

The Unmasking Option: A Thought Experiment

James Grimmelmann

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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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