

Behind a Veil of Obscurity – Anonymity, Encryption, Free Speech and Privacy

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I. The Scoundrel's Letter

When I was a senior in high school I had a wonderful history teacher; knowledgeable, open-minded and critical when it came to his subject and the methods employed in order to grasp it. I lively do remember, for example, one episode in class, when we were discussing a letter to the editor of a newspaper published just the very day in the paper's morning edition. I have to admit that I have no recollection whatsoever of the letter's content (which, of course, makes this effort of story-telling rather miserable). But I do recall that it was an anonymous letter we were talking about. As well as I do recall what my teacher told us about this way of conveying one's views: "only scoundrels", he said, "write anonymous letters".

And, of course his position seemed to be perfectly comprehensible. And why shouldn't it be? Indeed, public discourse as a democratic society's bonding agent, creating "a public communicative sphere by making common experiences available to those who would otherwise remain unconnected strangers",¹ desperately is in need of men and women who speak their minds freely without taking refuge behind a veil of obscurity. At its foundation rests an understanding of "civic courage", as Louis Brandeis famously put it in *Whitney v. California*, "to be the secret of liberty";² courage that asks to stand behind one's convictions, in particular when the majority of the community holds different views and even though

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The following essay was drafted as a contribution to the 7th International Conference on Information Law and Ethics, held at the University of Pretoria, South Africa on Feb 22 and 23 2016. Honoring the conference title, "a time for inclusion", rather than focusing on a specific national legal system, it contains a fundamental rights collage, primed by some general considerations, and draws on some international examples that may illustrate the problems to be solved. Some of the thoughts introduced here were originally developed, however, for a lecture at the First General Assembly of the MAPPING (Managing Alternatives for Privacy, Property and Internet Governance) project in Hannover on Sep 23 2015, where I was asked to discuss the question 'Do the Fundamental Rights to Privacy, Freedom of Press and Freedom of Expression (now) entail a right to anonymous/encrypted communication?'. I would like to thank Maria Botti und Nikolaus Forgó for their kind invitations to speak at these events, the participants for lively discussions and most helpful suggestions and my history teacher, Wolf Peschl, of course, for many valuable lessons.

¹ Robert Post, *Recuperating First Amendment Doctrine*, 47 *Stanford Law Review* 1995, 1249 (1276). *Also see* Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 *Harvard Law Review* 1990, 601 (635), and, in general for the concept of the public sphere, the seminal analysis by Jürgen Habermas, *Strukturwandel der Öffentlichkeit* (1962).

² *Whitney v. California*, 274 U.S. 357 (1927) 375 (Brandeis, J. concurring).

repercussions are to be expected. A democratic Society, to sum it up, cannot exist without the likes of Emile Zola, openly shouting out their 'J'Accuse' at public grievances and abuses of power.³

II. An Honorable Tradition

I still hold this to be true, and yet, many arguments as brief as the one I just presented may well have their share of truth, while being still too simple: The basic willingness of its citizens to stand up and to stand out, may be a necessary precondition of any society to be called democratic; but even assessed from the perspective of a free speech principle, it certainly is not a sufficient one, which from the very outset disqualifies the perception of all those who choose alternative ways to spread their views as 'scoundrels'. History, of all disciplines, proves best to what great extent anonymity in public discourse and democratic structures are interrelated and identifies "anonymous pamphleteering not [as] a pernicious, fraudulent practice, but [as] an honorable tradition of advocacy and of dissent":⁴

It is hard, for example, to imagine the longing of the British colonies in America for independence without Thomas Paine's famous pamphlet on 'Common Sense' coming to one's mind, originally published anonymously in the first and then as written "by an Englishman" in the second edition.⁵ And it is hard to imagine the formation of the United States without the Federalist papers, 85 essays written by Alexander Hamilton, James Madison and John Jay under the pseudonym 'Publius' promoting the ratification of the Constitution.⁶ The same holds true for the letters critical of the government of King George III published under the pseudonym 'Junius' in the pages of the 'Public Advertiser' in 18th century England,⁷ it applies

³ Le Figaro, 13 January 1898. See Henri Guillemin (ed), Émil Zola, J'accuse! La vérité en marche (Éditions Complexe 1988) 97-113. For a recent contribution on how Zola's intervention helped to shape the modern understanding of the public intellectual Steve Fuller, The Public Intellectual as Agent of Justice: In Search of a Regime, 39 Philosophy and Rhetoric 2006, 147.

⁴ McIntyre v. Ohio Elections Comm'n 514 U.S. 334 (1995) 357.

⁵ Common Sense; Addressed to the Inhabitants of America (both editions Bell 1776). The addition to the second edition was made, however, by Bell without Paine's consent – cf. Alfred Aldridge, Thomas Paine's American Ideology (1984) 42. Generally, for the 'Republican Charisma' exemplified by *Common Sense* see J. Michael Hogan/Glen Williams, Republican Charisma and the American Revolution: The Textual Persona of Thomas Paine's *Common Sense*, 86 Quarterly Journal of Speech 2000, 1.

⁶ For the First Collection of these Essays originally published between 1787 and 1788 in the New York Packet, The Daily Advertiser and The Independent Journal cf. the Federalist: a collection of essays written in favor of the new Constitution as agreed upon by the federal convention, September 17, 1787. In Two Volumes (Mc Lean 1788). On the question of the authorship of the respective essays see Jacob E. Cooke, The Federalist (1961) xix-xxx.

⁷ For the First (authorised) Collection of the letters originally published in the 'Public Advertiser' between 1769 and 1772, cf Junius: Stat Nominis Umbra (Woodfall 1772).

to Voltaire's 'Candide',⁸ arguably to the works of William Shakespeare,⁹ and countless further accounts on this side or the other side of the Atlantic that significantly influenced public discourse and eventually altered the political landscape. And they did so behind the aforementioned veil of obscurity. Or perhaps better: these influences may never have come to light and these alterations may have never happened, was it not for the veil of obscurity behind which advocacy could take refuge: either to allow the argument instead of the writer to come to the fore,¹⁰ thereby overcoming possible trenches of partisanship and personal prejudice,¹¹ or to highlight the author's position by the use of a certain pseudonym,¹² or, perhaps typically, because the ideas expressed were considered subversive, treacherous or blasphemous; too dangerous in any case to be freely circulated among the public.

Focusing on the last element, it is safe to state, as Hugo Black did for a US Supreme Court majority in *Talley versus California*, that "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind;"¹³ as on many occasions, anonymity proved to be an essential tool for speaking truth to power. Sadly in many places it still is.¹⁴ Yet, even where it is not, in the democratic societies adhering to the rule of law many of us have the privilege to live in, "[a]nonymity [serves as] a shield from the tyranny of the majority. [And as such it indeed and in manyfold ways does] exemplify the purpose of [fundamental rights in general and of freedom of speech] in particular: to protect unpopular individuals from retaliation-and their ideas from suppression-at the hand of an intolerant society."¹⁵ We may, therefore, conclude by referring to Catalina Botero Marino, then Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights: "[t]he protection of anonymous speech is conducive to the participation of

⁸ *Candide ou l'Optimisme*, Traduit de l'Allemand de Mr. le Docteur Ralph (1759).

⁹ See, for a recent encounter with the topic, James Shapiro, *Contested Will: Who Wrote Shakespeare?* (Simon and Schuster 2010).

¹⁰ See, on the question of 'source-bias' i.a., Chesa Boudin, *Publius and Petition: Doe v. Reed and the History of Anonymous Speech*, 120 *The Yale Law Journal* 2011, 2140 (2155-2156).

¹¹ A point of particular importance during the ratification of the US Constitution – see Victoria Smith Ekstrand & Cassandra Imfeld Jeyaram, *Our Founding Anonymity: Anonymous Speech during the Constitutional Debate*, 28 *American Journalism* 2011, 35 (45-47, 49-52). Also see Eran Shalev, *Rome Reborn on Western Shores: Historical Imagination and the Creation of the American Republic* (2009) 158 and Robert G. Natelson, *Does "The Freedom of the Press" Include a Right to Anonymity? The Original Meaning*, 9 *New York University of Law & Liberty* 2015, 160 (184-185).

¹² See, e.g. for the American Revolution Arthur Schlesinger, *Prelude to Independence: The Newspaper War on Britain 1764-1776* (Kopf, 1958).

¹³ *Talley v. California* 362 U.S. 60 (1960) 64.

¹⁴ See for a recent contribution Helmi Norman, *Arab Religious Skeptics Online: Anonymity, Autonomy, and Discourse in a Hostile Environment*, The Berkman Center for Internet & Society at Harvard University, Research Publication No. 2015-2, February 4, 2015.

¹⁵ *McIntyre v. Ohio Elections Comm'n* 514 U.S. 334 (1995) 357.

individuals in public debate since—by not revealing their identity—they can avoid being subject to unfair retaliation for the exercise of a fundamental right.”¹⁶

III. ... and the Press

Of course, it is not only individuals, acting independently based on their free-speech claims that beneficially employ anonymity in conveying their messages without having to fear the powerful forces they may be directed at. Anonymity has traditionally (and correctly) been perceived as essential prerequisite of the press and other media to assume their role of what the European Court of Human Rights calls a “public watchdog”,¹⁷ guarding the public interest as a turning table of information: To a lesser extent as far as anonymous reporting is concerned, for which there are, at least nowadays,¹⁸ few, however relevant examples - think of the British weekly “The Economist”; to a far greater extent as far as journalistic sources are concerned. As the ECtHR emphasized in *Goodwin v. UK*, its leading case on the subject: “Protection of journalistic sources is one of the basic conditions for press freedom [...]. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest[and] the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.”¹⁹

In particular, the Court pointed out in its later case law, regarding “the potentially chilling effect an order of source disclosure has on the exercise of [press] freedom, such a measure cannot be compatible with [...] the Convention unless it is justified by an overriding requirement in the public interest;²⁰ a demanding balancing exercise, resembling the test

¹⁶ Catalina Botero Marino, *Freedom of Expression and the Internet* (2013) § 134.

¹⁷ ECtHR 25.3.1985, *Barthold v. Germany*, 8734/79 § 58 and for the Court’s more recent case law 8.12.2015, *Caragea v. Romania*, 51/06 § 26. The Court’s case law, however, keeps expanding the attribution of “watchdog” as “the function of creating forums for public debate is not limited to the press. That function may also be exercised by non-governmental organisations, the activities of which are an essential element of informed public debate. The Court has therefore accepted that non-governmental organisations, like the press, may be characterised as social “watch-dogs”. In that connection their activities warrant similar Convention protection to that afforded to the press (see *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, 14 April 2009), § 27, and *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 103, 22 April 2013) – ECtHR 28.11.2013, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*, 39534/07 § 34. Also see 17.2.2015, *Guseva v. Bulgaria*, 6987/07 § 38 and EGMR 27.5.2004, *Vides Aizsardzības Klubs c. Lettonie*, 57829/00 § 42.

¹⁸ Whereas it used to be widespread in 19th century England or the US at that time, for example – see Jason A. Martin and Anthony L. Fargo, *Anonymity as Legal Right: Where and Why it Matters*, 16 *North Carolina Journal of Law and Technology* 2015, 311 (322-327).

¹⁹ ECtHR (GC) 27.3.1996, *Goodwin v. UK*, 17488/90 § 39.

²⁰ ECtHR 22.11.2012, *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*, 39315/06 § 127. Also see, in particular ECtHR (GC) 14.9.2010, *Sanoma Uitgevers B.V. v. the Netherlands*, 38224/03 and ECtHR 15.12.2009, *Financial Times Ltd and Others v. the United Kingdom*, 821/03. But see ECtHR

Byron White developed in the famed, even if oftentimes criticized, majority opinion in the US Supreme Court case *Branzburg v. Hayes* Judgment,²¹ as well as countless other efforts of national High Courts from Canada²² to Japan²³ to ensure source protection, even if on a case by case basis. To adequately pursue this matter, however, would require a separate paper on this topic.

IV. At the Core of a Free Speech Principle

In any case it seems sufficiently established that anonymity, from more than one perspective, rests at the very core of a free-speech principle according to the case of law referred to. And it impressively does so as well on the universal level which is amply demonstrated by the fact that when the International Covenant on Civil and Political Rights was negotiated, an amendment proposed by Brazil²⁴ to include the phrase “anonymity is not permitted” in its Article 19, was rejected emphatically.²⁵ Remarkably, it is this ubiquity that, upon closer examination, exposes the rationale for protecting anonymous speech as developed so far to be deficient: Of course, anonymous speech is elementary to a democratic society, precisely because it facilitates the creation of a public communicative sphere of common experiences; precisely because it enables and shapes public discourse; precisely because it is of such vital importance to public interest.

Still, that is not all: The right to speak freely and anonymously *may* serve a political function. It doesn't have to. Just as anonymous speech *may* have political content *and* be protected while it does not necessarily need political content in order *to* be protected. We may choose to speak anonymously on a large variety of topics and for a large variety of reasons.

John Mullan, for example in his survey of Anonymity in English literature distinguishes mischief, modesty, women being men, men being women, danger, reviewing, mockery, devilry and confession.²⁶ John Paul Stevens on behalf of a Supreme Court majority put it this way: “[T]he decision in favor of anonymity may be motivated by fear of economic or official

(dec) 27.5.2014, Stichting Ostade Blade 8406/06. For the Court's case law on searches and seizures intended to identify a source most recently ECtHR 19.1.2016 *Görmüş and Others v. Turkey*, 49085/07.

²¹ *Branzburg v. Hayes*, 408 U.S. 665 (700): “State's interest must be ‘compelling’ or ‘paramount’ to justify even an indirect burden on First Amendment rights.” For a recent analysis of the consequences of the developments caused by *Branzburg* cf. Martin & Fargo (n. 21) 334-339.

²² See for the case law of the Supreme Court of Canada *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572 and *R. v. National Post*, [2010] 1 SCR 477.

²³ Supreme Court of Japan, 2006 (Kyo) 19, Minshu Vol. 60, No. 8.

²⁴ See, Art 5 § IV of the Constitution of Brazil: ‘manifestation of thought is free, but anonymity is forbidden.’

²⁵ Marc J, Bossuyt, Guide to the “travaux Préparatoires” of the International Covenant on Civil and Political Rights (1987) 379-380.

²⁶ John Mullan, *Anonymity: A Secret History of English Literature* (2007).

retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible;"²⁷ indicating in any case that, the equation: anonymous speech = political or social activism suffers from a lack of complexity.

Thus, if we want to assess the deeper significance of anonymous speech in a broader, and therefore more adequate perspective, we need to reflect generally on what anonymity allows us to do in conceptualizing ourselves within the framework of society.

V. Privacy in Speaking?

In doing that, we may find Stevens's last remark somewhat disturbing: Of course, we may readily assume anonymity at the core of a fundamental rights claim to privacy. But may speaking anonymously really be about preserving "as much of one's privacy as possible"? At the very least it sounds counter-intuitive: After all anonymous speech for whatever reason, so far as we have discussed the phenomenon until now, does not seem to be about the speakers intent "to be let alone",²⁸ as Warren and Brandeis famously put it, or her claim to a sphere that does not allow for any intrusion. Quite the contrary: Even if ideally, the concept of speech presupposes a willing speaker²⁹ and (even if only potentially) somebody to speak to; as "[c]ommunication is a joint enterprise, and only that joint enterprise triggers the principle of free speech."³⁰ Speech, no matter if of the anonymous variety or not, means to convey a message to others;³¹ and to speak therefore means to open up rather than to seclude, to interact rather than to stay put.

So is it really correct to talk about privacy in speaking?

It is; even if understanding this presumes to deviate from the narrow concept of privacy I just introduced and to focus on the purposive approach the Canadian Supreme Court among others had long applied on Art 8 of the Canadian Charter "that emphasizes the protection of privacy as a prerequisite to individual security, self-fulfillment and autonomy as well as to the maintenance of a thriving democratic society".³² The European Court of Human Rights

²⁷ *McIntyre v. Ohio Elections Comm'n* 514 U.S. 334 (1995) 341-342. Also see *Watchtower Bible & Tract Soc. of N. Y., Inc. v. Village of Stratton* 536 U.S. 150 (2002).

²⁸ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *Harvard Law Review* 1890, 193 (205).

²⁹ *Virginia Pharmacy Board v Virginia Consumer Council*, 425 U.S. 748 (1976) 756.

³⁰ Frederick Schauer, *Free Speech: a philosophical enquiry* (Reprint 1984) 98.

³¹ Even if the message does not have to be „a narrow, succinctly articulable“ one - *Hurley et al v Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc, et al*, 515 U.S. 557 (1995) 569.

³² *R. v. Spencer*, [2014] 2 S.C.R. 212 § 15 referring to *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 156-57, *R. v. Dyment*, [1988] 2 S.C.R. 417, 427-28, *R. v. Plant*, [1993] 3 S.C.R. 281, 292-93, *R. v. Tessling*, 2004 SCC 67, [2004]

introduced a similar thought in its Niemietz Judgment in 1992³³ and developed it further in its case law over the past years arguing that the protection of one's 'private life' is "not limited to the protection of an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. It also protects the right to establish and develop relationships with other human beings and the outside world. [...] There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'".³⁴

If we thus perceive the protection of private life to encompass an individual's self-determined development in interaction with others,³⁵ we may readily conclude that a fundamental rights claim to privacy and a fundamental right to free expression are deeply interwoven; creating a safe sphere of sovereign decision which aspects of one's personality to disclose, what to communicate, whom to speak to, whom to avoid.³⁶

A right to self-determined social interaction so composed grants broad discretion to the individual in answering those questions; holistically safeguarding a person's prerogative in deciding what to realize and how to realize oneself in society.³⁷

It is therefore indeed, as the previous Special Rapporteur on Freedom of Expression for the Inter-American Commission on Human Rights recently held, "[b]oth the right to freedom of thought and expression and the right to private life that protect anonymous speech from government restrictions;"³⁸ and perhaps even closer to my understanding, as Lord Neuberger put it: "In the context of anonymous speech, an author's [privacy] rights reinforce his or her [free speech] rights".³⁹

3 S.C.R. 432, §§ 12-16 and Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401, [2013] 3 S.C.R. 733 §22.

³³ ECtHR (GC) 16.12.1992, Niemietz v. Germany, 13710/88 § 29.

³⁴ ECtHR 21.6.2011, Shimovolos v. Russia, 30194/09 § 64. See, for the Court's more recent case law ECtHR (GC), 12.6.2014, Fernández Martínez v. Spain, 56030/07 § 126 and ECtHR 12.1.2016, Bărbulescu v. Romania, 61496/08 § 35.

³⁵ See in comparative perspective Avner Levin & Mary Jo Nicholson, Privacy Law in the United States, the EU and Canada: The Allure of the Middle Ground, 2 University of Ottawa Law & Technology Journal 2005, 357 and Michael C. James, A Comparative Analysis of the Right to Privacy in the United States, Canada and Europe 29, Connecticut Journal of International Law 2014, 257.

³⁶ For a recent discussion of this topic see i.a. Bart van der Sloot, Privacy as Human Flourishing, 5 JIPITEC 2014, 230 and R.L. David Hughes, Two Concepts of Privacy, 31 Computer & Security Law Review 2015, 527.

³⁷ The "Right to be Forgotten" (ECJ [GC] 13.5.2014, Google Spain SL) is the most recent example for this perception –see, i.a., Richard Spinello, The Right to Privacy in the Age of Digital Technology, in Zeadally & Badra (eds), Privacy in a Digital, Networked World (2015) 291.

³⁸ Catalina Botero Marino, Freedom of Expression and the Internet (2013) § 134 (my emphasis).

³⁹ Lord Neuberger, "What's in a Name?" – Privacy and anonymous speech on the Internet, Keynote Speech Conference5RB, 30.9.2014 § 25.

It is a related, yet divergent rationale that shields encrypted communication from undue government interference. I would like to make that point rather quick. But still, even if the academic and professional discourse on the topic oftentimes mixes anonymity and encryption together as they both are concerned with disguised communication, it is important to point at an essential difference: while anonymity disguises the messenger, encryption disguises the message. And therefore the picture of the anonymous pamphleteer, addressing public grievances, is ill-fitted as a starting point of examining encryption in the first place; because – if this simplifies rather complex issues: The pamphlet craves the light of the public, the encrypted message shuns it.

The consequences of this observation are, of course, of some importance as far as the angle from which to address it in a fundamental rights perspective is concerned: Encrypted communication primarily seems to have a fundamental rights claim based on privacy considerations like the protection of “correspondence” as article 17 of the ICCPR and – following its wording – 8 ECHR put it, or the protection of “communication” in the sense of article 7 of the EU Charter of Fundamental Rights. Encryption provides security so that individuals are able “to verify that their communications are received only by their intended recipients, without interference or alteration, and that the communications they receive are equally free from intrusion”,⁴⁰ as encryption is of invaluable importance when it comes to communication of sensitive topics like illness, religion or sexual orientation.⁴¹

And yet one must not underestimate the great extent to which claims deriving from a right to privacy and such claims deriving from a right to free speech are interrelated as far as encrypted communication is concerned; being of essential importance, not only as far as the freedom to hold opinions but also as far as the freedom to seek, receive, and impart information and ideas is concerned.⁴² It would be wrong to simply sum up the phenomenon by stating that anonymous sources want to talk while encrypted sources intend to remain

⁴⁰ David Kaye, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression 22.5.2015, A/HRC/29/32 § 17.

⁴¹ See e.g. Stephen Stratton, Janet Dean, Mark Yarhouse and Michael Lastoria, Sexual Minorities in Faith-Based Higher Education: A National Survey of Attitudes, Milestones, Identity, and Religiosity, 41 *Journal of Psychology and Theology* 2013, 3. For select (approaches to the) problems in the various fields see i.a. Valentina Ciriani, Sabrina De Capitani di Vimercati, Sara Foresti, Sushil Jajodia, Stefano Paraboschi & Pierangela Samarati, Fragmentation and Encryption to Enforce Privacy in Data Storage 171, in Biskup & Lopez (eds), *ESORICS* (2007) 171, Yitzchak M. Binik, Kenneth Mah & Sara Kiesler, Ethical Issues in Conducting Sex Research on the Internet, 36 *The Journal of Sex Research* 2010, 82, Rajeev Kumar, Ram Gopal, Robert Garfinkel, Freedom of Privacy: Anonymous Data Collection with Respondent-Defined Privacy Protection, 22 *INFORMS Journal on Computing* 2010, 471.

⁴² Frank LaRue, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression 17.4.2013, A/HRC/23/40 §§ 24-27.

silent: Far too often encrypted communication turns out to be the necessary prerequisite for subsequently bringing to light that kind of information which could only be transmitted far from the public eye.

In any case, for now, it may be sufficient to reverse Lord Neuberger's remark on anonymous speech as far as encrypted messages are concerned: "In the context of encrypted speech, an author's [free speech] rights reinforce his or her [privacy] rights".⁴³

Of course, this twist has no immediate impact on the result regarding both of the fundamental rights claims in question: As Frank La Rue, then Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression stated in his 2013 Report to the Human Rights Council, assessing the problems before us: "Privacy and freedom of expression are interlinked and mutually dependent".⁴⁴ Consistently we may agree with the conclusions his successor David Kaye reached in his 2015 report: that encrypted and anonymous messages indeed enjoy the protection of the rights to privacy and freedom of expression.⁴⁵

VI. Modes of Communication

To leave it with this observation, however, would prove to be somewhat unsatisfactory, or so I assume. Because it keeps ignoring the elephant in the room: What does it mean that fundamental rights claims to privacy and freedom of expression *enjoy* a right to anonymous or encrypted communication? Of course, I will not be able to give you one, or even a coherent, answer to that question. Please do allow me, however, the following general remarks. In order to do this, let us take one step back, highlighting two points of Kaye's report:

First by a remark as to the way anonymity and encryption are related to a general concept of speech protection. Kaye's report relies on describing encryption and anonymity as specific *media* through which individuals exercise their freedom of expression⁴⁶ (reinforced, or backed up by their right to privacy, I would like to add). He does so, evidently, against the backdrop of case law shaped in particular by the European Court of Human Rights whereas "Article 10 ECHR protects not only the substance of the ideas and information expressed but also the

⁴³ Neuberger (n. 39) § 25.

⁴⁴ LaRue (n. 42) § 79.

⁴⁵ Kaye (n. 40) §§ 14-28.

⁴⁶ *Id.* § 26.

form in which they are conveyed.”⁴⁷ Which is why “all means of expression are included in the ambit of Article 10 of the Convention.”⁴⁸

True enough. But are encryption and anonymity indeed means of communication in that sense? Or to come back to the point Kaye made in his report: Are they *media*, employed in order to serve as a carrier of a message to be conveyed? You realize by the way I phrase the question that I am not keen to answer it affirmatively: To communicate anonymously or in an encrypted manner does not constitute a medium; it rather presupposes it. And thus it says not that much about the medium employed; as little in fact as it tells us about the content that is communicated.

Much more than to constitute a specific medium, to communicate anonymously or in an encrypted manner means to make use of a certain *mode* of communication. A mode that may apply to a large variety of different media as well as it may be applied to communicate a large variety of different messages. Anonymous or encrypted communication thus may well be regarded as a layer to be spread across the body of fundamental rights doctrine to be applied, allowing for a specific emphasis on those issues where these modes of communication may have particular use.

Now to approach the second point: Kaye’s Report, as well as the conclusion he draws, is primarily concerned with anonymity and encryption in digital communication and thus, of course, with the most important field of application for the topic I’m addressing. Indeed, it is evident, that today, when we are discussing anonymity and encryption, letters to the editor of a newspaper are no longer at the very center of our attention. Save for Dan Brown Novels, the same applies to coded messages handed from one person to another. Nowadays at the very center of our attention we find the global network that so significantly altered our means of communication and continues significantly to shape public discourse as well as the political landscape.

Indeed: “The Internet has profound value for freedom of opinion and expression, as it magnifies the voice and multiplies the information within reach of everyone who has access to it.”⁴⁹ Its “transformative nature [...] giv[es] voice to billions of people around the world”.⁵⁰

⁴⁷ See, i.a., ECtHR 23.5.1991, *Oberschlick v Austria* (No 1), 11662/85 § 57; (GK) 24.9.1994, *Jersild v Denmark*, 15890/89 § 31; 24.2.1997, *De Haes and Gijssels v Belgium*, 19983/92 § 48; 29.3.2001, *Thoma v Luxembourg*, 38432/97 § 45, 12.9.2011, *Palomo Sánchez v Spain*, 28.955/06 ua § 53 and for the Court’s more recent case law 28.10.2014, *Gough v UK*, 49327/11 Rn 149.

⁴⁸ See, for the Court’s recent case law ECtHR 21.10.2014, *Murat Vural v Turkey*, 9540/07 § 52.

⁴⁹ Kaye (n. 40) § 11.

And, as Lord Neuberger emphasized, the Internet “offers unprecedented opportunities for such self-development.”⁵¹

This has, of course, long since been recognized in free speech case law: John Paul Stevens, writing for a Supreme Court majority, emphasized already back in 1997 that “[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”⁵²

It is this amplifying function that, as the ECtHR emphasizes on a regular basis,⁵³ makes tools available on the internet powerful as well as dangerous. And even more so if employed anonymously. And – even though from a different perspective – the same may apply to conveying encrypted information which – in an advanced manner previously only at the disposal of governments – is drastically facilitated by modern technological means readily available.

As Kaye concludes: “Terrorists and criminals may use encryption and anonymity to hide their activities, making it difficult for Governments to prevent and conduct investigations into terrorism, the illegal drug trade, organized crime and child pornography, among other government objectives. Harassment and cyberbullying may rely on anonymity [...] cowardly mask[ing] discrimination, particularly against members of vulnerable groups.”⁵⁴

In particular as far as the latter problem is concerned, psychologists have noted that publicly communicating anonymously may indeed have a significant disinhibited effect on the communicator who then is liberated from the ties of open interaction according to the general social framework.⁵⁵ This, of course, hardly comes as a surprise. More than two Centuries ago Benjamin Franklin observed that anonymity: “enabled men of honor to behave

⁵⁰ The United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Freedom of Expression and the Internet, 23.5.2011.

⁵¹ Neuberger (n. 39) § 14.

⁵² *Reno v. American Civil Liberties Union* 521 U.S. 844 (1997) 870.

⁵³ See, i.a. ECtHR 22.4.2010, *Fatullayev/Azerbaijan*, 40984/07 § 95, 18.12.2012, *Yıldırım v. Turkey* 3111/10 § 48 and, in particular, (GC) 16.6.2015, *Delfi AS v. Estonia*, 64569/09 § 110.

⁵⁴ Kaye (n. 40) § 13.

⁵⁵ See, in particular, John Suler, *The Online Disinhibition Effect*, 7 *CyberPsychology & Behavior* 2004, 321. For a more recent study see Noam Lapidot-Lefler & Azy Barak, *Effects of anonymity, invisibility, and lack of eye-contact on toxic online disinhibition*, 28 *Computers in Human Behavior* 2012, 434.

dishonorably”.⁵⁶ And yet there is more to it, if we decide to give it a closer look, as *honor* or to put it in more modern terms: *reputation*, so painstakingly built and so carefully guarded in our social interactions off-line cannot serve its diverse functions in a sphere that allows the individual to dissolve the ties of recognition and accountability: “Anonymity and fluidity in the virtual world”, Robert Putnam observes, “encourage ‘easy in, easy out,’ ‘drive-by’ relationships. The [...] casualness [...] of computer-mediated communication [...] discourages the creation of social capital. If entry and exit are too easy, commitment, trustworthiness, and reciprocity will not develop.”⁵⁷

Thus, rather than to just disown a reputation, previously built, “anonymity inhibits the process by which reputations are formed”⁵⁸ in the first place. The global village – assessed from this perspective – starts to resemble the “great city”, Adam Smith describes in “The Wealth of Nations”, where the common man is “sunk in obscurity and darkness[; where h]is conduct is observed and attended to by nobody, and he’s therefore very likely to neglect it himself, and to abandon himself to every sort of low profligacy and vice.”⁵⁹

True enough: The shield of anonymity obviously tends not always to bring out the very best in us. Or to put it more bluntly, vindicating my history teacher: indeed, the shield of anonymity obviously tends to bring out the scoundrel from time to time; and secrecy by way of encryption, it may be added in the given context, may well abet him.⁶⁰ And we have to consider all these specific problems, when spreading our layer of fundamental rights doctrine over cases where the *modes* of anonymous or encrypted communication meet the amplifying function of digital tools.

VII. The Length of the Leash

Sure enough: How these problems are dealt with, evidently depends on the specific legal system we are talking about and the fundamental rights standards to be applied in these systems. Vietnam, for example, outlawed the use of pseudonyms in 2013; forcing bloggers to reveal their identity.⁶¹ Iran requires all IP addresses used for blogs in the country to be

⁵⁶ Shalev (n. 11) 158.

⁵⁷ Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (2000) 177.

⁵⁸ Daniel J. Solove, *The Future of Reputation* (2007) 141-142.

⁵⁹ Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* [1776] (Cannan ed.), vol. 2 (1904) 280.

⁶⁰ Just see Paul Bocij & Leroy McFarlane, *Cyberstalking: The Technology of Hate*, 76 *The Police Journal* 2003, 204 (210-211).

⁶¹ See Martin and Fargo (n. 21) 362.

registered.⁶² Russia obliges popular bloggers to register with the national media regulator⁶³ and China, most prominently, introduced a real-name registration requirement several years ago,⁶⁴ which according to government announcements dating from last year is to be strictly enforced.⁶⁵

The Korean Constitutional Court in a judgment of 2012 on the other hand struck down a statute requiring general online real name verification: As a [rule that] mandates identity verification regardless of the content of [a] posting from almost all users on all major websites [would cause a significant chilling effect, the court argued].[...]. Such [a] result of suppressing a great majority's legal postings on the account of the existence of a minority of people abusing the internet[, the Court went on to argue,] is an excessive restriction on freedom of anonymous speech [i]t treats all people as potential criminals in favour of investigative expediency.⁶⁶

This reason, it seems to me, may, in a nutshell, well serve as a description of the fundamental rights standard to be applied according to the diverse considerations outlined before: Anonymous and encrypted speech on the internet, though fraught with harmful side effects, should be strongly protected in view of its fundamental rights value. Strongly, although not absolutely: as these harmful side effects need to be addressed and eventually regulated; oftentimes just to effectively safeguard fundamental rights of individuals negatively affected by the actual or potential actions of others as well as to ensure public safety and well-being.

And so, even if the result of the *Delfi* judgement, delivered by the Grand Chamber of the European Court of Human Rights last year,⁶⁷ may well be criticized,⁶⁸ the general rationale underlying it, albeit originally developed in an earlier judgment, seems perfectly reasonable: “[A]lthough freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be

⁶² See, i.a., Saeid Golkar, Liberation or Suppression Technologies? The Internet, the Green Movement and the Regime in Iran, 9 *International Journal of emerging Technologies and Society* 2011 50 (60).

⁶³ See, i.a. Andrey Tselikov, The Tightening Web of Russian Internet Regulation, Berkman Center Research Publication No. 2014-15.

⁶⁴ See Jyh-An Lee & Ching-Yi Liu, Real Name Registration Rules and the Fading Digital Anonymity in China, 25 *Washington International Law Journal* 2016, 1.

⁶⁵ WSJ 4.2.2015, China Is Requiring People to Register Real Name for Some Internet Services.

⁶⁶ KCC 23.8.2012, 2010Hun-Ma47.

⁶⁷ *Delfi v. Estonia* (n. 53).

⁶⁸ See, i.a. Martin Husovec, General monitoring of third-party content: compatible with freedom of expression?, 11 *Journal of Intellectual Property Law & Practice* 2016, 17.

absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others.”⁶⁹

To transpose this into commonly accepted fundamental rights terminology: Anonymity and encryption may be restricted by law in order to pursue certain legitimate aims applying a strict proportionality standard. As even encryption and anonymity on the Internet, “although [...] important value[s], must be balanced against other rights and interests”.⁷⁰ Following the arguments introduced by the Supreme Court of South Korea, indiscriminate requirements like ubiquitous real-name registration requirements or general bans on encryption, however, will hardly pass effective fundamental rights scrutiny along these lines.

Still, we see that just because the fundamental rights to privacy, freedom of press and freedom of expression do entail a right to anonymous or encrypted communication, that does not mean that the scoundrel is unleashed... What we will have to keep discussing, however, is how long the leash ought to be: Because the answers to the questions whether or not to grant governments back-door access to encrypted data as is currently passionately discussed in the US,⁷¹ whether or not to accept prior approval for the use of VPNs as in Pakistan⁷² or the ban of certain encryption standards as in India,⁷³ whether or not to justify warrantless acquisition of anonymous online identities as recently quashed by the Supreme Court of Canada⁷⁴ and under which circumstances to hold intermediaries accountable for third-party statements as debated within the European system of human rights protection at present,⁷⁵ will decide the fate of our capacity for self-determined social interaction beyond the ever present scrutiny of our environment.

⁶⁹ *Delfi v. Estonia* (n. 53) § 149 referring to ECtHR 2.12.2008, *K.U. v. Finland*, 2872/02 § 49.

⁷⁰ *Delfi v. Estonia* (n. 53) § 149.

⁷¹ See, i.a., Reema Shah, *Law Enforcement and Data Privacy: A Forward-Looking Approach*, 125 *Yale Law Journal* 2015, 542.

⁷² See, i.a. Zubair Nabi, *The Anatomy of Web Censorship in Pakistan*, arXiv:1307.1144 [cs.CY].

⁷³ See, i.a., A. Parvathy; Vrijendra Singh, Ravi Shankar Choudhary, *Legal Issues Involving Cryptography in India*, 8 *Vidhigya* 2013, 1.

⁷⁴ *R v. Spencer* [2014] 2 SCR 212.

⁷⁵ See, i.a., Lisl Brunner, *The Liability of an Online Intermediary for Third Party Content – The Watchdog Becomes the Monitor: Intermediary Liability after Delfi v Estonia*, 16 *European Human Rights Law Review* 2016, 163. For the ECtHR’s case law see, most recently, ECtHR 2.2.2016, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, 22947/13.