The Unmasking Option:
A Thought Experiment

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In this talk:

- A story of anonymous online harassment.
- A counterintuitive proposal.
- A more realistic view of the uses and abuses of unmasking.
Act I: Skanks in NYC
Skanks in NYC
Dan Solove says:

“The law must restrict bad-faith lawsuits designed solely to unmask anonymous speakers.”
Act II: Unmasking
This *is* justice

- Rosemary Port got what she deserved.
- In contrast, a lawsuit would have been:
  - Slow and expensive for Port.
  - A much greater burden on Cohen.
  - Possibly futile.
From this, I conclude...

- We need more “bad-faith lawsuits designed solely to unmask speakers.”
- And once you put it that way, why not cut out the middleman?
- What if unmasking were the preferred remedy???
A thought experiment

- Posit a significantly lower threshold to unmask an unknown online harasser.
- In exchange, the plaintiff is required to give up all legal remedies.
- This is not a call for David Brin-style total transparency.
- Bear with me on this for a bit.
Identification r0XX0rz

☐ Best way to break up a mob.
☐ Less First Amendment trouble.
☐ Avoids making intermediaries liable.

:. on balance, it’s good for free speech
Dog Poop Girl objects

- Won’t this lead to disproportionate, illiberal, shaming-based revenge?
- But would you rather be Dog Poop Girl or be sued into bankruptcy?
- And if someone is going to bear this risk, why not the defendant?
Act III: The Punchline
Sadly, it doesn’t work

- Some plaintiffs need legal remedies.
  - And they’re not in a position to choose until after they know who it is.
- Some defendants fear retaliation.
  - Even a waiver of legal remedies can leave plaintiffs with too much power.
Solove has half a point

- Pretextual unmasking is a real problem.
  - NB: Retaliation cases involve harms we dislike but won’t or can’t police.
- But “weak claims” is a poor proxy for “pretextual unmasking.”
Lessons for real life

- Decouple identification from litigation.
- Identification standards can be looser than those needed to win a lawsuit.
- We need anti-pretext doctrines, and we should be more explicit about the ones we already have.
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