

In sum, a John Doe defendant in the federal courts whose anonymous online speech has given rise to allegations of wrongdoing may assert a First Amendment privilege against compelled disclosure of identity. By and large, the existence of that privilege is predicated on the *Talley* line of Supreme Court cases. However, no court has fully analyzed how, if at all, the anonymous speaker privilege flows from those cases. And, particularly in the courts of appeal, a related but separate body of law defining the role of the associational privilege in discovery regularly appears, if somewhat tangentially, in the overall picture. The time is ripe to move the associational privilege to center stage as the proper foundation for the anonymous speaker privilege. When that shift is made, the standard for applying the privilege will also be clear: The initial burden will shift back to the party seeking to invoke the privilege—onto the John Doe defendant—and a showing of "heightened relevance" by the plaintiff will be the standard for overcoming the privilege.

C. *Practical Implications of the New Standards*

The anonymous speaker privilege may foreclose proceedings on the merits at the pleading stage if the plaintiff does not meet his evidentiary burden on every element of his claims. If the majority of plaintiffs in the reported cases win this discovery dispute, some lose. For example, in *Salehoo Group v. ABC Co.*,[128] the court granted the anonymous defendant's motion to quash, finding that Salehoo did not adduce sufficient evidence of confusion, an element of its trademark infringement claim, though the defendant used "SaleHoo" all over its website. In *Dendrite International, Inc. v. Doe*,[129] the plaintiff alleged that Internet postings accusing the company of accounting and operational problems were defamatory. The court found there was insufficient proof of damages, even though the submission of a certification from the president and stock trading records evidenced a loss, albeit, arguably, a "minor" diminution in stock value.[130] Had these cases

[128] 722 F. Supp. 2d 1210 (W.D. Wash. 2010).
[129] 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).
[130] *Id.* at 772.

proceeded through the "normal" discovery process, the plaintiff may well have obtained evidence from the defendant in support of its claims, and, perhaps, sufficient additional evidence to win a jury verdict in its favor.

The trial court's order denying discovery of the identity of a John Doe would in many instances become tantamount to a final judgment because service cannot be affected and the case is dismissed.[131] The order of dismissal is of course appealable.[132] But because the issue on appeal is a discovery order, the trial court's decision will presumably be evaluated by an abuse of discretion standard.[133] Hence, one critic dubbed the anonymous speaker privilege a preliminary "unregulated judicial 'gut check' " of the merits of the case.[134]

From a larger perspective, the anonymous speaker privilege may discourage parties from filing suit at all. If, as a result, only "frivolous" lawsuits designed solely to stifle legitimate anonymous speech are precluded, this is not a cost but, instead, a benefit of this new discovery rule.[135] But there is no good data supporting the proposition that only frivolous lawsuits would be filtered out. Nor

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[131] The case may, of course, involve multiple defendants, some of whom are identified, in which event the court's resolution of the discovery issue does not end the case.

[132] Whether or not the discovery order would be appealable before final judgment is a close question that is not addressed here. S*ee* Mohawk Indus, Inc. v. Carpenter, 130 S. Ct. 599 (2009) (holding that discovery orders denying claims of attorney-client privilege are not appealable under the collateral order doctrine).

[133] If the question on appeal involves the nature or extent of the discovery privilege—whether a summary judgment or prima facie standard should be applied, for example—that would be a question of law. But insofar as the application of the standard is concerned, the standard on review would presumptively be abuse of discretion.

[134] Vogel, *supra* note 12, at 809.

[135] For the proposition that lawsuits tempting to unmask John Doe defendants are being used for this purpose see, for example, John Doe No. 1 v. Cahill, 884 A.2d 451, 457 (Del. 2005) ("The goals of this new breed of libel action are largely symbolic, the primary goal being to silence John Doe and others like him." (citing Lyrissa B. Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 860 (2000))).

are there empirical studies demonstrating that cases seeking to unmask anonymous speakers are proportionately more likely to be frivolous than any other type of case: If that were so, the sacrifice of some legitimate claims might be worth the avoidance of an undue number of illegitimate claims. In any event, some number of truly injured parties will refrain from entering the fray at all, faced with the new burdens on prosecuting a case. From this perspective, the practical outcome of the anonymous speaker privilege is preventing justice, and reducing the deterrent effect of a possible lawsuit on those who abuse or otherwise use the Internet for bullying or entrapment.

And those plaintiffs bold enough to embark on litigation against an anonymous online speaker and confront the anonymous speaker privilege will be required to spend more time and money to litigate. Moreover, this investment will be required at the earliest stages of the lawsuit. For example, the plaintiff in *SI03, Inc. v. Bodybuilding.com*[136] incurred attorneys' fees and costs for the motion to compel in the district court, the appeal to the Ninth Circuit, and the additional trial court proceedings on this discovery issue ordered by the circuit court before the litigation truly began. In some cases, expert testimony may also be required to overcome the privilege,[137] rendering the overall cost of initiating the lawsuit quite considerable.[138]

Taking into account the actual and potential costs of the anonymous speaker privilege, and the significant protections already in place in the civil justice system to prevent unwarranted lawsuits arising from speech,[139] it is worth ensuring that the

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[136] 441 F. App'x 431 (9th Cir. 2011).

[137] Experts may be required in claims involving securities fraud or intellectual property infringement, for example, to adduce sufficient evidence regarding elements of those claims. *See, e.g.*, Vogel, *supra* note 12, at 850.

[138] *Id.*

[139] These include Rule 11, motions to dismiss and for summary judgment, and, when the lawsuit is specifically directed at speech, "anti-SLAPP" statutes, which provide for an early assessment of the validity of the lawsuit. *See* Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1109 (9th Cir. 2003) (discussing California's anti-SLAPP statute, CAL. CIV. PROC. CODE § 425.16(a)).

anonymous speaker privilege is well justified on First Amendment grounds. Part III examines the fit between the First Amendment precedent cited in its support and the anonymous speaker privilege as currently applied.

III. THE FIRST AMENDMENT AND INDIVIDUAL ANONYMOUS SPEECH

First, this Part traces the origins of the right to anonymous speech: a genesis that long predates the Internet. The Article then switches from the stately cadence of the Supreme Court to the casual parlance of the Internet, and focuses on exactly what "anonymous speech" means in its online incarnation. From this perspective, the First Amendment right to speak anonymously justified by, *inter alia*, the *Federalist Papers*, does not translate readily to anonymous or pseudonymous bloggers on Twitter or Facebook.

A. *Supreme Court Decisions:* Talley *et al.*

The Supreme Court has spoken definitively on an individual's First Amendment right to "anonymous speech" in a line of cases beginning with *Talley v. California.*[140] In each of these cases the Supreme Court struck down laws that required disclosure of identity as a precondition to speech on the grounds that the First Amendment protects anonymous speech.[141] As noted above, the existence of the anonymous speaker privilege relies heavily on this line of cases.[142] This Article suggests, however, that the *Talley* line of cases provides little support for the anonymous speaker discovery privilege.[143]

In *Talley*, a Los Angeles ordinance prohibited the distribution of handbills not displaying the name of the person who printed or wrote the handbill.[144] Talley was arrested and convicted of

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[140] 362 U.S. 60 (1960).

[141] *Id.*

[142] *See supra* text accompanying notes 26–87.

[143] This same argument was made by another commentator but on different grounds than are proposed herein. *See* Vogel, *supra* note 12, at 831–40.

[144] *Talley*, 362 U.S. at 60–61.

distributing handbills urging a boycott of local merchants; the handbills did not display his name.[145] Noting the historical and political significance of anonymous speech, including the impact of the anonymously published *Federalist Papers*, and finding that the identification requirement would undoubtedly restrict the freedom of anonymous expression, the Court struck down the ordinance.[146] In *McIntyre v. Ohio Elections Commission*,[147] an Ohio statute prohibited the distribution of any publication designed to promote or defeat a candidate or an issue unless the publication contained the name of the organization or individual publisher. Echoing *Talley*, the Court in *McIntyre* referenced the "honorable tradition" of anonymous pamphleteering,[148] noted the role of anonymity as a "shield from the tyranny of the majority" which is the very purpose of the First Amendment,[149] and struck down the statute.[150] More recent Supreme Court cases reach the same result.[151]

The specific defect in the laws at issue in these cases was that they swept too broadly, prohibiting—or unduly burdening—

[145] *Id.* at 61.
[146] *Id.* at 64–65.
[147] 514 U.S. 334 (1995).
[148] *Id.* at 357.
[149] *Id.*
[150] *Id.*
[151] In *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999), the Court addressed statutory requirements for the initiation of a ballot referendum in Colorado. By statute, in order to circulate a petition to initiate a ballot initiative, the circulators were required to, *inter alia*, wear an identification badge. *Id.* at 186. The Court found this "injury to speech" to be even greater than that posed by the statute at issue in *McIntyre*, because petition circulation is a "less fleeting encounter" than distributing handbills, and struck down the requirement. *Id*. at 199. In *Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150, 154 (2002), an ordinance of the Village of Stratton prohibited "canvassing" on residential property unless the canvasser had obtained a permit. The ordinance further required that the canvasser display the permit—which contained the name of the canvasser—at demand of the canvassee. *Id.* at 155. The Court noted several Constitutional infirmities in this provision of the ordinance, including the facts that it prevented canvassers from retaining their anonymity and could preclude persons from canvassing for unpopular causes. *Id.* at 167.

anonymous speech that was not in some regard "wrongful."[152] The Court made it quite clear that if the challenged laws had prohibited only wrongful speech—anonymous or not—different considerations would be brought to bear.[153] For example, in *Talley*, the city argued that the ordinance was justified because it was intended to identify those responsible for fraud, false advertising, or libel.[154] The Court rejected that argument, not because anonymous libel is protected by the First Amendment,[155] but because the ordinance was not limited to fraudulent, false, or libelous anonymous speech.[156] Thus, the Court did not "pass on the validity of an ordinance limited to prevent[ing] these or any other supposed evils."[157] Similarly, in *McIntyre*,[158] the Court contrasted the "blanket anonymity prohibition" in the offending statute with specific measures that could be taken in the event of wrongful speech, including the "enforcement of defamation torts."[159] In other words, if Mrs. McIntyre had anonymously distributed handbills accusing one of the politicians involved in the referendum of embezzlement and been sued, that tort could still be "enforced." The *McIntyre* opinion does not suggest that the

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[152] Another difference between the state action at issue in the *Talley* line of cases and the enforcement of a subpoena in civil discovery is that the former constitutes a "prior restraint" on speech that is "highly disfavored." *See* Vogel, *supra* note 12, at 837 ("First, while the Talley line of cases establishes that the First Amendment can in some circumstances protect a speaker's anonymity, those cases are limited by the fact that they arise in the special, and highly disfavored, context of prior restraints."). To be sure, a court order compelling discovery in a private civil lawsuit constitutes state action that is subject to First Amendment constraints, but such an order does not constitute a prior restraint. *See* Sony Music Entm't, Inc. v. Does 1–40, 326 F. Supp. 2d 556, 563 (S.D.N.Y. 2004); Doe v. 2TheMart.com, Inc, 140 F. Supp. 2d 1088, 1091–92 (W.D. Wash. 2001).

[153] Talley v. California, 362 U.S. 60, 64 (1960).

[154] *Id.*

[155] Libel is not protected by the First Amendment. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact.").

[156] *Talley*, 362 U.S. at 64.

[157] *Id.*

[158] 514 U.S. 334 (1995).

[159] *Id.* at 351.

"enforcement" procedure for an allegedly defamatory statement should be altered—that a discovery privilege could be invoked, for example—if the allegedly wrongful speech was made anonymously.

However, in *New York Times Co. v. Sullivan*,[160] the Supreme Court did alter the "enforcement procedure" for defamation lawsuits against the press in order to reduce the chilling effect on legitimate speech protected by the First Amendment caused by the threat of a meritless lawsuit.[161] Specifically, the Supreme Court imposed additional evidentiary burdens to protect First Amendment press freedoms, creating a "constitutional privilege" for the speaker.[162] Arguably, the First Amendment similarly supports an altered enforcement procedure for defamation suits against anonymous speakers in order to reduce the chilling effect on legitimate anonymous speech.

This argument is undermined, however, by the line drawn in *Herbert v. Lando*,[163] in which the Court declined to create a First Amendment discovery privilege, notwithstanding the potential "chilling effect" on speech that would result, because of the countervailing interest in providing injured parties their day in court. In *Herbert*, the plaintiff brought a defamation lawsuit against members of the press, and one of the defendants, Lando, objected to discovery regarding information about the "editorial process" on the ground that such information was privileged pursuant to the First Amendment.[164] The Court explained the conflicting principles as follows:

> [I]n the 15 years since *New York Times*, the doctrine announced by that case, which represented a major development and which was widely perceived as essentially protective of press freedoms, has been repeatedly affirmed as the appropriate First Amendment standard

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[160] 376 U.S. 254 (1964).

[161] *Id.*; *see* Gertz, v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters.").

[162] *Gertz*, 418 U.S. at 332.

[163] 441 U.S. 153 (1979).

[164] *Id.* at 156.

> applicable in libel actions brought by public officials and public figures. At the same time, however, the Court has reiterated its conviction—reflected in the laws of defamation of all of the States—that the individual's interest in his reputation is also a basic concern.[165]

Lando argued that requiring disclosure of information about the editorial process and editorial decision-making would violate the First Amendment because disclosure would have "an intolerable chilling effect" on those processes.[166] The Court rejected that argument, noting that to the extent wrongful speech would be "chilled," or inhibited by the risk of potential liability, that effect was fully consistent with the First Amendment.[167] It rejected the notion that innocent speech would also be discouraged because there was no true risk of liability.[168] Acknowledging that a lawsuit is costly, so that proving innocence is a burden that might adversely affect the press and impinge on First Amendment considerations, the Court nonetheless declined to impose a discovery privilege to advance those considerations.[169] "Only complete immunity from liability for defamation" would insulate innocent speech from the burden of a lawsuit, "and the Court has regularly found this to be an untenable construction of the First Amendment."[170] Referring again to the "right to every man's evidence," the Court held that Lando had not made a "clear and

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[165] *Id*. at 169 (internal citations omitted). Similarly, in *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990), the Court rejected a university "peer review" privilege against discovery, notwithstanding the claim that compelling disclosure would have a "chilling effect" on "candid evaluations and discussions of candidates." *Id*. at 197. The Court held:

> We do not create and apply an evidentiary privilege unless it "promotes sufficiently important interests to outweigh the need for probative evidence . . . ." Inasmuch as "testimonial exclusionary rules and privileges contravene the fundamental principle that the public has a right to every man's evidence," any such privilege must be strictly construed.

Id. at 189 (quoting Trammel v. United States, 445 U.S. 40, 50–51 (1980) (quoting another source)).

[166] *Herbert*, 441 U.S. at 171.

[167] *Id.*

[168] *Id.* at 172.

[169] *Id.*

[170] *Id.* at 176.

convincing" case for "placing beyond the plaintiff's reach a range of direct evidence" relevant to proving his case.[171]

Clearly, then, the new "anonymous speaker privilege" must promote "sufficiently important interests" to outweigh the plaintiff's need to obtain the identity of the speaker. As argued above, the decisions in the *Talley* line of cases do not alone support the conclusion that it does. Whether the more general First Amendment principles expressed in these cases support the existence of the new privilege is examined, with a focus on anonymous online speech, in Part III.B.

B. *Anonymous Speech Online*

The *Talley* line of cases include sweeping comments on the value of anonymous speech that arguably support the more general proposition that "[t]he First Amendment does appear to include some aspect of anonymity in protecting free speech."[172] The Court in *Talley* proclaimed: "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind."[173] The historical significance of the *Federalist Papers*—and the fact that these were published under pseudonyms—is regularly cited in support of the value of anonymous speech.[174] The contribution of speech to society, in the eyes of the Supreme Court, is not limited to core political speech: Anonymity may be instrumental in promoting the interests of social justice,[175] for example, and the ability to publish anonymously has produced great literature.[176]

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[171] *Id.* at 169–70.

[172] Lefkoe v. Jos. A. Bank Clothiers, Inc., 577 F.3d 240, 248 (4th Cir. 2009).

[173] Talley v. California, 362 U.S. 60, 64 (1960).

[174] *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–43 (1995).

[175] *See Talley*, 362 U.S. at 64 ("Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.").

[176] *See McIntyre*, 514 U.S. at 342 ("Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.").

Arguably, these dicta support some enhanced measure of protection for anonymous speech—more than is afforded editorial decision-making. But if so, most anonymous online speech would seem to be the least likely candidate for that protection, for several reasons. Before returning to this argument, let us examine the nature of anonymous speech on the Internet.

Consider William Jones, who uses a proprietary, employer-provided e-mail service for work and a commercial service for personal e-mail. As is common, the proprietary e-mail service sets rules for the username William can use: first initial of first name, followed by no more than five letters or numbers, for example. Duplicates are not allowed. William tries to enter "wjones" but that user name is taken. He succeeds with "wjone4." William wants to choose a materially different username for his personal account to avoid any risk that his personal comments could be attributed to his employment status. Many of William's friends, with whom he regularly corresponds via e-mail, are, like William, rabid Dodgers fans, so he chooses "kershawkid" for his personal username. From the content of William's e-mail, most of his e-mail friends quickly come to realize that kershawkid is William Jones. William blogs about baseball, and, like all the other bloggers on the sites he visits, William uses a username to blog. He uses kershawkid when he blogs about baseball, simply because he doesn't want to have to remember too many usernames. But he does use a different username—"MrEd99," say—when he blogs about other subjects, primarily because he has read the literature cautioning against using the same username and password for multiple purposes because of the risk of "identity theft." Finally, William frequently visits Second Life, where he has a screen name that is different from his username, neither of which is his real name. But whenever he meets anyone at Second Life, his avatar tells the truth about William's upbringing, education, job, and other aspects of his life, because he hopes that one day he'll meet that special someone who will also be interested in him as a real

person. The speech from any of William's various pseudonyms could become the subject of a private civil lawsuit.[177]

As should be evident from this generic description of anonymous online speech, it differs from "real" anonymous speech in several ways. First, anonymity online is the rule, not the exception.[178] William is always anonymous, because the rules of the road require it or just because everyone else is acting this way. Certainly not all speech on the Internet is anonymous: A podcast by a popular news anchorperson, for example, is obviously not anonymous speech. But anonymity is the accepted practice. First Amendment jurisprudence lauds anonymous speech because it is special—extols "Publius"[179] or Mark Twain,[180] for example—but that gloss fades online, where anonymity is just not at all special. To the extent that the anonymous speaker privilege was created to encourage and support anonymous online speech, such encouragement is simply not necessary.

Second, anonymity online is rarely chosen specifically to protect the anonymity of the speaker. Again, the rules of communication via the Internet simply require some degree of anonymity, or the speaker chooses anonymity just because everyone else is acting this way. Fictitious names are also used to prevent data theft, or, particularly on the mammoth social networking sites, because it is quicker and easier to pick something whimsical than find some version of one's real name that has not already been taken. This issue of choosing—or not choosing—anonymity appears to have some bearing on the importance of protecting anonymous speech. Thus: "[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the

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[177] The blogs are obvious candidates, and, assuming William sometimes speaks in a forum, his avatar could get in trouble. An e-mail from wjone4 or kershawkid could be "blasted" to a recipient's own private e-mail list. Jane, one of the secondary recipients, could read William's e-mail and believes it to be defamatory.

[178] *See* Durkee, *supra* note 41, at 780 (stating that anonymity is "by default").

[179] *See McIntyre*, 514 U.S. at 343 n.6.

[180] *Id.* at 341 n.4.

freedom of speech protected by the First Amendment."[181] This feature of protected anonymous speech is virtually absent online.

Third, there is no one type of anonymity on the Internet, and most versions are not actually very anonymous. William is really not very anonymous as wjone4—everybody at work could identify the speaker—and this level of anonymity seems little worth protecting. But what if the plaintiff's attorney did not know, or have any way to find out without deposing William, where he works? William is not much more anonymous, at least to his friends, as kershawkid, but counsel would have even less chance of finding William as kershawkid than as wjone4. William is somewhat anonymous as MrEd99, although William should be aware—because the facts are generally known—that his true identity could easily be discovered by various lawful (e.g., government wiretapping) as well as illicit means (e.g., "hacking"). William's name itself is most protected on Second Life, but anyone he speaks to knows everything about him except his name: an odd kind of anonymity, indeed. None of William's online identities are, then, particularly anonymous at all. But if some higher degree of anonymity should be protected, but not all, what sensible rule could be devised to determine what degree of anonymity was sufficient to enjoy a privilege from disclosure?

Thus, in general, anonymous online speech does not have the attributes of the "real" anonymous speech of which the Supreme Court has spoken within the context of First Amendment rights.[182] Moreover, to the extent First Amendment rights are accorded anonymous speech in order to protect the speaker from "the tyranny of the majority,"[183] that protection is arguably unnecessary online. Instead, technology can be used. A speaker wishing to remain truly anonymous can use an "anonymizer" or other specialized technology securely to protect against the disclosure of identity.[184] Thus, if the *Talley* line of cases casts a penumbra that

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[181] *Id.* at 342.

[182] *See id.* at 357.

[183] *Id.*

[184] An anonymizer is the moniker for tools that protect against the disclosure of identity online. *See Anonymizer*, WIKIPEDIA, http://en.wikipedia.org/wiki/An

would justify a new First Amendment discovery privilege to protect anonymous speech, it seems unlikely that it would cover a significant volume of what is collectively deemed "anonymous online speech" today.[185]

If these arguments are correct, when "noguano," on an Internet bulletin board open to the public, accuses officers and directors of a company of being "[l]ying, cheating, thieving, stealing, lowlife criminals!!!!,"[186] he cannot resist disclosure of his true identity in a subsequent lawsuit. If this outcome does not fall afoul of the First Amendment, as this Article argues here, it is also the more just.

IV. THE FIRST AMENDMENT AND THE RIGHT TO ASSOCIATIONAL ANONYMITY

Though the *Talley* line of cases does not provide significant support for the proposition animating the new discovery privilege—that the identity of an anonymous speaker whose

onymizer (last visited Oct. 12, 2012). The IP addresses of users of a data haven cannot be obtained from a third party—absent extraordinary means—and users' identity is otherwise protected from any possible association with the posted speech. *See What is Freenet?*, THE FREENET PROJECT, https://freenetproject.org/whatis.html (last visited Oct. 16, 2012). Thus, an anonymous speaker using an anonymizer needs no First Amendment protection against the tyranny of the majority and needs no discovery privilege to protect against disclosure of identity; the anonymizer performs that function. *See id*.

[185] The case could perhaps be made that certain categories of online speech are more like "real" anonymous speech that would be protected by the implications of the *Talley* line of cases. As noted by Durkee, different "online spaces" have different characteristics, some of which "have sophisticated mechanisms to ensure that comments are accurate and some of which serve as forums for factual discourse." Durkee, *supra* note 41, at 794. Durkee argues that because of this fact, "merely asserting that speech occurred 'on the Internet' is insufficient in assessing both the level of First Amendment protections and the scope or severity of harm." *Id*. She suggests that the context of the online speech should be considered in making that assessment and notes that the "anonymous speech jurisprudence" of the Supreme Court "has long recognized the importance of context in weighing the competing interests of speakers and audience." *Id*. at 819.

[186] Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1090. (W.D. Wash. 2001).

speech is alleged to have been wrongful is protected by the First Amendment from disclosure during discovery—another line of Supreme Court authority firmly does. That is, the well-established "associational privilege" may, given the right circumstances, protect against the disclosure of the identity of an anonymous online speaker.[187] Part IV.A, below, reviews the "offline" legal framework of this privilege, and Part IV.B explores how this privilege should be applied in the online world. Part IV.C contrasts the outcomes when the associational privilege is applied instead of the anonymous speaker privilege.

A. *The "Associational Privilege" from Discovery of Identity*

The Supreme Court has repeatedly endorsed the "associational privilege," which protects anonymous membership in a group.[188] In the seminal case, *NAACP v. Alabama ex rel. Patterson*,[189] the Court held that Alabama could not compel the NAACP to reveal to the state's Attorney General lists of its members' names and addresses. The state sought this information via subpoena after alleging that the NAACP failed to comply with statutory requirements for "doing business" in the state.[190] The Court found that "compelled disclosure" of the members' names would likely violate the rights of the NAACP and its members to advocate collectively because of their fear of the consequences should the members' identities be known.[191]

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[187] Another privilege grounded in the First Amendment that would indirectly protect against the disclosure of the identity of an online speaker—because he or she is a news source—is the "reporter's privilege." *See, e.g.*, Anne M. Macrander, *Bloggers as Newsmen: Expanding the Testimonial Privilege*, 88 B.U. L. REV. 1075 (2008). This Article does not venture into this topic or address the arguments regarding the "boundaries (or existence) of any privilege." *See id*. at 1085. Instead, this discussion is limited to the nature and extent of any discovery privilege based on the First Amendment that an anonymous speaker can directly assert.

[188] *See*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 467 (1958).

[189] *Id*.

[190] *Id*. at 466.

[191] *Id*. at 462–63. The *Patterson* court noted the negative effects of compelled disclosure:

A qualified discovery privilege has been derived from the right of associational privacy established in *Patterson* that applies to compelled disclosure of the identity of an association's members.[192] The privilege also conditionally protects against disclosure of "any similar information that goes to the heart of an organization's associational activities . . . ."[193] For example, these "associational activities" include views expressed at association meetings,[194] communications among members related to a political campaign strategy,[195] or "strategic lobbying materials."[196] In the view of the Ninth Circuit, the type of information that may be subject to the privilege is virtually unlimited: If disclosure of the information would deter protected associational activities, the privilege may be

> [Compelled disclosure would] affect adversely the ability [of the NAACP] 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 Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.

Id.

[192] *See, e.g.*, Black Panther Party v. Smith, 661 F.2d 1243, 1264–66 (D.C. Cir. 1981), *vacated mem. sub nom.* Moore v. Black Panther Party, 458 U.S. 1118 (1982); Marfork Coal Co. v. Smith, 274 F.R.D. 193, 205-206 (S.D. W.Va. 2011); Christ Covenant Church v. Town of Southwest Ranches, No. 07-60516-CIV-DIMITROULEAS/ROSENBAUM, 2008 U.S. Dist. LEXIS 49483, at *16 (S.D. Fla. June 29, 2008) ("Thus, a qualified First Amendment associational privilege exists in the discovery context, potentially exempting a party from having to respond to infringing discovery requests.").

[193] Anderson v. Hale, No. 00 C 2021, 2001 U.S. Dist. LEXIS 6127, at *9 (N.D. Ill. May 5, 2001).

[194] DeGregory v. Att'y Gen., 383 U.S. 825, 828–30 (1966).

[195] Perry v. Schwarzenegger, 591 F.3d 1147, 1162. (9th Cir. 2009).

[196] *See In re* Motor Fuel Temp. Sales Practices Litig., 641 F.3d 470, 482 (10th Cir. 2011).

asserted.[197] The privilege may be asserted by the association itself[198] or by an individual member of the association.[199]

The privilege is most often asserted when the association is political or religious.[200] But in *Patterson*, the Court made it clear that the First Amendment associational privilege applies "whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters."[201] This breadth of protection of association activities harkens to the same breadth of protection for speech itself. It would be reasonable, then, to employ the same rules in this context: So long as the activities of the association are not strictly "commercial," those activities are entitled to a substantial measure of First Amendment protection.[202]

Though the exact contours of the privilege are the subject of some debate,[203] the law is fairly clear regarding the general

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[197] *Perry*, 591 F.3d at 1162 ("The existence of a prima facie case [for claiming the protection of the privilege] turns not on the type of information sought, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities.").

[198] *See* Christ Covenant Church v. Town of Southwest Ranches, No. 07-60516-CIV-DIMITROULEAS/ROSENBAUM, 2008 U.S. Dist. LEXIS 49483, at *6 (S.D. Fla. June 29, 2008).

[199] *See, e.g.*, *In re Motor Fuel*, 641 F.3d at 482 (motioning to quash filed by retail members of trade association); *Perry*, 591 F.3d at 1152 (objecting to disclosure made by official proponents of Proposition 8 as well as the campaign committee).

[200] *See generally, e.g.*, Anderson v. Hale, No. 00 C 2021, 2001 U.S. Dist. LEXIS 6127 (N.D. Ill. May 5, 2001).

[201] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461 (1958).

[202] *Cf.* Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 456 (1978) ("[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.").

[203] There is some debate in the courts as to whether the rules should be varied somewhat depending on whether the party objecting to disclosure is the plaintiff (arguably deserving of less protection) or the defendant. *See* Grandbouche v. Clancy, 825 F.2d 1463, 1467 (10th Cir. 1987) (citing Britt v. Superior Court, 575 P.2d 766, 775 (1978) (en banc)) ("[W]hile the filing of a lawsuit may implicitly bring about a partial waiver of one's constitutional right of associational privacy, the scope of such 'waiver' must be narrowly rather than expansively construed, so that plaintiffs will not be unduly deterred from instituting lawsuits by the fear of exposure of their private associational

contours of the associational privilege, and what the party seeking disclosure must show to overcome the privilege.[204] As is usual when a discovery privilege is invoked, the party claiming the benefit of the privilege bears the initial burden of showing its applicability.[205] To claim the privilege the party must make a factual showing that disclosure would have an adverse effect on his associational rights. If this showing is made, the privilege can be overcome by a demonstration of a specific need for disclosure.

In *Patterson*,[206] the Court noted that the NAACP had exhibited an "uncontroverted showing" of certain harassment. But later cases have established that no such concrete showing is necessary to assert the privilege. Instead, the party asserting the privilege "must demonstrate . . . a 'prima facie showing of arguable first amendment infringement.' "[207] Otherwise stated, the movant need only show that "there is some probability that disclosure will lead to reprisal or harassment,"[208] or a "reasonable probability."[209] This prima facie showing requires the party opposing disclosure to demonstrate some probability that disclosure would result in "threats, harassment, or reprisals from either Government officials or private parties. The proof may include, for example, specific

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affiliations and activities."). But, however that debate is resolved, in the circumstances presented in this Article—the party objecting to disclosure is a defendant—the "strongest" protection would presumably apply.

[204] These rules apply whether the party seeking disclosure is a private litigant or a government agency. *See, e.g.*, Adolph Coors Co. v. Wallace, 570 F. Supp. 202, 208 (N.D. Cal. 1983).

[205] *See, e.g.*, *In re* Motor Fuel Temp. Sales Practices Litig., 641 F.3d 470, 492 (10th Cir. 2011).

[206] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

[207] Brock v. Local 375, Plumbers Int'l Union of Am., 860 F.2d 346, 349–50 (9th Cir. 1988) (per curiam) (quoting U.S. v. Trader's State Bank, 695 F.2d 1132, 1133 (9th Cir. 1983)); *see also* Christ Covenant Church v. Town of Southwest Ranches, No. 07-60516-CIV-DIMITROULEAS/ROSENBAUM, 2008 U.S. Dist. LEXIS 49483, at *17 (S.D. Fla. June 29, 2008).

[208] Black Panther Party v. Smith, 661 F.2d 1243, 1267–68 (D.C. Ct. App. 1981), *vacated mem. sub. nom.* Smith v. Black Panther Party, 458 U.S. 1118 (1982).

[209] Int'l Soc'y for Krishna Consciousness, Inc. v. Wallace, No. 75 Civ. 5388 (MJL), 1985 U.S. Dist. LEXIS 22188, at *28 (S.D.N.Y. Feb. 28, 1985).

evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself."[210] The privilege may be established by evidence of "harassment, membership withdrawal, or discouragement of new members, or other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights."[211] The claim of privilege grows stronger as the danger to associational rights increases.[212]

The prima facie showing of infringement is not necessarily a high evidentiary threshold. Though the movant must show some facts showing infringement, the burden is "light" in view of the "crucial place speech and associational rights occupy under our constitution."[213] For example, an affidavit showing the beliefs and practices of the association are "controversial and subject to occasionally overt hostility"[214] meets the requirement, as does evidence of "specific evidence of hostility" against a "mainstream" religious sect.[215] However, the chilling effect is not simply

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[210] Buckley v. Valeo, 424 U.S. 1, 74 (1976) (per curiam).

[211] *Brock*, 860 F.2d at 350.

[212] *See Black Panther Party*, 661 F.2d at 1267. Alternatively, if the danger is slight, sufficient protection might be afforded by the entry of a protective order against further disclosure of the information obtained by a party in discovery. *See* Perry v. Schwarzenegger, 591 F.3d 1147, 1161 n.6 (9th 2010) ("A protective order limiting the dissemination of disclosed associational information may mitigate the chilling effect and could weigh against a showing of infringement . . . . The mere assurance that private information will be narrowly rather than broadly disseminated . . . however . . . is not dispositive."); *see* Dole v. Serv. Emps. Union, Local 280, 950 F.2d 1456, 1461 (9th Cir. 1991) ("[N]either letter suggests that it is the unlimited nature of the disclosure of the Union minutes that underlies the member's unwillingness to attend future meetings . . . . Rather, both letters exhibit a concern for the consequences that would flow from any disclosure of the contents of the minutes to the government or any government official.").

[213] New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1355 (2d Cir. 1989).

[214] *Int'l Soc'y for Krishna Consciousness*, 1985 U.S. Dist. LEXIS at *27.

[215] Christ Covenant Church v. Town of Southwest Ranches, No. 07-60516-CIV-DIMITROULEAS/ROSENBAUM, 2008 U.S. Dist. LEXIS 49483, at *17 (S.D. Fla. June 29, 2008).

inferred from the fact that the discovery would disclose associational activities or the identity of members.

Once the party opposing disclosure has made some showing of a "chilling effect" from disclosure, "the second step of the analysis is meant to make discovery that impacts First Amendment associational rights available only after careful consideration of the need for such discovery, but not necessarily to preclude it."[216] The courts do not apply a single standard in determining whether a need for the discovery has been met, but common elements include a "heightened relevance" of the information to the lawsuit,[217] and that "the discovery request, as framed, is the means least inclusive and intrusive for gathering the information to which the party has been deemed entitled."[218]

B. *The Associational Privilege Online*

An online association or member of an association could assert this privilege against the compelled disclosure of the identity of an anonymous John Doe defendant. One element of what the defendant must show before the privilege could be invoked is clear: some evidence of harassment, membership withdrawal, discouragement of new members, or other consequences which suggest a reasonable possibility of a "chilling" of associational

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[216] *Perry*, 591 F.3d at 1161. The Ninth Circuit refers to this as a burden shift; other courts simply refer to the entire analysis as a balancing test. *See, e.g.*, *Christ Covenant Church*, 2008 U.S. Dist. LEXIS 49483, at *20; Adolph Coors Co. v. Wallace, 570 F. Supp. 202, 205 (N.D. Cal. 1983).

[217] *Perry*, 591 F.3d at 1161 ("Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1)."); *Coors*, 570 F. Supp. at 208 ("[M]aterial sought by discovery is truly 'relevant' to the gravamen of the complaint."); Anderson v. Hale, No. 00 C 2021, 2001 U.S. Dist. LEXIS 6127, at *4 (N.D. Ill. May 5, 2001) (asserting that the information is so relevant that it "goes to the 'heart of the matter' ").

[218] *Coors*, 570 F. Supp. at 208; *see also Perry*, 591 F.3d at 1161 ("The request must also be carefully tailored to avoid unnecessary interference with protected activities . . . and the information must be otherwise unavailable.").

rights resulting from disclosure.[219] But what would establish the initial predicate for the privilege in online situations—the existence of an association and a set of common beliefs—and what constitutes "membership" in that association is less clear. The significance of the heightened relevance standard for overcoming the privilege must also be further explored, for in none of the decided cases is that standard applied when a single John Doe defendant has asserted the associational privilege. Arguably, the privilege would always be overcome—and therefore be largely meaningless—because the identity of the defendant would meet the highest relevance standard, unless this standard would operate differently in the online world.

1. *Defining "Association" in an Online Context*

The cases defining and applying this associational privilege had no need to dwell on the definition of "association" for purposes of the associational privilege: The organizations or members invoking the privilege were organized in some type of recognized association.[220] The Oxford English Dictionary defines an association as a "body of persons" advancing a "common cause" or "purpose."[221] Under this definition, the associational privilege for anonymous online speech would be broad indeed. The Internet enables associations on an unprecedented scale and with unprecedented ease. Millions of people from all over the world can collectively and simultaneously follow the "tweets" of a rock star, thereby, arguably, promoting "culture" simply by accessing the Internet on a desktop, laptop, or smartphone.[222] Any person or organization can create a website and invite members to participate in discussions, or set up a blog on Blogmaster, hosted

[219] *Coors*, 570 F. Supp. at 210.

[220] The NAACP was a nonprofit membership corporation; the Black Panthers a political party; and in *In re Motor Fuel* the parties resisting disclosure were retail members of motor fuel trade "associations." *In re* Motor Fuel Temp. Sales Practices Litig., 641 F.3d 470, 481 (10th Cir. 2011).

[221] *See Association, n.*, OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/11981?redirected From=association (last visited Dec. 15, 2012).

[222] TWITTER, www.twitter.com (last visited Nov. 21, 2012).

by Google.[223] The ease of communication enables association on a bewildering number of topics. For example, one of many service providers, Yahoo! sponsors millions of free message boards and groups for registered members.[224] Because of the ease and rapidity of communication on the Internet, it also promotes fleeting associations: a series of blogs on an isolated topic in the news, for example.

Thus, unless association is more narrowly defined, Internet associations would include virtually every online speaker. As an evidentiary privilege, it would seem reasonable to conclude that only an organization that has sufficient cohesive existence to sue and be sued *qua* organization ought to be able to assert an associational legal privilege. Pursuant to the Federal Rules of Civil Procedure, service on an unincorporated association is made by "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process."[225] Following the logic of this argument, if an online organization does not have an officer or some other managing agent, it cannot claim the associational privilege.[226] Few blogs, or websites sponsored by individuals, or persons posting comments or messages on these sites would, therefore, be able to claim the associational privilege.

2. *"Common Beliefs" in an Online Context*

Assuming the existence of a cognizable association, the association also has to be engaged in the support of "common

[223] GOOGLE, www.google.com (last visited Nov. 21, 2012)

[224] YAHOO!, www.yahoo.com (last visited Nov. 21, 2012).

[225] FED. R. CIV. P. 4(h)(1).

[226] This Article proposes that this concept—that an organization that cannot sue or be sued cannot claim an associational privilege—be incorporated into First Amendment jurisprudence, not the specific rules governing service. Therefore, it would not be necessary to determine specifically what law regarding service applied—the Federal Rules or a state code, for the latter vary significantly—which is a difficult endeavor when behavior on the Internet is at issue.

beliefs" or engaged in a "collective effort."[227] Putting up a bulletin board is not, *per se*, engaging in a collective effort, though that action may enable others to advance their beliefs.[228] For example, suppose a downtown hardware store offers one of real billboards for citizens to post and exchange recipes for Turkish food. The business has no interest in promoting Turkish food, but is making the space available to promote its goodwill. This business has not created an association to advance the cause of Turkish food, even though all the persons posting recipes have some kind of common interest. The posters themselves do not qualify as an association, unless they organize and choose an officer or other managing agent. Similarly, Yahoo! has not created an association to advance economic beliefs by setting up a bulletin board for posting information about a particular publicly-traded company. Match.com and its members do not comprise an association advancing the association's interest in promoting happiness. Match.com is making money, and the members are pursuing their individual interests.

3. *Who May Invoke the Privilege?*

Given the existence of a recognizable association, the purpose of which is to advance some political, religious, economic, or cultural interest, a third issue is whether any particular individual seeking to avail himself of the associational privilege is qualified to do so. If the association is a "membership" organization, members should be able to assert the privilege.[229] But there are

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[227] *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958). This also accords with the dictionary definition of "association" noted above. *See Association, n.*, *supra* note 221.

[228] *See, e.g.*, *Patterson*, 357 U.S. at 460.

[229] In *Int'l Soc'y for Krishna Consciousness, Inc. v. Wallace*, No. 75 Civ. 5388 (MJL), 1985 U.S. Dist. LEXIS 22188, at *22 (S.D.N.Y. Feb. 28, 1985), the court stated an association's "sympathizers" would be protected by the associational privilege. The term "sympathizers" is not, however, used in the Supreme Court cases addressing the associational privilege. Further, it appears that the court was reacting to the extreme breadth of the discovery requests—the plaintiffs sought information about the Society's members, employees, "devotees . . . adherents or agents"—in casting the net so widely. *Id.*

many online associations that are not membership organizations. Wikimedia Foundation, for example, is a 501(c)(3) organization that sponsors, *inter alia*, Wikipedia.[230] Its goal is to "collect and develop the world's knowledge and to make it available to anyone for free for any purpose."[231] In furtherance of its goal, the Foundation sponsors the Wikipedia website on which "anyone in the world" can make entries.[232] These facts would seem to qualify it as an association advancing a cultural interest and, therefore, entitled to claim the associational privilege. But could anyone who made an entry claim the privilege?[233] A reasonable limitation in this regard may be found by returning to the fundamental purpose of the privilege: to protect the right to engage in a "collective effort."[234] Membership evidences some effort on the part of a member: the payment of dues or fees, subscription to a newsletter, or at a minimum consenting to having one's name included on a list. Some similar showing of effort on behalf of or in the interests of the organization should also be required of a non-member seeking to invoke the privilege. In other words, posting one entry on a website or blog sponsored by a qualified association would not by itself suffice.

4. *Heightened Relevance*

Finally, the privilege can be overcome only if the party seeking discovery meets the heightened relevance standard,[235] which means the information sought must be "crucial" to the case,[236] and the requested discovery is the "least inclusive and intrusive" means of

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[230] *Frequently Asked Questions*, THE WIKIMEDIA FOUNDATION, http://wikimediafoundation.org/wiki/Frequently_asked_questions (last visited Dec. 15, 2012).

[231] *Id.*

[232] *Id.*

[233] For example, in Faconnable USA Corp. v. Does 1–10, 799 F. Supp. 2d 1202, 1203 (2011), the plaintiffs' defamation claim arose from an entry made by the defendant in Wikipedia linking the plaintiff company to a terrorist organization.

[234] *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958).

[235] Perry v. Schwarzenegger, 591 F.3d 1147, 1161. (9th Cir. 2009).

[236] Black Panther Party v. Smith, 661 F.2d 1243, 1268 (D.C. Ct. App. 1981) *vacated mem. sub. nom.* Smith v. Black Panther Party, 458 U.S. 1118 (1982).

obtaining the information.[237] When the anonymous speaker is the defendant, the plaintiff has no recourse other than to obtain his identity.[238] The heightened relevance standard would be met. Arguably, the identity of a putative defendant could also be crucial to the case if the allegations of the complaint supported the assertion of liability against that person[239] or the identity of a key witness.

But the need for disclosure to the plaintiff—and to the judge and witnesses who may need to know the identity of the defendant—does not necessarily justify disclosure to the public generally. The defendant's identity could be made subject to a protective order. Thus, the privilege would remain meaningful, albeit not standing as a total bar to the prosecution of the lawsuit. Such a protective order would, in effect, allow the defendant to proceed anonymously.

Few cases address the issue of allowing a defendant in a civil lawsuit to litigate anonymously.[240] The instances of a John Doe defendant wishing to remain anonymous have become frequent only in the last few years, as anonymous communication via the Internet has become universal.[241] More commonly, the plaintiff is

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[237] Adolph Coors Co. v. Wallace, 570 F. Supp. 202, 208 (N.D. Cal. 1983).

[238] *Cf.* Doe I v. Individuals, 561 F. Supp. 2d 249, 255 (D. Conn. 2008) (applying the new discovery privilege by holding that "the defendant's identity is central to Doe II's pursuit of her claims against him").

[239] *But see* Marfork Coal Co. v. Smith, 274 F.R.D. 193, 205 (S.D. W. Va. 2011). The plaintiff sued identified members of various environmental groups and sought the identity of other members who may have been involved in the protests from which the case arose, intending, presumptively, to then sue those other members. *Id.* The court refused to require disclosure, because of the First Amendment associational privilege and on relevancy grounds. *Id.*

[240] The Article is here discussing private, civil litigation. In various specialized proceedings the confidentiality of party information is established by the rules applicable to those proceedings. *See, e.g.*, 18 U.S.C. § 5038 (2006) (establishing rules for use of juvenile records in federal juvenile delinquency proceedings).

[241] This is obviously a different matter than deciding whether to allow a plaintiff to name a John Doe defendant, pending discovery to determine the identity of the actor. Regarding the latter, the rules were well-established in the

the party desiring to remain anonymous, and the rules of decision in such a case are fairly well-developed.

Rule 10(a) of the Federal Rules of Civil Procedure states that a complaint shall include the names of all the parties, and "[t]he normal presumption in litigation is that parties must use their real names."[242] The two reasons the parties are presumptively to be named are the public's "right to open courts"[243] and the right of private individuals to confront their accusers.[244] The presumption can be overcome, and courts have discretion to allow a plaintiff to proceed anonymously if disclosure of identity poses a reasonable risk of retaliation or of suffering physical or mental injury harm due to the disclosure of intimate or private information.[245]

In the few cases in which a defendant in federal district court has requested to proceed anonymously, the courts have applied these same rules for determining whether to allow a defendant to proceed anonymously. In *Doe I, and Doe II v. Individuals*,[246] the court denied the defendants request to proceed anonymously, finding that the "social stigma, embarrassment, and economic harm" that could result from the lawsuit did not qualify as the

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pre-Internet world. *See, e.g.*, Munz v. Parr, 785 F.2d 1254, 1257 (8th Cir. 1985).

[242] FED. R. CIV. P. 10(a); *see, e.g.*, Plaintiff B v. Francis, 631 F.3d 1310, 1316 (11th Cir. 2011); Does v. Kamehameha Schools, 596 F.3d 1036, 1042 (9th Cir. 2010).

[243] *Kamehameha Schools*, 596 F.3d at 1042; *see also* James v. Jacobson, 6 F.3d 233, 238 (4th Cir. 1993).

[244] *Plaintiff B*, 631 F.3d at 1315; *Kamehameha Schools*, 596 F.3d at 1042; Doe v. Smith, 429 F.3d 706, 710 (7th Cir. 2005) ("[The plaintiff] has denied [the defendant] the shelter of anonymity—yet it is [the defendant], and not the plaintiff, who faces disgrace if the complaint's allegations can be substantiated . . . . And if the complaint's allegations are false, then anonymity provides a shield behind which defamatory charges may be launched without shame or liability."); Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe, 599 F. 2d 707, 713 (5th Cir. 1979).

[245] *Kamehameha Schools*, 596 F.3d at 1042; K.D. v. City of Norwalk, 2006 U.S. Dist. LEXIS 42639, at *1 (D. Conn. June 14, 2006) (citing FED. R. CIV. P. 10(a)).

[246] 561 F. Supp. 2d 249 (D. Conn. 2008).

"special harms" required to proceed anonymously.[247] For similar reasons the court denied the defendants request to proceed anonymously in *Gorilla Girls, Inc. v. Kaz*.[248]

But it is worth questioning whether the same presumption that identity should be disclosed during the litigation should apply when the party seeking to remain anonymous is a defendant and the defendant's identity has been "unmasked," for several reasons. First, the presumption is on shakier ground when one of the bases for it disappears: All of the parties to the litigation know the identity of the other. Second, in regard to the public's general interest in "open courts," although it may be true that the general knowledge that civil proceedings are open to the public provides "therapeutic value to the community,"[249] the degree of openness necessary to provide that value may be different today than it was years ago. The public has become accustomed to communicating anonymously and reading the news posted by an anonymous blogger. Arguably, so long as the claims made in a lawsuit, the defenses asserted, and the outcome are a matter of public record, the anonymity of the defendant would not, as a general rule, adversely affect the public's interest in "open proceedings."[250]

On occasion, however, the identity of the defendant would be of specific interest to members of the public. If the unmasked

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[247] *Id.* at 257.

[248] 224 F.R.D. 571 (S.D.N.Y. 2004).

[249] Colleen E. Michuda, *Defendant Doe's Quest for Anonymity: Is the Hurdle Insurmountable*?, 29 LOY. U. CHI. L.J. 141, 144 (1997).

[250] The disinclination to allow a party to proceed anonymously is often said to be "constitutionally embedded." *See* K.D. v. City of Norwalk, No. 3:06CV 406 (WWE), 2006 U.S. Dist. LEXIS 42639, at *1 (D. Conn. June 14, 2006). However, the Supreme Court has not specifically spoken on the right to prosecute or defend a civil trial anonymously. It has held that has the First Amendment protects the public's right to attend criminal trials, and prohibits the government from limiting the information to which the public should have access, and noted the general presumption of openness in judicial proceedings. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 556 (1980); Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978). Thus, though there may be a general "presumption of openness" embedded in the Constitution, it can certainly be overcome. *See, e.g.*, James v. Jacobson, 6 F.3d 233, 238 (4th Cir. 1993).

defendant were an elected official or a government agent—a police officer, for example—the community may well be entitled to know that that person has been accused of wrongdoing. If the unmasked defendant were a publicly-traded corporation, the identity of that company should be disclosed so that the shareholders are aware of the alleged wrongdoing. There may be other instances in which a defendant's identity should be disclosed in the public interest. That interest does not, however, readily translate into "relevance" to the case as that concept is defined by the Federal Rules of Evidence.[251]

It is proposed then, that the standard for overcoming the associational privilege should be altered when a John Doe defendant successfully invokes the privilege. In particular, the privilege can be overcome to the extent that the plaintiff is able to obtain the identity of the anonymous John Doe defendant, but the defendant is ordinarily allowed to proceed anonymously. If, however, the plaintiff demonstrates that the identity of the defendant is of particular interest to the public because of the defendant's special relationship to members of the public, the defendant should not be allowed to proceed anonymously.[252] Thus, the new standard would require "heightened relevance" to unmask the defendant to the plaintiff and "identified public interest" to unmask the defendant to the public.

C. *Contrasting Outcomes*

In fashioning the anonymous speaker privilege, courts responded to path-breaking technological and cultural innovations by adapting existing principles of law to meet the needs of the changed world. One of those needs, in the age of the Internet, is to promote and sustain the "promise of the Internet" as a powerful

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[251] FED. R. EVID. 401. Evidence is relevant if it "has any tendency to make a fact more or less probable" or "is of consequence in determining the action." *Id.*

[252] The plaintiff may have no interest in making the necessary showing, and to this extent, the protection of the public's interest is dependent on a private party. But, of course, this is true in many instances in the civil justice system. The public's interest in the deterrent value of tort liability is dependent on the filing of a lawsuit by an individual plaintiff, for example.

tool for democratic participation in public debate, enabled, in part, because the Internet so easily facilitates anonymous speech.[253] But great caution must be exercised in the process of evolving the law to meet new needs in order to prevent the destruction or diminution of important old needs. In particular, to protect the right to redress grievances in a court of law, and to obtain all relevant evidence, any evidentiary privilege against discovery must be well-grounded in the law and supported by considerations of economy and justice. It is, therefore, well worth revisiting the anonymous speaker privilege.

As discussed above, the only legitimate privilege against the disclosure of the identity of a John Doe defendant arises from the First Amendment's associational privilege, which can fairly readily be adapted to the anonymous online world. Properly applied, this privilege achieves the mutual objectives of protecting speech and promoting justice.

The rules for invoking and overcoming the anonymous speaker privilege, properly grounded on the associational privilege, provide a stark contrast to the procedure adopted by the federal courts and state courts in cases like *Dendrite*[254] and *Cahill*.[255] The initial burden is on the defendant to show sufficient grounds for the assertion of the privilege. Those grounds are a factual showing that the speech was made in connection with an association and disclosure of identity is reasonably likely to cause harm. So applied, the anonymous speaker privilege will be in accord with the general practice in regard to discovery privileges: The party claiming the protection of the privilege "always bears the initial burden of establishing the factual predicate for the privilege."[256]

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[253] *See* Gleicher, *supra* note 12, at 323 ("From anonymous message boards criticizing massive corporations, to citizens who scrutinize elected officials, to websites that enable the anonymous release of government and corporate documents, the Internet has expanded the cape of anonymity to shield an army of pamphleteers.").

[254] Dendrite Int'l, Inc. v. Doe, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

[255] John Doe No. 1 v. Cahill, 884 A.2d 451 (Del. 2005).

[256] *In re* Motor Fuel Temp. Sales Practices Litig., 641 F.3d 470, 492 (10th Cir. 2011).

Only if this burden is met does the plaintiff have to show a specific need to know the identity of the defendant; no heightened evidentiary requirements are imposed. Ordinarily this burden will be met when the identity of the defendant is sought in discovery, but identity will be disclosed only to the plaintiff and others involved in the lawsuit with a true need to know. If the plaintiff seeks public disclosure of the identity of the defendant, she will have to demonstrate a specific and particular public interest in that information.

Why does it matter? If, pursuant to the current regime, disclosure of the identity of the defendant is allowed when plaintiff's case is sufficiently strong, why revisit the privilege? First, when dealing with issues of constitutional dimension it is important to get it right. The textual origins and intellectual rationale for First Amendment privileges should be solidly grounded in law. Misunderstanding the source or reasoning that undergirds those privileges can only lead to diffusion of those rights and confusion of those principles. Further, when the anonymous speaker privilege is properly grounded in the associational privilege, different results in anonymous online speech cases will obtain that are more evenhanded in balancing the rights of those engaging in anonymous online speech and those defamed, defrauded, or who have otherwise suffered real injury at the hands of such speakers.

In *Doe v. 2TheMart.com, Inc.*,[257] the defendants, a publicly-traded company and its officers and directors, were alleged to have committed market fraud. The principal defense asserted by the defendants was that the fluctuation in the market price of stock—the basis of the plaintiff shareholders' alleged damages—was not caused by the defendants.[258] In support of this defense, defendants alleged that derogatory remarks about the company and its performance posted on a public bulletin board dedicated to discussion about the defendant company had caused the price

[257] 140 F. Supp. 2d 1088, 1089 (W.D. Wash. 2001).
[258] *Id.* at 1090.

fluctuations.[259] Defendants' theory was that the remarks were posted in order to manipulate the stock price and benefit the posters, in violation of securities laws.[260] Had the speakers identified themselves in their postings, under the ordinary rules of discovery the defendants would presumably have been allowed to obtain discovery from those speakers, because the information would have been relevant to the defense. But the postings were anonymous. Applying the "old" anonymous speaker privilege, the court granted the motion to quash defendant's subpoena seeking to unmask the speakers.[261] Applying the associational privilege, it is highly likely that the result would have been otherwise. The public bulletin board does not appear to qualify as an "association" that has "members" qualified to invoke the privilege.

In *Highfields Capital Management v. Doe*,[262] the court quashed a subpoena seeking the identity of a poster of messages using the screen name "highfieldscapital" on a public Internet message board.[263] The complaint alleged trademark infringement and defamation.[264] Applying the "old" anonymous speaker privilege, the court found that the plaintiff had not supported its allegations with sufficient facts to show a prima facie case.[265] Applying the associational privilege, it is highly likely that the result would have been otherwise. The public bulletin board does not appear to qualify as an "association" that has "members" qualified to invoke the privilege.

In *Salehoo Grp., Ltd. v. ABC Co.*,[266] the John Doe defendant owned and operated a website—www.salehoosucks.com—dedicated to posting "unfavorable" information about the plaintiff. The plaintiff, alleging claims of trademark violation and

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[259] *Id.* at 1097.
[260] *Id.*
[261] *Id.* at 1098.
[262] 385 F. Supp. 2d 969 (N.D. Cal. 2005).
[263] *Id.* at 972.
[264] *Id.*
[265] *Id.* at 971.
[266] 722 F. Supp. 2d 1210, 1212 (W.D. Wash. 2010).

defamation, sought to unmask the defendant.[267] The court granted Doe's motion to quash the subpoena to Doe's ISP on the grounds that the plaintiff had not pled a prima facie case.[268] Applying the associational privilege, the motion would have been denied. Assuming, *arguendo*, that the defendant company, by soliciting comments about Salehoo, qualified as an association, it appears unlikely that the disclosure of the individual owner and manager of the association would subject him to the risk of public hostility or retaliation. Even if the facts showed that the privilege could successfully be invoked, the privilege would have been overcome by the core relevance of the identity of the defendant to the prosecution of the lawsuit.

In *Cornelius v. DeLuca*,[269] the plaintiff sought to unmask an anonymous online speaker in order to determine the relationship of that speaker to the identified defendant. The speaker had made allegedly defamatory remarks and, based on other facts in the case, the plaintiff had reason to believe the speaker was an agent or employee of the defendant.[270] Applying the "old" anonymous speaker privilege, the court denied the requested discovery, largely on the grounds that the relevant information—the speaker's relationship with the defendant—could be obtained by asking the defendant.[271] The court noted that the result was certainly a departure from the ordinary rules of discovery:

> [T]he Court understands that in the normal case where a witness's First Amendment rights were not implicated, a party would not have to rely solely on the word of a key representative of the opposing party. Here, however, Plaintiffs have to come forward with something more to justify the deterrent effect on free speech.[272]

Applying the associational privilege, the requested discovery would have been granted. Assuming, *arguendo*, that

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[267] *Id.* at 1213.
[268] *Id*. at 1218.
[269] No. 1:10-CV-027-BLW, 2011 U.S. Dist. LEXIS 27213, at *2 (D. Idaho Mar. 15, 2011).
[270] *Id.* at *13.
[271] *Id.* at *13–14.
[272] *Id*.

bodybuilder.com, the website on which the posting was made, qualified as an association, and that the poster was an employee or otherwise a member of the association and could invoke the privilege, it appears unlikely that the disclosure of identity would subject the speaker to the risk of public hostility or retaliation. Even if the facts showed that the privilege could successfully be invoked, the privilege would arguably have been overcome by the relevance of the identity of the speaker as a key witness or possible defendant.

V. CONCLUSION

Current jurisprudence on the anonymous online speaker privilege is rooted in the *Talley-McIntyre* line of cases. Because those cases do not relate to any discovery privilege, however, they give no guidance on the grounds for invoking or standards for overcoming an anonymous speaker privilege. The courts have therefore struggled to define these standards. As argued above, this effort should be abandoned. The proper First Amendment basis for an anonymous speaker privilege lies elsewhere, in the "associational privilege" line of cases. While the associational privilege has not yet been applied to protect anonymous online speech, it can readily be adapted to the online world, as discussed above.

The cases applying the associational privilege also set forth the proper procedures for asserting and overcoming the anonymous speaker privilege. The initial burden should be on the anonymous John Doe defendant to show sufficient grounds for the assertion of the privilege: that the speech was connected to the First Amendment right to association, and disclosure of identity with that association poses a real risk of harm. Only if this burden is met should the plaintiff have to show a specific need to know the identity of the defendant: No heightened evidentiary requirements are imposed. These standards for invoking and overcoming the anonymous speaker privilege, properly grounded on the

associational privilege, better balance First Amendment rights and the right of a party in civil litigation to "every man's evidence."[273]

[273] Herbert v. Lando, 441 U.S. 153, 189 (1978).