SETTING THE TIPPING POINT FOR DISCLOSING THE IDENTITY OF ANONYMOUS ONLINE SPEAKERS: LESSONS FROM OTHER DISCLOSURE CONTEXTS

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INTRODUCTION

Anonymous speech can have great First Amendment value.[1] But anonymous speech—and perhaps especially anonymous online speech—can sometimes inflict substantial harm, as is the case, for example, with defamation, threats, and copyright infringement.[2] For this reason, First Amendment protections for anonymous speech are far from absolute.[3]

Under what conditions should courts thus require anonymous online speakers alleged to have engaged in defamatory, threatening, or other unprotected and illegal speech to disclose their identities? Disclosing—or "unmasking"—the identity of an online speaker who seeks to speak anonymously to protect herself from unjust reprisal can undermine important First Amendment values, but unmasking

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1. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995) (describing a range of circumstances in which anonymous speech has First Amendment value); Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 892–98 (2009).

2. *See, e.g.*, Bryan H. Choi, *The Anonymous Internet*, 72 MD. L. REV. 501, 539–40 (2013) ("When anonymity allows perpetrators to escape detection, harms go unredressed and the aggregate incidence of harmful behavior increases."); Lidsky, *supra* note 1, at 884–85 ("If John Doe is unscrupulous or merely reckless, however, he can use the power the Internet gives him to inflict serious harm on the corporation. He can pollute the information stream with defamatory falsehoods, which may in turn influence other investors to question the corporation's credibility or financial health. Moreover, once the defamatory information enters the information stream, it may have a greater impact than if it had appeared in print. Because the defamatory statements can be copied and posted in other Internet discussion fora, both the potential audience and the subsequent potential for harm are magnified. And, as the persistence of Internet hoaxes demonstrates, once a rumor takes hold in cyberspace, it may be almost impossible to root out.").

3. *See* Choi, *supra* note 2, at 542–51 (observing that the Court's case law rejects the notion of a generalized right to anonymity).

an anonymous online speaker who seeks instead to avoid legal accountability for her unprotected (and illegal) speech does not.[4] To date, courts have struggled with a wide variety of tests that seek to determine the point—I will call this the tipping point—at which they become sufficiently confident that disclosure's accountability gains justify the unmasking of an anonymous online speaker.

This Essay takes an intradisciplinary approach to this problem by examining parallel disclosure challenges in other First Amendment contexts, exploring how lessons learned in those debates might inform courts' approaches to identifying the appropriate legal trigger for unmasking anonymous online speakers alleged by private plaintiffs to have engaged in illegal (and unprotected) speech. As we shall see, courts considering other disclosure challenges often screen for any impermissible government motive in seeking disclosure and then balance the disclosure's informational or other benefits against any deterrent effects on protected speech. Together, these two analyses appropriately recognize that the government often—but not always—has good reason for seeking disclosure and also that different disclosure requirements may vary considerably in their potential chilling effects on protected expression.

This Essay then explores how these analyses might inform the search for an appropriate unmasking standard in the online setting. It suggests that courts confronted with such challenges choose an evidentiary standard that leaves them confident both that the disclosure effort is appropriately motivated by an interest in vindicating the plaintiffs' private law interests rather than in censoring or targeting vulnerable speakers, and also that such disclosure's accountability gains outweigh their potential chilling effects. More specifically, this Essay concludes that courts might be more suspicious of disclosure efforts sought by a government official and correspondingly impose a tougher evidentiary standard, or tipping point, on that plaintiff before requiring disclosure of the defendant's identity. Furthermore, courts might choose the appropriate tipping point based on their assessment of the disclosure's potential chilling effects, which may turn in great part on the nature of the contested speech—for example, as commercial or noncommercial, or of public or private concern.

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4. Lyrissa Lidsky and Thomas Cotter thoughtfully distinguish between an anonymous speaker's interest in avoiding what they call "wrongful" retaliation (such as threats and harassment) from a speaker's interest in escaping "justifiable" retaliation (such as legal accountability for actionable expression). Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1570–75 (2007).

I. LESSONS FROM DISCLOSURE CHALLENGES IN OTHER CONTEXTS

A number of thoughtful commentators have explained that courts considering disclosure challenges in other settings generally assess the government's motive in seeking disclosure, balance the disclosure's expressive costs against its benefits in achieving important government interests, or both.[5] Dale Ho, for example, describes an "antisuppression" approach in which courts consider social and historical context to determine whether the government improperly seeks disclosure to target and censor controversial or dissenting views.[6] He also describes a contrasting "antichilling" approach in which courts instead consider whether governmental disclosure requirements impose expressive costs (by deterring protected speech) that outweigh their benefits in achieving substantial government interests.[7]

As Leslie Kendrick has observed, both approaches are often in play. More specifically, she explains that a number of judicial decisions that reject the government's efforts to force identity disclosure can be understood as appropriately representing "a categorical presumption against a certain form of government purpose: where the government orders disclosure in order to penalize or deter particular viewpoints."[8] If the courts find that the

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5. As Leslie Kendrick has observed, "disclosure law is about both categorization and balancing, both purpose and effects." Leslie Kendrick, *Disclosure and its Discontents*, 27 J.L. & POL. 575, 577 (2012); *see also id.* at 576 (explaining that she aims to "complicate" our understanding of disclosure doctrine by suggesting that "a small but important set of disclosure cases is actually about categorization and purpose, rather than balancing and effects," and second, that "although disclosure law is more about purpose and categorization than generally recognized, it does not follow that the doctrine is mistaken in focusing on effects and balancing").

6. Dale E. Ho, NAACP v. Alabama *and False Symmetry in the Disclosure Debate*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 413–14 (2012).

7. *Id.* at 407; *see also id.* at 413 (weighing "the harm that a given speech restriction has on a speaker's expressive activity against the interests asserted by the state in maintaining its regulation").

8. Kendrick, *supra* note 5, at 583; *accord id.* at 581 ("If the government could not criminalize the offending viewpoints directly, the corollary is that it also could not penalize them through exposure. Here, the government action at issue is not criminal, civil, or administrative penalty. Instead, it is disclosure or threatened disclosure undertaken with the dual aims of exposing speakers to shame and reprisals and employing that unwelcome prospect to deter their protected expression. These aims indicate that the government's purpose is to single out particular speakers for unfavorable treatment."); *see also* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (urging that First Amendment doctrine in general can be understood as the courts' search for impermissible government motive in regulating speech); *id.* at 425–26 (explaining that a motive-based approach to First Amendment analysis "claims that what is essential is not the consequences of a regulation but the reasons that underlie it. The point of attention is neither the speaker nor the audience, but the governmental actor standing in the way of the communicative process.

government's disclosure efforts are so impermissibly motivated, it will reject the efforts.

Disclosures that are not motivated by an impermissible government interest are generally still "analyzed for their effects on expression, which will inevitably involve balancing interests."[9] Such a balancing approach[10] involves "weigh[ing] the harm that a given speech restriction has on a speaker's expressive activity against the interests asserted by the state in maintaining its regulation."[11] Together, these two approaches appropriately recognize that the government often—but not always—has good reason for seeking disclosure, and also that different disclosure requirements may vary considerably in their potential chilling effects on protected expression.[12]

We can see both approaches at work in a number of disclosure contests. Recall, for example, the Supreme Court's decision in *NAACP v. Alabama ex rel. Patterson*.[13] There, the State of Alabama sought to compel disclosure of the identities of all Alabama members of the NAACP, ostensibly to enforce state law regulating foreign corporations doing business within the state.[14] But plenty of evidence indicated that the government's disclosure efforts were instead motivated by its intent to shut down its target's political

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Under this model, an action may violate the First Amendment because its basis is illegitimate, regardless of the effects of the action on either the sum of expressive opportunities or the condition of public discourse. Conversely, an action may comport with the First Amendment because legitimate reasons underlie it, again regardless of its range of consequences. The critical inquiry concerns what lies behind, rather than what proceeds from, an exercise of governmental power").

9. Kendrick, *supra* note 5, at 596.

10. Kendrick explains that courts have always engaged in balancing when considering disclosure requirements, even though they often claim to be reluctant to do so elsewhere in First Amendment analyses. *Id.* at 576 ("[T]he issue of disclosure presents a particularly strong challenge to the predominant, dim view of effects- and balancing-tests."); *id.* at 587 ("Given that disclosure may at once provide listeners (and would-be speakers) with useful information and deter other would-be speakers (and thus deprive listeners of other viewpoints), determining the effect of a law upon autonomy may require a type of balancing.").

11. Ho, *supra* note 6, at 413.

12. Kendrick, *supra* note 5, at 586 ("There are enough legitimate reasons for the government to legislate disclosure that it would be improper to draw an inference of discrimination from the fact of a disclosure requirement. First, information is necessary to governance, particularly so in a regulatory state. The government may legitimately seek disclosures to ensure the functioning not just of its campaign finance system but also of its securities laws, its prescription drug approval process, and any number of other regulatory undertakings. . . . Second, in contrast with most restrictions on speech, compelled disclosure may itself serve First Amendment values.").

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

14. *Id.* at 451.

activity.[15] Indeed, historian Taylor Branch characterized the purpose of the litigation led by Alabama Attorney General (and later Governor) John Patterson as "to put the NAACP out of business—a goal that Alabama successfully accomplished for a number of years."[16]

In addition to screening for impermissible government motive, the *Patterson* decision also explicitly relied on balancing, as the Court determined that the expressive costs of such disclosure in chilling members' political speech and association greatly outweighed the government's sketchy interest in enforcing its laws regulating out-of-state corporations.[17] On one side of the scale, the NAACP "ha[d] made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members ha[d] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[18] On the other, "whatever interest the State may have [had] in obtaining names of ordinary members ha[d] not been shown to be sufficient to overcome petitioner's constitutional objections."[19] *Patterson* thus involved a case in which the Court had both good reason to suspect the government's motive in seeking disclosure as well as strong evidence that the disclosure's expressive costs outweighed its nominal law enforcement benefit. The Court thus had more than ample grounds to reject the disclosure effort.

Switching to another context, the Court's campaign disclosure doctrine similarly illustrates both motive-based and balancing analysis at work. But campaign disclosure requirements often survive those inquiries, as the Court has generally upheld statutes requiring certain political speakers to disclose their identities—for example, as the source of certain campaign contributions or communications, or as petition signatories.[20]

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15. Ho, *supra* note 6, at 415 ("As the Supreme Court wryly observed in a later decision, it was notable that the statute invoked by the state in this case had never once been applied in any other instance to try to oust a corporation from doing business in Alabama.").

16. *See* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–63, at 222 (1988) (describing Alabama's efforts as the "pioneer action" among "twenty-five separate lawsuits challenging [the NAACP's] right to operate in the South, most of them filed by hostile states and municipalities").

17. *Patterson*, 357 U.S. at 463–65.

18. *Id.* at 462; *see also* Ho, *supra* note 6, at 413 ("The plaintiffs, in other words, faced more than mere criticism for their beliefs; they faced a choice between self-expression and exposure to significant personal injury.").

19. *Patterson*, 357 U.S. at 465; *see also id.* at 463 ("We turn to the final question whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have.").

20. *See* Citizens United v. FEC, 558 U.S. 310, 371 (2010) ("The First Amendment protects political speech, and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This

First, we can understand the Court again to be screening for impermissible government motive in seeking to disclose the identity of campaign contributors and other campaign speakers—but here finding none.[21] Unlike in *Patterson*, courts find little reason to suspect the government's motive and often see good reason for such disclosures, concluding that the government is permissibly motivated by an interest in informing voters—an interest that itself furthers First Amendment values by enhancing listeners' decision-making autonomy and informing their participation in democratic self-governance.[22]

Second, the Court's approach in the campaign disclosures setting also relies heavily on balancing.[23] In general, the Court has

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transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."); Doe v. Reed, 130 S. Ct. 2811, 2819 (2010) (upholding disclosure requirements of the names of petition signatories to achieve the government's interest in "preserving the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability"); Buckley v. Valeo, 424 U.S. 1, 67 (1976) ("[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return."). But not every campaign disclosure requirement survives the Court's scrutiny. *See, e.g.*, Buckley v. Am. Const. Law Found., Inc., 525 U.S. 182, 199–200 (1999) (striking down a state law requiring petition circulators to wear identifying badges as imposing expressive costs that outweigh any informational benefit to listeners); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 355–57 (1995) (striking down a state law requiring campaign leaflets to disclose their source).

21. Ho, *supra* note 6, at 408 (noting "fundamental differences between the First Amendment harms inflicted by disclosure requirements as applied to minority or dissident groups, and the costs exacted when such rules are applied in most circumstances"); *id.* at 435 (concluding that the campaign disclosure doctrine is largely anti suppression in approach: "Traditionally, we have subjected more powerful speakers to disclosure requirements, while at the same time exempting relatively powerless speakers from such requirements in order to shield them from reprisals").

22. For a discussion of the values most often identified as underlying the First Amendment, see, e.g., ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 6 (2012) (summarizing and describing the three major proposed purposes of the First Amendment as "cognitive" (advancing knowledge and discovering truth); "ethical" (furthering individual autonomy and self-fulfillment); and "political" ("facilitating the communicative processes necessary for successful democratic self-governance")); Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 423 (1980); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1786 (2004).

23. *Buckley*, 424 U.S. at 68 ("These are not insignificant burdens on individual rights, and they must be weighed carefully against the interests which Congress has sought to promote by this legislation."); *id.* at 66 ("The strict test established by *NAACP v. Alabama* is necessary because compelled

made a default balancing judgment that campaign disclosures' substantial informational benefits to voters outweigh their comparatively limited deterrent effects on speech.[24] But because the Court also recognizes the possibility that some speakers—like 1950s Alabama NAACP members—may have unusually good reasons to resist disclosure, it has created an exception that permits speakers to rebut this default balancing judgment that campaign disclosures' informational gains outweigh their expressive costs when they can prove "a reasonable probability that the compelled disclosure will . . . subject them to threats, harassment, or reprisals from either Government officials or private parties."[25] The Court has insisted, however, that such speakers prove, rather than simply claim, the likelihood of such retaliation.[26] For these reasons, the Court has generally upheld the government's campaign disclosure efforts.

Courts generally apply even more relaxed standards of scrutiny to factual disclosure requirements in the commercial speech

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disclosure has the potential for substantially infringing the exercise of First Amendment rights. But we have acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement . . . ."); *id.* at 72 ("On this record, the substantial public interest in disclosure identified by the legislative history of this Act outweighs the harm generally alleged."); Richard Briffault, *Two Challenges for Campaign Finance Disclosure After* Citizens United *and* Doe v. Reed, 19 WM. & MARY BILL RTS. J. 983, 991–92 (2011) (discussing the Court's "balancing of informational gains against threats to political participation"). The Court has thus created a rebuttable presumption that favors disclosure over anonymity in the context of campaign speech statutes. *Id.* at 999. The baseline presumption in the online unmasking context, in contrast, to date disfavors disclosure unless and until the private party seeking disclosure meets the requisite evidentiary standard. *See infra* Part II. The difference between the two defaults may be explained in part by judicial deference to legislative judgments in electoral matters on the one hand and the judicial tradition of requiring litigation plaintiffs to bear the burden of proof on the other.

24. *Reed*, 130 S. Ct. at 2819 (upholding disclosure requirements of petition signatories to achieve the government's interest in "preserving the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability"); *Citizens United*, 558 U.S. at 371 ("The First Amendment protects political speech, and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."); *Buckley*, 424 U.S. at 67 ("[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.").

25. *Reed*, 130 S. Ct. at 2820 (quoting *Buckley*, 424 U.S. at 74).

26. *E.g.*, Doe v. Reed, 823 F. Supp. 2d 1195, 1212 (W.D. Wash. 2011) (finding on remand that the plaintiffs who resisted disclosure of petition signatories had failed to show reasonable probability of threats or harassment).

context.[27] There, the Supreme Court has held commercial speech to be of comparatively less First Amendment value than the political speech addressed above, and therefore subject to greater regulation.[28] The Court has thus applied rational basis scrutiny in upholding disclosure requirements that "are reasonably related to the State's interest in preventing deception of consumers."[29] Courts also often uphold statutes requiring commercial speakers to make factual disclosures to inform listeners' decision making even absent deception concerns.[30] Here too we can see assessments of motive

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27. These disclosures often concern matters other than a speaker's identity, but all involve contested disclosures of objectively verifiable facts—like identity—that the speaker would prefer not to disclose. *See, e.g.*, Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 107 (2d Cir. 2001) (involving a challenge to a statute that required manufacturers to inform consumers of the mercury content of certain products).

28. The Court has held that commercial speech that is false, misleading, or related to an illegal activity is entitled to no constitutional protection and thus can be banned altogether. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562–64 (1980). In contrast, the Court applies intermediate scrutiny to laws regulating other types of commercial speech based on its conclusion that such speech—although still of comparatively low value—can helpfully inform individuals about their choices in the commercial realm. *Id.*; *see also* Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. (forthcoming 2014) (manuscript at 5–6), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309133 ("[An] emphasis on the informational interests of listeners, as distinct from the liberty of speakers, provides the distinctive rationale for commercial speech protection. . . . All this changes for commercial speech because, here, the theory of First Amendment protection is not freedom of mind, but freedom of information flow.").

29. Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 250, 252–53 (2010) (upholding a federal statute requiring bankruptcy professionals to include certain disclosures in their advertisements "to combat the problem of inherently misleading commercial advertisements—specifically, the promise of debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs"); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985) (holding that disclosure requirements that are reasonably related to the State's interest in preventing consumer deception do not violate commercial speakers' First Amendment rights).

30. *See* Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in* United Foods, Zauderer, *and* Abood, 40 VAL. U. L. REV. 555, 584 (2006) ("[C]ommercial speech is routinely and pervasively compelled for reasons that have little to do with the prevention of deception. The Federal Trade Commission now imposes mandatory disclosure rules on a wide range of industries, requiring sellers to divulge such information as 'the durability of light bulbs, octane ratings for gasoline, tar and nicotine content of cigarettes, mileage per gallon for automobiles, or care labeling of textile wearing apparel.' Congress has passed innumerable statutes that contain analogous disclosure requirements. These disclosure requirements force commercial speakers to engage in commercial speech, but they do not do so merely to prevent potential consumer deception. They primarily seek to reduce information costs and thereby to establish a more

and balancing at work. Courts generally find little reason to suspect the government's motive in this setting[31] because of the strong informational value of the matters required to be disclosed—information that itself furthers listeners' First Amendment interests.[32] Moreover, courts' implicit balancing assessment suggests that such disclosures pose little danger of chilling commercial speakers who retain strong economic incentives to speak.[33] Indeed, the Court's commercial speech doctrine rests in part on the "hardiness" of commercial speech.[34]

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educated and efficient marketplace." (quoting Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 664 (1977))). Courts have not yet settled on rational basis or intermediate scrutiny as the appropriate level of review to apply to disclosure requirements intended to inform listeners, absent a history of deception by regulated commercial speakers. *See* N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 133 (2d Cir. 2009) (discussing whether rational basis scrutiny or some heightened level of review should apply to disclosure requirements designed to inform consumer decision making in the absence of a finding of deception by the regulated commercial speakers).

31. *Zauderer*, 471 U.S. at 652 n.14 ("Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized. Similarly, we are unpersuaded by appellant's argument that a disclosure requirement is subject to attack if it is 'under-inclusive'—that is, if it does not get at all facets of the problem it is designed to ameliorate. As a general matter, governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied.").

32. *Sorrell*, 272 F.3d at 113–15 ("Commercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the 'marketplace of ideas.' Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal. In such a case, then, less exacting scrutiny is required than where truthful, nonmisleading commercial speech is restricted.").

33. *Id.* at 114 ("[T]he individual liberty interests guarded by the First Amendment, which may be impaired when personal or political speech is mandated by the state . . . are not ordinarily implicated by compelled commercial disclosure . . . . Required disclosure of accurate, factual commercial information presents little risk that the state is forcing speakers to adopt disagreeable state-sanctioned positions, suppressing dissent, confounding the speaker's attempts to participate in self-governance, or interfering with an individual's right to define and express his or her own personality." (citations omitted)).

34. *See* Va. Bd. of Pharmacy v. Va. Citizen Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976) ("The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or

Disclosure doctrine outside of the online context can thus be understood as involving an examination of the government's motive in seeking disclosure of a speaker's identity and rejecting those disclosures that are impermissibly motivated, followed by a balancing of the disclosure's informational or public law enforcement benefits against its expressive costs (if any) in deterring protected speech.[35] The next Part explores how attention to both motive and balancing may similarly help us think through disclosure debates in the online setting, where courts struggle with whether and when to require the unmasking of anonymous online speakers alleged to have engaged in illegal (and unprotected) speech.

II. APPLYING THESE LESSONS TO ONLINE DISCLOSURE DEBATES

Courts considering unmasking subpoenas in the online context to date have generated a wide variety of possible tests while offering little rationale for their preferred choice. The tests are similar in that each requires the plaintiff to meet some threshold evidentiary standard—again, I will call this the tipping point—that the defendant's anonymous speech has violated tort, copyright, or some

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political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely. Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker."). For an argument that the same may be true of well-financed and highly motivated political speakers, see Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 797 (1999) (suggesting that those engaged in partisan political speech have the same, very strong incentives to speak as those engaged in commercial speech).

35. The Court has applied strict scrutiny to disclosures of certain facts other than speaker identity outside of the commercial context. *See, e.g.*, Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 795–96 (1988) (striking down a state statute requiring fundraisers to disclose the percentage of funds actually turned over to clients after concluding that the disclosure's significant burden on noncommercial speakers outweighed the State's limited interests); *see also* Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573–74 (1995) ("[O]utside [the context of commercial speech, the State] may not compel affirmance of a belief with which the speaker disagrees. . . . [T]his general rule . . . applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."). But the government's requirement of certain factual disclosures sometimes survives even strict scrutiny. *See Riley*, 487 U.S. at 799 n.11 ("[N]othing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny.").

other law.[36] The tests differ, however, in how much they demand of the plaintiff. So far the alternatives range from requiring the plaintiff to show that she has a "legitimate, good faith" basis for her claim,[37] to requiring that the plaintiff show that her claim can survive a motion to dismiss,[38] to requiring the plaintiff to "make a concrete showing as to each element of a prima facie case against the defendant,"[39] to requiring the plaintiff to show that her claim could survive a motion for summary judgment on each of the elements within the plaintiff's control.[40] Even after the plaintiff has met the requisite evidentiary showing, some courts further require an additional balancing analysis that weighs the defendant's expressive interests against the plaintiff's need for disclosure to vindicate private law rights.[41] Both the choice among the various evidentiary standards[42] and the choice of whether to additionally require another balancing element remain contested.[43]

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36. Note that courts also generally impose threshold procedural requirements upon the plaintiff, such as requiring that she undertake efforts to notify the anonymous speaker-defendant that she is the subject of a disclosure petition and to provide the speaker/defendant a reasonable opportunity to oppose the petition. *See, e.g.*, Doe v. Cahill, 884 A.2d 451, 460–61 (Del. 2005); Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 760–61 (N.J. Super. Ct. App. Div. 2001); Matthew Mazzotta, Note, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. REV. 833, 847 (2010) ("[A]lthough the language of different standards varies widely, there is general agreement that plaintiffs seeking to unmask anonymous defendants should first show that they have made reasonable attempts to provide defendants with notice and an opportunity to respond to the unmasking subpoena.").

37. *E.g.*, Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1095 (W.D. Wash. 2001); *In re* Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. 26, 37 (Va. Cir. Ct. 2000), *rev'd on other grounds, sub nom.* Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 F.3d 377 (Va. 2001).

38. *E.g.*, Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 579 (N.D. Cal. 1999).

39. Doe I v. Individuals, 561 F. Supp. 2d 249, 256 (D. Conn. 2008).

40. *E.g.*, *Cahill*, 884 A.2d at 463. To be sure, courts often vary in their descriptions of these various standards and to what extent they differ from each other. *See, e.g.*, *In re* Anonymous Online Speakers, 661 F.3d 1168, 1176 (9th Cir. 2011) (characterizing *Doe v. Cahill* as adopting a prima facie rather than a summary judgment standard).

41. *E.g.*, *Dendrite Int'l, Inc.*, 775 A.2d at 760–61.

42. For a sampling of articles discussing the disagreement among courts adopting these various standards, see Clay Calvert et al., *David Doe v. Goliath, Inc.: Judicial Ferment in 2009 for Business Plaintiffs Seeking the Identities of Anonymous Online Speakers*, 43 J. MARSHALL L. REV. 1, 15–29 (2009); Ryan M. Martin, *Freezing the Net: Rejecting a One-Size-Fits-All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuits*, 75 U. CIN. L. REV. 1217, 1226–37 (2007); Mazzotta, *supra* note 36, at 847–48; Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OR. L. REV. 795, 802–15 (2004).

43. *Compare* Mazzotta, *supra* note 36, at 863 ("The second important component of the balancing prong is consideration of the speaker's First

Courts might valuably draw from other disclosure contests to view the choice of a tipping point not as an end in itself but as a means to the end of assessing motive and balancing.[44] For example, courts might choose the tipping point between protecting anonymity and ordering disclosure in part to screen for impermissible government motive. As a threshold matter, courts might be slower to suspect government motive when the government is not the party seeking the disclosure, as is usually the case in the online unmasking context. As we have seen, legislatures and government agencies in other settings generally seek to require disclosure to inform listener decision making[45] or to achieve other goals.[46] In the online unmasking context, in contrast, private-party plaintiffs generally seek state action in the form of a court order requiring disclosure of an anonymous speaker's identity to enable accountability for that speaker's allegedly illegal and unprotected speech.[47] As Nathan Oman and Jason Solomon have urged in

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Amendment right to remain anonymous. Some courts have rejected this consideration as superfluous or an extra burden on plaintiffs. But explicit consideration of the speaker's right to anonymity is important because unmasking requests arise in a wide variety of contexts and under many different causes of action, including defamation, trespass to chattel, trademark, and trade secret violations."), *with* Vogel, *supra* note 42, at 808 ("The fourth *Dendrite* factor is even more troubling. In effect, the court acknowledges that, even if plaintiff has alleged a viable legal claim against the defendant—and supported that claim with admissible evidence—the court may still exercise discretion to stop the case in its tracks, at least to the extent that the 'strength of the prima facie case' is given less weight than 'the defendant's First Amendment right of anonymous free speech.'" (quoting *Dendrite Int'l, Inc.*, 775 A.2d at 760–61)), *and* Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1373, 1380 (2009) ("Arguably, a separate balancing test is unnecessary because a balancing of interests is built into the prima facie evidence standard. Under the prima facie evidence standard, the defendant's right to speak anonymously outweighs the plaintiff's right to pursue a libel action unless and until the plaintiff presents evidence that the libel claim is viable; once this burden is met, the balance tips in favor of allowing plaintiff to pursue a claim for vindication of her reputation. An explicit balancing test serves only to tilt the scales further toward the protection of anonymous speech because presumably it allows even a viable defamation claim to be dismissed on the ground that it is not strong enough to outweigh defendant's First Amendment interests.").

44. Kendrick explains that "disclosure law should reflect a categorical prohibition on compelled disclosure with the purpose of penalizing or deterring protected expression," and "other compelled disclosures should be analyzed for their effects on expression, which will inevitably involve balancing interests." Kendrick, *supra* note 5, at 596.

45. Citizens United v. FEC, 558 U.S. 310, 370 (2010).

46. Doe v. Reed, 130 S. Ct. 2811, 2819 (2010).

47. *See, e.g.*, *In re* Anonymous Online Speakers, 661 F.3d 1168, 1171 (9th Cir. 2011) (seeking disclosure of the speaker's identity in action for tortious interference with existing contracts and advantageous business relations); Doe I v. Individuals, 561 F. Supp. 2d 249, 252 (D. Conn. 2008) (seeking disclosure of the speaker's identity in action for libel, invasion of privacy, and emotional

another setting, this difference may be significant for First Amendment purposes: "[T]he Court should pay more attention to the identity of the plaintiff and the way that the litigation is being used. There is a difference between a government official seeking to quash criticism and a private individual seeking redress for a wrong in which he was uniquely victimized."[48]

Impermissible government motive is less likely a concern when a nongovernmental plaintiff seeks to unmask an anonymous defendant. In contrast, concerns about motive might be more acute if the plaintiff herself is a public official who seeks to unmask an anonymous critic—thus suggesting a more demanding evidentiary standard of the plaintiff. In other words, the stronger the public official plaintiff's showing that the anonymous defendant's speech was illegal, the less basis for suspecting the plaintiff's disclosure effort is motivated by a desire to squelch protected expression. Consider, for example, *Doe v. Cahill*, which involved a defamation claim by an elected town council member against an anonymous online speaker for allegedly defamatory blog postings critical of the official.[49] There, the Delaware Supreme Court chose the most demanding available evidentiary standard, in part because of the plaintiff's status as a public official.[50]

Similarly, we might also choose among available tipping points to achieve the goals of balancing analysis, recognizing—as we have seen in other disclosure contexts—that disclosures may vary in their deterrent effects on protected speech. Note that the various tipping point tests currently in play in the unmasking context are not true balancing tests because they generally consider only one side of the scale,[51] assessing only the varying strength of the plaintiff's private

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distress); Doe v. Cahill, 884 A.2d 451, 454 (Del. 2005) (seeking disclosure of the speaker's identity in action for defamation).

48. *See* Nathan B. Oman & Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 DUKE L.J. 1109, 1114 (2013) ("[T]he Court should be more attentive to the nature of state involvement in litigation and the importance of the state's interest in providing private parties with a means of redress for private injuries."); *id.* at 1163 ("As a mechanism for providing redress, private law is not something that is easily replicated by other avenues, particularly in the case of private-figure plaintiffs like Snyder. This inquiry about available redress, though, has been entirely absent due to the Court's imputing regulatory motive to the state. Closer attention to the state interest in redress, we believe, would lead to greater efforts to allow *some* measure of redress, while still protecting First Amendment values.").

49. *Cahill*, 884 A.2d at 454.

50. *Id.* ("We are concerned that setting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all. A defamation plaintiff, particularly a public figure, obtains a very important form of relief by unmasking the identity of his anonymous critics.").

51. *See supra* note 36 and accompanying text.

law enforcement interests to be achieved by the disclosure without any explicit attention to disclosures' potential for chilling protected speech on the other side.[52] A few courts have responded to this gap by requiring the plaintiff to survive a separate balancing analysis even after making the requisite evidentiary showing.[53]

But courts might instead draw from other disclosure contests to choose the appropriate tipping point based on their assessment of the disclosure's potential chilling effects, which may turn in great part on the nature of the contested speech.[54] In other words, the greater the disclosure's potential for chilling protected speech, the tougher the evidentiary showing that courts should require of the plaintiff to show that her private law enforcement interests outweigh such expressive costs. To this end, a defendant who is on notice of a disclosure petition and has the opportunity to oppose it may offer circumstance-specific evidence as to the disclosure's potential for chilling.[55] But even in those cases where the plaintiff was unable to notify the anonymous defendant, courts might use the nature of the contested speech as a proxy for the disclosure's chilling potential. In other words, the more courts are concerned about chilling—and their concern often varies with the nature of the speech at issue[56]—the more they should demand of the plaintiff before concluding that the benefits of disclosure outweigh their expressive costs.

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52. *See* Ho, *supra* note 6, at 421 ("Although private activity in response to disclosure can *in some contexts* effectively chill speech, this is certainly not the case in *all* or even most instances."); Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1476 (2013) (urging courts to take care to distinguish—for constitutional purposes—chilling effects created by private action rather than directly by government action); *id.* at 1479–80 ("[I]n private chill cases, one cannot safely assume that overprotecting a [speaker's] First Amendment interests will enhance public discourse or other First Amendment values. Instead, overprotection may come at the expense of a third party's responsive speech or other legal activities.").

53. *See* Dendrite Int'l, Inc. v. Doe, 775 A.2d 756, 760–61 (N.J. Super. Ct. App. Div. 2001).

54. Kendrick, *supra* note 5, at 579–80 ("The effects-and-balancing approach articulated in *NAACP v. Alabama* has become the primary standard for violations of associational rights, including most compelled disclosures. A court first asks the extent to which the challenged state action burdens expressive association. In disclosure cases, this burden generally takes the form of a deterrent effect on association. Establishing a constitutionally significant deterrent effect requires a showing of credible threats of reprisal, usually predicated on evidence of past reprisals. If a deterrent effect is constitutionally significant, then it must be balanced against the interests furthered by the challenged regulation.").

55. *See* Doe v. Reed, 130 S. Ct. 2811, 2820 (2010) (explaining that parties can avoid disclosure if they show that disclosure will subject them to threats or harassment); *Cahill*, 884 A.2d at 460–61.

56. *See Reed*, 130 S. Ct. at 2819; Citizens United v. FEC, 558 U.S. 310, 370 (2010).

For example, courts might generally assess the accountability benefits of disclosure as outweighing its expressive costs to a commercial speaker, as commercial speakers are relatively unlikely to be chilled. Consider, for example, anonymous online commercial speech alleged to infringe copyrights or trademarks[57]: unmasking such speakers not only can vindicate significant private law interests but also often threatens little danger of chilling low-value commercial speech. Courts considering disclosure petitions or unmasking subpoenas in such cases may thus choose to impose less demanding evidentiary standards on the plaintiff.[58]

Similarly, a plaintiff's unmasking interest should be more likely to survive a balancing analysis when the anonymous speaker addresses a matter of private, rather than public, concern. The Court has repeatedly emphasized that speech concerning public affairs "occupies the highest rung on the hierarchy of First Amendment values and is entitled to special protection."[59] In contrast, when "matters of purely private significance are at issue, First Amendment protections are often less rigorous. That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on

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57. *E.g.*, Sony Music Entm't Co. v. Does 1–40, 326 F. Supp. 2d 556, 558 (S.D.N.Y. 2004) (copyright infringement suit where anonymous defendants were alleged to have illegally downloaded and distributed copyrighted material); Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578, 580 (N.D. Cal. 1999) (trademark infringement with evidence of actual confusion).

58. For examples of decisions in which courts required a less demanding evidentiary showing from the plaintiff seeking disclosure in the context of online commercial speech, see *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011) (distinguishing standards appropriately applied to political as opposed to commercial speech, given different levels of First Amendment protection); Lefkoe v. Jos. A. Bank Clothiers, Inc., 577 F.3d 240, 248–49 (4th Cir. 2009) ("Because the Doe Client's letter was commercial speech, any First Amendment right to speak anonymously 'enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression.' We thus conclude that the Doe Client's claimed First Amendment right to anonymity is subject to a substantial government interest in disclosure so long as disclosure advances that interest and goes no further than reasonably necessary." (citations omitted) (quoting Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989)) (internal quotation marks omitted)).

59. Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) (quoting Connick v. Myers, 461 U.S. 138, 145 (1938)) (internal quotation marks omitted); *see also id.* ("Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. . . . The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' That is because 'speech concerning public affairs is more than self-expression; it is the essence of self-government.'") (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

matters of public interest."[60] Consider, for example, *Doe I v. Individuals*,[61] which involved defamation and tort claims brought by two female law students against anonymous individuals who posted allegedly defamatory, threatening, and harassing claims on a law school admissions website about the plaintiffs' purported sex lives, medical histories, substance abuse, criminal histories, and more.[62] There the plaintiffs' private law enforcement interests were quite high, as they sought to protect their reputations and their professional futures as well as their emotional and physical security.[63] In contrast, the First Amendment value of—and thus concerns about chilling—the contested speech on such matters not of public concern was comparatively low.[64] Here too courts may appropriately impose a less demanding evidentiary standard on the plaintiff than in cases where the contested speech involves a matter of public concern.[65]

To be sure, distinguishing speech as public or private, or commercial or noncommercial in nature is often no easy task.[66] My point here is simply that rather than mechanically choosing and applying among several available tipping points as ends in themselves, courts should more thoughtfully pick and apply tipping points to screen for impermissible government motive and balance the benefits of disclosure against its potential chilling effects on protected expression.[67]

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60. *Id.* at 1215; *see also id.* at 1215–16 (explaining that not all speech is of equal First Amendment value, and that the regulation of speech on matters of private concern poses substantially less danger to key First Amendment values).

61. 561 F. Supp. 2d 249 (D. Conn. 2008).

62. *Id.* at 251, 255–56 (applying intermediate evidentiary standard between good faith/motion to dismiss and summary judgment).

63. Danielle K. Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 77, 80 (2009).

64. Lidsky, *supra* note 43, at 1389 (arguing that because the plaintiffs were targeted "not because they ran a business, held public office, or sought to influence public affairs but simply because of gender, intelligence and appearance," disclosing the anonymous speakers posed "relatively little danger of silencing discussion on matters of public concern").

65. Note too that choosing the evidentiary standard based on the disclosure's potential chilling effect eliminates the need for an additional (and potentially confusing or superfluous) balancing analysis. *See supra* notes 41, 43 and accompanying text.

66. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1211 (2011); City of San Diego, Cal. v. Roe, 543 U.S. 77, 80–81 (2004); Riley v. Nat'l Fed. of the Blind of N.C., 487 U.S. 781, 795–96 (1988).

67. Other commentators have at various times and for various reasons also suggested that courts' choice of standard should turn in part on the character of the contested speech, the status of the plaintiff, or both. *See, e.g.*, Clay Calvert et al., *supra* note 42, at 3–5; Ryan M. Martin, *supra* note 42, at 1238–39. Here I explain that approach as appropriately tracking assessments of motive and balancing undertaken by courts in other disclosure contexts.

CONCLUSION

Courts confronted with online unmasking challenges might helpfully draw from other disclosure contexts to choose a tipping point that leaves them confident both that the disclosure effort is appropriately motivated by an interest in vindicating plaintiffs' private law interests rather than in censoring or targeting vulnerable speakers and also that such disclosures' accountability gains outweigh their potential chilling effects. More specifically, courts might be more suspicious of disclosure efforts sought by a government official and correspondingly impose a tougher tipping point on that plaintiff before requiring disclosure of the defendant's identity. Furthermore, courts might choose the appropriate tipping point based on their assessment of the disclosure's potential chilling effects, which may turn in great part on the nature of the contested speech—for example, as commercial or noncommercial, or of public or private concern.

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