

Nameless in Cyberspace Anonymity on the Internet

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Proposals to limit anonymous communications on the Internet would violate free speech rights long recognized by the Supreme Court. Anonymous and pseudonymous speech played a vital role in the founding of this country. Thomas Paine's *Common Sense* was first released signed, "An Englishman." Alexander Hamilton, John Jay, James Madison, Samuel Adams, and others carried out the debate between

Federalists and Anti-Federalists using pseudonyms. Today, human rights workers in China and many other countries have reformed the link between anonymity and free speech.

Given the importance of anonymity as a component of free speech, the cost of banning anonymous Internet speech would be enormous. It makes no sense to treat Internet speech differently from printed leaflets or books.

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Introduction

In a 1997 decision, a federal district court in Georgia invalidated a state law criminalizing anonymous and pseudonymous Internet communications.¹ In so doing, the court issued a decision consistent with centuries of American tradition and jurisprudence. Throughout the history of this country, pseudonymous and anonymous authors have made a rich contribution to political discourse. Had the court held any other way, it would have fallen into the common trap of treating the Internet as *sui generis*, unrelated to any prior communications media. Instead, the court correctly recognized that there is no distinction to be drawn between anonymous communications on the “Net” and in a leaflet or a book.²

Unfortunately, the threats to anonymous Net discourse have continued to proliferate since the Georgia decision. U.S. and foreign law enforcement authorities continue to regard anonymity as a threat to public order. Various pending proposals would encourage, or mandate, changes to the infrastructure of the Net that would eliminate it as a medium for anonymous discourse.

Anonymity and Pseudonymity, Cornerstones of Free Speech

Controversial and thought-provoking speech has frequently been issued from under the cover of anonymity by writers who feared prosecution or worse if their identities were known. *Cato’s Letters*, an influential series of essays about freedom of speech and political liberty first appearing in 1720, were written by two British men, John Trenchard and Thomas Gordon, under the pseudonym “Cato.”³ *Cato’s Letters* had a wide following in America:⁴ Benjamin Franklin and numerous colonial newspapers reprinted the letters; John Adams and Thomas Jefferson both quoted Cato.⁵ “In the history of political liberty as well as of freedom of speech and press, no 18th-century work exerted more influ-

ence than *Cato’s Letters*,” historian Leonard Levy has written.⁶

In 1735, John Peter Zenger was arrested for seditious libel for publishing pseudonymous essays by Lewis Morris, James Alexander, and others attacking New York governor William Cosby.⁷ Zenger, a German printer who immigrated to the United States, also republished several of *Cato’s Letters*. Andrew Hamilton of Philadelphia defended Zenger. In his stirring oration to the jury, he asked them to lay “a foundation for securing to ourselves, our posterity, and our neighbors” the right of “exposing and opposing arbitrary power . . . by speaking and writing truth.”⁸ The jury’s acquittal of Zenger helped to end common law prosecutions of American writers and publishers under British common law.

Thomas Paine’s *Common Sense*, acclaimed as the work that first sparked Americans to think of separating from Britain, was first published signed simply “An Englishman.”⁹ Perhaps equally famous, Alexander Hamilton, John Jay, and James Madison wrote *The Federalist Papers* under the joint pseudonym “Publius.”¹⁰ They were answered by the Anti-Federalists, who wrote under such names as “A Federal Farmer” (Richard Henry Lee),¹¹ “Candidus” (Samuel Adams),¹² and even another “Cato” (Gov. George Clinton).¹³

In the following century, as the tensions between North and South mounted, many writers on the volatile issue of slavery also shielded themselves behind pseudonymous identities.¹⁴ For example, “A Colored Baltimorean”¹⁵ wrote that black people considered themselves American and desired to live in America in equality. “Communi paw” wrote about black economic and social life and about racial prejudice among white abolitionists.¹⁶ Women abolitionists writing pseudonymously included “Magawisca”¹⁷ and “Zillah,”¹⁸ who suggested that abolitionists should confront inequality within their own movement.

Pseudonymity has continued to play an important role in political speech in this century. George Kennan, a high-ranking member of the staffs of General George C. Marshall

and President Harry S Truman and considered by many to be the architect of America's postwar policy of "containment," signed his influential 1947 essay, "The Sources of Soviet Power," merely as "X."¹⁹ Politicians, including presidents, communicate anonymously with the press when they wish to express ideas or communicate information without attribution; press reports are full of quotes attributed to sources such as "a senior State Department official" or "a senior White House staff member." Pseudonymity has also protected people stigmatized by prior political speech or association; many blacklisted writers continued to work throughout the McCarthy era by using names other than their own.²⁰

The Supreme Court on Anonymous Speech

The Supreme Court has consistently held that anonymous and pseudonymous speech is protected by the First Amendment. In its most recent statement, *McIntyre v. Ohio Campaign Commission*,²¹ the Court invalidated an Ohio ordinance requiring the authors of campaign leaflets to identify themselves.²² The Mrs. McIntyre in the case had been fined for handing out anonymous leaflets during a local school board campaign.²³ The Court repeated what it had said in *Talley*: "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind."²⁴ It recognized that an author may have a variety of valid motives for shielding her identity:

The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible.²⁵

The Court compared the Ohio ordinance to the newspaper right-of-reply law it had invalidated in *Miami Herald Publishing Co. v. Tornillo*,²⁶ noting that the ordinance com-

pelled speakers to add their own names as part of the content. "[T]he identity of the speaker is no different from other components of the document's content that the author is free to include or exclude."²⁷

Anonymity, the Justices pointed out, "provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent."²⁸

The Court astutely placed Mrs. McIntyre's leaflet in the context of centuries of anonymous political discourse. "Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority."²⁹ Though the Supreme Court usually refers only to prior case law and scholarly legal writings in its holdings, in this case the Justices took the unusual measure of citing John Stuart Mill's *On Liberty* in support of the proposition that anonymity is a protection against the majority's tyranny.³⁰

McIntyre was not a lightning bolt from the blue but the culmination of a consistent and carefully reasoned series of cases dating back to the 1950s. In its earlier jurisprudence, the Court repeatedly upheld the right of the NAACP to keep its membership lists secret from state prying.³¹ Later, citing an astonishing record of federal government harassment and dirty tricks, the Court excused the Ohio Socialist Workers' Party from state requirements that it disclose its list of contributors.³² Moreover, the Court had also previously invalidated a Los Angeles ordinance against the distribution of anonymous leaflets.³³

The parallel between Mrs. McIntyre's leaflet and an unsigned Web page or e-mail on a political topic is obvious. Nevertheless, people who fail to see the analogy between the Internet and the print media continue to call for a ban on anonymity in cyberspace.

The Georgia Law

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H.B. 1630, an amendment to the state's Computer Systems Protection Act, making it a misdemeanor for one "knowingly to transmit any data through a computer network [using] any individual name . . . to falsely identify the person . . . transmitting such data."³⁴ Immediately a group of plaintiffs, including the American Civil Liberties Union and the author of this paper, brought suit in federal district court in Georgia challenging the constitutionality of the law.³⁵ The district court granted a preliminary injunction against enforcement of the law, holding that "the statute's prohibition of internet transmissions which 'falsely identify' the sender constitutes a presumptively invalid content-based restriction" under *McIntyre*.³⁶

The court concluded that the statute was vague and overbroad because it was "not drafted with the precision necessary for laws regulating speech. On its face, the act prohibits such protected speech as the use of false identification to avoid social ostracism, to prevent discrimination and harassment, and to protect privacy . . . a prohibition with well-recognized First Amendment problems."³⁷

The preliminary injunction was later converted into a permanent one and the state of Georgia decided not to take an appeal, so the district court's ruling became the final and definitive statement on H.B. 1630.

Critiques of Cyberspace Anonymity

"The ultimate implication, I believe, is that to achieve a civilized form of cyberspace, we have to limit the use of anonymous communications," David Johnson wrote in "The Unscrupulous Diner's Dilemma and Anonymity in Cyberspace."³⁸ In a *Columbia Law Review* note published in October 1996, Noah Levine called for "a simple statute . . . requiring administrators of anonymous remailers to maintain records of users in a manner which allows for the identification of senders of specific messages."³⁹ Levine, like

most commentators on this side of the issue, failed to say why *McIntyre* would not apply in cyberspace.

The Supreme Court said in *Reno v. ACLU*⁴⁰ that "[t]hrough the use of Web pages, mail exploders and newsgroups, [any Net user] can become a pamphleteer."⁴¹ As the Court recognized, a Web page is an electronic leaflet. However, if proponents of Internet anonymity legislation have their way, the same text may be treated differently depending on whether it is printed on paper or stored in electronic form. The proponents therefore incur a responsibility to explain why Internet communications are to be treated differently from print communications.

There are a limited number of legal theories that advocates of regulation have used to justify such treatment. The two most important ones have already been rejected by the Supreme Court. Radio and broadcast television have been more tightly regulated than print media on the basis of a theory of "spectrum scarcity,"⁴² and a "pervasiveness" doctrine first raised in the *Pacifica*⁴³ ("seven dirty words") case has been used to justify the regulation of speech disseminated by both broadcast and cable media. Although no one can reasonably argue that the Internet is a "scarce" medium, proponents of Internet censorship relied very heavily on the argument that the Net is "pervasive," meaning that it comes into the house and may present speech inappropriate for minors. This year, in affirming the unconstitutionality of the Communications Decency Act,⁴⁴ the Supreme Court decisively held that the Internet is not "scarce": "[T]he Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communications of all kinds."⁴⁵ Nor is it a "pervasive" medium under *Pacifica*: "[T]he Internet is not as 'invasive' as radio or television."⁴⁶

Another argument sometimes raised by proponents of Internet speech regulation is even less supported by case law: that marginal speech on the Net is more dangerous than the same speech in print because it reaches larger audiences more easily. For example, in

defending the regulation of violent speech on the Internet, law professor Cass Sunstein wrote, "Suppose that an incendiary speech, expressly advocating illegal violence, is not likely to produce lawlessness in any particular listener or viewer. But of the millions of listeners, one, or two, or ten, may well be provoked to act, and perhaps to imminent, illegal violence."⁴⁷ However, the proposition that controversial speech is acceptable so long as it reaches only a very few listeners flies directly in the face of the governing metaphor of First Amendment jurisprudence, as stated by Justice Holmes: "The ultimate good desired is better reached by free trade in ideas. . . . The best test of truth is the power of the thought to get itself accepted in the competition of the market."⁴⁸ Sunstein, by contrast, argues that government must intervene whenever controversial speech is about to gain acceptance in the marketplace of ideas.⁴⁹

A closely related argument is that anonymous speech is more dangerous on the Internet because of the lack of gatekeepers—such as publishers, editors, or television producers—who may know the identity of the anonymous speaker or filter out anonymous speech. However, that argument is also highly anti-democratic and opposed to free markets because it presupposes that anonymous speech is acceptable only if prescreened by an informed elite. "Such an elitist attitude should not be part of modern free speech philosophy," writes attorney Lee Tien in an informative article on the applicability of *McIntyre* to cyberspace.⁵⁰

No gatekeeper stood between Mrs. McIntyre and her intended audience. In order to reconcile *McIntyre* with a pro-regulation view based on the lack of gatekeepers, it is necessary to drag in Cass Sunstein's volume argument as well. According to that view, Mrs. McIntyre's actions were permissible because her audience was very small. Here you have two elitist arguments for the price of one.

Since the Georgia decision, law enforcement authorities have continued to push for the elimination of anonymity on the Internet.⁵¹ On December 17, 1997, law

enforcement officials from the United States and seven other industrialized countries issued a joint statement calling for "information and telecommunications systems" to be "designed to help prevent and detect network abuse." According to an article in *Communications Daily*, "It would be helpful to law enforcement if information sent over the Internet were tagged, and packets would transmit information reliably as to where they came from, including user and service provider, officials said."⁵²

A few months later, FBI director Louis Freeh testified to a Senate appropriations subcommittee about child pornography, encryption, and the traceability of e-mail. His prepared remarks stated: "The telephone industry is required by FCC regulation to maintain subscriber and call information for a fixed period of time. It would be beneficial for law enforcement if Internet service providers adopt a similar approach for retaining subscriber information and records for screen names and associated Internet working protocol numbers, or 'IP addresses.'"⁵³

Laws requiring the disclosure of identity in cyberspace would require far-reaching changes in Internet technology. Today, one can set up an Internet account without one's full name being stored anywhere on the Internet; in fact, by setting up accounts on a private network attached to the Internet, users may gain use of the Net without placing their identities on file anywhere at all. Anonymity and pseudonymity are built into the architecture of the Net. Legislators should be particularly wary of laws requiring sweeping changes to communications technology in order to serve speech-restricting goals.

Conclusion

Problems linked to anonymity, such as difficulty in tracing hackers and perpetrators of online fraud,⁵⁴ must find other solutions. Better security practices as a preventive measure are a logical first step.⁵⁵ Around the world, many governments refuse to protect their citi-

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Anonymous and pseudonymous speech on the Internet is entitled to First Amendment protections.

zens' basic rights, including the right of free speech. Anonymous Internet communications may be the only way to ensure those regimes' accountability.⁵⁶ For example, Lance Cottrell, CEO of anonymizer.com, has recently joined forces with Professor Lord Alton, long active in human rights work, to offer Chinese citizens anonymous access to a site and survey on Chinese population control.⁵⁷

Anonymous and pseudonymous speech on the Internet forms a part of the rich tradition of such speech in prior media, including print, and is entitled to the same First Amendment protections. Legislation against anonymity threatens to end that rich tradition and should be opposed. If such legislation is passed, we can be confident that the Supreme Court will again find it inconsistent with our Constitution and our history.

Notes

1. *ACLU v. Miller*, 977 F. Supp. 1228 (N.D. GA) (1997).

2. *Ibid.*

3. Leonard W. Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985), pp. 109–18. See also John Trenchard and Thomas Gordon, *Cato's Letters* (Indianapolis, Ind.: Liberty Fund, 1995).

4. Clinton Rossiter notes the influence of the letters, saying, "No one can spend any time in the newspapers, library inventories, and pamphlets of colonial America without realizing that Cato's Letters rather than Locke's Civil Government was the most popular, quotable, esteemed source of political ideas in the colonial period." Clinton Rossiter, *Seedtime of the Republic* (New York: Harcourt, Brace & World, 1953), p. 141. See generally Bernard Bailyn, *Pamphlets of the American Revolution, 1750–1776* (Cambridge, Mass.: Harvard University Press, 1965), pp. 28–29.

5. Leonard W. Levy, *Freedom of the Press: From Zenger to Jefferson* (New York: Bobbs-Merrill, 1966), pp. xxvi, 114.

6. *Ibid.*

7. See generally James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1963), pp. 1–25.

8. Levy, *Emergence of a Free Press*, pp. 43–44.

9. David Freeman Hawke, *Paine* (New York: Harper & Row, 1974), p. 44.

10. See Jacob Cooke, ed., *The Federalist* (Middletown, Conn.: Wesleyan University Press, 1961).

11. "A Federal Farmer" was Richard Henry Lee. Lee was a signer of the Declaration of Independence and had been president of the Continental Congress. *Ibid.*, p. 142. Not to be confused with "A Farmer," a pseudonym probably of John Francis Mercer, a law student of Thomas Jefferson's. "On the issues of a bill of rights, political parties, and especially representation and simple versus complex government, the argument of this Maryland writer is indispensable to the student of Anti-Federalism." *The Complete Anti-Federalist*, ed. Herbert J. Storing (Chicago: University of Chicago Press, 1981), vol. 5, p. 5.

12. "Candidus" was used by both Samuel Adams and Benjamin Austin Jr. One of Adams's essays shows that at least one of the Framers understood the problem of overspending and national debt, "warning against the tendency to blame on a lack of energy in government what is really due to dissipation and living beyond the means available; the remedy is to be found, not in government reform, but in industry and frugality." *The Complete Anti-Federalist*, vol. 4, p. 124.

13. "Cato" was potentially Gov. George Clinton. See *The Complete Anti-Federalist*, vol. 2, p. 101.

14. William Lloyd Garrison, the editor of *The Liberator*, an abolitionist paper, was subject to potential retaliation. "Several black abolitionists followed him from his office to his Roxbury residence each night to protect him from physical attacks." *The Black Abolitionist Papers: Volume III: The US, 1830–1846*, ed. C. Peter Ripley et al. (Chapel Hill: University of North Carolina Press, 1991), p. 10.

15. "A Colored Baltimorean" was William Watkins, a freeborn and educated black man. He served as minister and doctor to the blacks of Baltimore and opened up a school for blacks when he was only 19. Later, he wrote for Frederick Douglass's paper under the name "A Colored Canadian." *Ibid.*, p. 97.

16. "Communi paw" was James McCune Smith, who held a doctorate degree in medicine and opened the first black-owned pharmacy. "Smith helped define many of the themes of the black abolitionist movement." *Ibid.*, p. 350.

17. "Magawisca" (who also used the pseudonyms

- “A” and “Ada”) was Sarah L. Forten, a founding member of the Philadelphia Female Anti-Slavery Society. Her works appeared in Garrison’s newspaper, *The Liberator*. *Ibid.*, p. 145. Her brother, James Jr., also wrote for *The Liberator* under the pseudonym “F.” *Ibid.*, p. 164.
18. “Zillah” was Sarah M. Douglass. She was one of the first to open a school for women and eventually taught medicine and physiology.
19. George Kennan, *Memoirs 1925–1950* (Boston: Little, Brown & Co., 1967), pp. 354–67.
20. Margaret Blanchard, *Revolutionary Sparks* (New York: Oxford University Press, 1992), p. 237.
21. *McIntyre v. Ohio Campaign Commission*, 514 U.S. 334, 115 S.Ct. 1511 (1995).
22. Ohio Rev. Code Ann. § 3599.09(A) (1988).
23. *McIntyre*.
24. *Ibid.* at 341 (citing *Talley v. California*, 362 U.S. 60, 64, 80 S.Ct. 536, 538) (1960).
25. *Ibid.* at 342.
26. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831 (1974).
27. *McIntyre* at 348.
28. *Ibid.* at 342.
29. *Ibid.* at 357.
30. *Ibid.*
31. *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163 (1958); *NAACP v. Alabama*, 360 U.S. 240, 79 S.Ct. 1001 (1959); *NAACP v. Alabama*, 377 U.S. 288, 84 S.Ct. 1302 (1964).
32. *Brown v. Socialist Workers ’74 Campaign Commission* (Ohio), 459 U.S. 87, 103 S.Ct. 416 (1982).
33. *Talley v. California*, 362 U.S. 60, 64, 80 S.Ct. 536, 538 (1960).
34. Act. No. 1029, GA Laws 1996, GA Statute p. 1505, codified at O.C.G.A. §§ 16-9–93.1
35. *ACLU v. Miller*.
36. *Ibid.* at 1232.
37. *Ibid.* at 1233.
38. March 4, 1994, essay available at <http://www.eff.org/>.
39. Noah Levine, “Note: Establishing Legal Accountability for Anonymous Communication in Cyberspace,” *Columbia Law Review* 96 (October 1996): 1526, 1561.
40. *ACLU v. Reno*, 117 S.Ct. 2329 (1997).
41. *Ibid.* at 2344.
42. See generally *Denver Area Telecommunications Consortium v. FCC*, 116 S.Ct. 2374 (1996).
43. *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026 (1978).
44. 47 U.S.C.A. § 223(a)(1), § 223(d), § 223(e)(5)(A) *supp.* 1997.
45. *ACLU v. Reno* at 2344.
46. *Ibid.* at 2343; Jonathan D. Wallace, “The Specter of Pervasiveness: *Pacifica*, New Media, and Freedom of Speech,” Cato Institute Briefing Paper no. 35, February 12, 1998, pp. 7–9.
47. Cass Sunstein, “Constitutional Caution,” *1996 University of Chicago Legal Forum*, pp. 361, 370, 1996.
48. *Abrams v. U.S.*, 250 U.S. 616, 630, 40 S.Ct. 17, 22 (1919) (Holmes, J., dissenting).
49. Cass Sunstein, “The First Amendment in Cyberspace,” *Yale Law Journal* 104 (May 1995): 1757.
50. Lee Tien, “Who’s Afraid of Anonymous Speech? McIntyre and the Internet,” *Oregon Law Review* 75 (Spring 1996): 117, 152.
51. Justice Department prosecutor Philip Reitingger has argued that true anonymity destroys the hope of catching criminals. “I think we are perilously close to a lose-lose situation in which citizens have lost their privacy to commercial interests and criminals have easy access to absolute anonymity.” Steve Lohr, “Privacy on Internet Poses Legal Puzzle,” *New York Times*, April 19, 1999, p. C4.
52. “Internet Change Focus of International Law Enforcement,” *Communications Daily*, December 17, 1997.
53. Louis Freeh, Testimony before Senate Appropriations Subcommittee, March 10, 1998, quoted in e-mail of Declan McCullagh to “nym” list, March 10, 1998.
54. Network-clogging anonymous spam is another problem associated with anonymity, but approaches other than banning anonymity are available there as well. They include blacklisting Internet service providers that host spammers; fil-

ters; or perhaps, ultimately, pricing plans that compensate Internet service providers for the bandwidth a sender actually uses.

55. See Michael J. Sniffen, "FBI Hunts Federal Hackers," *AP Online*, June 1, 1999; see also Lauren Thierry and Casey Wian, "Putting an End to Internet Fraud, CNNfn," CNNfn, *Business Unusual*, August 2, 1999, Transcript #99080201FN-12 (describing Ebay's escrow and insurance services to protect customers from fraud in online auctions).

56. The American Association for the Advancement of Science reached the same conclusion in its report on anonymity. See <http://www.slis.indiana.edu/TIS>. Al Teich, director of Science and Policy Programs at AAAS, notes that "if anonymous communication is used for illegal purposes, the origina-

tors of the anonymous messages—if they can be found—should be punished. However, the positive values of anonymity more than offset the dangers it presents." Jonathan Wallace, "AAAS Urges Caution in Regulating Anonymous Communication on the Internet," Red Rock Eater News Service, Monday, July 19, 1999.

57. "Anonymizer.com & Lord Alton Partnership Extends Freedom of Speech to Victims of Human Rights Abuses in China," *PR Newswire*, August 23, 1999, electronic document. Using "military strength encryption, anonymizer.com's gateway shields the activities of users from prying eyes, protecting their rights both legally and technically. Individuals accessing the site are free to read its content and report on human rights abuses, without fear of government retaliation."

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