

The Right to Remain Anonymous: Anonymous Speakers, Confidential Sources and the Public Good

Jocelyn Hanamirian*

INTRODUCTION

In the digital age, the news media gives voice to anonymous speakers in two ways: reporters may extend confidentiality to sources in exchange for newsworthy information, or a news website may host an online comment function that allows readers to post their reactions to content pseudonymously.¹ Of these two groups of anonymous speakers, only online posters enjoy certain First Amendment protection against a subpoena seeking disclosure of their identities.

The reporter's privilege has always been legally defined as the professional privilege of a reporter to maintain the confidentiality of his sources.² Yet as with all evidentiary privileges, the reporter's privilege serves both private and public ends.³ Historically, state statutes and state common law have protected the private arrangement that enables sources to disclose information without fear of reprisal, and journalists to gain newsworthy content, because this relationship furthers the free flow of information to the public.⁴ By contrast, protection for anonymous

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1. Newspapers usually require that letters to the editor be signed, eliminating anonymity from this mode of commentary. Historically, however, letters to the editor and other commentary did not have to be signed. One historian has noted that "must-sign" policies were not widely instituted until the 1950s and 1960s, as a means to deter "haters and hollers from cluttering up the column and scaring off other writers." See Bill Reader, *We the (Anonymous) People*, AM. JOURNALISM REV., Sept. 22, 2010, at 17.

2. In *Branzburg v. Hayes*, the only Supreme Court case to take up the issue of whether a reporter's privilege exists under the First Amendment, the Court explicitly noted that "the privilege claimed is that of the reporter, not the informant." 408 U.S. 665, 695 (1972). The 39 states that have enacted reporters' shield laws also locate the privilege with the reporter. To access an explanation of state shield laws, see THE REPORTER'S PRIVILEGE COMPENDIUM, <http://www.rcfp.org/privilege/> (follow hyperlinks to each state, then reference item IV.B of each state's reporter's privilege outline, "Whose privilege is it?") (last visited May 11, 2011).

3. See *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996). See also Colin Miller, *A Public Privilege*, 118 YALE L.J. POCKET PART 166 (2009), available at <http://thepocketpart.org/yj-online/professional-responsibility/750-a-public-privilege> (forcefully emphasizing the public benefit derived from the reporter's privilege and arguing that "all evidentiary privileges must serve two masters").

4. *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting). See also *infra* notes 67-75 and

speakers has always been rooted in the First Amendment under a concern that forced identification may chill speech on public issues, and would violate the principle of speaker autonomy.⁵

Yet the distinction between the speech activity of confidential news sources and anonymous political speakers is not as sharp as history would draw it.⁶ One might consider a reporter “the surrogate of the third party speaker who wishes to remain anonymous.”⁷ Under this view, a source’s interest in anonymity is “qualitatively different and far more compelling than [the interests] of a reporter” because revelation of the source’s identity exposes the source to political reprisal, while only damaging the reporter’s future capacity for newsgathering.⁸

The framing of the reporter’s privilege as reporter-based has come under scrutiny in recent years, as some commentators have argued that courts afford more protection to anonymous posters than confidential sources.⁹ For example, virtually all plaintiffs seeking to unmask an online poster must make a prima facie showing of the merits of their claim against the poster before they can abridge the poster’s First Amendment right to anonymity.¹⁰ Yet, under the reporter’s privilege analysis in most jurisdictions, courts need not inquire into the strength of the claim of a plaintiff subpoenaing the identity of a reporter’s confidential source.¹¹ Moreover, one of the dominant tests for unmasking online speakers, first articulated in *Dendrite International Inc. v. Doe*, requires courts to “balance the defendant’s First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant’s identity.”¹² No such First Amendment balancing test has ever been articulated by a court applying a qualified reporter’s privilege, because the privilege is framed as the reporter’s right to protect the confidentiality of his source, rather than the

accompanying text.

5. See *infra* notes 55–58 and accompanying text.

6. See James C. Goodale, COMMUNICATIONS LAW IN THE DIGITAL AGE 2008 145, 155 (PLI Practice, Course Handbook, 2008) [hereinafter *Recent Developments 2007–2008*].

7. *Id.*

8. Note, *The Rights of Sources—The Critical Element in the Clash over the Reporter’s Privilege*, 88 YALE L.J. 1202, 1204 (1979) [hereinafter *The Rights of Sources*].

9. See George Freeman, Vice President and Assistant Gen. Counsel for *the New York Times*, Remarks at the Practising Law Institute’s seminar Communications Law in the Digital Age 2010: Reporter’s Privilege and Anonymous Speech (Nov. 11, 2010).

10. See *Recent Developments 2007–2008*, *supra* note 6, at 155–56.

11. *Id.* Goodale and his coauthors have not only noted this discrepancy but also further questioned, without answering, whether consistently imposing a requirement of prima facie or summary judgment level evidence on those who would seek to reveal a confidential source would result in “less risk of litigants going on ‘fishing expeditions’ for information covered by the reporter’s privilege.” See *id.* at 156.

12. *Dendrite Int’l Inc. v. Doe No. 3*, 775 A.2d 756, 760–61 (N.J. Super. Ct. App. Div. 2001). Courts outside of New Jersey that have applied the *Dendrite* test include federal and state courts in California, New Hampshire, Connecticut, Arizona and North Carolina. See, e.g., *Mobilisa, Inc. v. Doe I*, 170 P.3d 712 (Ariz. Ct. App. 2007); *Doe I v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008); *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2004); *Mortg. Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, 999 A.2d 184 (N.H. 2010); *Hester v. Does*, No. 10-CVS-361 (N.C. Sup. Ct. June 28, 2010).

source's First Amendment right to speak anonymously.¹³ Jurisdictions which include a discretionary balancing element in their reporter's privilege analysis weigh the strength of the public interest in maintaining reporter-source confidentiality against the plaintiff's need to identify the source.¹⁴

Given the discrepancy between the *Dendrite* test for unmasking online posters and the reporter's privilege analysis, the assistant general counsel for the *New York Times*, George Freeman, has lamented that:

In the case of a typical third party poster on your community forum, there's no contract, there's not even any contact between [the newspaper] and the third party poster, and . . . the speech that is engaged in is often scurrilous, false, defamatory, and otherwise irrelevant to real news. Why is it that the courts seem to be as, if not more, protective of speech of an anonymous poster than in the reporter-source relationship?¹⁵

Freeman's critique highlights a frustration with the few jurisdictions that have chosen to treat anonymous commentary on news websites as the legal equivalent of information shared in the context of a reporter-source relationship, protecting the identity of online commenters under the state's reporter's shield law.¹⁶ Critiques such as Freeman's also raise the question of whether the law is more protective on the whole of online posters than of journalists seeking to preserve the anonymity of their sources. Would the reporter's privilege be strengthened if it—like the *Dendrite* standard—required a balancing of the First Amendment rights of the confidential speaker against the strength of the subpoenaing party's claim?¹⁷ Taking the *Dendrite* model one step further, would the reporter's privilege be strengthened by reframing it as the privilege of the source to speak anonymously,

13. See *Recent Developments 2007–2008*, *supra* note 6, at 155 (summarizing the reporter's privilege analysis as turning on the "relevance of the information sought, the criticality of the information to proving the plaintiff's claim, exhaustion of alternative sources and, in some jurisdictions, the viability of the claim").

14. See *Mitchell v. Superior Ct.*, 690 P.2d 625, 634 (Cal. 1984) (reasoning that

[t]he investigation and revelation of hidden criminal or unethical conduct is one of the most important roles of the press in a free society—a role that may depend upon the ability of the press and the courts to protect sources who may justifiably fear exposure and possible retaliation. Thus when the information relates to matters of great public importance, and when the risk of harm to the source is a substantial one, the court may refuse to require disclosure even though the plaintiff has no other way of obtaining essential information.).

See also *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980) ("Assuming . . . that the case does not appear frivolous . . . and that the desired information appears more than remotely relevant, the court must assess the extent to which there is a need for confidentiality.").

15. See *supra* note 9.

16. See *infra* note 127 and accompanying text.

17. While there are many tests for unmasking anonymous posters that are less protective than the *Dendrite* test (e.g., the tests set out in *Doe No. 1 v. Cahill* and *Columbia Insurance Company v. Seescandy.com*), this Note will primarily use the *Dendrite* test as a point of comparison with the reporter's privilege, since one of the aims of this Note is to analyze whether the unmasking cases, at their most protective, are any more protective on average than the qualified reporter's privilege cases. See *Doe No. 1 v. Cahill*, 884 A.2d 451 (Del. 2005); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999).

rather than the professional privilege of the reporter to gather news?¹⁸ Paul Levy, chief architect of the *Dendrite* test, suggested just such a reframing after hearing Freeman and other media lawyers' concerns at a practitioner seminar in November 2010.¹⁹ "We created our [*Dendrite*] standard out of your source cases," Levy acknowledged.²⁰ "There's no reason why we shouldn't go backwards."²¹

While several commentators have seized upon the diversity of legal standards for unmasking online anonymous posters and have subsequently proposed a uniform one—and still others have proposed that a uniform standard be adopted with respect to all anonymous poster and confidential source cases—there has yet to be a probing analysis of whether courts' differing approaches to subpoenas to identify an online speaker and subpoenas to identify a confidential news source makes sense from a policy standpoint.²² This Note will examine the wisdom of "going backwards," or privileging the confidential source's First Amendment right to anonymous speech, rather than the newsgatherer's right to maintain confidential source relationships. It will argue that it is crucial to preserve, as the animus behind the reporter's privilege, the reporter-source relationship and the public benefit of the free flow of information that this association enables. Part I of this Note will set out as background the historical development of the legal rights of anonymous speakers, both in traditional media and online, as well as the divergent development of the reporter's privilege. Part II will compare key cases concerning the reporter's privilege and cases in which Internet service providers (ISPs) and news websites have asserted third party standing to protect the First Amendment

18. This argument had in fact been advanced in the aftermath of the Supreme Court's decision that the First Amendment does not provide a shield, qualified or otherwise, to journalists from having to testify to a grand jury where that testimony may divulge the names of anonymous sources. See generally *Branzburg v. Hayes*, 408 U.S. 665 (1972). See also *The Rights of Sources*, *supra* note 8, at 1203–04 (arguing that "a source's interests . . . are qualitatively different and far more compelling than those of a reporter," and that "proper consideration of the interests of sources compels courts to use a different analytic approach and grant sources greater protection than was provided in *Branzburg* . . .").

19. Paul Levy, Att'y, Pub, Citizen Litig. Grp., Remarks at the Practising Law Institute's seminar Communications Law in the Digital Age 2010: Reporter's Privilege and Anonymous Speech (Nov. 11, 2010).

20. *Id.*

21. *Id.*

22. While one commentator has argued that reporter's privilege analyses should incorporate not only the rights of the newsgatherer but also the First Amendment rights of the confidential source qua anonymous speaker, this argument was advanced before the online poster cases had arisen and created controversy over the rights of anonymous speakers. See sources cited *supra* note 8 and accompanying text. One commentator has raised the discrepancy between newsgatherer privileges and First Amendment rights of anonymous speakers as a "doctrinal inconsistency" in anonymous speech jurisprudence, but went no further in analyzing the desirability of this discrepancy from a policy standpoint than arguing that the two analyses ought to be uniform in order to "facilitate[] more accurate litigant expectations . . . [which] in turn, [will] . . . reduce the risk of a chilling effect . . ." Amy Pomerantz Nickerson, Comment, *Coercive Discovery and the First Amendment: Towards a Heightened Discoverability Standard*, 57 UCLA L. REV. 841, 879–80 (2010). Still another commentator has raised the narrow question of whether the journalist's privilege ought to be applied to subpoenas to identify anonymous posters to news media websites, but did not advance a conclusion on this issue. See Jane E. Kirtley, *Mask, Shield, and Sword: Should the Journalist's Privilege Protect the Identity of Anonymous Posters to News Media Websites?*, 94 Minn. L. Rev. 1478, 1510–13 (2010).

rights of their subscribers and commenters. It will show that, in some circumstances, online commenters do enjoy stronger legal protection than reporters and their sources. However, from this comparison, this Note will conclude that the reporter's privilege would not be strengthened by decoupling the interests of the source from those of the reporter. Part III will demonstrate that decoupling the rights of reporter and source will undermine the justification for a reporter's privilege for nonconfidential information, as well as obscure a crucial distinction between news operations and websites publishing anonymously leaked information such as Wikileaks. This Note will conclude by arguing that the most current proposed federal shield bill, the Free Flow of Information Act of 2009, sets forth workable language that simultaneously strengthens the reporter's privilege and frames the privilege as a public benefit, reflecting that the societal interest in protecting the reporter-source relationship is greater than the individual interests of either the reporter or the source.²³

I. ANONYMOUS SPEECH AND THE REPORTER'S PRIVILEGE

A. THE FIRST AMENDMENT RIGHT TO ANONYMOUS SPEECH

The legal protections that online anonymous speakers enjoy today originate from a line of cases in which the Supreme Court identified a First Amendment interest in the anonymous publication of political pamphlets.²⁴ In the first such case, the Supreme Court struck down a Los Angeles ordinance prohibiting the distribution of handbills that did not include the author's name on the cover.²⁵ The petitioner in this case was arrested and fined for violating the ordinance after he distributed handbills advocating a boycott against merchants who had allegedly engaged in racially discriminatory hiring practices.²⁶ The petitioner had only included the name and address of the boycotting organization on the handbill, omitting his own name.²⁷ While the state of California defended its disclosure law as a means to prevent false statements that might impact the public during elections, the Court struck down the ordinance as unduly restricting freedom of speech.²⁸ In this and subsequent cases, the Court has deemed speaker identification requirements too blunt an instrument to achieve states' antifraud goals.²⁹

23. See S. 448, 111th Cong. (2009).

24. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (holding unconstitutional an Ohio law against distributing anonymous campaign literature); *Talley v. California*, 362 U.S. 60 (1960) (holding unconstitutional an ordinance which barred distribution of unsigned handbills). See also *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002) (holding unconstitutional a town ordinance which required individuals to register with the town before engaging in door-to-door advocacy).

25. *Talley*, 362 U.S. at 65.

26. *Id.* at 61.

27. *Id.*

28. *Id.* at 64.

29. See *id.* at 65; *McIntyre*, 514 U.S. at 357; *Wachtower Bible*, 536 U.S. at 166 (2002) (holding that "the requirement that a canvasser must be identified in a permit application filed in the mayor's

Nevertheless the Supreme Court has indicated that, at least in the context of referendum petitions, a state's interest in preventing fraud is strong enough to uphold a disclosure law against First Amendment scrutiny.³⁰ In *Doe No. 1 v. Reed*, the Court found that Washington state's interest in preserving the integrity of its electoral process was sufficient to uphold its Public Records Act (PRA), which required public disclosure of the signatories to referendum petitions.³¹ Petitioner Protect Marriage Washington initiated the suit to enjoin the disclosure of the signatories to a petition that opposed the expansion of rights for same sex domestic partners.³² The Court addressed only the petitioners' facial challenge to the Act, meaning that the law remained subject to challenge as applied to particular facts, but did not violate the First Amendment as written.³³ It was thus left to the District Court to determine whether the PRA was unconstitutional as applied to the petitioners, an inquiry that would turn on whether the petitioners can demonstrate "a reasonable probability that the compelled disclosure . . . will subject them to threats, harassment, or reprisals . . ."³⁴ This test, which the Supreme Court has formulated to determine whether the interest in preserving anonymity outweighs a compelling state interest in disclosure, grew out of a seminal case that upheld the right of the NAACP to refuse to disclose the identities of its members to the Alabama State Attorney General.³⁵ Indeed, two years before the Court recognized a distinct right to publish handbills anonymously, it held that the right to freedom of association immunized the NAACP from state scrutiny of its membership lists, where the NAACP demonstrated that its members had suffered reprisals after revelation of their membership.³⁶

The disclosure law cases illustrate that, while not absolute, freedom of speech under the First Amendment encompasses an individual's decision to speak anonymously on political issues.³⁷ More broadly, the Court has recognized a First Amendment right for any author—political or otherwise—to publish anonymously, stating that "at least in the field of literary endeavor, the interest in having

office and available for public inspection necessarily results in a surrender of that anonymity" protected by the First Amendment).

30. *Doe #1 v. Reed*, 130 S. Ct. 2811 (2010) (finding a state's interest in preserving the integrity of the electoral process to be a "sufficiently important governmental interest" to uphold a disclosure requirement in referendum petitions against First Amendment scrutiny).

31. *Id.* at 2815, 2821.

32. *Id.* at 2813.

33. *Id.* at 2815.

34. *Id.* at 2820.

35. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (announcing the test). *See also* *NAACP v. Ala.*, 357 U.S. 449 (1958).

36. *NAACP*, 557 U.S. at 466.

37. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) (stating 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"). *But see Reed*, 130 S. Ct. at 2831 n.4 (Stevens, J., concurring) ("Justice Scalia conceives of the issue as a right to anonymous speech But our decision in *McIntyre* posited no such freewheeling right The right [to freedom of speech] . . . is the right to speak, not the right to speak without being fined or the right to speak anonymously.").

anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.”³⁸ With the advent of the Internet as a new speech medium, the Court extended full First Amendment protection to online speech in *Reno v. American Civil Liberties Union*.³⁹ Indeed, the Court evoked the spirit of its handbill cases when describing the immense opportunity for individual expression afforded by the Internet: “Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”⁴⁰ It is out of this legal and technological progression—from the recognition that disclosure laws regulating political publications implicate First Amendment rights, to the recognition of a right to anonymous publication generally, and finally to the recognition that First Amendment protections apply to online speech—that the case law surrounding online poster anonymity has developed.⁴¹

In the online poster context, the interest that competes with a speaker’s First Amendment right to anonymity is not the state’s power to impose disclosure requirements on speakers, but rather a private party’s power to subpoena the identity of an online speaker from an ISP or host website, in order either to name the poster as a libel defendant or to call him or her as a witness in another civil or criminal proceeding.⁴² When presented with a motion to quash such a subpoena, courts have uniformly held that the subpoenaing party must show his claim has merit in order to defeat the motion and obtain the requested information.⁴³ Courts have agreed that, at a minimum, those seeking to make use of compulsory

38. *McIntyre*, 514 U.S. at 342.

39. 521 U.S. 844 (1997).

40. *Id.* at 870. See also Lee Tien, *Who’s Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117, 129, 136 (1996) (discussing the *McIntyre* court’s concern for protecting “cheap speech” and the Internet as the new cheap speech medium).

41. See, e.g., *Krinsky v. Doe*, 72 Cal. Rptr. 3d 231, 238–39 (Cal. Ct. App. 2008) (holding that judicial recognition of the constitutional right to publish anonymously has a long-standing tradition); *In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *7 (Va. Cir. Ct. Jan. 31, 2000) (“before a court abridges the First Amendment right of a person to communicate anonymously on the Internet, a showing, sufficient to enable the court to determine that a true, rather than perceived, cause of action may exist, must be made.”).

42. See Ashley I. Kissinger & Katherine Larsen, *Untangling the Legal Labyrinth: Protections for Anonymous Online Speech*, 13 No. 9 J. INTERNET L. 1, 16 (2010) [hereinafter *Untangling the Legal Labyrinth*] (stating that the most frequent way a plaintiff seeks the identity of an anonymous poster is to “commence[] a lawsuit against a Jane or John Doe defendant and then move[] for issuance of a pre-service discovery subpoena on the owner of the Web site on which the offending material was posted, the anonymous poster’s Internet service provider (ISP), or both”).

43. See, e.g., *Krinsky*, 72 Cal. Rptr. 3d at 245 (holding that in California a plaintiff must make a prima facie showing of the elements of libel to overcome a defendant’s motion to quash a subpoena for his identity); *Doe No. 1 v. Cahill*, 884 A.2d 451, 460 (Del. 2005) (holding that in Delaware, a plaintiff must support his defamation claim with facts sufficient to defeat a summary judgment motion in order to obtain the identity of an anonymous defendant through the compulsory discovery process); *Dendrite Int’l. Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001) (holding that, among other requirements, a plaintiff must make a prima facie showing of each element of its cause of action prior to a court ordering the disclosure of the identity of the unnamed defendant); *Am. Online*, No. 40570, 2000 WL 1210372, at *7.

discovery to unmask an online poster cannot arbitrarily abridge the First Amendment anonymity rights of the poster with “fishing expeditions.”⁴⁴

From this point of commonality, however, courts over the past decade have forged an array of tests that may impose additional requirements on those seeking to identify a poster.⁴⁵ The state-by-state, and even court-by-court, divergence in legal standards applied to subpoenas designed to identify online posters is due in part to the absence of a controlling standard announced by the Supreme Court or by any federal circuit court.⁴⁶ The variance is also a natural result of different courts’ application of the First Amendment balancing test, which calls for a balancing of the First Amendment rights of the speaker with the subpoenaing party’s right to legal redress.⁴⁷ The least burdensome of these tests, the so-called “good faith” standard, requires only that the party requesting the subpoena “has a legitimate, good faith basis” for the legal claim that is the impetus for the subpoena, and that the information requested is “centrally needed” to advance that claim.⁴⁸ The “motion to dismiss” standard, articulated in *Columbia Insurance Co. v. Seescandy.com*, requires the plaintiff to: (1) identify the anonymous party with sufficient specificity such that a court may determine whether the defendant is a real person or entity who could be sued in federal court; (2) identify all previous steps taken to locate the defendant; and (3) establish that his suit against the anonymous defendant could withstand a motion to dismiss.⁴⁹ As the *Seescandy* case concerned not expressive speech but speech pertaining to intellectual property rights, it remains to be seen whether courts will limit the motion to dismiss standard

44. See *Recent Developments 2007–2008*, *supra* note 2, at 156 (stating that the prima facie showing requirement in the anonymous poster cases serves to prove that a plaintiff “is not merely harassing a poster or trying to stifle legitimate criticism”). One court has gone even further, analogizing the scrutiny that courts must give preservice discovery request to that given to the government’s process of obtaining warrants in a criminal investigation:

Pre-service discovery is akin to the process used during criminal investigations to obtain warrants. The requirement that the government show probable cause is, in part, a protection against the misuse of *ex parte* procedures to invade the privacy of one who has done no wrong. A similar requirement is necessary here [in pre-service discovery of the identity of an anonymous poster] to prevent abuse of this extraordinary application of the discovery process and to ensure that the plaintiff has standing to pursue an action against defendant.

Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 579–80. (N.D. Cal. 1999).

45. See Ashley I. Kissinger & Katharine Larsen, *Protections for Anonymous Online Speech*, in COMMUNICATIONS LAW IN THE DIGITAL AGE 2011 815, 826–39 (PLI Practice, Course Handbook, 2011) (surveying legal protections for anonymous online speakers and listing over ten distinct tests for unmasking an anonymous poster).

46. See *Untangling the Legal Labyrinth*, *supra* note 42, at 17 (noting the lack of federal appellate cases announcing a standard to balance the rights of online speakers with parties seeking to unmask them in order to obtain redress).

47. See *Am. Online*, No. 40570, 2000 WL 1210372, at *7 (noting that “what is sufficient to plead a prima facie case varies from state to state, and sometimes, from court to court,” leading to a lack of uniformity among state standards which incorporate a prima facie showing requirement into their tests for unmasking online posters).

48. *Am. Online*, No. 40570, 2000 WL 1210372, at *8. See also *Untangling the Legal Labyrinth*, *supra* note 42, at 21 (outlining the “good faith test”).

49. *Seescandy.com*, 185 F.R.D. at 578–79.

to the nonexpressive speech context.⁵⁰

Under the more restrictive “summary judgment” standard, a plaintiff must: (1) notify the anonymous poster that he is the subject of a subpoena, in some circumstances by posting the notification on the same message board upon which the original posting at issue appeared; (2) withhold action to afford the anonymous defendant a reasonable opportunity to file and serve opposition to the application; and (3) support his defamation claim with facts sufficient to defeat a summary judgment motion.⁵¹ The *Dendrite* standard noted above is the most restrictive standard, requiring in addition to the three components of the summary judgment standard that (4) plaintiffs set forth the exact anonymous statements which they allege constitute actionable speech, and (5) the court “balance the defendant’s First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant’s identity to allow the plaintiff to proceed.”⁵² In cases concerning expressive speech, where the plaintiff is suing the online poster for defamation, the summary judgment and *Dendrite* tests are the prevailing standards.⁵³ Courts differ as to whether they will apply the same standard to cases where the plaintiff seeks to name the anonymous individual in order to call him or her as a nonparty witness.⁵⁴

1. Theoretical Underpinnings of the Right to Anonymous Speech

In each of the primary Supreme Court cases striking down disclosure laws—*Talley v. California* and *McIntyre v. Ohio Elections Commission*—the Court’s conclusion that the First Amendment affords a right to anonymous publication rests upon two pillars: (1) acknowledgement that anonymous political speech has been a historically important force in our nation’s political development and (2) concern that forced identification may chill speech on public issues for fear of reprisal.⁵⁵ Both cases cite a national “tradition of anonymity in the advocacy of political causes,” from the pre-Revolutionary War Letters of Junius to the Federalist Papers, authored by James Madison, Alexander Hamilton and John Jay, but published under the pseudonym “Publius.”⁵⁶ In *McIntyre*, the Court opined that the right to anonymous publication plays an important role in the American constitutional scheme, proclaiming that “[a]nonymity is a shield from the tyranny of the majority It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—

50. See Ashley I. Kissinger & Katharine Larsen, *Protections for Anonymous Online Speech*, in COMMUNICATIONS LAW IN THE DIGITAL AGE 2011 815, 832–34 (PLI Practice, Course Handbook, 2011).

51. *Cahill*, 884 A.2d at 460–61.

52. *Dendrite Int’l. Inc. v. Doe No. 3*, 775 A.2d 756, 760–61 (N.J. Super. Ct. App. Div. 2001).

53. See *Untangling the Legal Labyrinth*, *supra* note 42, at 18.

54. See *id.*

55. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 344, 341–42 (1995); *Talley v. California*, 362 U.S. 60, 64–65 (1960).

56. *McIntyre*, 514 U.S. at 343 n.6; *Talley*, 362 U.S. at 65.

and their ideas from suppression—at the hand of an intolerant society.”⁵⁷ The Court has subsequently cited *McIntyre* to support the broader proposition that anonymity is an aspect of the First Amendment theory of speaker autonomy, a principle that affords authors an editorial right to determine the content of their speech, including omissions.⁵⁸

Justice Thomas, in his concurring opinion in *McIntyre*, undertook an originalist analysis of whether “freedom of speech, or of the press” was understood by the Framers to entail a right to publish anonymously, ultimately concluding that the First Amendment was in fact intended to encompass a right to anonymous political speech.⁵⁹ Notably, two of the historical incidents that Thomas cites in support of an original right to anonymity are cases in which newspaper editors refused to reveal the identities of pseudonymously published articles critical of the government.⁶⁰ In these cases, members of the Continental Congress and the New Jersey State Assembly defended the editors’ refusal in the name of freedom of the press.⁶¹

Despite the force of the majority opinions in *Talley* and *McIntyre* proclaiming the existence of a First Amendment right to anonymous publication, each opinion drew a dissent that declaimed the existence of any generalized right to anonymity in the absence of a demonstrated threat of reprisal to the speaker.⁶² In *Talley*, Justice Clark objected that “[t]he Constitution says nothing about freedom of anonymous speech,” and that “the record is barren of any claim, much less proof, that [Talley] will suffer any injury whatever by identifying the handbill with his name.”⁶³ Justice Scalia in *McIntyre* opposed not only the notion that there is an original right to anonymous publication under the Constitution but also the majority’s discourse on anonymity as central to the marketplace of ideas, arguing that anonymous publication “facilitates wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity.”⁶⁴ The proliferation of online message boards and comment functions on news websites has only sharpened the debate over the social utility of anonymous speech, with one prominent commentator advocating a “traceable anonymity” regime whereby ISPs and

57. 514 U.S. at 357.

58. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (citing *McIntyre* as illustrating “th[e] general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.”). See also Tien, *supra* note 40, at 131–36 (discussing *Hurley* and *McIntyre* as instances of the principle of speaker autonomy).

59. 514 U.S. at 359, 371 (Thomas, J., concurring).

60. *Id.* at 361–62. (Thomas, J., concurring) (recounting controversy over the Continental Congress’ attempt in 1779 to discover the identity of the author of an article in the *Pennsylvania Packet*, which several members of the Congress itself thwarted, and the New Jersey State Legislature’s attempt to uncover the identity of an anonymous critic “Cincinnatus,” only to be thwarted by a State Assembly vote that Cincinnatus’ anonymity was protected by the freedom of the press).

61. *Id.*

62. *Id.* at 379, 385 (Scalia, J., dissenting); *Talley*, 362 U.S. at 70 (Clark, J., dissenting).

63. 362 U.S. at 69–70 (Clark, J., dissenting).

64. 514 U.S. at 385 (Scalia, J., dissenting).

website operators would be required to collect visitors' IP addresses to increase accountability for online harassment.⁶⁵ However, as the Court has noted, the federal and state governments do not have the power to punish certain utterances "in order to maintain what they regard as a suitable level of discourse within the body politic."⁶⁶

B. THE REPORTER'S PRIVILEGE

The journalistic merit of relying on confidential sources is not above controversy within the profession.⁶⁷ However, since at least the Eighteenth Century, American history has been littered with controversies in which newspaper editors refused to disclose the identity of their pseudonymous contributors, and reporters refused to divulge the identity of their sources in the name of freedom of the press.⁶⁸ Statutory recognition of a reporter's privilege in the United States did not originate until 1896, when Maryland enacted the nation's first reporter's shield statute.⁶⁹ The Maryland statute provided—and still provides—an absolute shield to reporters from forced disclosure of their confidential sources, even when subpoenaed to testify before a grand jury.⁷⁰ Thirty-eight states have since followed Maryland's lead, with Kansas and Wisconsin being the latest states to enact shield laws.⁷¹ Unlike Maryland's statute, however, most state shield laws provide a "qualified," rather than an "absolute," reporter's privilege.⁷² Florida's journalist

65. Daniel Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 123 (2009).

66. *Cohen v. California*, 403 U.S. 15, 23 (1971). See also Tien, *supra* note 40, at 140–42.

67. See Alicia C. Shepard, *Anonymous Sources*, AM. JOURNALISM REV., Dec. 1994, at 21–24.

68. See, e.g., *McIntyre*, 514 U.S. at 361–62 (Thomas, J., concurring); *Telnikoff v. Matusevitch*, 702 A.2d 230, 243 (Md. 1997) (recounting that in 1777 the Maryland House of Delegates admonished the Whig Club of Baltimore for demanding revelation of the identity of the author of a pro-Tory editorial). The Maryland reporter's shield statute was passed in reaction to a case in which a *Baltimore Sun* reporter spent five days in jail for refusing to testify before a grand jury about his confidential sources. See J.S. Bainbridge, Jr., *Subpoenaing the Press*, A.B.A. J., Nov. 1, 1988, at 72.

69. See MD. CODE ANN., CTS. & JUD. PROC. § 9–112 (West 2011); *Telnikoff*, 702 A.2d at 244 (stating that Maryland was the first state in the union to adopt a reporter's shield statute).

70. The original statute provided:

That no person engaged in, connected with or employed on a newspaper or journal shall be compelled to disclose in any legal proceeding or trial, or before any committee of the legislature or elsewhere, the source of any news or information procured or obtained by him for and published in the newspaper on and in which he is engaged, connected with or employed.

See *Telnikoff*, 702 A.2d at 244 (citing the original statute). The current reporter's shield statute provides, in part, that:

any judicial, legislative, or administrative body, or any body that has the power to issue subpoenas may not compel any person described in subsection (b) of this section to disclose: (1) The source of any news or information procured by the person while employed by the news media, whether or not the source has been promised confidentiality. . . .

MD. CODE ANN., CTS. & JUD. PROC. § 9–112.

71. James C. Goodale et. al., *Reporter's Privilege: Recent Developments 2009–2010*, in COMMUNICATIONS LAW IN THE DIGITAL AGE 2010 151, 157 (PLI Practice, Course Handbook, 2010) [hereinafter *Recent Developments 2009–2010*].

72. See THE REPORTER'S PRIVILEGE COMPENDIUM, <http://www.rcfp.org/privilege/> (click "select all states" and compare "B. Absolute or Qualified Privilege"; then click "Compare") (last visited May

privilege statute provides a typical model of a qualified privilege statute. To overcome the privilege, a party must show that: “(a) [t]he information is relevant and material to unresolved issues that have been raised in the proceeding for which the information is sought; (b) [t]he information cannot be obtained from alternative sources; and (c) [a] compelling interest exists for requiring disclosure of the information.”⁷³ States that have not enacted shield laws may provide common law protection to journalists from forced disclosure of their sources.⁷⁴ Reporters may also receive the benefit of a state shield law in federal court, as federal courts adjudicating a civil case arising under state law must apply the applicable state law of evidentiary privilege.⁷⁵ Thus, in a state law case, a reporter seeking to withhold the identity of a confidential source may claim protection under state shield law, the state constitution or state common law.

In a case arising under federal law, a journalist’s options are less certain. While the Court has unambiguously recognized a First Amendment right to anonymous speech, the extent to which the First Amendment may be invoked to protect the identity of a confidential news source varies from circuit to circuit. The Supreme Court has only once considered whether the First Amendment requires recognition of a privilege for reporters—in *Branzburg v. Hayes*.⁷⁶ The Court in *Branzburg* held that there is no First Amendment privilege for reporters to refuse to testify before a grand jury, even where this testimony may require a reporter to reveal the identity of a confidential source.⁷⁷ However, the Court emphasized that its holding was limited to the issue of grand jury testimony.⁷⁸ Whether the First Amendment provides for a reporter’s privilege more broadly is an issue seemingly left open by Justice White’s majority opinion, while discussed favorably in Justice Powell’s concurrence.⁷⁹ Most circuit courts, except the Sixth and Seventh Circuits, have

11, 2011) (listing whether a state’s reporter’s privilege is qualified or absolute). See also CAREY LENNING & HENRY COHEN, CONG. RESEARCH SERV., RL 32806, JOURNALISTS’ PRIVILEGE TO WITHHOLD INFORMATION IN JUDICIAL AND OTHER PROCEEDINGS: STATE SHIELD STATUTES (2005) (summarizing trends across state shield laws, with an appendix containing the full text of all state shield laws enacted before 2005).

73. Fla. Stat. Ann. § 90.5015(2)(a–c) (West 2011).

74. See, e.g., *Idaho v. Kiss*, 700 P.2d 40, 44–46 (Idaho 1985); *Ayash v. Dana-Farber Cancer Inst.*, 822 N.E.2d 667, 696 n.33 (Mass. 2005) (stating that Massachusetts, which lacks a state shield statute, has “recognized that values underlying the First Amendment to the United States Constitution and art. 16 of the Amendments to the Massachusetts Constitution may give rise to a common-law privilege that would allow a news reporter to refuse to reveal his sources”).

75. FED. R. EVID. 501.

76. 408 U.S. 665 (1972).

77. *Id.* at 708.

78. *Id.* at 682 (“The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime.”).

79. *Id.* at 707, 710. Justice White in his majority opinion clarified that “news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment.” *Id.* at 707. Justice Powell’s concurrence recognized a qualified reporter’s privilege, whereby “[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”

interpreted *Branzburg* to recognize some degree of First Amendment privilege for reporters outside of the grand jury context.⁸⁰

In the absence of assured First Amendment protection, reporters seeking to avoid testifying in federal criminal proceedings regarding the identity of a source have recently raised the Fifth Amendment right against self-incrimination as a shield.⁸¹ For example, in December 2008, *Detroit Free Press* reporter David Ashenfelter invoked the Fifth Amendment at a deposition, refusing to reveal the source that named Assistant United States Attorney Richard Convertino as the target of a Department of Justice investigation for misconduct in connection with a terrorism prosecution.⁸² In April 2009, after a two year battle between Convertino and Ashenfelter, a Michigan District Court found for Ashenfelter, concluding that, under the Fifth Amendment, he could not be forced to appear for a criminal deposition to identify his sources.⁸³ However a reporter may only invoke the Fifth Amendment right against self-incrimination where a prosecutor has not already provided him or her with immunity from any criminal prosecution that may result from his testimony.⁸⁴

1. Theoretical Underpinnings of the Reporter's Privilege

While both the *McIntyre* majority opinion and Justice Thomas' concurrence underscore the historic underpinnings of the First Amendment right to anonymous speech, the Court in *Branzburg* rejected the idea that the First Amendment has also historically shielded confidential sources: "From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished."⁸⁵ The very structure of this controversial statement by the Court typifies legal discourse on the reporter's privilege in that, while the individual rights of the reporter and source may be referenced, justification for the privilege ultimately rests upon concern for the vitality of the press. For example, dissenting Justice Stewart espoused the existence of a constitutional right for

Id. at 710.

80. See *Recent Developments 2009–2010*, *supra* note 71, at 173, 181 n.2 (rounding up cases from the First, Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth and D.C. Circuits recognizing a First Amendment reporter's privilege outside of the grand jury context). *But see* *McKevitt v. Palasch*, 339 F.3d 530, 532–33 (7th Cir. 2003) (suggesting that *Branzburg* did not recognize a First Amendment privilege for nonconfidential information, and potentially casting doubt on whether the First Amendment may privilege confidential information, even when there is a concern for "harassment, burden, [or] using the press as an investigative arm of the government . . ."); *Convertino v. U.S. Dep't of Justice*, No. 07-CV-13842, 2008 WL 4104347, at *2 (E.D. Mich. Aug. 28, 2008) (citing *Store Commc'ns, Inc. v. Giovan*, 810 F.2d 580, 584–86 (6th Cir. 1987), for the proposition that "the Sixth Circuit has explicitly declined to recognize a qualified First Amendment privilege for reporters").

81. See Samantha Frederickson, *Leaning on the Fifth*, *THE NEWS MEDIA & THE LAW*, Winter 2009, at 23.

82. *Id.*

83. See James C. Goodale et. al., *Reporter's Privilege: Recent Developments 2008–2009*, in *COMMUNICATIONS LAW IN THE DIGITAL AGE 2009* 113, 120 (PLI, Practice, Course Handbook, 2009).

84. See *Leaning on the Fifth*, *supra* note 81 at 24.

85. *Branzburg*, 408 U.S. at 698–99. See also discussion *supra* pp. 127–29.

reporters to maintain the confidentiality of their sources, describing this right as stemming “from the broad societal interest in a full and free flow of information to the public.”⁸⁶ Another example of a public interest formulation in support of the reporter’s privilege appears in the case of *Garland v. Torre*, which predates *Branzburg* and marks the first time that a reporter asserted a testimonial privilege grounded in the First Amendment.⁸⁷ In *Garland*, a writer for the *New York Herald Tribune* refused, during her deposition, to reveal the identity of an unnamed “network executive” to whom she had attributed several statements about the actress Judy Garland.⁸⁸ The Second Circuit stated that it accepted “the hypothesis that compulsory disclosure of a journalist’s confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news,” but ultimately found that the duty of a witness to testify in court necessarily abridges the First Amendment freedom of all witnesses, reporters or otherwise, “to choose whether to speak or be silent”⁸⁹ Thus to the extent that the Second Circuit acknowledged a First Amendment interest against forced disclosure of confidential sources, the interest derived from the chilling effect that such a disclosure would have on the dissemination of news to the public.⁹⁰

The disclosure cases weigh very seriously the threat that a chilling effect on political speech may result from compelled identification in handbill distribution, and the “free flow of information” rationale for a reporter’s privilege likewise links the reporter’s ability to disseminate news with the continued willingness of confidential sources to provide newsworthy information. Yet the Court in *Branzburg* was quite equivocal when evaluating whether a chilling effect would in fact result from subjecting reporters to grand jury subpoena, describing a “consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions”⁹¹ It further referred to the wide-ranging results of a study in which daily newspaper editors were asked to estimate how many of their stories have been based on information received in confidence, and discussed the methodological difficulty of measuring the extent to which informants are actually deterred by the knowledge that the press is subject to subpoenas.⁹²

Since *Branzburg*, professional journalists and their advocates have repeatedly written and testified on the importance of confidential sources to reporting.⁹³ They

86. *Id.* at 725 (Stewart, J., dissenting).

87. 259 F.2d 545 (2d Cir. 1958). *See also* *Branzburg*, 408 U.S. at 685–86 (describing *Garland* as the first case in which a reporter asserted a First Amendment right to protect his confidential sources).

88. *Garland*, 259 F.2d at 547.

89. *Id.* at 548–49.

90. *Id.* at 547–48.

91. 408 U.S. at 690–91.

92. *Id.* at 693–95.

93. *See* RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 594–625 (2008) (chronicling legislative efforts from 1929 to 2008 to enact a federal reporter’s privilege and the news media’s testimony in support of those efforts). *See also* Steven D. Zansberg, *The Empirical Case: Proving The Need for the Privilege*, 2 MEDIA LAW RESOURCE CENTER BULL. 145, 149 (2004), available at <http://>

have testified that the full scope of news stories that benefit from the insight of confidential sources is underestimated, as these sources provide and verify information not only for investigative pieces, but also elucidate the significance of a day's news events.⁹⁴ The public debate that *Branzburg* engendered regarding the strength of the link between reporters' ability to gather news and their ability to rely on confidential sources stands in stark contrast to the *Talley* and *McIntyre* Courts' presumption of a chilling effect from forced disclosure, though dissenting opinions in each case criticized the majority's failure to find that the disclosure would subject the petitioner to any actual harm.⁹⁵

2. The Reporter-Source Relationship

While the public benefit of news dissemination has been advanced as the primary justification for the reporter's privilege, the Supreme Court has examined the nature of the private interests at stake in the reporter-source compact. In *Cohen v. Cowles Media Co.*, the Court treated the issue of whether a confidential source can bring state law breach of contract and promissory estoppel claims against a reporter for publishing a source's name despite having promised the source confidentiality.⁹⁶ While the defendant newspaper in the case argued that the First Amendment prohibited such claims, the Court found that where the state's law of promissory estoppel is one of general applicability, the First Amendment does not forbid its application to the press.⁹⁷ In the wake of *Cohen*, Minnesota, Georgia, and New York have permitted application of their state law of breach of contract or promissory estoppel to sanction a reporter's breach of confidentiality.⁹⁸

On remand of the *Cohen* case itself, the Minnesota Supreme Court described the reporter-source compact as a "special ethical relationship" and a "moral commitment," that nonetheless does not give rise to a binding legal contract.⁹⁹ It declined to imply a contract under a promissory estoppel theory, announcing that it must "balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity."¹⁰⁰ The court left open the possibility that there may be circumstances in which "the state's interest in

www.medialaw.org/Content/NavigationMenu/Publications1/MLRC_Bulletin/Bulletin_Archive/2004-2WhitePaper.pdf (demonstrating reporters' reliance on confidential sources and unpublished source materials in four contexts: (1) government reporting; (2) private sector; (3) non-confidential sources; and (4) military affairs).

94. See *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. 39–41 (2007) (statement of Lee Levine, Partner, Levine Sullivan Koch & Schulz, L.L.P. and Adjunct Professor, Georgetown University Law Center).

95. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 379 (1995) (Scalia, J., dissenting); *Talley v. California*, 362 U.S. 60, 69 (1960) (Clark, J., dissenting).

96. 501 U.S. 663 (1991).

97. *Id.* at 670.

98. James C. Goodale et. al., *Reporter's Privilege in COMMUNICATIONS LAW IN THE DIGITAL AGE* 2011 239, 285 n. 204 & 205 (PLI Practice, Course Handbook, 2011) [hereinafter *Reporter's Privilege 2011*] (noting that three states have not permitted such suits).

99. *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 203 (Minn. 1990).

100. *Id.* at 205.

enforcing the promise to the source outweighs [the press'] First Amendment" interests, though the "outed" source did not prevail in that case.¹⁰¹ Subsequently the District of Columbia, applying Virginia state law, agreed with Minnesota that a confidential source relationship creates a moral rather than contractual obligation.¹⁰² It rejected a breach of contract claim brought by a confidential source, where the source admitted to lying to the defendant reporter.¹⁰³

The *Cohen* promissory estoppel analysis adds a curious dimension to the reporter-source relationship, by citing a potential "state interest" in the enforcement of a reporter's promise to a source, which may trump the interests of the reporter. Where legal recognition of the reporter-source relationship stems from the public interest value of news, rather than direct concern for the rights of the source, and where states recognizing a reporter's privilege have also recognized that the reporter alone may waive the privilege, in what sense may a state have an independent interest in enforcing the confidentiality compact? The case is difficult to synthesize with the rationale underlying the reporter's privilege, unless interpreted as standing for the proposition that the public interest, as protected by the state, is always paramount in the reporter-source relationship, such that the public interest in compensating sources for breach of confidentiality may predominate over the interests of the reporter.

II. KEY CASES

In order to ascertain whether reframing the reporter's privilege as the First Amendment right of the source to remain anonymous, rather than the right of the press to fulfill its newsgathering function, strengthens the reporter's privilege, it must first be demonstrated that the anonymous speaker cases in fact provide a more protective model. A recent New Hampshire Supreme Court opinion, juxtaposing the *Dendrite* standard with the state's qualified reporter's privilege analysis, demonstrates that, at least in the core area of defamation cases, anonymous posters may have the legal upper hand.¹⁰⁴ In that case, the company Mortgage Specialists subpoenaed a website, *Implode-Explode*, which ranks and critiques the performance of mortgage lenders, seeking to force the website to disclose (1) the identity of an unnamed individual who had leaked Mortgage Specialists' 2007 loan figures, in the form of a chart, to the website, which the site subsequently posted, and (2) the identity of an anonymous poster to the website, where Mortgage Specialists sought to name the poster as a libel defendant for statements made against the company.¹⁰⁵

The court held that the leak-publishing website need not automatically turn over the identity of the leaker, because it extended qualified reporter's privilege

101. *Id.*

102. *Steele v. Iskifoff*, 130 F. Supp. 2d 23, 31 (D.D.C. 2000).

103. *Id.* at 33.

104. *Mortg. Specialists, Inc. v. Implode-Explode Heavy Indus., Inc.*, 999 A.2d 184 (N.H. 2010).

105. *Id.* at 188.

protection to the website under the New Hampshire state constitution.¹⁰⁶ The holding touches on the interesting issue of what websites may be categorized as news organizations in order to claim reporter's privilege protection. Within the scope of this Note, however, the court's decision is of interest because of the way in which it differentiated New Hampshire's reporter's privilege analysis from the state's test to unmask anonymous online speakers. In considering Mortgage Specialists' demand that Implode-Explode turn over the identify of the loan chart leaker, the court first set out to define a test for overcoming the state's qualified reporter's privilege in a civil suit where the press is a nonparty to a defamation action.¹⁰⁷ The court adopted the First Circuit's test in *Bruno & Stillman Inc. v. Globe Newspaper Co.*, under which it would be required to balance: (1) whether Mortgage Specialists' claim for disclosure of the leaker is merely a pretense for exercising discovery powers as a fishing expedition; (2) whether there is a need for confidentiality between the journalist and the source; (3) the exhaustion of other non-confidential sources for the identity of the leaker; and (4) the importance of confidentiality to preserve the journalist's continued newsgathering effectiveness.¹⁰⁸ The court remanded for application of this test to the plaintiff's subpoena to identify the leaker.¹⁰⁹

The anonymous commenter's identity was subject to an entirely different set of protections. There, the New Hampshire Supreme Court adopted the *Dendrite* test for unmasking online speakers.¹¹⁰ Under *Dendrite*, a plaintiff must (1) notify the anonymous posters that they are the subject of a subpoena; (2) identify the anonymous statements alleged to constitute actionable speech; and (3) state a prima facie cause of action against the anonymous defendants, producing sufficient evidence to support each element of its cause of action.¹¹¹ If a plaintiff has met these threshold conditions, the court must then balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented, and the necessity for disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.¹¹² As the test sets out, this balancing is necessary to accommodate both the well established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation.¹¹³ As with the reporter's privilege analysis, the court remanded for application of the *Dendrite* test to the facts of the case.¹¹⁴

Matching up the prongs of the *Dendrite* test to the elements of the state's

106. *Id.* at 190.

107. *Id.* at 190.

108. *Id.* at 190–191 (adopting the qualified reporter's privilege in *Bruno & Stillman Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595–98 (1st Cir.1980)).

109. *Id.* at 191.

110. *Id.* at 193 (citing *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001)).

111. *Dendrite*, 775 A.2d at 760.

112. *Id.* at 760–61.

113. *Id.* at 760.

114. *Mortg. Specialists*, 999 A.2d at 191.

reporter's privilege analysis—which is typical of both other state and federal courts' qualified reporter's privilege analyses in the context of civil actions—the *Dendrite* test quickly emerges as the more protective standard. The elements of the privilege analysis—setting forth a requirement for the plaintiff to reasonably exhaust sources other than the reporter for obtaining the identity sought, and to demonstrate the importance of the disclosure sought to his case—is readily encompassed within the last prong of *Dendrite*, in which the court will evaluate the need for the disclosure to allow the plaintiff's case to proceed. Yet the First Amendment protection afforded the anonymous poster under *Dendrite* assures, in addition, that even where the plaintiff has shown the requisite need for disclosure, that such a need will be subject to the additional check of the poster's First Amendment rights. By contrast, under the *Bruno* test the plaintiff's need for disclosure of a source's identity must be balanced with “the potential injury to the free flow of information that the disclosure portends.”¹¹⁵ As the contrast between the Supreme Court's analysis of potential chilling effects in *Talley/McIntyre* and *Branzburg* demonstrates, recognition of a direct First Amendment interest may afford stronger anonymity protection than the assertion of a potential threat to newsgathering, especially where a specific evidentiary showing of harm may be necessary to convince a court of a threat to newsgathering.¹¹⁶ Further, the typical qualified reporter's privilege analysis does not require the court to consider the impact of the disclosure on newsgathering.¹¹⁷ While the *Dendrite* standard, on balance, affords more protection to the subpoenaed party than the typical reporter's privilege analysis, it must be acknowledged that this will not be the case in states that afford reporters an absolute privilege against civil subpoenas, and that not every state follows the *Dendrite* standard. However, given the growing prevalence of *Dendrite*, and the fact that most states do not extend absolute privilege protection to reporters in civil actions, the lament that courts are more protective of anonymous posters than confidential sources rings true in the defamation context.¹¹⁸

How, then, might a media lawyer utilize the anonymous poster precedent to the advantage of a news client in a confidential source case? One Pennsylvania case shows a potential way forward. In December 2008, a Pennsylvania federal court decided as a matter of first impression that a newspaper, *The Pocono Record* (the *Record*), had standing to assert the First Amendment rights of anonymous

115. *Id.*

116. *See Reporter's Privilege 2011*, *supra* note 98, at 267 (citing *Maurice v. NLRB*, No. 81-2216, 1981 WL 137986, at *3 (S.D. W. Va. July 13, 1981), *rev'd on other grounds*, 691 F.2d 182 (4th Cir. 1982), which found that compelled testimony by reporters of *The Charleston Daily Mail* in other court proceedings has resulted in “long-term adverse consequences” to the paper's newsgathering abilities, and such harm would likely recur from compelled disclosures in the future).

117. *See id.* at 266 (setting out that the qualified reporter's privilege is most often formulated as a three part test, in which a litigant must prove the materiality and criticality of the sought information to its claim, as well as the exhaustion of alternative sources).

118. *See supra* p. 120 and note 9.

commenters to its website.¹¹⁹ The commenters in question had responded to the paper's coverage of a hostile work environment lawsuit brought by a local nurse against her former employer, the Pocono Medical Center (PMC).¹²⁰ The plaintiff nurse, Brenda Enterline, claimed that a Dr. Cooks had sexually harassed her during her work in the emergency room.¹²¹ The newspaper received a flood of online commentary in response to its article—nearly sixty comments appeared the day the article was published.¹²² A poster using the pseudonym “ergirl” said that she had worked for PMC for more than ten years, and swore that, “Dr. Cooks never once in my entire time working there ever to my knowledge ever did anything that I would take ever as sexual harassment.”¹²³ One commenter proclaimed the opposite: “This doctor was so horrible, rude, inconsiderate and way off base! I feel very bad for this nurse and believe every word of her story.”¹²⁴ Three weeks after the article's publication, Enterline subpoenaed the *Record* to identify eight of the posters, who appeared to have personal knowledge of Dr. Cooks and the work environment at PMC, in order to name them as potential witnesses in her sexual harassment case.¹²⁵ The *Record* moved to quash the subpoena for requesting information protected by the First Amendment and the Pennsylvania reporter's shield law.¹²⁶

Before the Enterline subpoena, newspapers in Oregon, Montana and Florida had already successfully quashed subpoenas for the IP addresses of anonymous online posters, where libel plaintiffs sought to name the posters as defendants, by claiming protection for the posters under their states' shield laws.¹²⁷ *Enterline v. Pocono Medical Center* broke ground in the genre of unmasking cases because the court

119. *Enterline v. Pocono Med. Ctr.*, 751 F. Supp. 2d 782, 789 (M.D. Pa. 2008).

120. *Id.* at 783.

121. *Id.*

122. Decl. of William Watson in Supp. of Opp'n of Ottaway Newspapers, Inc. to Plaintiff's Mot. to Compel & for Sanctions, *Enterline v. Pocono Med. Ctr.*, 751 F. Supp. 2d 782 (M.D. Pa. 2008) (No. 3:08-cv-01934-ARC) Ex. B, available at [http://www.citmedialaw.org/sites/citmedialaw.org/files/2008-11-26 Declaration%20of%20Watson%20in%20Support%20of%20Opposition%20to%20Motion%20to%20Compel.pdf](http://www.citmedialaw.org/sites/citmedialaw.org/files/2008-11-26%20Declaration%20of%20Watson%20in%20Support%20of%20Opposition%20to%20Motion%20to%20Compel.pdf).

123. *Id.* at Ex. B ¶ 13.

124. *Id.* at Ex. B ¶ 7.

125. *Id.* ¶ 6 (citing Pl.'s Mot. to Compel & for Sanctions, *Enterline v. Pocono Med. Ctr.*, 751 F. Supp. 2d 782 (M.D. Pa. 2008) (No. 3:08-cv-01934-ARC), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2008-11-10-Enterline%27s%20Motion%20to%20Compel%20and%20For%20Sanctions.pdf>).

126. *Enterline v. Pocono Med. Ctr.*, 751 F. Supp. 2d 782, 783–84 (M.D. Pa. 2008).

127. See *Beal v. Calobrisi*, No. 08-CA-1075 (Fl. Cir. Ct. Oct. 9, 2008), available at http://www.newsroomlawblog.com/uploads/file/Beal_v_Calobrisi.pdf; *Doe v. TS*, No. CV08030693, 2008 WL 5683406 (Or. Cir. Ct. Sept. 30, 2008); Transcript of Mot. to Quash, *Doty v. Molnar*, No. DV-07-022 (Mont. Dist. Ct. Sept. 3, 2008), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2008-09-03-Hearing%20and%20Oral%20Ruling%20on%20Billings%20Gazette%20Motion%20to%20Quash.pdf>. Note that Enterline did not intend to bring a libel action against the pseudonymous posters, as did the above-mentioned plaintiffs, but rather sought to name them as potential witnesses. For a discussion of these cases and the application of the reporter's privilege to anonymous postings, see Jane E. Kirtley, *Mask Shield, and Sword: Should the Journalist's Privilege Protect the Identity of Anonymous Posters to News Media Websites?*, 94 MINN. L. REV. 1478 (2010).

did not evaluate the applicability of Pennsylvania's shield law to the case.¹²⁸ Instead, it focused on the *Record's* First Amendment claim, in which the paper asserted the commenters' rights to speak anonymously rather than its own privilege to withhold the identifying information.¹²⁹ Judge Richard Caputo, applying the constitutional and prudential standing requirements to the *Record's* claim to third party standing, held that "the relationship between *The Pocono Record* and readers posting in the Newspaper's online forums is the type of relationship that allows *The Pocono Record* to assert the First Amendment rights of the anonymous commentators."¹³⁰

In the absence of precedent squarely granting a newspaper third party standing to protect anonymous posters to its website, Judge Caputo relied on a D.C. Circuit opinion establishing that an ISP had standing to assert the anonymity rights of posters to its online forums, as well as a line of cases which recognized third party standing of proprietors and nonprofit organizations in "similar business/client relationships."¹³¹ The Court found adequate injury in fact on the part of the newspaper to support third party standing, where "preventing the *Record* from asserting the First Amendment Rights of anonymous commentators will compromise the vitality of the newspaper's online forums, sparking reduced reader interest and a corresponding decline in advertising revenues."¹³² The Court acknowledged the obvious practical obstacles to the commenters to assert their own First Amendment rights, where they wished to remain anonymous.¹³³ Finally, the Court found that the *Record* would zealously advocate for the commenters "in light of the Newspaper's desire to maintain the trust of its readers and online commentators."¹³⁴

The Court's ready acknowledgement of injury in fact to the newspaper in *Enterline*, following the precedent in which ISPs successfully asserted economic injury in fact, challenges the Supreme Court's statement in *Branzburg* that the potential chilling effect of requiring journalists to answer to grand jury subpoena poses a "consequential, but uncertain burden on news gathering . . ."¹³⁵ If courts readily accept that forced identification of anonymous commenters will chill this commentary, driving down hits to news websites and corresponding revenue, there is no logical reason why the potentially chilling effect of outing sources ought not to be treated more skeptically. Like online commenters, confidential sources, too, face practical obstacles to defending their own anonymity rights. And like the

128. *Enterline*, 751 F. Supp. 2d at 788 n.1.

129. *Id.* ("[t]he Court's finding that the disclosure of information sought by Plaintiff is improper under the First Amendment is sufficient for disposition of Plaintiff's current motion.").

130. *Id.* at 786.

131. *Id.* (citing *In re Verizon Internet Servs. Inc.*, 257 F. Supp. 2d 244, 258 (D.D.C. 2003), *rev'd on other grounds by* Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.2d 1229 (D.C. Cir. 2003)).

132. *Id.*

133. *Id.*

134. *Id.*

135. *See supra* p. 132 and note 91.

defendant newspaper in *Enterline*, reporters and news organizations can be expected to engage in zealous advocacy on behalf of their confidential sources. It may therefore be tempting for the media law community to look to *Enterline* as a means to reframe the reporter's privilege analysis as the reporter's assertion of third party standing to defend the anonymity rights of his source.

III. THE IMPORTANCE OF A RELATIONSHIP-BASED PRIVILEGE

The primary drawback to refashioning the reporter's privilege in the image of the anonymous poster cases is that, by advancing the anonymity interest of the source as paramount, the newly formulated privilege will obscure the public interest in effective newsgathering as a whole. Jurisdictions that recognize a privilege for nonconfidential information gathered in the course of a journalist's work rely on just this public interest rationale, as there is no anonymous party to be protected. The First Circuit, for example, has described the compelled disclosure of nonconfidential source material as a "lurking and subtle threat" to the freedom of the press.¹³⁶ In a case in which CBS moved to quash a grand jury subpoena to provide a court with the outtakes of a *60 Minutes* episode, the Third Circuit recognized that compelled disclosure of the outtakes "may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the privilege."¹³⁷ The court reached this conclusion, even where the government had obtained waivers from its witnesses that the material may be aired in court, because the reporter's privilege belongs to the news organization and was thus CBS's privilege alone to waive.¹³⁸ As protection for nonconfidential source material is still a developing area of media law, it will only benefit media advocates working toward the expansion of such protection to emphasize the public interest rationale for the reporter's privilege, rather than the confidential source's individuated anonymity right.

Further, as recognized by the *Cohen* case, there is a distinctly moral dimension to the reporter-source relationship that may prove useful for journalistic organizations to emphasize in order to differentiate themselves from less discriminating "news" sources in the era of Wikileaks.¹³⁹ Today, informants who wish to make their inside information on the workings of government publicly known have an equally viable choice between publishing this information on the Internet directly (either under a pseudonym or under the aegis of a Wikileaks-style site), or sharing this information with a reporter with whom they have a relationship. It is clear that the federal legislature has no intention of protecting sites such as Wikileaks under any reporter's shield, as it has explicitly amended the most recent draft of the proposed reporter's shield statute to exclude protection for

136. U.S. v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988).

137. U.S. v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980).

138. *Id.*

139. See *supra* p. 134 and note 102.

confidential sources who have leaked classified information.¹⁴⁰ Arguably, then, current public policy supports the idea that the reporter's privilege should provide a level of protection sufficient to incentivize would-be informants to enter into a reporter-source relationship, rather than to take disclosure into their own hands. If media advocates begin to argue that the interest in anonymous speech itself forms the heart of the privilege, this would seem to create the opposite incentive—driving disclosure to unmoderated mediums, such as message boards and Wikileaks-style sites.

IV. CONCLUSION

There is great potential for strengthening the reporter's privilege without grafting the *Dendrite* test wholesale onto the privilege analysis. The latest proposed federal shield bill, the Free Flow of Information Act of 2009, offers a public interest balancing test that is a step in the right direction.¹⁴¹ Explicitly referencing Justice Stewart's dissenting opinion in *Branzburg*, which grounded a constitutional reporter's privilege in "the broad societal interest in a full and free flow of information to the public," the proposed bill provides a mandatory balancing test in which courts will have to evaluate whether "the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information."¹⁴² This prong could potentially function as protection for confidential sources, which would be just as robust as the First Amendment balancing prong in *Dendrite*, if courts recognize that the public interest in effective newsgathering necessarily encompasses both a source's First Amendment interest in entering into a confidential relationship, as well as a reporter's interest in being able to maintain this relationship free of government incursion. Indeed, at its heart, the lament that anonymous posters enjoy greater protection than journalists' sources is a public interest critique, which turns upon the judgment that the speech enabled by online anonymity is less integral to civil discourse than the information that news sources provide within the context of a confidential relationship. The paradox that arises from this insight is that the way in which media advocates can assure news sources the First Amendment protection they deserve is not by focusing on the rights of the sources themselves, but rather on the public interest in news dissemination that the reporter-source relationship is uniquely suited to advance.

140. See H.R. 985, 111th Cong. § 2(a)(3)(D)(i),(2009) (providing no shield protection for confidential sources where "disclosure of the identity of such a source is essential to . . . prosecuting a person who without authorization disclosed properly classified information and who at the time of such disclosure had authorized access to such information"). See also Charlie Savage, *After Afghan War Leaks, Revisions in a Shield Bill*, N.Y. TIMES, Aug. 4, 2010, at A12.

141. H.R. 985.

142. *Id.* at § 2(a)(4); see *supra* p. 132 and note 86.