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THE RIGHT TO ANONYMOUS ASSOCIATION IN CYBERSPACE: US LEGAL PROTECTION FOR ANONYMITY IN NAME, IN FACE, AND IN ACTION

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Abstract

The Internet has become a communication medium of intense group interaction, and individuals with marginalised identities have used anonymity as a tool with which to participate in online interaction. In order to capture the full spectrum of the role that anonymity plays in cyberspace, I explore in this article the US constitutional right to anonymous association. I draw on the concepts of anonymity defined in the social science literature — identity protection, visual anonymity, and action anonymity — and analyse US case law regarding the right to anonymous association in both offline and online worlds. The examination suggests that (1) the right to anonymous association has been especially meaningful for those who are marginalised in society; (2) future courts — in light of established legal rules governing the right to anonymous association — must give careful consideration to the question as to who is seeking anonymity; (3) different concepts of anonymity have greater independence in cyberspace and, therefore, need to be distinguished by scholars and courts. Overall, the right to anonymous association in cyberspace can be understood as the positive right of individuals to control information about themselves in order to find and associate with others. The examined case law shows that strong support for such a right is embedded in the US legal tradition.

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1. Introduction

A 1993 *New Yorker* cartoon captured the spirit of a then-new phenomenon when it declared that "on the Internet, nobody knows you're a dog,"[1] celebrating the liberty enabled by new technology: online anonymity. Now, however, the cartoon itself has become a parody. "On the Internet, everyone knows you're a dog" mockingly mourns a gloomy reality: loss of anonymity and destruction of privacy in cyberspace.

Whether the Internet affords too much or too little anonymity is a matter of dispute, but most agree that anonymity can be used for both legitimate *and* illegitimate purposes. Anonymity can be liberating, allowing online users to become less inhibited by social conventions and restraints. At the same time, the benefits of anonymity can be dubious when it is used to avoid accountability for socially unruly behaviours and illegal activities. Accepting the premise that anonymous communication online is "morally neutral"[2] leads us to ask not whether we will regulate online anonymity but *how* — and in particular how we can do so while promoting the positive values associated with anonymity.

Much research has been done regarding online anonymity as a legal right, but it is speech rights that receive most emphasis by the legal scholarship. The right to anonymity is considered worth protecting because the content of speech, such as a dissenting opinion or an unpopular idea, is valuable - if not crucial - in a pluralistic democracy. Yet the context of online communication forces us to ask whether this speech-focused argument can capture the full spectrum of the role that anonymity plays in cyberspace. Online communication is not only a speech-related activity, but also an associational activity. The proliferation of online communities demonstrates that people participate in online communication not only for the content but also to interact with other communicators, especially those who share their interests or concerns. Social network sites such as Facebook and MySpace have attracted millions of users enabling them to maintain pre-existing social networks as well as to build new networks with strangers based on shared interests, political views, or activities.[3]

In this article I posit that, to determine how to regulate online anonymity, we need to understand the multifaceted concept of anonymity in online communication and various circumstances under which anonymity is worthy of protection. Then we can assess whether existing legal rules regulating anonymity are an appropriate answer to the how question. With this aim, I draw on the concepts of anonymity defined and manipulated in empirical research in the social sciences. I also review US court cases concerning the right to anonymous communication while focusing on the right to anonymous association instead of the right to anonymous speech.

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[1] G Fleishman, "Cartoon Captures Spirit of the Internet" (14 Dec 2000) *New York Times*.

[2] A Teich et al, "Anonymous Communication Policies for the Internet: Results and Recommendations of the AAAS conference" (1999) 15 *Information Society* 71-77.

[3] D Boyd and N Ellison, "Social Network Sites: Definition, History, and Scholarship" (2007) 13 *Journal of Computer-Mediated Communication* available at jcmc.indiana.edu/vol13/issue1/boyd.ellison.html (last accessed 3 Apr 2010).

2. Previous Research and Theoretical Underpinnings

2.1 Research on Anonymity as a Legal Right in the United States

Froomkin provides a comprehensive review of US legal protection for anonymity,[4] and concludes that it is strong in relation to constitutional protection of political speech, but becomes uncertain in other areas.[5] As this paper concerns anonymity in the context of communication, its focus is legal research addressing the guarantees of anonymity in the First Amendment.

The US Supreme Court ("the Court") addressed and protected the right to anonymous speech in various cases including two cornerstone cases — *Talley v California*[6] and *McIntyre v Ohio Election Commission*.[7] In *Talley*, the Court struck down a Los Angeles ordinance preventing the distribution of handbills unless the name and address of the author or distributor was printed thereon. In its majority opinion, the Court cited the fact that the Federalist Papers were published under the name of "Publius" and discussed the importance of anonymity in encouraging the free flow of ideas and speech. In *McIntyre*, the Court upheld the right of individuals to distribute anonymous political literature and wrote: "Anonymity is a shield from the tyranny of the majority."[8]

The protection for anonymous political speech, however, has not been absolute. In *Buckley v Valeo*,[9] the Court upheld the disclosure requirement mandated by the Federal Election Campaign Act of 1971: the Court found that disclosure to the Federal Election Commission of the name and address of contributors of more than ten dollars a year to political candidates was acceptable because the government's interest in fair elections was more compelling than protecting anonymity interests of donators. Meanwhile, the Court suggested in *First National Bank of Boston v Bellotti*[10] that the protection for anonymous political speech does not extend to anonymous commercial speech.

When confronted with the question as to whether the law governing offline anonymous speech rulings can or should be applied to cyberspace, scholars generally argue in favour of protecting anonymity in cyberspace. They vary, however, in their supporting arguments and in their views on the extent to which Court decisions can be

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[4] Froomkin examines the legal protection in the following five areas: (1) protection of anonymity in the US Constitutional law (i.e., the First Amendment's guarantees of anonymous speech and secret association); (2) regulation of anonymity through criminal law/national security law (i.e., anonymity of witnesses, of defendants, and of jurors in criminal cases); (3) protection of anonymity in civil actions (i.e., anonymity of plaintiffs, of defendants, and of third parties in civil cases); (4) anonymity in other citizen-government relationships; and (5) disclosure of identity requirements in daily life.

[5] M Froomkin, "Anonymity and the Law in the United States" (2008) University of Miami Legal Studies Research Paper No 2008-42 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1309225 (last accessed 21 Jan 2010).

[6] *Talley v California*, [1960] 362 US 60 (hereafter *Talley*).

[7] *McIntyre v Ohio Elections Commission*, [1995] 514 US 334 (hereafter *McIntyre*).

[8] *Ibid*, 557.

[9] *Buckley v Valeo*, [1976] 424 US 1 (hereafter *Buckley*).

[10] *First National Bank of Boston v Bellotti*, [1978] 435 US 765 (hereafter *Bellotti*).

applied. Some scholars interpret the *McIntyre* provision for First Amendment protection narrowly, that is, as protecting only anonymous political speech.[11] Others suggest that protection of a broader scope — for more than political speech — can be inferred from offline anonymous speech cases.[12]

Another line of legal scholarship on online anonymity arises as cases are litigated in the courts. The first online anonymity case reaching the courts was *ACLU of Georgia v Miller*, in which a Georgia statute was struck down for instituting a comprehensive ban of all anonymous communication over all computer networks including the Internet.[13] Scholarly analysis of this case points out flaws with the statute and suggests that a narrowly tailored legislative restriction aiming to prohibit only true abuses of anonymity, such as online fraud, may pass First Amendment scrutiny.[14] On the other hand, Ekstrand examines six cases in which state courts attempt to define guidelines for unmasking anonymous speakers online; she argues that the guidelines look much like the law of reporter's privilege, a development that highlights the critical role that Information Service Providers (ISPs) have begun to play in defence of their subscribers.[15] Others note problems with current laws for protection of online anonymity and propose better alternatives.[16] Most recently Lidsky, analysing libel suits against anonymous online speakers between 1999 and 2009, concludes that the scope of protection for anonymous online speech varies greatly by jurisdiction.[17]

2.2 Research on Anonymity in the Context of Online Communication

Many social science researchers try to answer the question as to how anonymity influences online behaviour. Their empirical research defines and manipulates anonymity in a variety of different ways, presenting varied and inconsistent answers

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[11] G du Pont, "The Criminalization of True Anonymity in Cyberspace" (2001/2002) 7 *Michigan Telecommunications and Technology Law Review* 191-216; M Froomkin, "Regulation and Computing and Information Technology: Flood Control on the Information Ocean: Living with Anonymity, Digital Cash, and Distributed Databases" (1996) 15 *The Journal of Law and Commerce* 395-507.

[12] J Krasovec, "Cyberspace: The Final Frontier, for Regulation?" (1997) 31 *Akron Law Review* 101-145; E Stein, "Queers Anonymous: Lesbians, Gay men, Free Speech, and Cyberspace" (2003) 38 *Harvard Civil Rights-Civil Liberties Law Review* 159-213.

[13] *ACLU of Georgia v Miller*, [1997] 977 F Supp 1228 (ND GA) (hereafter *Miller*).

[14] D Karl, "State Regulation of Anonymous Internet Use after ACLU of Georgia v Miller" (1998) 30 *Arizona State Law Journal* 513-540; P Weston, "III First Amendment: 2 Internet Crime Statutes: b) Fraud: American Civil Liberties Union of George v Miller" (1999) 14 *Berkeley Technology Law Journal* 403-418.

[15] V Ekstrand, "Unmasking Jane and John Doe: Online Anonymity and the First Amendment" (2003) 8 *Communication Law and Policy* 405-427.

[16] J Furman, "Cybersmear or Cyber-SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation" (2001) 25 *Seattle University Law Review* 213-254; S Helms, "Translating Privacy Values with Technology" (2001) 7 *Boston University Journal of Science and Technology Law* 288-325; L Lidsky, "Silencing John Doe: Defamation & Discourse in Cyberspace" (2000) 49 *Duke Law Journal* 855-946; D Sobel, "The Process that 'John Doe' is Due: Addressing the Legal Challenge to Internet Anonymity" (2000) 5 *Virginia Journal of Law and Technology* para 1-21.

[17] L Lidsky, "Anonymity in Cyberspace: What Can We Learn From John Doe" (2009) 50 *Boston College Law Review* 1373-1391.

to their inquiry. For the purpose of this paper, the very fact that anonymity is a multifaceted concept is useful, as it provides an analytical tool with which to examine US court cases concerning the right to anonymous communication.

Anonymity, as defined and manipulated in the empirical research, has three distinct aspects: 1) identity protection, 2) visual anonymity, and 3) action anonymity.[18] Burkell who identifies these three aspects in the social science literature explains each of them as follows. First, identity protection is an original, literary interpretation of the term anonymity. Being anonymous simply means being unidentified. Second, visual anonymity refers to a state of being unseen and particularly having the face unseen. Wearing a mask in public places, for instance, allows visual anonymity. Many forms of online communication, unlike interaction in face-to-face communication, can ensure visual anonymity. Third, action anonymity is related to the fact that people feel responsible for their actions or feel known by their actions even when they are not identified. This explains, according to Burkell, why a pratfall in the subway is embarrassing even if nobody knows who you are. In sum, individuals can feel known 1) by name (or other unique identifier), 2) by being seen, and 3) by history of action.[19] These different aspects of anonymity, while they are necessarily linked in unmediated everyday interactions, have greater independence in online interactions.[20]

2.3 The Direction of This Research

A review of the legal scholarship on anonymity reveals that scholars have focused largely on anonymity as it relates to speech rights. On the other hand, the empirical research shows that the concept of anonymity is composed of three distinct aspects that may have greater independence from one another in online communication than in the real world. Moreover, the proliferation of online communities and social networking sites demonstrates that people participate in online communication to interact and associate with other communicators.

In this article, therefore, I aim to fill the gap in the legal scholarship by exploring the US constitutional right to anonymous association both in general and online.[21] In analysing relevant cases, I draw on the three conceptual aspects of anonymity to see if existing legal rules properly address the full spectrum of online anonymity.

3. The Right to Anonymous Association

3.1 The Right to Association

Prior to an exploration of the US constitutional right to anonymous association, a brief examination of the right of association is warranted. The general right to association

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[18] J Burkell, "Anonymity in Behavioural Research: Not Being Unnamed, But Being Unknown" (2006) 3 *University of Ottawa Law & Technology Journal* 89-203.

[19] *Ibid*, 202.

[20] *Ibid*, 202.

[21] To identify relevant cases, I examined: law review articles, legal news articles, legal news Web sites, the LEXIS and Westlaw databases, and case law reporters.

has two aspects[22] that are closely related but somewhat different: "the right of the individual to expressive association" and "the collective right to association."

First, the right of the *individual* to expressive association is so termed because it refers to the right of an individual to engage in an association that conforms to his or her beliefs and ideas. In this context, the right of association is viewed as dependent on underlying individual rights of expression.[23] When the Court emphasised "the unalienable relationship between political expression and association,"[24] it essentially recognised the right to association as the right of an individual to express beliefs and ideas and as a right that is derived from, subsidiary to, and accompanies the right to expression.

Second, the *collective* right to association is a separate right of association, as protected by the First Amendment. In the First Amendment it is referred to as "the right of the people peaceably to assemble," a right that is independent from the right of speech. The collective right to association relies upon the notion that people can effectively achieve their shared goal by collective action. When the Court declared that the "freedom of association was an inseparable aspect of the 'liberty'"[25] assured by the First Amendment in a case involving the National Association for the Advancement of Colored People (NAACP), the Court recognised the right to association as a right for an association — the NAACP in that case — to promote a shared goal through its collective efforts. Thus, this aspect of the right of association is labelled as *the collective right to association,* which is a separate and independent right from the right to expression.

These two aspects of the right to association — the right of the individual to expressive association and the collective right to association — are closely related. In some cases, exercising one's right to association can mean exercising both aspects of the right. It is meaningful, however, to treat the two aspects of the right as separate because the distinction will help us to recognise unique characteristics in each aspect of the right while examining cases concerning the right to *anonymous* association.

3.2 Anonymity in the Right of the Individual to Expressive Association

The first aspect of the right to association is linked to the fact that anonymity may influence the ability of an individual to engage in an association that conforms to his or her beliefs and ideas. This right was endangered when the government tried to reveal the membership of people in associations. Cases involving labour union officers, public school teachers, and lawyers have addressed anonymity in the right of the individual to expressive association. These individuals refused to file affidavits to show their associational ties with groups holding subversive or dangerous ideas.

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[22] In addition to these two aspects of the right to association, the Court has also held that the right to associate includes a right not to associate. The Court therefore invalidated certain compulsory fees exacted from unwilling group members and reviewed laws requiring groups to include unwanted members. See K Sullivan and G Gunther, *Constitutional Law* 14th ed (New York: Foundation, 2001), at 1337.

[23] *Ibid*, 1337.

[24] *Sweezy v New Hampshire*, [1957] 354 US 234, 250 (hereafter *Sweezy*).

[25] *NAACP v Alabama ex rel Patterson*, [1958] 357 US 449, 462 (hereafter *Patterson*).

Addressing the right of the individual to anonymous association for the first time in the 1950 case *American Communications Association v Douds,*[26] the Court denied the right of labour union officers to refrain from revealing their associational ties with the Communist Party or any organisation that believes in or teaches the overthrow of the government by force or by any illegal methods. The Court relied mainly upon the speech/conduct dichotomy, saying that the disclosure requirement was designed to prevent *conduct*, not beliefs, and noting that it applied to only a small number of persons who wanted to become labour union officers. The *Douds* disclosure requirement was therefore held to be constitutional. Three other cases — *Barenblatt v United States*,[27] *Wilkinson v United States*,[28] and *Braden v United States*[29] — involved witnesses before the Un-American Activities Committee (HUAC) who refused to answer questions relating to their participation in or knowledge of alleged Communist Party activities. In rulings similar to that in *Douds*, the Court found that a requirement of disclosure was constitutional on grounds that preservation of national security against the worldwide Communist conspiracy was an overriding government interest, and because Communist organisations obtained support under the mask of anonymity.

In 1957, however, the Court ruled that legislative inquiries into Communist Party membership contravened the liberties protected by the First Amendment. In its so-called "Red Monday"[30] decisions — *Watkins v United States*[31] and *Sweezy v New Hampshire*[32] — the Court ruled that to compel witnesses before the HUAC to disclose their memberships would endanger their right to express their beliefs and ideas. Taking a similar approach in 1966 in *DeGregory v Attorney General of New Hampshire*,[33] the Court said that a witness called to an investigation by a state attorney general had a right not to reveal his past relationship with the Communist Party. It also ruled in *Baird v State Bar of Arizona*[34] in 1971 that an applicant could not be denied admission to the Bar merely because she had refused to answer the question as to membership in any organisation that advocates forceful overthrow of the US government. In these cases, the Court viewed the right of association as dependent on underlying individual rights of expression while emphasising an inalienable relationship between political expression and association.

Though the Court recognised in these cases the importance of anonymity, it elaborated its view on the right of the individual to anonymous association in the 1960

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[26] *American Communications Association v Douds*, [1950] 339 US 382 (hereafter *Douds*).

[27] *Barenblatt v United States*, [1959] 360 US 109 (hereafter *Barenblatt*).

[28] *Wilkinson v United States*, [1961] 365 US 399 (hereafter *Wilkinson*).

[29] *Braden v United States*, [1961] 365 US 431 (hereafter *Braden*).

[30] Margaret Blanchard explained that communism was the constant concern of justices and red hunters in the 1950s. By 1957, she said, the change of the Court personnel induced decisions protecting the rights of Communists, which made conservatives upset. See M Blanchard, *Revolutionary Sparks: Freedom of Expression in Modern America* (New York: Oxford University Press, 1992), at 266-67.

[31] *Watkins v United States*, [1957] 354 US 178 (hereafter *Watkins*).

[32] *Sweezy,* at note 24.

[33] *DeGregory v Attorney General of New Hampshire*, [1966] 383 US 825 (hereafter *DeGregory*).

[34] *Baird v State Bar of Arizona*, [1971] 401 US 1 (hereafter *Baird*).

case of *Shelton v Tucker.*[35] *Shelton* involved an Arkansas statute that compelled every teacher to file an annual affidavit listing every organisation to which he or she had belonged or to which he or she regularly contributed money within the preceding five years. The Court struck down the comprehensive affidavit on the basis that, while the state had a right to investigate the competence and fitness of those whom it hired to teach in its schools, the statute was unlimited and indiscriminately sweeping and therefore unconstitutional. The Court said:

> Public exposure, bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organisations, would simply operate to widen and aggravate the impairment of constitutional liberty.[36]

Since the scope of the inquiry into associational ties was "completely unlimited," the Court ruled that the comprehensive disclosure interfered with "associational freedom."[37] In other words, for disclosure to be constitutional it must be narrowly tailored.

In sum, when anonymity in the right of the individual to expressive association was in question, the Court ruled that mandatory disclosure to the government was constitutional only if (1) the disclosure was designed to prevent *conduct*, (2) the government had *an overriding and compelling interest* to seek the disclosure, and (3) the disclosure was *narrowly tailored*. These three requirements closely follow the Court's traditional approach in speech cases. The first requirement originates from the speech/conduct dichotomy that allows government restrictions on individual freedoms when the restrictions are designed to regulate conduct instead of speech. The second requirement is based upon the fact that freedom of speech is not absolute and must be weighed against a compelling government interest. The third requirement is also often found in free speech cases mandating a regulation on speech to be narrowly tailored to serve the government interest. The similarities are not surprising considering the first aspect of the right to association — the right of the individual to expressive association — is considered as a right that is derived from, subsidiary to, and accompanies the right to expression.

Announcing legal rules and applying them are, however, two separate things. Recall that the Court, while dealing with the issue of mandatory disclosure of Communist Party membership, denied in some cases the right of the individual to anonymous association and in others protected it. Membership in the Communist Party was considered at times to be engaging in illegal conduct but at other times to be expressing political beliefs. Disclosure of Communist Party membership was in some cases seen to serve the overriding government interest to preserve national security, but was also considered to endanger individual liberties including the freedom to criticise or discuss governmental policies. The fact that the definition of a "subversive" or "dangerous" idea changes over time also makes it difficult to apply the first two criteria for constitutionally compliant mandatory disclosure — preventing conduct and serving a compelling government interest. In the early 1950s,

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[35] *Shelton v Tucker*, [1960] 364 US 479 (hereafter *Shelton*).

[36] *Ibid*, 486-87.

[37] *Ibid*, 488-90.

members of the Communist Party were the source of fear and concern, but they are not any more. Since the attacks of September 11 2001, many are most concerned about terrorist activities.

The last criteria for constitutionality of a rule of mandatory disclosure is, however, easier to apply and provides the guiding principle regarding the right of the individual to anonymous association. That is, the disclosure must be narrowly tailored. In other words, even if a disclosure is designed to prevent conduct and to serve a compelling government interest, the disclosure is unconstitutional if it is not narrowly tailored. The comprehensive disclosure mandated in *Shelton* was found unconstitutional precisely because of its unlimited and indiscriminate nature.

In light of this guiding principle, there is no justification for US military attempts to establish an uncontrolled domestic surveillance mechanism and data mining[38] — in an effort to secure the United States against terrorist attacks. Measures by the Bush Administration authorising the National Security Agency (NSA) "to engage in warrantless wiretapping of international phone calls and the gathering of phone records en masse" are similar.[39] Even if the information gathering was designed to prevent the conduct of terrorists, and done in an attempt to protect national security, the extensive nature of the NSA monitoring of individuals' associational ties and their communicative activity offends the individual right to anonymous association.

3.3 Anonymity in the Collective Right to Association

The right to association also concerns the right of an association to achieve its common goals without mandatory disclosure to the government. This aspect of the right is endangered when the government seeks access to the membership list of an association. This issue has been addressed by the Court in cases in which the Ku Klux Klan (KKK), the NAACP, and the Communist Party refused to produce their respective membership lists to the government.

In *New York ex rel. Bryant v Zimmerman*[40] in 1928, the Court ruled that the KKK did not have the right to anonymous association. It declared that (1) the State was entitled to be informed of the nature and purpose of an association within its territory and (2) that mandatory disclosure of a membership list was justifiable when it was applied to an association like the KKK that used secrecy to harm personal rights and public welfare. In a similar vein, the Court denied the right of the Communist Party to anonymous association in its decisions in *Uphaus v Wyman*[41] in 1959 and *Communist Party of United States v Subversive Activities Control Board*[42] in 1961. It reasoned that the Communist Party was not an ordinary political party but an organisation that secretly conspired to overthrow the government by violent force. In short,

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[38] S Kreimer, "Watching the Watchers: Surveillance, Transparency, and Political Freedom in the War on Terror" (2004) 7 *University of Pennsylvania Journal of Constitutional Law* 133-181.

[39] D Solove, "The First Amendment as Criminal Procedure" (2007) 82 *New York University Law Review* 112-176, at 116.

[40] *New York ex rel Bryant v Zimmerman*, [1928] 278 US 63 (hereafter *Bryant*).

[41] *Uphaus v Wyman*, [1959] 360 US 72 (hereafter *Uphaus*).

[42] *Communist Party of the United States v Subversive Activities Control Board*, [1961] 367 US 1.

organisations were not able to convince the Court of their collective right to anonymous association if they sought illegal goals through their collective activities.

The NAACP, however, succeeded in opposing the compelled disclosure of membership. In the 1950s, southern states sought to impede activities of the NAACP by forcing it to disclose the names of its members. The collective right to anonymous association was recognised by the Court for the first time in *NAACP v Alabama ex rel. Patterson*[43] on grounds that members of the NAACP would have been in physical and psychological danger had the membership of the organisation been disclosed. After *Patterson,* the Court consistently protected the collective right of the NAACP to anonymous association in three subsequent cases: *Bates v City of Little Rock*,[44] *Louisiana ex rel. Gremillion v NAACP,*[45] and *Gibson v Florida Legislative Investigation Committee*.[46] In these four cases related to the NAACP, the Court established the following legal rules:

- A collective right to anonymous association is demonstrated by (1) lawful objectives (2) a history of harassment of its members and (3) evidence that the freedom of association of its members would be substantially abridged by the disclosure; and
- Statutory abridgement of that right is permitted if the government can demonstrate (1) a controlling justification or a legitimate and substantial governmental interest, and (2) a relevant correlation between the governmental interest and the alleged purpose of the mandatory disclosure.

Importantly, the collective right was protected by the Court when mandatory disclosure of its membership would undermine the ability of the association to recruit and keep members. Protection of anonymity in this situation is directly related to the ability of the association to pursue its collective effort to promote its shared goal.

The ability of an association to pursue and promote its shared goal is related to what Gerken labels as "second-order diversity" and what Sunstein calls "enclave deliberation." Second-order diversity is "the kind of diversity that comes when society consists of many institutions and groups, some of which have little in the way of internal diversity."[47] Society, if it allows many organisations to exist and if each of them is fairly uniform, can benefit from many organisations with clear practices and positions of their own because the great range of views may emerge from these organisations.[48] Similarly, Sunstein defines enclave deliberation as a "form of deliberation that occurs within more or less insulated groups, in which like-minded people speak mostly to one another". He notes that it promotes "the development of positions that would otherwise be invisible, silenced, or squelched in general debate."[49]

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[43] *Patterson,* at note 25.

[44] *Bates v City of Little Rock*, [1960] 361 US 516.

[45] *Louisiana ex rel Gremillion v NAACP*, [1961] 366 US 293.

[46] *Gibson v Florida Legislative Investigation Comm*, [1963] 372 US 539.

[47] C Sunstein, *Republic.com 2.0* (New Jersey: Princeton University Press, 2007), at 73.

[48] *Ibid*, 214.

[49] *Ibid*, 77.

The importance of the judicial decision to protect the collective right to anonymous association can be seen in the example of the NAACP, whose members had a history of harassment when their membership was made known to the government and the public. Had the NAACP not been allowed to anonymise the identities of its members, and had the membership drifted away, the association would not have been able to contribute to the civil rights movements. Anonymity was necessary in order for the NAACP to engage in enclave deliberation. The society benefited from the second-order diversity enabled by anonymity. Indeed, many movements of great value that have effected positive social change have been possible because groups — that were "extreme" in their time — were able to seek their shared goals through their collective activities.

3.4 Anonymity in the Right to Wear Masks in Public Places

In addition to these two aspects of the right to association, laws restricting anonymity in public places (i.e. anti-mask laws) have implications for the right to association. General anti-mask laws[50] forbid the concealment of identity in public places, but one may want to wear a mask while participating in a rally for an organisation he or she belongs to. Thus, the right to wear a mask is intertwined with the right to anonymous association.

Historically anti-mask laws originated from efforts to prevent the violent activities of the KKK,[51] but they still exist in more than a third of the states in the United States. Associations such as the Union of Iranian Students, the Iranian Students' Association, the KKK, and other white supremacy groups have challenged the constitutionality of anti-mask laws. These groups argue that anonymity is a precondition to expression of themselves in public places because without it they will be harassed. For instance, Iranian students in Texas and San Francisco who organised and participated in demonstrations against the Shah of Iran[52] said that, if their identities had become known, agents of the Iranian government might have retaliated against them and against their relatives in Iran.

The Court has heard none of the anti-mask cases, but eight cases concerning anti-mask laws have been decided by several state and federal courts. While the outcomes

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[50] According to Stephen J Simoni, two different anti-mask laws — "criminal" anti-mask laws and "general" anti-mask laws — exist. Criminal anti-mask laws prohibit wearing a mask during the commission of crimes, but general anti-mask laws forbid the concealment of identity in public places, regardless of coexistent criminal activity. These general anti-mask laws exempt some types of mask-wearing, such as wearing masks with holiday costumes, for theatrical productions and masquerade parties, and for occupational safety and health purposes. See S Simoni, "'Who Goes There?'— Proposing A Model Anti-mask Act" (1992) 61 *Fordham Law Review* 241-274, 241-42.

[51] The Supreme Court of Arizona said that the purpose of its anti-mask statute was "to frustrate the efforts of the Ku Klux Klan in Arizona" in its 1978 decision of ATE of Arizona v Donald Wesley Gates. See also W Allen, "Klan, Cloth, and Constitution: Anti-Mask Laws and the First Amendment" (1991) 25 *Georgia Law Review* 819-860, at 821.

[52] Muhammad Reza Shah Pahlevie was the Shah of Iran at the time. He became repressive and used his secret policy to put down domestic strife.

varied with jurisdiction,[53] the first question commonly asked by the courts was whether the need of members of organisations to wear masks to conceal their identities was so great that the members deserved constitutional protection. In answering this question, the courts relied upon the legal rules set out in *Patterson*, discussed above. In that case, the courts weighed the interest in the wearing of a mask by asking whether disclosure of identity would result in harassment, retaliation, injury, or loss of a job. Also, the courts denied the right to wear masks if anonymity served vicious purposes or unlawful activities.

3.5 Concepts of Anonymity Addressed in These Cases

As noted earlier, anonymity is a multifaceted concept that has three distinct aspects: identity protection (i.e. unnamed), visual anonymity (i.e. unseen), and action anonymity (i.e. unknown by history of action). How are these aspects of anonymity linked to anonymity in the cases examined above? To address this question, I examine the aspect of anonymity that is most prominent in each type of case even though all aspects of anonymity are linked in offline interactions.

First, anonymity in the right of the individual to expressive association is most related to action anonymity. We may learn about a person more by knowing his action than by knowing his name or face. For instance, simply knowing that the name of a schoolteacher is Jack Smith or knowing how he looks does not tell much about who he is. On the other hand, knowing a schoolteacher goes to the members' meeting of the National Socialist Movement tells something about who he is. Many will not want the teacher to convey his beliefs to schoolchildren. Recall the *Shelton* case in which the Court elaborated its view on the right of the individual to anonymous association. The state government wanted to investigate the fitness of those whom it hired to teach in its school by inquiring about the organisations to which teachers had belonged or contributed money. Sets of actions or associational ties linked to the same individual form one's identity.

Second, anonymity in the collective right to association is linked most closely to identity protection. For certain associations to release the names of their members to the government (and consequently to the public) could and would have impeded their ability to pursue and promote their shared goals. Third, anonymity in the right to wear masks in public places is most connected to visual anonymity. Some did not want to be seen because being seen was equal to being known in these cases.

How are these aspects of anonymity related to online anonymity? Are the legal rules governing anonymity in the offline cases adequate to regulate anonymity in cyberspace? I explore these questions in the next section.

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[53] The right to anonymity of the Union of Iranian Students was protected in both *Aryan v Mackey*, [1978] 462 F Supp 90 and *Ghafari v Municipal Court for the San Francisco Judicial District of the City* [1978] 87 Cal App 3d 255. The right to anonymity of White supremacy groups was protected in two cases — *Knights of the KKK v Martin Luther King, Jr Worshippers* [1990] 735 F Supp 745 and *American Knights of the Ku Klux Klan v City of Goshen* [1999] 50 F Supp 2d 835 — but was denied in other four cases: *State v Miller* [1990] 398 SE2d 547, *Hernandez v Commonwealth* [1991] 406 SE2d 398, *Hernandez v Superintendent* [1992] 800 F Supp 1344, and *Church of the American Knights of the Ku Klux Klan v City of Erie* [2000] 99 F Supp 2d 583.

4. The Right to Anonymous Association in Cyberspace

4.1 The Right to Identity Protection and Visual Anonymity

In online communication, it is much easier to participate in a group interaction without revealing one's name or face to other members in the group and/or to others who do not belong to the group. In this context, people voluntarily give up action anonymity while seeking to remain unnamed and unseen. Social scientists have found that online groups matter more to people with marginalised-concealable stigmatised identities (e.g. being gay or holding extreme political beliefs) and to people who are isolated through illness or other circumstances.[54] Online interaction can allow those who with stigmatised identities are able to reveal their hidden self without revealing their name or face and so get social support they need from others like them. The first online anonymity case reaching the courts, *Miller*, is right on this point.

In the *Miller* case, a diverse coalition of fourteen plaintiffs challenged the constitutionality of the Georgia statute that banned all anonymous communication over all computer networks including the Internet.[55] A federal district court overturned the statute on First Amendment grounds without specifically or explicitly mentioning the right to anonymous association. Affidavits of the plaintiffs demonstrate, however, that anonymity interests in the collective right to anonymous association and in the right to wear masks in public places were also critical issues in the *Miller* case.

First, the *Miller* case shows that the members of some organisations used pseudonyms while browsing the World Wide Web; participating in online mailing lists, discussion groups, and chat rooms; and sending private e-mails. A member of the AIDS Survival Project, for example, testified that members of that group engaged in chat room discussion to provide emotional support to its rural members with AIDS or HIV.[56] The use of pseudonyms enabled members of the AIDS Survival Project to interact with others without revealing their name or face. Despite not knowing the names and faces of other members, the members *knew* who other members were because the members were not anonymous but pseudonymous. A pseudonym — a subset of anonymity that is inherently traceable — allows the continuity of identity and the creation of an online personality.[57] A pseudonym allows one to be known by history of action while remaining unnamed and unseen.

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[54] See S Watt, M Lea, and R Spears, "How Social is Internet Communication? A Reappraisal of Bandwidth and Anonymity effects" in S Woolgar (ed) *Virtual Society?: Technology, Cyberbole, Reality* (2002) 61-62; K McKenna and J Bargh, "Coming out in the Age of the Internet: Identity 'Demarginalization' through Virtual Group Participation" (1998) 75 *Journal of Personality and Social Psychology*, 681-694; D Huffaker and S Calvert, "Gender, Identity, and Language Use in Teenage Blogs" (2005) 10(2) *Journal of Computer-Mediated Communication,* available at http://jcmc.indiana.edu/vol10/issue2/huffaker.html (last accessed 3 Apr 2010).

[55] "ACLU, Others Challenge GA Law Banning Anonymity, Trademark Use on 'Net'" (1996) 23037 *Computer Industry Litigation Reporter*.

[56] AIDS Affidavit, "Declaration of Jeff Graham" (1996) available at http://caselaw.lp.findlaw.com/data/law_reviews/031j_online_law/froomkin.html (last accessed 3 Apr 2010).

[57] M Froomkin, "Anonymity and Its Enmities" (1995) *Journal of Online Law*, available at www.wm.edu/law/publications/jol/95_96/froomkin.html (last accessed 3 Apr 2010).

That the anonymity interests needing protection in the *Miller* case were the first and second aspects of anonymity — identity protection and visual anonymity — means we can apply the legal rules from the collective right to anonymous association and from the right to wear masks in public places. In both of these types of cases, the Court required the association to demonstrate that it seeks lawful interests, that it has a history of its members being harassed and that disclosure would result in substantial abridgement of its members' freedom of association. The *Miller* plaintiffs' affidavits show that some organisations including the AIDS Survival Project, the Atlanta Freethought Society,[58] and the Atlanta Veterans Alliance[59] meet these conditions. First, none of the groups sought illegal purposes. Second, their members had a history of being harassed. For instance, a member of the AIDS Survival Project said, "In spite of laws meant to protect the rights of those with HIV and AIDS, including one making HIV status confidential, people with AIDS continue to lose jobs, insurance, and even their homes as a result of social prejudices."[60] Third, the freedom of association would be abridged by the disclosure. A Freethought Society member and an Atlanta Veterans Alliance member said many of the members would not use the Internet at all to interact with others if they had to use their real name.[61]

In a similar vein, the US District Court for the Northern District of Illinois in *Anderson v Hale*[62] protected the collective right of the members of the World Church of the Creator (WCOTC) to anonymous association in an online context. *Anderson*[63] was a series of cases that followed a racial hate crime. Benjamin Nathaniel Smith, a WCOTC member, killed two people in Illinois and Indiana and wounded nine others during the Fourth of July weekend in 1999.[64] Rev. Stephen Tracy Anderson, one of the wounded, filed suits against Matthew Hale, the head of the white supremacy group, and the WCOTC for conspiring in the shootings. In the civil suit, Anderson sought various records including the telephone and email records of Hale and the WCOTC as well as the former and current membership list of the WCOTC. Anderson also served subpoenas on four ISPs to produce the subscription information of thirteen WCOTC members. The court granted the request of Anderson in part, but denied him disclosure of the membership list of WCOTC and the subscription information of its members. The denial was due to the fact that although WCOTC members had a history of being harassed and that the disclosure would abridge their rights to

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[58] The Atlanta Freethought Society is a non-profit organisation advocating the complete separation of church and state.

[59] The Atlanta Veterans Alliance serves the needs of veterans in Georgia who are gay, lesbian, bisexual, or trans-gendered.

[60] See note 56 above.

[61] Free Thought Affidavit, "Declaration of Kimberly Lyle-Wilson" (1996) available at www.eff.org/legal/cases/EFGA_v_GA/960924_afs.affidavit (last accessed 3 Apr 2010); Veteran's Alliance Affidavit, "Declaration of Eric Van Pelt" (1996) available at www.eff.org/legal/cases/EFGA_v_GA/960924_ava.affidavit (last accessed 3 Apr 2010).

[62] *Anderson v Hale*, [2000] 198 FRD 493 (hereafter *Anderson I*); *Anderson v Hale*, [2001] 2001 US Dist LEXIS 6127 (hereafter *Anderson II*).

[63] *Anderson* refers to both *Anderson I* and *Anderson II*. See note 62.

[64] M McDonough, "Civil Rights Group Sues White Supremacist" (2000) *American Lawyer Media*, available at www.rickross.com/reference/hale/hale33.html (last accessed 3 Apr 2010).

anonymous association, Anderson had failed to show the relevance of the information sought.

The *Anderson* case is meaningful in that it is the first online anonymous association case in which the court explicitly applied the offline rules. The decision demonstrates the assumption of the court that offline rules are well-suited to an online context, and its willingness to apply them. A comparison of *Anderson* and *Bryant* — a 1928 decision in which the Court denied the collective right of the KKK to anonymous association — is interesting. The *Bryant* Court ruled that mandatory disclosure of a membership list was justifiable because it was applied to the KKK, which used secrecy to harm personal rights and public welfare. In the *Anderson* case, on the other hand, despite pointing out that verbal and physical attacks committed by publicly identified WCOTC members against other citizens threatened safety and order across communities, the court did not further explore the legality of WCOTC objectives and activities in order to determine whether it had a right to anonymous association to begin with.

Second, the *Miller* case emphasises the increased potential for and importance of participating in a group interaction without revealing one's name or face. A member of the AIDS Survival Project said that because of the high rate of HIV infection in rural Georgia, the AIDS Survival Project placed a high priority on its members having continuing accessibility to the chat rooms for emotional support.[65] Moreover, members of the AIDS Survival Project, although they did not know the names and faces of other members, knew that other members either had had or survived AIDS: the information that mattered most to the members.

Another online case demonstrates the further great benefit of participating in group action under this type of anonymity. The case involves Timothy McVeigh, a member of the US Navy (who bears no relation to the Oklahoma City bomber). McVeigh was an America Online (AOL) subscriber using "boysrch" as his screen name and having identified his marital status as "gay" in his member profile. When Navy personnel, investigating McVeigh's alleged homosexuality, called AOL's toll-free customer service number and submitted McVeigh's screen name, the AOL representative divulged McVeigh's real identity.[66] After finding out that AOL had released his name to the Navy, McVeigh sent e-mail messages to AOL users with the word "gay" in his or her member profile, relating how AOL had mistreated him.[67] Many AOL users who came to know of what had happened to McVeigh wrote to AOL, the White House, the Pentagon, and Congress. This dramatic support from AOL users encouraged McVeigh to sue the Navy and also forced AOL to clarify its policy with respect to the privacy of its customers.[68] As Stein correctly points out, McVeigh's cyber-activism would have been less effective, or even impossible if lesbians and gay men did not have the opportunity to anonymously identify as "gay" or "lesbian" in their member profiles.[69]

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[65] See note 56 above.

[66] *McVeigh v Cohen*, [1998] 983 F Supp 215 (hereafter *McVeigh*).

[67] E Stein, "Queers Anonymous: Lesbians, Gay men, Free Speech, and Cyberspace" (2003) 38 *Harvard Civil Rights-Civil Liberties Law Review* 159-213.

[68] *Ibid.*

[69] *Ibid*, 211-12.

4.2 The Right to Action Anonymity

New threats to the third conceptual aspect of anonymity — action anonymity — are on the rise. The story of project "Gaydar" shows that protection of action anonymity in cyberspace has met a new challenge. Gaydar is the name of a class project developed by two MIT students.[70] The students discovered that they, using Facebook friend links, could predict whether the person was gay. The project Gaydar shows that through online interactions (i.e. by friending someone on a social networking site) people may inadvertently - without knowing they are making it public - reveal information about themselves that they might rather have kept hidden.

As noted in the earlier section on the concept of action anonymity, sets of actions/associational ties linked to the same individual form one's identity. This is the very assumption of the project Gaydar: who you are can be revealed by who your friends are. For instance, if all of your Facebook friends are over 45, you are probably not a teenager.[71] The ability to connect with others online poses a risk to action anonymity: "Even if you do not affirmatively post revealing information, simply publishing your friends' list may reveal sensitive information about you, or it may lead people to make assumptions about you that are incorrect." [72]

AOL's Data Valdez in 2006 is another example of a situation in which action anonymity was endangered. AOL turned over twenty million search queries (three months of search queries by 650,000 AOL users) to researchers. Although AOL removed the data from its site after the public outcry, it soon became available all over the Internet.[73] Moreover, though the data was associated with random ID numbers, given enough clues that information could be connected back to an individual.[74] In other words, search terms could expose the most intimate details of a person's life including medical history, sexual orientation, and religious affiliation.

Recall that action anonymity was the aspect of anonymity that is most relevant to the right of the individual to expressive association. Also recall that while addressing the right of the individual to anonymous association the Court strongly emphasised that constitutionality requires that disclosure should be narrowly tailored. In other words, the essential consideration is the extent and scope of the disclosure. In this light, the massive data leak of AOL is particularly offensive because of the boundless nature of the disclosure. Extensive monitoring and indiscriminate disclosure of online activities — whether it is done by government to detect potential terrorist threats or by private entities for seemingly benign purposes such as research and doing checks on potential employees — would run against the constitutional guarantee of action anonymity.

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[70] C Johnson, "Project 'Gaydar': At MIT, an Experiment Identifies Which Students Are Gay, Raising New Questions about Online Privacy" (20 Sept 2009) *Boston Globe* available at http://www.boston.com/bostonglobe/ideas/articles/2009/09/20/project_gaydar_an_mit_experiment_raises_new_questions_about_online_privacy/ (last accessed 10 Jan 2010).

[71] *Ibid.*

[72] The comment was made by Kevin Bankston, senior staff attorney for the Electronic Frontier Foundation. See *Ibid.*

[73] Electronic Frontier Foundation, "AOL's Massive Data Leak" (YEAR) available at http://w2.eff.org/Privacy/AOL/ (last accessed 3 Apr 2010).

[74] *Ibid.*

4.3 Other Issues Related to Protection of Online Anonymity

There are two other issues related to protection of online anonymity. The first is a threat from private entities. The second is protection afforded by technology.

First, a few cases examined above show that private entities including ISPs have become a huge threat to protection of online anonymity. For instance, AOL revealed the identity of McVeigh on the basis of a simple phone call from the Navy and, without considering the consequences of disclosure, leaked massive search data. In the *Anderson* case, the requests made by the plaintiff for civil disclosure posed a risk to online anonymity. Indeed, the Recording Industry Association of America (RIAA) has made considerable efforts to identify anonymous file sharers. Thus, briefly noting the legal development in Peer to Peer (P2P) file sharing cases may shed some additional light on protection of online anonymity.

In struggling to fight against unauthorised copying and distribution of digital music over P2P networks, the RIAA subpoenaed ISPs under a section of Digital Millennium Copyright Act[75] (DMCA) for information regarding individual users that it suspected of infringing copyrights. In *RIAA v Verizon,*[76] however, a federal appellate court ruled that the broad interpretation and use of the DMCA subpoena provision by the RIAA could threaten users' freedom of speech and expectations of anonymity and privacy and was, therefore, unconstitutional. Since then, the RIAA and other copyright holders have been filing lawsuits against individuals using the John Doe procedure identifying the alleged copyright infringers only by their numerical IP addresses[77] but have reportedly succeeded in compelling ISPs to reveal the identities of several thousand users.[78]

The case law examined in an earlier section demonstrates that the Court will deny the right to anonymous association if a group is seeking illegal goals. This suggests that anonymous file sharers who engage in illegal activities will not be entitled to such protection. However, the distinction between lawful goals and unlawful ones — between illegal file sharers and legitimate file shares — is not always clear-cut. Even though copyright holders are entitled to discovery of the identity of illegal file sharers, courts should not be quick to reveal identities unless there is concrete evidence of illegal activities.

Another issue related to protection of online anonymity is that people can rely on technology to protect their anonymity. For instance, using anonymous remailer services,[79] Internet users can send emails without a trace. Also, ISPs cannot link an IP

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[75] 17 USC 512.

[76] *Recording Industry Association of America, Inc v Verizon Internet Servercies, Inc*, [2003] 351 F 3d 1229.

[77] A Kao, "RIAA v Verizon: Applying the Subpoena Provision of the DMCA" (2004) 19 *Berkeley Technology Law Journal* 405-426.

[78] L Lidsky and T Cotter, "Authorship, Audiences, and Anonymous Speech" (2007) 82 *Notre Dame Law Review* 1537-1603.

[79] A remailer service removes the sender's e-mail address from the message and replaces it with the sender's assigned identification number. Then, it forwards the message to the intended receiver.

number back to a user if the user alters the IP number assigned to the location and/or alters a MAC number assigned to the device using the IPv6 protocol.[80] According to Froomkin, US law does not directly prohibit the running and use of anonymous remailers.[81] Also, the use of encryption technology is allowed in the United States with the exception of restrictions imposed on the export of encryption technology.[82] Although technological solutions can provide some answers, legal protection is still important because technological solutions are only available for technically savvy users and are not perfect. For instance, even anonymous remailers are vulnerable to traffic analysis, which is effective when the identity of the communicators instead of the content of communication is desired.[83] Also, it would not make much sense to ask people to rely on technology alone.

5. Further Discussion and Conclusions

At the outset of this article, I posited that the moral neutrality of anonymity leads us to ask how we can regulate online anonymity while promoting the positive values associated with anonymity. The findings of this article reveal various circumstances under which anonymity is demanded and is worthy of protection. In this final section, I discuss the implications of the findings and provide conclusions.

First, the examined cases demonstrate that the right to anonymous association has been especially meaningful for those who are marginalised in society. The groups that sought constitutional protection for anonymous association were the NAACP, the Iranian Student Association, the Communist Party, and white supremacy groups. Individuals who sought constitutional protection for anonymous association include ones with marginalised identities (e.g. being gay, being ill with a stigmatised disease, or holding extreme political beliefs). While what is stigmatised changes over time, the marginalisation of communicators and discrimination against them continue to exist. The law is the source of adequate protection for marginalised communicators when social norms fail to provide it. The importance of constitutional protection for anonymous association may lie in its protection of those with "unpopular" or "minority" identities, just as constitutional protection for anonymous speech is especially important for those with unpopular or dissenting ideas. The role that the law has played offline should be extended to - and may be even more important in – cyberspace. As the social science literature evidences, the Internet provides ample opportunity for online communicators to exercise their right of anonymous association, and this opportunity is particularly meaningful for online communicators with marginalised identities.

Anonymizer.com, Rewebber.de, and Freedom.net are examples of remailer services. See M Stockton, "Protecting Copyrights in Cyberspace: Holding Anonymous Remailer Services Contributorily Liable for Infringement" (1997) 14 *Thomas M Cooley Law Review* 317-349, at 323-24.

[80] M Froomkin, "Anonymity and the Law in the United States" (2008) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1309225 (last accessed 5 Jan 2010).

[81] *Ibid*.

[82] *Ibid*.

[83] R Kling et al, "Assessing Anonymous Communication on the Internet: Policy Deliberations" (1999) 15 *The Information Society* 79-90.

In a similar vein, the case law shows that the courts have considered the need for anonymity in various types of association by asking whether there has been a history of harassment of its members. That the courts have asked *who* is seeking the anonymous associational rights suggests that in future judicial decisions as to whether to unmask an anonymous online communicator should take into consideration not only the nature of the content but also the type of communicator. In reviewing case law concerning anonymous online defamation, Martin is critical of the fact that courts have developed standards for unmasking online speakers without regard for the content of the speech at issue.[84] Martin argues that if courts were to follow the law of defamation in the offline context, it would be reasonable to require public-figure plaintiffs, who seek to unmask an alleged defamer in political speech cases, to meet a higher standard than private plaintiffs. By the same token, if courts were to provide legal support for the right to anonymous association outlined in this article, it would be just and proper for them to give careful consideration to the identity of the communicator at issue. In cases in which the revealing of an identity would subject an individual to discrimination or retaliation, public or private entities seeking to unmask the individual should be required to demonstrate that the disclosure is narrowly tailored and serves an overriding interest.

Next, the findings of this article indicate that it is meaningful to distinguish different aspects of anonymity in the online context. In some cases online users sought anonymity as to their name or face but not their history of action. In such cases, online users voluntarily shared a limited range of information about their identity to a rather large number of people (e.g. members of an HIV support group). This helps us to re-conceptualise online privacy. Information may be considered "private" even when the information is shared "publicly" with those outside one's limited circle of family and closest friends, if one chooses to reveal a limited range of information about oneself while taking steps to conceal other aspects of one's identity.

The findings also show that keeping anonymity in regard to actions has become harder because all dimensions of personal information are collected, stored, analysed, and shared in cyberspace. Online users may reveal who they are without knowing that they are making their private information public: seemingly benign behaviours such as friending someone on Facebook or using an online search engine can disclose information about who they are. Legal rules governing the individual right to anonymous association provide a strong basis, however, for protecting action anonymity. In the offline cases, disclosure was allowed only if a disclosure was inevitable (i.e. the disclosure was necessary to prevent conduct and to serve a compelling government interest) and was narrowly tailored. These legal rules should be extended to online cases and to cases in which private entities pose threats to anonymity.

Lastly, the findings of this article suggest that protection of the right to anonymous association in cyberspace promotes two important goals. First, the protection ensures that people can express themselves by engaging in not only speech but also associational activities without the fear of being known. People have a basic need to belong, and identification with a social group helps promote self-esteem. Associational activities are especially meaningful for those who are isolated through

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[84] R Martin, "Freezing the Net: Rejecting a One-Size-Fits-All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuits" (2007) 75 *University of Cincinnati Law Review* 1217-1244.

illness or those who are afraid of revealing their hidden self and can provide vital social support for them. Second, the protection is conducive to enclave deliberation within a group and can contribute to the development of diversity in society. People can freely express their thoughts within a group without fearing that their identities will be made known to outsiders. As a result, a great range of views may emerge, some of which would otherwise be unheard or silenced in general debate.

In light of these important values, the right to anonymous association in cyberspace should be perceived not as the negative right — the freedom from a governmental mandate to disclose — but the positive right — the freedom of individuals to control information about themselves in order to find, meet, interact, and associate with others of their choice. Disclosure of private information online would not necessarily therefore mean losing control over how the information is accessed and used.