Anonymity and pseudonymity: Free speech's problem children

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Anonymity and pseudonymity: Free speech's problem children

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Through comparative analysis of United States, English, German and European Court of Human Rights jurisprudence, this article considers the viability of relying exclusively on either speaker *or* audience *interests to underpin a free speech right within the context of anonymous and pseudonymous social media and online speech. It argues that this approach, which has hitherto been applied in these jurisdictions, can lead to a 'double-edged sword': on the one side, pursuant to* audience *interests, people may be dissuaded from participating in the exchange of information and ideas, because their anonymity or pseudonymity is not protected; on the other side, a constitutionally protected right to free speech based entirely on* speaker *interests could inadvertently protect unwanted and damaging speech.*

Introduction

It has been recognised, both by legal scholars, and within the context of legal practice, that social media, and the internet generally, facilitates anonymous and pseudonymous expression.[1] This article begins by briefly introducing the concepts of *speaker* and *audience* interests. It does this by setting out, in broad terms, the arguments that are analysed in detail throughout this article in favour and against these conflicting interests. The following section sets out how free speech is treated in England, in the United States and by the European Court of Human Rights ('ECtHR'). It establishes that English[2] jurisprudence has traditionally treated free speech, and by extension anonymous and pseudonymous expression, not as a right, but rather as a liberty, in that it exists only where its exercise is not restricted by law; a position predominantly based on *audience* interests, rather than that of the *speaker*. It argues that this position has evolved to an extent. Consequently, a right to free speech, and therefore anonymous and pseudonymous expression, does, in fact, exist as part of the free speech guarantee. However, this right is not absolute and, as a result, is only subject to a *level* of protection. This view is then compared with the

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[1] For legal scholarship, see generally Saul Levmore, 'The Internet's Anonymity Problem' in Saul Levmore and Martha C Nussbaum (eds), *The Offensive Internet* (Harvard University Press, 2010) 50; Jamie Bartlett, *The Dark Net: Inside the Digital Underworld* (Random House, 2014) ch 2; Eric Barendt, *Anonymous Speech* (Hart Publishing, 2016) ch 6; Bruce Baer Arnold, 'Has Social Media Really Shifted the Line Between Personal and Private Forever?' on *Inforrm's Blog* (13 October 2016) <https://inforrm.org/2016/10/13/has-social-media-really-shifted-the-line-between-personal-and-private-forever-bruce-baer-arnold/>. In relation to UK legal practice, see the Director of Public Prosecution's comments relating to Crown Prosecution Service guidelines on prosecuting online crimes, including trolling: BBC News, *Internet Trolls Targeted With New Legal Guidelines* (10 October 2016) <www.bbc.com/news/uk-37601431>.

[2] References to 'English law' mean the law and jurisprudence of England and Wales.

polarised position of the US (and to an extent, Germany) in which exists a clearly recognised *speaker* interests-orientated right to anonymous and pseudonymous speech, which is subject to constitutional protection. What is apparent from the Strasbourg case law is that protection afforded for anonymous and pseudonymous expression falls short of an absolute right. Consequently, at present at least, it seems to sit, rather opaquely, somewhere between the two sides. This feeds in to an examination of the problems that are symptomatic of relying exclusively on either *speaker* or *audience* interests at the expense of the other. It is argued that, particularly in the modern context of online and social media expression, this bifurcated approach, which has hitherto been applied in England, Europe and the US, can lead to a 'double-edged sword': on the one side, pursuant to *audience* interests, people may be dissuaded from participating in the exchange of information and ideas, because their anonymity or pseudonymity is not protected; on the other side, a constitutionally protected right to free speech based entirely on *speaker* interests could inadvertently protect unwanted and damaging speech. This argument is considered through the lens of three specific harms[3] that can emanate from anonymous and pseudonymous speech which are, arguably, better regulated by an *audience*-orientated approach.

Introducing the concepts of speaker and audience interests

As set out above, this article considers the contrasting positions of English, European and US jurisprudence in respect of reliance on *speaker* or *audience* interests. What these concepts mean in practice will depend on whether they are, in any given context, underpinned by free speech or privacy rationales. By way of introducing these concepts, the following paragraph sets out the broad arguments in favour and against the competing interests. These arguments are applied and analysed in-depth throughout the article.

The privacy rationale for anonymity and pseudonymity underpins the right to keep certain information secret, including the *speaker's* identity.[4] From a freedom of expression rationale perspective, protecting the *speaker* interests, by preserving their anonymity or pseudonymity, will encourage them, and others, to speak more freely, and therefore will facilitate the dissemination of more information; if they are permitted to communicate anonymously or pseudonymously they do not need to fear harassment or prosecution.[5] So far as *audience* interests are concerned, there are conflicting arguments. On the one hand, it can be said that the anonymity or pseudonymity of the *speaker* can benefit the *audience*, in so far as it promotes free speech, as an anonymous or pseudonymous *speaker* is more inclined to impart information to the *audience* for the reasons set out above. On the other hand, the *audience* interest will usually favour transparency, for the following reasons: (i) knowing the identity of the *speaker* enables the *audience* to evaluate the *speaker's*

[3] The three harms considered are: (i) the absence of 'responsible' intermediaries; (ii) the proliferation of 'fake news'; and (iii) the fact that victims of, for instance, cyber-bullying, hate crime and defamation are not able to identify the origin of the communication.

[4] See David Kaye, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc A/HRC/29/32 (22 May 2015) [16]ff; Jan Oster, *European and International Media Law* (Cambridge University Press, 2017) 47. The privacy rationale for anonymity and pseudonymity is considered in light of Eady J's judgment in *Author of a Blog v Times Newspapers Ltd* [2009] EMLR 22 ('*Author of a Blog*').

[5] Oster, *European and International Media Law*, above n 4; Richard Arnold and Mira T Sundara Rajan, 'Do Authors and Performers Have a Legal Right to Pseudonymity' (2017) 9(2) *Journal of Media Law* 189, 198.

veracity; (ii) if the *speaker's* identity is known they are more likely to express themselves responsibly, and less likely to engage in harmful, offensive, irresponsible and damaging speech; and (iii) remedial action and/or prosecution with respect to damaging, offensive and harmful speech is easier to facilitate if the identity of the *speaker* is known.[6]

Anonymous and pseudonymous speech: a polarisation of law and jurisprudence

Through recourse to both statute and case law relating, where possible, to online and social media expression, this section considers how the respective law has been applied to anonymous speech. In doing so, it looks at jurisdictions that have opposing views as to the extent to which such expression is protected.

The view from England and the European Court of Human Rights: a qualified right to anonymous and pseudonymous speech

In his book *Anonymous Speech*,[7] Barendt provides a detailed history of anonymous and pseudonymous speech in England. What is clear is that, despite this established tradition, and unlike the US, where a strong constitutional *right* to anonymous speech has emerged, in England an *absolute right* is not recognised.[8] This position derives from how freedom of expression has historically been treated under English law: as a bare or residual liberty rather than a right, existing only where the law does not restrict its exercise.[9] Thus, traditionally at least, the 'freedom lives … in the gaps of the criminal and civil law'.[10] However, as illustrated by cases such as *Brutus v Cozens*[11] and *Redmond-Bate v DPP*,[12] a stronger principle of free speech has been applied by the courts to narrowly interpret legislation so that the respective statute's interference with freedom of expression is minimised. Equally, a common law right to free speech has been established by jurisprudence relating to, for instance, the creation and development of defences of fair comment and public interest privilege to libel

[6] Arnold and Rajan, above n 5, 198.
[7] Barendt, *Anonymous Speech*, above n 1, ch 2.
[8] For the US and German positions, see below. This view on the positions of English and US law is supported by Arnold and Rajan, above n 5, 197.
[9] Barendt, *Anonymous Speech*, above n 1, 81, 89. Barendt provides examples of laws such as obscenity, libel and contempt of court, which have restricted the application of freedom of expression.
[10] Ibid.
[11] [1973] AC 854. The House of Lords held that the word 'insulting', pursuant to s 5 of the *Public Order Act 1936*, 1 Edw 8 and 1 Geo 6, c 6, should not be interpreted to penalise the use of offensive language during an anti-apartheid demonstration at Wimbledon.
[12] [2000] HRLR 249. The case related to three women Christian fundamentalists who were preaching from the steps of Wakefield Cathedral. Fearing a breach of the peace amongst the crowd, a police officer asked the women to stop, and subsequently arrested them for wilfully obstructing an officer in the execution of his duty contrary to s 89(2) of the *Police Act 1996* (UK). The Court of Appeal held that the police had no right to stop citizens engaging in lawful conduct, unless there were grounds to fear that it would, by interfering with the rights or liberties of others, provoke violence which in those circumstances might not be unreasonable. Accordingly, the preachers were entitled to say things which members of their audience may find irritating or controversial, but they did not threaten or provoke violence. As a result, the police officer was not acting in the execution of his duty when he told them to stop.

actions.[13] The protection afforded to freedom of expression was augmented further by the incorporation of the European Convention on Human Rights ('ECHR'), including the art 10 right to freedom of expression, into English law by the *Human Rights Act 1998* ('HRA 1998'). Pursuant to HRA 1998 s 6(1), the courts must take account of the right when developing the common law. Similarly, s 3 imposes an obligation on the judiciary to interpret legislation in conformity with art 10. As a result, it is no longer correct to regard free speech as a mere residual liberty.[14]

How do these developments relate to online speech and, in particular, social media expression, in the context of anonymous and pseudonymous communication? As set out above, it is submitted that, as is the case with the print and broadcast media, there is, under English law, a right, albeit not an *absolute* one, to communicate anonymously and pseudonymously online and via social media.[15] However, this type of communication is subject to the same legal restrictions that can be applied to the traditional media, such as public order laws, laws relating to hate speech, obscenity laws, the *Protection from Harassment Act 1997* (UK)[16] and, more specifically, s 127 of the *Communications Act 2003* (UK)[17] and ss 32[18] and 33[19] of the *Criminal Justice and Courts Act 2015* (UK). In the context of civil liability and, in particular, the protection of reputation, s 5 of the *Defamation Act 2013* (UK) provides website operators with a defence to defamation actions where an operator did not, itself, post the allegedly defamatory imputation on the website. The defence will operate so long as the claimant can identify the speaker who posted the imputation, or the operator takes steps to provide the claimant with the speaker's full name and address or, if the speaker prefers, to remove the statement from the website.[20] Consequently, the only way anonymous speakers will be able to keep their defamatory statements on websites is with the website operator's assistance. This is unlikely as the operator is then, by default, exposed to liability. Thus, these provisions, relating to both criminal and civil liability, appear to suggest that online anonymous communication is, to an extent,

[13] See, eg, *Silkin v Beaverbrook Newspapers Ltd* [1958] 1 WLR 743; *Spiller v Joseph* [2011] 1 AC 852 [107]–[108]; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127; *Jameel v Wall Street Journal Europe* [2007] 1 AC 359.

[14] Barendt, *Anonymous Speech*, above n 1, 90.

[15] The existence of such a right is demonstrated by s 10 of the *Contempt of Court Act 1981* (UK) which provides that a court cannot compel a person to disclose, nor is a person guilty of contempt of court for refusing to disclose, the source of information contained within a document for which that person is responsible, unless the court is satisfied that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

[16] Jacob Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71 *Cambridge Law Journal* 355, 357–65.

[17] This provision makes it an offence to send through a public electronic communications network a message which is 'grossly offensive or of an indecent, obscene, or menacing character'. For analysis of this provision see Peter Coe, 'The Social Media Paradox: An Intersection with Freedom of Expression and the Criminal Law' (2015) 24(1) *Information & Communications Technology Law* 16, 31–5. See also *DPP v Woods* (Unreported, Chorley Magistrates Court, 8 October 2012); *Chambers v DPP* [2013] 1 All ER 149.

[18] This amended the offence of sending a letter, electronic communication or article of any description which conveys a threat or abuse, pursuant to s 1 of the *Malicious Communications Act 1988* (UK), to a triable either way offence. The amendment was made partly to tackle concerns over an increase in 'cyber-bullying'.

[19] This provision has made 'revenge porn' a specific triable either way offence. It is defined as '[d]isclosing private sexual photographs and films with intent to cause distress', and covers the sharing of images, both online and offline. This means that images posted over the internet and via social media, as well as those distributed by text message, email or in hard copy, are captured.

[20] For detailed analysis of this provision see James Price QC and Felicity McMahon (eds), *Blackstone's Guide to the Defamation Act 2013* (Oxford University Press, 2013) ch 6.

discouraged, and clearly have the potential to limit freedom of anonymous and pseudonymous speech. Therefore, they could be subject to challenge. However, it is likely that this would be met with strong arguments to the contrary, as the courts are unlikely to favour submissions that they should not be applied when they operate to protect victims of, for instance, cyber-bullying, revenge porn and defamatory attacks.[21]

The existence or otherwise of a right to anonymity was considered in *Author of a Blog v Times Newspapers Ltd*[22] as an element of personal privacy, as opposed to an aspect of the right to freedom of expression. The case concerned a blog, known as *NightJack*.[23] The author of the blog used it as a platform for discussing his work as a serving police officer. Within these discussions he was extremely critical of government ministers and police operations. Indeed, in his judgment, Eady J was of the opinion that much of what the claimant published could be characterised as 'political speech'.[24] *The Times* wanted to reveal the blogger's identity;[25] consequently he applied to the court for an interim injunction to restrain the newspaper from publishing any information that could lead to his identification as the person responsible for the blog. Hugh Tomlinson QC, on behalf of the claimant, argued in terms of his right to privacy. However, it is arguable that, additionally, some of the arguments were underpinned by the free speech rationale. Both the privacy and free speech arguments were predominantly based on the interests of the *speaker*. He advanced the argument that the claimant, and other bloggers, would be 'horrified' if their anonymity could not be protected,[26] a proposition clearly based on the privacy rationale that anonymity (and by extension pseudonymity) allows speakers to keep certain information secret, including their identity.[27] He submitted, firstly, as a general proposition, that 'there is a public interest in preserving the anonymity of bloggers'.[28] It is submitted that this argument is founded on the free speech rationale, and is based, foremost, on *speaker* interests, as preserving the anonymity of bloggers enables them to exercise their right to impart information and ideas, as guaranteed by the ECHR art 10(1) (and that, conversely, revealing their identity would restrict their right to do this).[29] Secondly, he suggested that there was no public interest in the disclosure of the claimant's identity, as the publication of such information would make no contribution to a debate of general interest.[30] In giving judgment for the defendant,

[21] Barendt, *Anonymous Speech*, above n 1, 90.
[22] [2009] EMLR 22.
[23] Which, incidentally, had been awarded the Orwell Prize for citizen journalism in 2009.
[24] *Author of a Blog* [2009] EMLR 22 [24].
[25] Interestingly, this case dealt with rather unique circumstances: *The Times* journalist had identified the claimant by deduction not, as was accepted by counsel for the claimant, by breach of confidence. Therefore, the matter related to whether an enforceable right to maintain anonymity existed in the situation where another person has been able to deduce the identity in question. Eady J recognised that bloggers generally may want to conceal their identity. However, in relying on *Mahmood v Galloway* [2006] EMLR 26, Eady J stated that it is a 'significantly further step to argue, if others are able to deduce their [the claimant's] identity, that they [*The Times*] should be restrained by law from revealing it'. Thus, potentially at least, the situation may be different if the identity of the speaker could not be deduced but, for example, a newspaper wanted to disclose it: ibid [3], [9]–[10].
[26] Ibid [4].
[27] Kaye, above n 4, [16]ff; Oster, *European and International Media Law*, above n 4, 47.
[28] [2006] EMLR 26 [5].
[29] Ibid [18]. Of course, there is the secondary argument that preserving the anonymity of bloggers protects the *audience* interest in receiving information of public interest, as bloggers may be dissuaded from doing so should their identity be compromised.
[30] Ibid [22].

Eady J did not expressly accept or reject any arguments based on the free speech rationale by the claimant. However, he rejected the claimant's application, and their privacy arguments, on the ground that 'blogging is essentially a public rather than a private activity',[31] consequently the claimant had no reasonable expectation of privacy.[32] He went on to state that even if this requirement had been met, the public interest in revealing that a police officer was expressing strong criticism of the police and political figures outweighed his right to privacy[33] and that revealing his identity enabled readers to assess his veracity.[34] Thus, the judgment seems, largely, to ignore any *speaker*-orientated arguments based on the free speech rationale advanced on behalf of the claimant and, rather, based on the interests of the *audience*, disagrees with counsel's second argument.

A discrete area of English law where the privacy rationale has successfully been applied to protect anonymity relates to *Norwich Pharmacal* orders.[35] For instance, in *Totalise plc v The Motley Fool Ltd*[36] the claimant had successfully applied for such an order for the disclosure by *Motley Fool* of the identity of a third party who had posted, pseudonymously, defamatory comments of the claimant on a bulletin board. In giving the judgment of the Court of Appeal, Aldous J said that in such cases 'the court must be careful not to make an order which unjustifiably invades the right of the individual to respect for his private life' and that there was 'nothing in Article 10' which supported the argument that 'it protects the named but not the anonymous' and that 'there are many situations in which … the protection of a person's identity from disclosure may be legitimate'.[37] Consequently, as observed by Arnold and Rajan, in the context of pseudonymity specifically:

> [c]onsistently with [*Totalise*] there have been cases … in which *Norwich Pharmacal* orders for the disclosure of the identities of pseudonymous persons posting on chatrooms and websites have been refused on the ground that the wrongs alleged against them did not justify invading their private lives.[38]

Notwithstanding the jurisprudence relating to *Norwich Pharmacal* orders, Eady J's judgment in *Author of a Blog* clearly suggests, and is indicative of the fact, that freedom of anonymous and pseudonymous speech enjoys very limited protection in modern English law. This case, along with *Reno v American Civil Liberties Union*,[39] are considered in more detail below, as they animate the problems associated with relying exclusively on either *audience* or *speaker* interests respectively.

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[31] Ibid [11], [29], [33].
[32] This is a threshold requirement for claimants pleading misuse of private information.
[33] [2009] EMLR 22 [21]–[23], [33].
[34] Ibid 21. See analysis and criticisms of this point below.
[35] *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133: Under the *Norwich Pharmacal* procedure the court can order that an individual or entity, who is not a party to the court proceedings but who is, innocently or not, mixed up in the wrongdoing, to assist a party to the proceedings by providing specified information or documents in respect of the proceedings.
[36] [2002] 1 WLR 1233.
[37] Ibid [25].
[38] Arnold and Rajan, above n 5, 202. The cases cited by Arnold and Rajan include *Sheffield Wednesday Football Club Ltd v Hargreaves* [2007] EWHC 2375 (QB) (18 October 2007) and *Clift v Clarke* [2011] EWHC 1164 (QB) (18 February 2011). See also Maureen Daly, 'Is There an Entitlement to Anonymity? A European and International Analysis' (2013) 35(4) *European Intellectual Property Review* 198.
[39] 521 US 844 (1997).

Under s 2(1) of the HRA 1998 an English court must take account of decisions of the ECtHR, although any such ruling does not bind it. As a result, anonymous and pseudonymous expression could be subject to stronger protection under English law if there were a clear indication of the existence of a free speech anonymity right from the Strasbourg Court. However, the ECtHR has, to date, not been required to consider the extent to which a limit imposed on anonymous speech would render any such limit as incompatible with art 10 of the ECHR. If such an issue were to be brought before the Court, it is likely that a state would robustly argue for restrictions to be placed on anonymous expression, for example, on the basis that it needs to protect the right to respect for private life pursuant to the ECHR art 8, including the right to reputation, which can require, as discussed above in relation to s 5 of the *Defamation Act 2013* (UK), disclosure of the speaker's personal details. Additionally, far from providing clarity on the existence, or otherwise, of a right to freedom of anonymous speech conveyed online and via social media, ECtHR jurisprudence on the matter has been equivocal. In *KU v Finland*[40] the Court held that any guarantee of privacy and freedom of expression rights for an individual placing an anonymous advertisement is not absolute, and must accord precedence to other rights and interests, such as the prevention of crime and the protection of rights of others. However, although the ECtHR decision in *Delfi AS v Estonia*[41] seems to be based explicitly on *audience* interests in free speech,[42] the Court afforded online anonymous communication a greater level of importance. Delfi, an internet news portal service, had been required by the Estonian courts to compensate the victim of threatening and defamatory comments which had been posted on its service, even though it operated a 'notice-and-take-down' procedure when readers complained of these statements. The issue before the Court was whether or not there had been an infringement of the freedom of expression of the owner of Delfi. The Grand Chamber of the Court held that the Estonian Supreme Court's ruling was compatible with the ECHR, stating that '[i]t is mindful … of the interest of internet users in not disclosing their identity'.[43] According to the Court, anonymity 'is capable of promoting the free flow of ideas and information in an important manner, including, notably, on the internet'.[44] Consequently, it rejected Delfi's argument that victims of defamatory statements must bring defamation proceedings against the authors of comments after their identity had been established.[45] Other Council of Europe institutions have emphasised the importance of online anonymous communication. For instance, in *Delfi* the Court considered a Declaration of the Council of Ministers on freedom of communication on the internet.[46] Principle 7 of the Declaration recognises that 'to ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users of the Internet not to disclose their identity'.[47] Additionally, an earlier Recommendation of the Committee of Ministers had suggested recognition of anonymity in the context of internet

[40] European Court of Human Rights, Fourth Section, Application No 2872/02, 2 December 2008.
[41] European Court of Human Rights, First Section, Application No 64569/09, 10 October 2013, upheld by the Grand Chamber of the Court on 16 June 2015.
[42] Speaker and audience interests are discussed below.
[43] *Delfi AS v Estonia* [2015] EMLR 26 [147].
[44] Ibid [147].
[45] Ibid [151].
[46] Ibid [44].
[47] Council of Europe, *Declaration on Freedom of Communication on the Internet*, adopted by the Committee of Ministers on 28 May 2003, Principle 7 (Anonymity).

communications as an aspect of personal privacy protection.[48] Although these provisions, and the Strasbourg Court's decision in *Delfi*, do not, as yet, establish an absolute right to anonymous and pseudonymous speech, it is submitted that such explicit recognition of the importance of anonymous and pseudonymous expression from the ECtHR and Council of Europe institutions suggests that, in the correct circumstances, such a right could be brought into existence. As will be seen in the following section, the US position (and, to an extent, the position in Germany) is markedly different. In the US, a constitutional *right* to anonymous speech, both generally and online, has been consistently held to exist and has been protected.

The German and US position: the *Spickmich* case and *McIntyre v Ohio Elections Commission* — an absolute right to anonymous and pseudonymous speech?

Unlike the ECtHR's equivocal stance on anonymous and pseudonymous online expression, German jurisprudence is clearer as to the courts' adopted position. This is illustrated by the *Spickmich* case,[49] which concerned a teacher who argued that her name, the details of her school and, specifically, anonymous assessments of her teaching by pupils should be removed from www.spickmich.de, a portal for community schools, which was accessible via registration, by providing the user's name, email address and school details. The issue before the German courts concerned conflicting rights. On the one hand, the teacher submitted that the storage and publication of the information contravened her right to informational self-determination — in that she should be able to determine what, if any, information should be made available to those with access to the portal. This privacy right is subject to robust protection under German law.[50] However, on the other hand, the argument was advanced that, based on the right to freedom of expression, students should be able to assess the teaching qualities of their teachers anonymously. The Federal Supreme Court,[51] in upholding the rulings of the lower court, dismissed the teacher's complaint. The Court's decision was founded on three key points: firstly, anonymity is an inherent aspect of the use of the internet;[52] secondly, in any event, s 13(6) of the *Telemedia Act 2007* (Germany) protects anonymity and pseudonymity.[53] Pursuant to this provision, service providers must, as far as is technically possible and

[48] Council of Europe, *Recommendation No R (99) 5 of the Committee of Ministers to Member States for the Protection of Privacy on the Internet*, adopted by the Committee of Ministers on 23 February 1999, Guidelines 3 and 4.

[49] Bundesgerichtshof [German Federal Court of Justice], VI ZR 196/08, 23 June 2009, Neue Juristische Wochenschrift 2009, 2888.

[50] The origins of the right to informational self-determination date back to 1983, when the German Federal Constitutional Court declared unconstitutional certain provisions of the *Revised Census Act* that had been adopted unanimously by the German Federal Parliament, but were challenged by diverse associations before the Constitutional Court. See Bundesverfassungsgerichts [German Constitutional Court], 1 BvR 209, 269, 362, 420, 440, 484/83, 15 December 1983 reported in (1983) 65 BVerfGE 1. See generally Antoinette Rouvroy and Yves Poullet, 'The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy' in Serge Gutwirth et al (eds), *Reinventing Data Protection?* (Springer, 2009).

[51] The Bundesgerichtshof.

[52] Indeed, this had been recognised in an earlier decision of the Court, which held that contributors to a discussion forum must accept the risk of personal attack from pseudonymous participants: Bundesgerichtshof [German Federal Court of Justice], VI ZR 101/06, 27 March 2007, Neue Juristische Wochenschrift 2007, 2558.

[53] *Telemedia Act 2007* (Germany) 26 February 2007, BGBl I, 179, s 13(6).

reasonable, allow the anonymous or pseudonymous use of their services; and, finally, as a matter of principle, an obligation to identify an individual with the expression of a particular view would, both generally, and in the specific context of this case, lead to self-censorship from fear of the negative consequences of identification.[54] The Court held that the imposition of such an obligation would be incompatible with art 5.1 of the German Basic Law.[55] At this juncture it is worth considering that the Court's claim that 'anonymity is an inherent aspect of the use of the Internet' could be perceived as a naturalistic fallacy, and open to the rejoinder that just because anonymity *is* largely a part of cyber-culture, this does not force the conclusion that it *ought* to be that way. Instead, it is submitted that the judgment is more subtle and nuanced, as it does not impose a *de facto* 'cyber-right' to anonymity, but rather 'reveals the strong attachment' of German law to the freedom to use online communications anonymously,[56] in that it demonstrates that freedom of such speech takes precedence over the important countervailing right to informational self-determination as an element of personal privacy. Thus, the reasoning of the Court is clearly indicative of a *speaker* interest-orientated approach. It is less equivocal than the jurisprudence of the ECtHR, and demonstrates stronger support for *speaker* interests than is present in England. For instance, although the context of the cases are different, in *Author of a Blog*, in Eady J's judgment, the speaker's identity was required to enable the *audience* to assess the value of his publications. In other words, the public interest dimension of the speaker's claim was impaired by anonymity.[57] To the contrary, the blogger's argument for anonymity was based on the fact that it allowed him (and other bloggers) to disseminate important information, as a whistleblower, without fear of reprisals from his employers or the state.[58] This argument is, fundamentally, the same as the Court's reasoning for dismissing the teacher's complaint in *Spickmich* as, in the Court's view, anonymity allowed the *speaker* (the children) to advance their honest view without fear of retribution. However, unlike the US position examined below, the *Spickmich* decision is not solely based on the interests of the *speaker*. Rather, it is submitted that the judgment also exhibits elements of an *audience* interest approach. This is on the basis that the free dissemination of information about the teacher enabled those with access to the portal to make an informed decision as to the performance of the teacher and the school.

In the US there has been even stronger jurisprudential support for freedom of anonymous and pseudonymous online expression that is, therefore, diametrically opposed to the English position. The Supreme Court case of *McIntyre v Ohio Elections Commission*[59] concerned Margaret McIntyre, who had distributed leaflets at public meetings at an Ohio school. The leaflets expressed opposition to a proposed school tax levy. McIntyre had produced the leaflets at home on her own computer. In some of the leaflets she was identified as the author. However, others were addressed from 'Concerned Parents and Tax Payers'. She continued to distribute these particular leaflets despite being warned that they contravened § 3599.09(A) of the Ohio Revised

[54] Bundesgerichtshof [German Federal Court of Justice], VI ZR 196/08, 23 June 2009, Neue Juristische Wochenschrift 2009, [38].
[55] *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 5.1. The Court also found that the portal facilitated the right of the students, parents and teachers to receive information, which is also protected by art 5.1: ibid [40].
[56] Barendt, *Anonymous Speech*, above n 1, 153.
[57] *Author of a Blog* [2009] EMLR 22 [21]–[23].
[58] Ibid [5].
[59] 514 US 334 (1995) ('*McIntyre*').

Code, pursuant to which authors were not permitted to write, print or disseminate campaigning literature without providing their name and address. Consequently, McIntyre was fined, a decision upheld by the Ohio State Supreme Court. As in *Author of a Blog*, the 'speech' in *McIntyre* was political in nature,[60] as it engaged a state provision related specifically to 'campaign literature'. It is submitted that the fundamental basis of the State Supreme Court's judgment, founded on *audience* interests, is similar to Eady J's reasoning in *Author of a Blog*, in which it was held that the blogger's anonymity impaired the operation of the public interest as his identity was required to better enable the audience to determine his veracity.[61] According to the State Supreme Court, the burden placed on an author of campaign literature to identify themselves is 'more than counterbalanced' by the public interest in 'providing the audience to whom the message is directed with a mechanism by which they may better evaluate its validity' and enables the identification of authors publishing fraudulent and defamatory communications.[62] Eventually, the case was heard by the US Supreme Court.[63] Stevens J, giving the judgment of the Court, stated: 'an author's decision to remain anonymous … is an aspect of the freedom of speech protected by the First Amendment'.[64] As a result of this seminal ruling, which has been followed in a number of subsequent cases,[65] enshrined within the First Amendment is an absolute free speech *right* to communicate anonymously or pseudonymously.[66]

Two strands emerge from Stevens J's judgment to justify the anonymity right.[67] The first is paradigmatic of the argument from democratic self-governance, as supported by the argument from self-fulfilment and, as is advanced below, goes to a *speaker's* interest in anonymous expression. It advances a libertarian argument that '[a]nonymity is a shield from the tyranny of the majority'[68] and, according to Barendt, enables 'radicals and dissenters to express unpopular views free from the fear of retaliation or prosecution'.[69] This instrumental argument is clearly aligned to free speech rationale arguments in *Author of a Blog*,[70] and the *speaker* interest-orientated reasons given by the Federal Supreme Court in the *Spickmich* case. Similarly, in an

[60] *Author of a Blog* [2009] EMLR 22 [24].
[61] Ibid [21]–[23].
[62] *McIntyre v Ohio Elections Commission*, 618 NE 2d 152 (1993). The State Supreme Court relied on the case of *First National Bank of Boston v Bellotti*, 435 US 765 (1978) in which it was held that not only are such interests sufficient to overcome the minor burden placed on individuals to disclose their identity in this context, but that these interests and pursuant regulations would survive constitutional scrutiny.
[63] *McIntyre v Ohio Elections Commission*, 514 US 334 (1995).
[64] Ibid 342. Ginsburg J and Thomas J gave separate concurring judgments. Thomas J gave an account of anonymous political writing in the US in the 18th century. From this examination he inferred that the Founding Fathers of the Constitution intended anonymous speech to be covered by the First Amendment: ibid 359–71.
[65] As Barendt observes, although the decision has been distinguished in cases relating to litigation concerning the disclosure of election expenditure, its 'fundamental correctness' has rarely been questioned within US jurisprudence: Barendt, *Anonymous Speech*, above n 1, 56, ch 7.
[66] For example, see *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 US 557 (1995); *Buckley v American Constitutional Law Foundation*, 525 US 182 (1999); *Watchtower Bible and Tract Society of New York v Stratton*, 536 US 150 (2002); *ACLU of Nevada v Heller*, 378 F 3d 979 (9th Cir, 2004).
[67] Lyrissa Barnett Lidsky and Thomas F Cotter, 'Authorship, Audiences and Anonymous Speech' (2006) 82 *Notre Dame Law Review* 1537, 1542–4.
[68] *McIntyre*, 514 US 334, 357 (1995).
[69] Barendt, *Anonymous Speech*, above n 1, 58.
[70] [2009] EMLR 22, [4], [18].

earlier decision, the Supreme Court, in *Talley v California*,[71] recognised 'a tradition of anonymity in the advocacy of political causes'[72] accordingly, in the absence of anonymity, valuable political speech may not be published.[73] The second strand is rights-based. According to Stevens J 'the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude'.[74] Thus, an author is free to determine the contents of their publication, and they are entitled to write anonymously or pseudonymously. As a rejoinder to the contention that an *audience* may have a real interest in knowing the identity of the author to assess their credibility and the strength of their views, Stevens J employed the argument that to compel an individual to disclose their name (or any other identifying details) is equivalent to requiring them to express a particular opinion.[75] This argument is considered in more detail below.

The *McIntyre* decision has been followed in the context of online communications[76] and, therefore, by extension, would apply to social media speech. In *ACLU v Zell Miller*[77] a federal district court held that a Georgia statute making it an offence to transmit messages over the internet using a false name was invalid, as it contravened the First Amendment. In the same year, in *Reno v American Civil Liberties Union*,[78] the US Supreme Court, in determining that there was no basis for qualifying the protection afforded by the First Amendment guarantee of freedom of speech in the context of the internet, rejected the argument that the internet could be subject to similar special content regulation that had traditionally been applied to, and had constrained, broadcast media. In particular, the Court stated that although some of its earlier cases had recognised special justifications for regulation of the broadcast media, these are not necessarily applicable to other speakers.[79] It was of the opinion that the factors it had relied upon in relation to the broadcast media[80] 'are not present in cyberspace'.[81] Eady J's judgment in *Author of a Blog* was based exclusively on *audience* interests. To the contrary, this decision was based entirely on the interests of the *speaker*. Both cases are considered again in the following section, which looks at the problems that are symptomatic of relying purely on one interest. Thus, the right to

[71] 362 US 60 (1960).
[72] *McIntyre*, 514 US 334, 343 (1995).
[73] Barendt, *Anonymous Speech*, above n 1, 58.
[74] *McIntyre*, 514 US 334, 348 (1995).
[75] Ibid 348–9. Consequently, the Supreme Court rejected the Ohio State's argument that the disclosure requirement was justified as it provided the audience with more information.
[76] However, the right to communicate anonymously on the internet is not absolute. For example, pursuant to Federal statute it is an offence to use a telecommunications device, without the user disclosing their identity, with intent to abuse, threaten or harass any specific individual. See 47 USC § 223(a)(1)(c); Danielle Keats Citron, *Hate Crimes in Cyberspace* (Harvard University Press, 2014) 124–5. According to Barendt, this law would almost certainly survive constitutional challenge, as true threats, instilling a real fear of violence, are not protected by the First Amendment: Barendt, *Anonymous Speech*, above n 1, 126; *Planned Parenthood of the Columbia/Williamette Inc v American Coalition of Life Activists*, 290 F 3d 1058 (9th Cir, 2002).
[77] 977 F Supp 1228 (ND Ga, 1997).
[78] 521 US 844 (1997).
[79] Ibid 868–70. For instance, in *Red Lion Broadcasting Company v FCC*, 395 US 367, 399–400 (1969) and *FCC v Pacifica Foundation*, 438 US 726 (1978) the Court relied on the history of extensive government regulation of the broadcast media. Other factors included (i) the scarcity of available frequencies at its inception (*Turner Broadcasting Systems Inc v FCC*, 512 US 622, 637–8 (1994)); and (ii) its 'invasive' nature (*Sable Communications of California Inc v FCC*, 492 US 115, 128 (1989)).
[80] *Reno v American Civil Liberties Union*, 521 US 844, 868–9 (1997).
[81] Ibid 869.

communicate anonymously, both online and offline, has now been accepted as an integral part of the First Amendment.

This section has established that, at present, anonymous and pseudonymous online expression is faced with two opposing schools of thought. In England, freedom of expression provides a *level* of protection for such speech, whereas the US (and to a lesser extent, Germany) clearly recognises a constitutional right for these types of communication. What is apparent from the Strasbourg case law is that protection afforded for anonymous and pseudonymous expression, at the moment at least, falls short of a clearly recognised right and, consequently, seems to sit, rather opaquely, somewhere between the two sides. However, based on the explicit importance placed upon anonymous and pseudonymous speech by the ECtHR in *Delfi* and by Council of Europe provisions, there seems to be potential for the establishment of such a right. These schools of thought are based on opposing interests: those of the *speaker* and the *audience*. The following section will consider these rights, and how they apply to anonymous and pseudonymous speech communicated via social media and online.

Justifications for online anonymity — speaker versus audience interests: an obsolete distinction in the context of social media speech?

The *speaker* versus *audience* interests dichotomy has consistently been the subject of arguments relating to free speech generally.[82] Within these arguments there has been a clear delineation between these 'competing' interests. The case law explored above demonstrates that, on the one hand, *speaker* interests in free speech (and privacy) have been used to support a *right* to anonymous expression, whereas, on the other hand, *audience* interests have tended to have been employed to argue for the author's identity to be known or, at the very most, for a limited level of protection for anonymous speech.[83] This section will discuss the problems associated with the exclusive application of each interest as a basis for free speech, particularly within the context of anonymous and pseudonymous online and social media communication, as has hitherto been the practice in England, the US and Europe. It will advance the argument that applying either interest exclusively to online and social media expression is problematic, for the following reasons: A US-type *right* to anonymous speech, based on *speakers'* interests, goes too far. It does not adequately protect other countervailing rights and, inadvertently, protects speakers who disseminate harmful and damaging speech. However, the English and ECtHR positions that, at best, provide limited protection for anonymous speech, based on *audience* interests, do not

[82] For example, see Thomas Scanlon, 'A Theory of Freedom of Expression' (1972) 1 *Philosophy and Public Affairs* 204; R M Dworkin, 'Introduction' in R M Dworkin (ed), *The Philosophy of Law* (Oxford University Press, 1977) 1, 15; Frederick Schauer, *Free Speech: A Philosophical Inquiry* (Cambridge University Press, 1982) 105–106, 158–60; Larry Alexander, *Is There a Right to Freedom of Expression?* (Cambridge University Press, 2005) 8–9; Seth F Kreimer, 'Sunlight, Secrets and Scarlet Letters; The Tension Between Privacy and Disclosure in Constitutional Law' (1991) 140 *University of Pennsylvania Law Review* 1, 85–6; Robert C Post, 'The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v Falwell*' (1990) 103 *Harvard Law Review* 603, 639–40.

[83] See *Delfi AS v Estonia* [2015] EMLR 26 above.

go far enough in protecting certain groups who, for instance, may use social media as a method to disseminate information of constitutional value.[84]

Conflicting or complementary interests? Striking a balance between the speaker and the audience

As already discussed, the Supreme Court's decision in *McIntyre* is based on the right of the *speaker* to determine the contents of their speech. According to the Court, this *speaker* interest took precedence over the *audience's* right to information regarding the speaker's identity, in order for the reader to be able to properly assess the credibility of the author's publication. In its judgment, the Supreme Court approved a New York court's decision in *New York v Duryea*[85] that, when it comes to anonymous sources, the public is able to determine the value of speech,[86] as compared to communications from an identified speaker:

> Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read the message. And then, once they have done so, it is for them to decide what is 'responsible', what is valuable, and what is truth.[87]

The decisions that followed, in cases such as *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston*,[88] *Buckley v American Constitutional Law Foundation*,[89] *Watchtower Bible and Tract Society of New York v Stratton*,[90] *ACLU of Nevada v Heller*[91] and, in the context of online communication, *ACLU* and *Reno*,[92] were similarly based on *speaker* interests to support anonymous and pseudonymous expression. The interests of the *speaker* were also the dominant interests in the German Federal Supreme Court's ruling in *Spickmich*.

The US Supreme Court's decision in *Reno* highlights some of the issues surrounding online and social media speech generally and, in particular, anonymous speech conveyed via these mediums. Thus, the efficacy of the judgment, based purely on *speaker* interests, if applied to a modern context, is questionable. Like *Author of a Blog*, it highlights problems symptomatic of applying one interest exclusively. The Court was of the opinion that 'the Internet is not as invasive as radio or television'.[93] In coming to this decision, the Court relied upon the finding of the District Court that:

> Communications over the Internet do not invade an individual's home or appear on one's computer screen unbidden. Users seldom encounter content by accident … [a]lmost all

[84] See Peter Coe, 'Redefining "Media" Using a "Media-as-a-Constitutional-Component" Concept: An Evaluation of the Need for the European Court of Human Rights to Alter Its Understanding of "Media" Within a New Media Landscape' (2017) 37(1) *Legal Studies* 25.
[85] 351 NYS 2d 978, 995 (1974).
[86] Indeed, Post argues that speech should be assessed entirely divorced from the context in which it is made, including the origin of the communication: Post, above n 82, 639–40.
[87] *New York v Duryea*, 351 NYS 2d 978, 995 (1974), quoted in *McIntyre*, 514 US 334, 348 n 11 (1995).
[88] 515 US 557 (1995).
[89] 525 US 182 (1999).
[90] 536 US 150 (2002).
[91] 378 F3d 979 (9th Cir, 2004).
[92] *Reno v American Civil Liberties Union*, 521 US 844 (1997). See above.
[93] Ibid 869.

> sexually explicit images are preceded by warnings as to the content … odds are slim that a user would come across a sexually explicit sight by accident.[94]

This decision is indicative of the pace at which online and social media communication has developed, as the findings upon which the decision is based are arguably at odds with current online expression. Internet communications, in particular those transmitted via social media, can be invasive. To an extent this may be 'allowed' by the user of the social media platform, by virtue of registering with the platform and joining particular communities. However, users are still subject to 'unbidden' messages regularly appearing on their mobile telephone, tablet and laptop screens.[95] Further, the availability of sexually explicit content has been proliferated by social media, and is synonymous with platforms such as WhatsApp and Snapchat, as demonstrated by the 'revenge porn' phenomenon.[96] 'Unbidden' messages and content of a sexually explicit nature are, very often, anonymous or pseudonymous, meaning that there exists a lack of accountability which can seriously impact upon an individual's ability to seek recourse, for instance in relation to damage caused to their reputation by virtue of libel proceedings (this is discussed in more detail below).[97]

Contrary to judgments based purely on *speaker* interests, Kreimer suggests that, in many situations, anonymous or pseudonymous expression is not appropriate, as it is important for the *audience* to be able to identify the *speaker*. Knowing the origin of the speech enables the *audience* to attribute a value and assess the veracity of their previous communications, as they will be publicly accessible. Therefore, this allows them to evaluate their prior experience.[98] This view is animated by Eady J's judgment in *Author of a Blog*[99] in which he upheld *The Times*' argument that the public was entitled to know the identity of the author of the blog to assess the strength of his criticisms of the police force in which he was serving.[100] Accordingly, Schauer and Alexander are of the opinion that free speech is predominantly concerned with *audience* interests. They believe that *speakers* enjoy only derivative rights, which are subject to protection only to ensure that the interests of the *audience* are safeguarded.[101] Some social media platforms have adopted this stance in respect of their anonymity and pseudonymity policies. Facebook, for example, at least 'officially', does not allow registration under a pseudonym.[102] The platform believes that users are more responsible in debate and social commentary when they use the site under their real name.[103] Similarly, between 2011 and 2014 Google+ required users to register under their 'common name' (the name by which they were known to family, friends and colleagues). It used an algorithm to detect likely pseudonyms, and automatically suspended these accounts, even when these users were generally known

[94] *American Civil Liberties Union v Reno*, 929 F Supp 824 (ED Pa, 1996) (finding 88).
[95] For detailed analysis of how the economic constructs of social media has influenced this issue see José van Dijck, *The Culture of Connectivity* (Oxford University Press, 2013) 163–76.
[96] Coe, 'The Social Media Paradox', above n 17, 28–9. See generally Brian Leiter, 'Cleaning Cyber-Cesspools: Google and Free Speech' in Saul Levmore and Martha C Nussbaum (eds), *The Offensive Internet* (Harvard University Press, 2010) 155.
[97] Leiter, above n 96; Levmore, 'The Internet's Anonymity Problem', above n 1.
[98] Kreimer, above n 82, 85–6.
[99] [2009] EMLR 22. See above for the facts of the case.
[100] Ibid [21].
[101] Schauer, above n 82, 105–106; Alexander, above n 82, 8–9.
[102] Rebecca MacKinnon, *Consent of the Networked* (Basic Books, 2012) 150.
[103] Facebook Guidelines of March 2015 for the removal of hate content, available at Facebook, *Encouraging Respectful Behaviour: Hate Speech* <www.facebook.com/communitystandards#hate-speech>.

by a pseudonym or nickname. Google said that it introduced the policy to promote the safe use of the internet, and to prevent the dissemination of anonymous spam.[104] The views of Kreimer, Schauer and Alexander, Eady J's judgment, and Facebook's policy correlate with Barendt's argument that the case for freedom of speech dictates that, when it comes to general political and economic discourse, the public should know something about the credentials of the speaker. Equally, an audience wants to know the identity of the speaker to enable it to evaluate the worth of the publication.[105]

It is submitted that these views, the decision in *Author of a Blog*, and Facebook's policy are problematic, particularly in the context of anonymous and pseudonymous online and social media expression, for the following reasons. Firstly, they do not take into account the use of pseudonyms. If the audience is unaware that the speaker is communicating under a pseudonym they may not adjust the value they attribute to that respective communication.[106] Secondly, knowing the speaker's true identity does not, necessarily, add any value. Just because one can see the name of the speaker or author does not mean they can assess their credibility. This observation is particularly pertinent in respect of citizen journalism. These journalists, who may well be disseminating information of real constitutional value, may not have a 'background' to assess that is accessible to the public. In these circumstances, they may as well be acting under a pseudonym, as their real identity does not provide any usable information for the audience to evaluate. Equally, the traditional media increasingly rely on citizen journalists as a source of news. Consequently, speech is 'recycled' through traditional forms of media that may come from speakers that are identified but unknown, or from anonymous sources, or from speakers operating under a pseudonym. Thirdly (and directly linked to the points above), Facebook's anonymity and pseudonymity policy relies on users to report fellow users using pseudonyms. In many instances, it is likely that these users will have no idea that a pseudonym is being used. Notwithstanding this, from a practical perspective, it is almost impossible for platforms such as Facebook to monitor and vet the millions of messages carried each week.[107] Furthermore, it also conflicts with the advice given to police officers to use a pseudonym on social media to protect their identity. Many police officers do use pseudonyms for this purpose on Facebook, among other social media platforms. For the same reason, the General Medical Council supports the right of doctors to use social media anonymously or pseudonymously.[108] Incidentally, Facebook's real name policy has been held to infringe German data protection law.[109] Finally, the problems that could potentially flow from the decision in *Author of a Blog* are, like *Reno*, in respect of *speaker* interests, symptomatic of applying *audience* interests exclusively. These judgments illustrate the need for a balance to be struck between both interests.

[104] Laurel Papworth, *Social Network Identity: Anonymity, Pseudonymity, and Accountability – Media 140* (16 November 2011) Silkcharm <http://laurelpapworth.com/social-network-identity-anonymity-pseudonymity-and-accountability-media140/>.
[105] Barendt, *Anonymous Speech*, above n 1, 66–7.
[106] Lidsky and Cotter, above n 67, 1567.
[107] Levmore, 'The Internet's Anonymity Problem', above n 1, 59.
[108] Barendt, *Anonymous Speech*, above n 1, 135.
[109] Specifically, s 13(6) of the *Telemedia Act 2007* and s 3a of the *Data Protection Act 2003*. See *Telemedia Act 2007* (Germany) 26 February 2007, BGBl I, 179, s 13(6) and *Data Protection Act 2003* (Germany) 14 January 2003, BGB1, 66, s 3a. The ruling was successfully challenged by Facebook in the state Administrative Court on the ground that the law only applied when the data controller was established in Germany, or a non-EU state. The Court accepted that Facebook was established in Ireland, which did not prescribe in law the freedom to communicate anonymously: Sandra Schmitz, 'Facebook's Real Name Policy: Bye-Bye, Max Mustermann?' (2013) 4 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 190.

There is currently an abundance of blogs, similar to *Night Jack*, that disseminate information of constitutional value.[110] Because the decision required the author to identify himself it surely has the propensity to dissuade other people (and whistleblowers) from communicating in a similar way.

The decision in *Author of a Blog* also illustrates a challenge faced by citizen journalists.[111] Because, in most circumstances, these journalists are not considered 'media', they are not subject to the enhanced right to media freedom. As a result, they cannot avail themselves of a journalist's immunity from being required to disclose sources of information. If the author of the blog would have taken his 'story' to *The Times*, rather than publish it on his blog, the newspaper may have published it, and then refused to identify its source because it, as a recognised media entity, would not have had to disclose its source pursuant to the right to media freedom. In doing so, it would have argued that the public interest in the story took precedent over any interest the police force had in identifying the whistleblower. The judgment, based exclusively on *audience* interests, seems to favour the traditional media, in that, by virtue of the right to media freedom, it is immune from disclosing its sources, yet it is also able to identify a respected citizen journalist who independently publishes a story for which it could claim journalists' privilege.[112]

Taking this argument a step further, as well as bestowing certain privileges on the media, the right to media freedom carries with it duties and responsibilities, including transparency.[113] The journalistic media is subject to a right of reply.[114] Therefore, at least within a European context, the media has to make available certain information about the publisher or editor. [115] As Oster states, '[w]hile anonymity is part of freedom of expression, responsible journalism requires that at least the editor of the publication be immediately identifiable in order to facilitate effective protection against defamation and privacy violation'.[116] This duty runs counter to a culture of anonymity and pseudonymity prevalent on the internet and social media, and very often practised by citizen journalists. Thus, notwithstanding the fact that a blogger, such as the author of *NightJack*, is not considered media, and therefore not subject to media freedom, even if they were, the fact that that they are the 'source', 'author' and 'publisher' would mean that they would not be fulfilling their journalistic responsibilities pursuant to the right if they published anonymously or under a pseudonym. In contrast, a journalist for *The Times* could use their editor or publishing company of the newspaper to 'shield' their identity. Herein lies a significant challenge

[110] Night Jack was the recipient of the 2009 Orwell Prize for citizen journalism.
[111] See generally Coe, 'Redefining "Media" Using a "Media-as-a-Constitutional-Component" Concept', above n 84.
[112] Eric Barendt, 'Bad News for Bloggers' (2009) 2 *Journal of Media Law* 141, 146–7.
[113] See the ECtHR case of *Fatullayev v Azerbaijan* (European Court of Human Rights, First Section, Application No 40984/07, 22 April 2010).
[114] For example, see *Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services* ('*Audiovisual Media Services Directive*') [2010] OJ L 95/1, art 28; *Ediciones Tiempo SA v Spain* (European Commission of Human Rights, Application No 13010/87, 12 July 1989); Council of Europe, *Resolution (74) 26 of the Committee of Ministers of the Council of Europe on the Right of Reply – Position of the Individual in Relation to the Press*, adopted by the Committee of Ministers on 2 July 1974; Council of Europe, *Recommendation Rec(2004) 16 of the Committee of Ministers to Member States on the Right of Reply in the New Media Environment*, adopted by the Committee of Ministers on 15 December 2004.
[115] According to Oster, this presumably applies to all European countries. See Oster, *European and International Media Law*, above n 4, 49.
[116] Ibid.

for citizen journalists: what is relevant to the concept of responsible journalism is that a person, whether that be the journalist or their editor, or an organisation, such as the publishing company, claims responsibility for a publication, and can, as a result, be held liable. For example, it is the policy of *The Economist* to publish all of its articles anonymously. However, it is clear that The Economist Newspaper Ltd is responsible for its articles, and can, therefore, be held liable for them. Consequently, both the *The Economist*, and its journalists, in respect of this at least, comply with their journalistic responsibilities. To the contrary, because of the nature of citizen journalism, in particular the fact that many bloggers operate alone as both the author and the publisher, means they do not have the 'shield' of an identifiable editor or organisation that could be held liable. If they did, this would defeat the very purpose of their anonymity or pseudonym. However, by not providing the details of an identifiable person or organisation they are not conforming to the concept of responsible journalism. Ultimately, this challenge faced by citizen journalists could undermine the value of such journalism and, paradoxically, damage *audience* interests, as less people will engage with it, which will, in turn, hinder democratic participation and self-fulfilment.

Barendt suggests that the rights and interests of *speakers*, distinct from those of the *audience* are 'emphasised' by the argument from self-fulfilment, in that 'speech is an essential aspect of the right to self-development and fulfilment, or of individual autonomy, and so must be respected as an aspect of that autonomy'.[117] Baker takes this further. He argues that the right to freedom of expression should take precedence over countervailing rights because it facilitates autonomy — by allowing individuals to exercise self-expression or self-disclosure, they control whether or not to reveal themselves to others and enables the respective individual to be treated as autonomous.[118] According to Barendt this argument is problematic. He suggests that the argument from self-fulfilment is the 'least plausible rationale' for freedom of speech and that it would be 'odd' to base the right to free speech on the *speaker's* interest in self-development or fulfilment. Specifically, he states: '[h]ow does the mask of anonymity claimed by someone who prefers to remain nameless or to publish under the disguise of a pseudonym advance that person's self-development as an individual?'[119] It is submitted that the position adopted by Barendt is flawed, in respect of anonymous and pseudonymous expression conveyed by both the traditional media and, in particular, online and via social media, for the reasons discussed below.

In *Reno*, District Judge Dalzell stated that the internet is 'the most participatory form of mass speech yet developed'.[120] Social media platforms, blogs, email and chat rooms are a way of not only receiving information, but of transmitting views on any topic instantaneously; they have facilitated a convergence of audience and producer.[121] Thus, anonymity and pseudonymity is a culturally inherent aspect of

[117] Barendt, *Anonymous Speech*, above n 1, 62.
[118] C Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford University Press, 1989) ch 3; C Edwin Baker, 'Autonomy and Hate Speech' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press, 2009) 139, 142–6.
[119] Barendt, *Anonymous Speech*, above n 1, 63.
[120] *American Civil Liberties Union v Reno*, 929 F Supp 824, 833 (ED Pa, 1996).
[121] See Coe, 'The Social Media Paradox', above n 17, 23; Jack M Balkin, 'The Future of Free Expression in a Digital Age' (2009) 34 *Pepperdine Law Review* 427, 440; Jack M Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004) 79(1) *New York University Law Review* 1; Rowbottom, above n 16, 365.

online and social media communication.[122] According to Suler the ability to communicate anonymously is a principal factor for *online disinhibition effect*, whereby people are less inhibited to say things online which they would not say in a 'real life' encounter. It allows them to hide their identity and to operate under the assumption, at least, that their real identities cannot be linked to messages they send, and so they cannot be held responsible for the consequences of that expression.[123] In this context, the 'mask' of anonymity or the 'disguise' of a pseudonym can advance a person's self-development as it gives them a voice in circumstances where, without anonymity or pseudonymity, they would not be able to express themselves. A pertinent example is academic speech. One only has to look at *Times Higher Education* to see regular instances of academics writing anonymously about controversial issues within their University, or higher education generally. Of even greater significance is academic speech in countries where academics fear persecution for expressing views.[124] In both of these examples, arguably academics are developing intellectually. In these types of situations where they could not, or would not want to, reveal their identity through fear of persecution or reprisals, by virtue of being able to express themselves anonymously or under a pseudonym, they are able to engage in dialogue with other academics and/or the process of research, writing and, ultimately, peer review of their work (which tends to be conducted anonymously in any event[125]). Of course, the rejoinder to this argument is that such disinhibition, by virtue of anonymity and pseudonymity, can potentially act as a catalyst for irresponsible and unacceptable behaviour in online and social media forums (this is discussed in greater depth below).

It has been argued that Mill's argument from truth and the argument from democratic self-governance are, predominantly, associated with *audience* interests.[126] Indeed, in relation to the argument from democratic self-governance, and in the context of the regulation of speech at public meetings, Meiklejohn was of the opinion that it is important that 'not every one shall get to speak, but that everything worth

[122] Malcolm Collins, *The Ideology of Anonymity and Pseudonymity* (2 August 2013) Huffpost <www.huffingtonpost.com/malcolm-collins/online-anonymity_b_3695851.html>.

[123] John Suler, 'The Online Disinhibition Effect' (2004) 7 *CyberPsychology and Behaviour* 321, 322. It has been acknowledged that young people in particular are often more likely to discuss their anxieties and attempt to form friendships online under a pseudonym rather than use their real name: Sherry Turkle, *Alone Together* (Basic Books, 2011) 189–98, 229–31.

[124] For example, see *Erdogan v Turkey* (346/04 and 39779/04) [2014] ECHR 530; Alicia Mendonca, 'European Court of Human Rights Upholds Academic Freedom: *Mustafa Erdogan v Turkey*' (2014) 25(8) *Entertainment Law Review* 304; *Turkey Must Stop Persecuting Its Academics* (24 March 2016) Times Higher Education <www.timeshighereducation.com/letters/turkey-must-stop-persecuting-academics>.

[125] In the humanities and social sciences, 'double blind' reviews remain standard practice (the author does not know the identity of the reviewer and vice versa), whereas within science and medical disciplines, 'single blind' reviews tend to be employed (the author does not know the identity of the reviewer, but the reviewer knows the author's name and institution): Science and Technology Committee, *Peer Review in Scientific Publications*, HC 856, Session 2010–12 (2011) [15]–[16].

[126] See generally Barendt, *Anonymous Speech*, above n 1, 61; Sir John Laws, 'Meiklejohn, the First Amendment and Free Speech in English Law' in Ian Loveland (ed), *Importing the First Amendment, Freedom of Speech and Expression in Britain, Europe and the USA* (Hart Publishing, 1998) 123, 123–37; Andrew Nicol QC, Gavin Millar QC and Andrew Sharland, *Media Law and Human Rights* (Oxford University Press, 2nd ed, 2009) 3 [1.06]; Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2005) 18; Jan Oster, 'Theory and Doctrine of "Media Freedom" as a Legal Concept' (2013) 5(1) *Journal of Media Law* 57, 69.

saying shall be said'.[127] However, in *McIntyre* the Supreme Court justified the existence of a right to anonymous and pseudonymous expression as a protection against the tyranny of the majority.[128] Consequently, an additional argument to support a right to anonymity based on *speaker* interests is that without such a right *speakers* would not participate at all in political discourse. According to scholars such as Dworkin, Post and Redish, such a right is incorporated within a *speaker's* right to contribute to public life.[129] It is submitted that the argument from democratic self-governance, and the argument from self-fulfilment, do not operate exclusively from each other as justifications for anonymous and pseudonymous speech. To the contrary, self-fulfilment is an integral and supportive aspect of an individual's ability to participate in democratic discourse. The argument from democratic self-governance, as supported by the argument from self-fulfilment, is particularly pertinent to online and social media communication, as it supports the primary rationale for a right to anonymous speech within these arenas; anonymous expression enables more people to engage in public discourse and, in so doing, contribute valuable information and ideas to society than would be the case if their speech were inhibited by a requirement to disclose their identity. Indeed, David Kaye, the UN Rapporteur on the promotion of freedom of expression, has robustly supported a right to communicate anonymously online. Kaye's support of anonymous communication on the internet is indicative of a combination of the arguments advanced above in that, in authoritarian countries, there will be universal reluctance to speak freely and contribute to public and political discourse, both online and offline, for fear of persecution.[130] As Barendt states: '[a]nonymity enables the circumvention of the myriad restrictions on the exercise of freedom of expression imposed by authoritarian governments'.[131] It can also facilitate democratic participation in liberal societies more tolerant of political dissent.[132] In fact, the example of academic speech in relation to self-fulfilment given above is equally applicable to this point. Anonymity is essential for individuals wishing to express views that may expose them to disciplinary action or dismissal by their employer, or ostracism from colleagues.[133] These are the very reasons why Eady J's judgment in *Author of a Blog*, based exclusively on *audience* interests, is so fundamentally flawed. Paradoxically, rather than protecting the audience, by potentially dissuading individuals from participating in citizen journalism, it damages *audience* interests, as less people are exposed to information that may have a constitutional value. This can limit their engagement with democratic discourse and hinder their self-fulfilment. Equally, according to

[127] Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Oxford University Press, 1960) 64.
[128] *McIntyre*, 514 US 334, 357 (1995).
[129] See generally Ronald Dworkin, 'Foreword' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press, 2009) v; Post, above n 82; Martin H Redish, 'Value of Free Speech' (1982) 130 *University of Pennsylvania Law Review* 591.
[130] Kaye, above n 4, [23], [31].
[131] Barendt, *Anonymous Speech*, above n 1, 129.
[132] Ibid. Oster refers to Justice Holmes' marketplace of ideas theory laid down in *Abrams v United States*, 250 US 616 (1919), in which it was asserted (at 630–31) that 'the best test of truth is the power of the thought to get itself accepted in the competition of the market', in relation to this argument. He states that, pursuant to the theory, 'everyone should have a voice in public debate. If speech is either made anonymously or not all, then it is preferable that it is being made anonymously. This applies even more given that fear of harassment or sanctions often — but of course not necessarily — arises in cases in which the speaker wants to contribute to a controversial matter of general interest, such as political or religious affairs': Oster, *European and International Media Law*, above n 4, 49.
[133] Ibid.

Stein, protection of anonymous and pseudonymous speech, particularly in 'cyberspace', 'provides a context' for lesbians and gay men 'in which to speak freely, without identifying themselves, and without having to be physically present to communicate with others'.[134] This can be extended to vulnerable groups, such as asylum-seekers, immigrants and the mentally and physically disabled, amongst others, in that, for the same reasons, anonymity and pseudonymity enables them to exercise their freedom of speech and, therefore, not only develop intellectually, but also participate in, and contribute to, public discourse.[135] However, there is a robust rejoinder to this argument. Thomas Scanlon's individual autonomy concept, which is based on the right of the *audience* to receive information, be exposed to every type of argument and be free from governmental intrusion into the process of individual decision-making,[136] is equally applicable, as access to minority views, that may not be available without anonymous or pseudonymous communication, are an essential aspect of *audience* rights.

Thus, where social media and online communication are concerned, *speakers* have a particularly strong claim to the right to freedom of expression[137] and, by extension, the right to communicate anonymously or pseudonymously. This is because the convergence of audience and producer, which has been created by social media and online expression, has, in turn, given rise to the ascendance of citizen journalism. Consequently, free speech is facilitated by the fact that these *speakers* are not subject to, for instance, political bias, censorship, the influence of media ownership and editorial control, at least to the same extent as they would be within the context of the mass media,[138] where greater emphasis is usually placed on the interest of the *audience* who, to assess the reliability of the journalist or broadcaster, are concerned with being apprised of that individual's identity.[139] Ekstrand argues that those who communicate online and, by extension, via social media, are more likely to tolerate anonymity, either because it is generally accepted that anonymous and pseudonymous communication is 'normal' in these arenas[140] or because their expectations are lower as to the reliability of the information provided or the expertise of those responsible for disseminating the information.[141] To the contrary, Citron suggests that certain aspects of the internet may make online communication potentially more damaging than information disseminated offline.[142] There is no doubt this can be extended to social media. A consequence of the way in which social media and online communication has become ingrained within our social cultural fabric is that habits, conventions and social norms, that were once informal manifestations of social life, are now infused within these methods of communication. What were casual and ephemeral actions and/or acts of expression, such as conversing with friends or colleagues, swapping/displaying pictures, or exchanging thoughts that were once kept private or maybe shared with a select few, have now become formalised and permanent. These actions and expressions are, in the click of mouse, or the flick of a

[134] Edward Stein, 'Queers Anonymous: Lesbians, Gay Men, Free Speech and Cyberspace' (2003) 38 *Harvard Civil Rights – Civil Liberties Law Review* 159, 199–205.
[135] Barendt, *Anonymous Speech*, above n 1, 64, 129.
[136] Scanlon, above n 82, 223. See also Schauer, above n 82, 69.
[137] Barendt, *Anonymous Speech*, above n 1, 130.
[138] Coe, 'The Social Media Paradox', above n 17, 21, 24; Barendt, *Anonymous Speech*, above n 1, 130.
[139] Barendt, *Anonymous Speech*, above n 1, 61–5.
[140] Ibid 130.
[141] Victoria Smith Ekstrand, 'The Many Masks of Anon: Anonymity as Cultural Practice and Reflections in Case Law' (2013) 18 *Journal of Technology Law and Policy* 1, 18.
[142] Citron, *Hate Crimes in Cyberspace*, above n 76, 4–12.

finger, publicised for the world to see. Thus, unlike broadcasts or newsprint, that are perceived to be more transitory in nature, and are 'tomorrow's fish and chips' paper',[143] online communication lends itself to permanency;[144] it enters the public domain, with the potential for long-lasting and far-reaching consequences.[145] Search engines, such as Google, provide users with links to harmful communications. These can remain accessible to the public, sometimes for very long periods of time, and certainly longer than with the traditional media, after they were initially published.[146] This can have negative and long lasting effects on individuals' lives. For instance, research carried out by the Chartered Institute of Personnel found that two out of five employers look at candidates' online activity or social media profiles to inform their recruitment decisions.[147] Realistically, this is likely to be even higher, as many employers do not 'officially' screen applicants.

The fact that information disseminated online and via social media can, potentially, remain available permanently, and is easily accessible by anybody, gives rise to three further issues, which are amplified by anonymous and pseudonymous expression: (i) the absence of 'responsible' intermediaries, which is conducive to (ii) the proliferation of fake news and (iii) the fact that victims of, for instance, cyber-bullying, hate crime and defamation are not able to identify the origin of the communication. Consequently, these harms form the foundation for a strong *audience* interest-based argument against a *right* to anonymous and pseudonymous speech; they provide support for the restriction of anonymous and pseudonymous speech in an online or social media context. This argument, considered through the lens of these harms, informs the remainder of this section.

In *The Offensive Internet,* Levmore points to the distinction between the traditional media and, in particular, social media.[148] He states that, with the traditional media (including the press, broadcasting and book and journal publishing), the danger posed by anonymity is mitigated by the presence of an active intermediary.[149] In these contexts the journalist, editor or publisher can vouch for the integrity and reliability of

[143] Although, the print press has long held archives, both physically and, more recently, online.
[144] See generally Viktor Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press, 2009).
[145] Van Dijck, above n 95, 6–7; Coe, 'The Social Media Paradox', above n 17, 25. See also Rowbottom, above n 16, 366–77.
[146] Leiter, above n 96, 155. See also the case of Paris Brown. At 17 years old, Paris was the first Youth Police Crime Commissioner. However, after just 6 days, she resigned from her role over comments she had posted on twitter dating back to when she was as young as 14 years old that could be interpreted as being homophobic and racist. In an interview, she admitted of having 'fallen into a trap of behaving with bravado on social networking sites', but denied she held these views. At the time of writing, a Google search for 'Paris Brown' still lists, within the top five results, a Daily Mail article from 2013 calling her 'foul-mouthed' and 'offensive'. Thus, the stigma attached to these comments could follow Paris for the rest of her career. See Russell Myers, 'Is This Foul-mouthed, Self-obsessed Twitter Teen Really the Future of British Policing? Youth Crime Tsar's Sex and Drug Rants', *Daily Mail* (London), 7 April 2013 <www.dailymail.co.uk/news/article-2305118/Paris-Brown-Is-foul-mouthed-self-obsessed-Twitter-teen-really-future-British-policing.html>.
[147] CIPD, 'Pre-employment Checks: An Employer's Guide' (Guide, December 2013) 2. ACAS (Advisory, Conciliation and Arbitration Service) reports that dismissals concerning employee use of social media is on the rise and recognises that users of social media are oblivious to the risks generated by their relationship with it, and the way in which it blurs the lines of private and public life: Andrea Broughton et al, 'Workplaces and Social Networking: The Implications for Employment Relations' (Research Paper 11/11, Acas, 2010) 12.
[148] Levmore, 'The Internet's Anonymity Problem', above n 1, 50, 54–5.
[149] Ibid. See also Saul Levmore, 'The Anonymity Tool' (1996) 144 *University of Pennsylvania Law Review* 2191.

their source, author or speaker. They can also check the story prior to publication or broadcast and, if need be, refer it to their legal team to prevent the dissemination of any material that may present disproportionate legal risks. To the contrary, it is unusual for online intermediaries to assume this responsibility for two reasons. Firstly, there has been a disinclination amongst social media companies to play the role of arbiter, as this leaves them open to claims of censorship.[150] This stance is clearly based on *speaker* interests. Secondly, due to the volume of online and social media communications, monitoring content is extremely difficult for social media platforms and website operators.[151] For Internet Service Providers ('ISPs') acting as conduits for the transmission of messages, monitoring such content is impossible.[152] These reasons pose a significant challenge for these mediums that have, traditionally, supported the interest of the *speaker*.[153] They are under increasing pressure to be able to identify authors of, for instance, defamatory material, revenge porn, cyber-bullying, hate speech and communications inciting terrorism to enable successful civil actions and/or criminal prosecutions.[154] This issue is animated by the recent 'fake news' phenomenon.[155] Social media platforms are being asked to deal with the proliferation of fake news on their sites.[156] Facebook, in particular, has been the subject of strong criticism in the wake of the 2016 US election.[157] This led to the platform introducing *audience* interest-based measures to deal with the issue of fake news (it announced that it will be partnering with a third-party fact-checking organisation) whilst, at the same time, reiterating its *speaker* interest-based commitment to 'giving people a voice' and that it 'cannot become an arbiter of truth',[158] with Mark Zuckerberg stating:

> We believe in giving people a voice, which means erring on the side of letting people share what they want whenever possible. We need to be careful not to discourage sharing of opinions or to mistakenly restrict accurate content.[159]

It is submitted that pressure to act as intermediaries that censor material may deter social media platforms, website operators and ISPs from providing their service and/or encourage them to act as arbiters of truth. This, in turn, could have a chilling effect on freedom of expression. The criticism leveled at social media platforms in respect of their reluctance to act as proactive intermediaries in the context of fake

[150] Levmore, 'The Internet's Anonymity Problem', above n 1.
[151] Barendt, *Anonymous Speech*, above n 1, 131.
[152] Ibid.
[153] Although see the argument above in relation to Facebook's anonymity and pseudonymity policy.
[154] For example, pursuant to s 3 of the *Terrorism Act 2006* (UK), they may be subject to criminal proceedings if they fail to take down unlawful 'terrorism-related' material upon receiving appropriate notice.
[155] In respect of all forms of speech, including anonymous and pseudonymous expression.
[156] Ed Klaris and Alexia Bedat, 'With the Threat of Fake News, Will Social Media Platforms Become More Media Companies and Forsake Legal Protections?' on *Inforrm's Blog* (21 December 2016) <https://inforrm.wordpress.com/2016/12/21/with-the-threat-of-fake-news-will-social-media-platforms-become-more-media-companies-and-forsake-legal-protections-ed-klaris-and-alexia-bedat/>.
[157] Oliva Solon, '2016: The Year Facebook Became the Bad Guy', *The Guardian* (online), 12 December 2016 <www.theguardian.com/technology/2016/dec/12/facebook-2016-problems-fake-news-censorship>.
[158] Adam Mosseri, *News Feed FYI: Addressing Hoaxes and Fake News* (15 December 2016) Facebook <https://newsroom.fb.com/news/2016/12/news-feed-fyi-addressing-hoaxes-and-fake-news/>.
[159] Mark Zuckerberg on *Facebook* (19 November 2016) <www.facebook.com/zuck/posts/10103269806149061>.

news, and the consequential response of the sites, are indicative of the challenges that emanate from the apparent conflict between the perceived roles of these platforms, and whether they should be required to operate as media or as technology companies.[160] It also clearly demonstrates that basing social media expression exclusively on one or other right is not appropriate. Instead, a combination of the two is required to provide an *enhanced level* of protection for anonymous and pseudonymous expression.

In contrast to social media platforms such as Facebook, that have adopted real name policies,[161] some sites have implemented policies that enable their users to communicate under a pseudonym or anonymously. Examples include sites such as Social Number, Gaia Online, Evsum and Anonyming.[162] According to Bartlett and Citron, a particularly notorious site is 4chan, which has become synonymous with trolling, the dissemination of pornographic material, internet attacks and threats of violence.[163] Herein lies the problem with online expression communicated anonymously or pseudonymously; it can prevent, or at least make it very difficult, for a victim of cyber-bullying, revenge porn, hate speech or defamation to identify the origin of the speech. The fact that they are unaware of the perpetrator, and their proximity to them, can make the harm suffered more acute.[164] This is illustrated by a number of cases from different jurisdictions. In 2007, several pseudonymous posts sexually abusing and threatening named female law students at Yale University were disseminated by the US social media site AutoAdmit.[165] The victims were successful in obtaining a court order requiring the platform to identify the perpetrators.[166] The Latvian-based social media site Ask-fm has been linked to anonymous cyber-bullying for a number of years.[167] In 2013 bullying on the site allegedly led to the suicide of Hannah Smith, a 14-year-old from Leicestershire, UK.[168] The Canadian newspaper,

[160] For example, until as recently as November 2016, Mark Zuckerberg has consistently described Facebook as a 'tech company', rather than a 'media company'. However, in December 2016, Zuckerberg finally conceded that Facebook is a 'media company': Maghan McDowell, 'Mark Zuckerberg: Facebook Is Not a Media Company', *WWD* (online), 14 November 2016 <http://wwd.com/business-news/media/mark-zuckerberg-facebook-not-media-company-10705266/>; Bethany Minelle, *Facebook CEO Mark Zuckerberg Pens Manifesto to Beat Fake News* (17 February 2017) Sky News <http://news.sky.com/story/facebook-ceo-mark-zuckerberg-pens-manifesto-to-beat-fake-news-10771067>.

[161] See the discussion above.

[162] Barendt, *Anonymous Speech*, above n 1, 134.

[163] Ibid 170; Citron, *Hate Crimes in Cyberspace*, above n 76, 52–5.

[164] Barendt, *Anonymous Speech*, above n 1, 132.

[165] *Doe I and Doe II v Individuals*, 561 F Supp 2d 249 (D Conn, 2008). See also Danielle Keats Citron, 'Civil Rights in Our Information Age' in Saul Levmore and Martha C Nussbaum (eds), *The Offensive Internet* (Harvard University Press, 2012) 31, 34–5; Martha C Nussbaum, 'Objectification and Internet Misogyny' in Saul Levmore and Martha C Nussbaum (eds), *The Offensive Internet* (Harvard University Press, 2012) 68, 73–5.

[166] *Doe I and Doe II v Individuals*, 561 F Supp 2d 249 (D Conn, 2008). See also Citron, *Hate Crimes in Cyberspace*, above n 76, 39–45, 133–4; Lyrissa Barnett Lidsky, 'Anonymity in Cyberspace: What Can We Learn From John Doe?' (2009) 50 *Boston College Law Review* 1373, 1386–9.

[167] Formspring, a similar US social media platform, has also been linked to a number of teen suicides: Amy Binns, 'Facebook's Ugly Sisters: Anonymity and Abuse on Formspring and Ask.fm' (2013) 4(1) *Media Education Research Journal* 27.

[168] This followed four previous suicides linked to anonymous bullying on the site in Lancashire, Florida and Ireland: Joe Shute, 'Cyberbullying Suicides: What Will It Take to Have Ask.fm Shut Down?', *The Telegraph* (online), 6 August 2013 <www.telegraph.co.uk/news/health/children/10225846/Cyberbullying-suicides-What-will-it-take-to-have-Ask.fm-shut-down.html>; Jon Henley, 'Ask.fm: Is There a Way to Make It Safe?', *The Guardian* (online), 7 August 2013 <www.theguardian.com/society/2013/aug/06/askfm-way-to-make-it-safe>.

The Globe and Mail, reported in 2016 that at least seven teen suicides, from countries around the world, are the result of anonymous cyber-bullying emanating from the site.[169] Also in 2013, Reece Elliot of South Shields, UK used a pseudonym to threaten to kill two hundred students at a school in the US State of Tennessee on a memorial Facebook page for a fellow student killed in a car crash. The threats caused thousands of students to stay away from the school. Consequently, Elliot was convicted of sending 'grossly offensive' and 'menacing' messages contrary to s 127 of the *Communications Act 2003* (UK).[170] In the same year, in the UK, Isabella Sorley and John Nimmo used Twitter to anonymously tweet threats of violence, including rape, to Caroline Criado-Perez for campaigning for a woman to appear on Bank of England notes, and to Stella Creasy MP for supporting Criado-Perez's campaign. According to Judge Riddle the tweets' anonymity heightened the victims' fear, as they had no way of knowing the danger posed by perpetrators, or how to recognise and avoid them.[171] Like Elliot, they were convicted of the s 127 offence.

The absence of proactive intermediaries, the ubiquity of fake news and, as illustrated by the examples above, the fact that victims of, for example, cyber-bullying and defamation are unable to easily identify the origins of the offending communication reinforce Levmore's contention that anonymous online communication has made it 'the preferred medium for juvenile communications'.[172] They also support the argument that a constitutionally protected US-style *speaker* interest-based absolute *right* to anonymous and pseudonymous speech could be claimed by anybody, including those disseminating fake news, or engaging in cyber-bullying, revenge porn, hate crimes, harassment or defamation. However, despite this, it is a *non-sequitur* that an *audience* interest-based argument, dictating that social media platforms, website operators and ISPs should require users to identify themselves, prevails (as has happened in authoritarian countries such as China[173]).

Conclusion

This article has established the benefits of anonymous and pseudonymous expression, particularly online and via social media: it facilitates free speech by enabling more people to communicate and exchange ideas and information. As a result, it fuels greater participation in public discourse and facilitates self-fulfilment. If this type of speech is restricted or prohibited, based on an *audience* interest approach, then these tangible advantages will be lost. Consequently, as advanced in relation to *Author of a Blog*, this, paradoxically, can damage the interests of the *audience* as it may dissuade people from engaging with this form of media and contributing to valuable citizen journalism that, in turn, could limit the amount of people able to participate in democratic discourse. Furthermore, the benefits gained by the audience from requiring speakers to identify themselves, particularly in respect of online and social

[169] David McGinn, 'Your Kid Is on Ask.fm? Be Afraid, Very Afraid', *The Globe and Mail* (online), 21 January 2016 <www.theglobeandmail.com/life/parenting/your-kid-is-on-askfm-be-afraid-very-afraid/article28308222/>; *Stories of 7 Teen Suicides Because of Ask.fm Bullying* (14 August 2016) NoBullying.com <https://nobullying.com/stories-of-7-teen-suicides-because-of-ask-fm-bullying/>.
[170] Owen Bowcott and Matt Williams, 'Internet Troll Admits Facebook Threats to Kill 200 Tennessee Students', *The Guardian* (online), 26 April 2013 <www.theguardian.com/technology/2013/apr/26/internet-troll-kill-tennessee-students>.
[171] 'Two Jailed for Twitter Abuse of Feminist Campaigner', *The Guardian* (online), 25 January 2014 <www.theguardian.com/uk-news/2014/jan/24/two-jailed-twitter-abuse-feminist-campaigner>.
[172] Levmore, 'The Internet's Anonymity Problem', above n 1, 50, 56–7.
[173] Barendt, *Anonymous Speech*, above n 1, 132. See also Kaye, above n 4, [23], [31].

media expression, is questionable; it does not, necessarily, enable the audience to accurately assess the credentials of the speaker and, therefore, the value of the communication. However, free speech based entirely on *speaker* interests and, in particular, the existence of a US-style constitutionally protected right to communicate anonymously and pseudonymously is equally as problematic, as it inadvertently protects speakers engaging in unwanted and damaging speech.

How lawyers, judges and *speakers* and *audiences* in all contexts of speech proceed is not an easy question to answer, and requires more research and debate. Ultimately, however, what this article has ascertained is that a balance needs to be struck between the competing *speaker* and *audience* interests. For the reasons outlined above, and in the prevailing sections, anonymous and pseudonymous expression should be allowed to continue, albeit not without qualification. For instance, in the context of online expression, upon being notified by the victims of harmful and damaging speech or by the authorities, social media platforms, website operators and ISPs should immediately suspend the offending perpetrator's account. They should also assist the authorities and the victims of crimes or defamatory allegations by identifying the perpetrators of the harmful speech for the purpose of legal proceedings. As Citron advocates, users who have previously been allowed to communicate anonymously or under a pseudonym, but who have abused that privilege by engaging in, for instance, hate speech or cyber-bullying, should be prevented from doing so in the future by being required to use their real name.[174]

[174] Citron, *Hate Crimes in Cyberspace*, above n 76, 239.