

ARTUR PERICLES LIMA MONTEIRO

**Online anonymity in Brazil:
identification and the dignity in wearing a mask**

Master's dissertation

Supervisor: Professor Virgílio Afonso da Silva

**UNIVERSITY OF SÃO PAULO
FACULTY OF LAW
São Paulo – SP
2017**

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identification and the dignity in wearing a mask**

Dissertation submitted to the graduate program on law at the Faculty of Law of the University of São Paulo, in partial fulfilment of the requirements for the degree of master of science, in the field of concentration of constitutional law, under the supervision of Professor Virgílio Afonso da Silva.

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ABSTRACT

Artur Pericles Lima Monteiro. Online anonymity in Brazil: identification and the dignity in wearing a mask. 2017. 144 pp. Master's degree – Faculty of Law, University of São Paulo, São Paulo, 2017.

Anonymity has long been held in disrepute by Brazilian constitutional law literature, which typically assigns it no value. Prevailing scholars insist on an interpretation of the constitution which reads an identification requirement into the clause on anonymity. The internet presents a challenge for this understanding of freedom of expression. This dissertation addresses that challenge by adopting an interpretive approach. It starts by considering what the implementation of that reading of the constitution would look like in practice, exploring the strategies adopted by the Press Act of 1967. Calling into question, both for pragmatic and substantive reasons, whether those strategies would be available if applied as a general imposition on communication, the argument turns to other practices admitted by Brazilian law, or explicitly provided by the constitution, that are inconsistent with the reading of an unrestricted identification requirement. What the anonymity clause means is thus shown to turn on a question of value. We must consider that question in light of the best theory of the point of our constitutional rights, particularly freedom of expression. By adopting a constitutive justification, which connects it to democracy, to political legitimacy and, ultimately, to dignity, we appreciate that anonymity must be protected by freedom of expression just as any part the content of the speech would. Identification is expressive, and so is anonymity. The internet makes this patently clear by enabling anonymous personal communication, which creates the possibility of ‘anonymous intimacy’. This approach of constitutive justification of freedom of expression also serves us well in our understanding of the right to privacy. It provides us with the best basis for why surveillance is wrong, even when it is successful. So conceived, the right to privacy insists that government must not interfere with the private lives of individuals in a manner which is inconsistent with dignity. Having rejected the identification paradigm, the dissertation then offers a reinterpretation of Brazilian law as regards online anonymity tools, anonymous platforms and anonymous content.

RESUMO

Artur Pericles Lima Monteiro. Anonimato online no Brasil: identificação e a dignidade de usar uma máscara. 2017. 144 pp. Mestrado – Faculdade de Direito, Universidade de São Paulo, São Paulo, 2017.

O anonimato tem sido visto em descrédito pelo direito constitucional brasileiro, que não lhe atribui valor algum. Insiste-se numa interpretação da constituição que lê um dever de identificação no dispositivo sobre anonimato. A internet apresenta um desafio a esse entendimento. Esta dissertação responde a esse desafio a partir de uma abordagem interpretativa. Ela começa com uma análise de como essa leitura da constituição poderia ser colocada em prática, discutindo as estratégias adotadas pela Lei de Imprensa de 1967. Depois de colocar em xeque – por razões tanto pragmáticas quanto substantivas – a noção de que tais estratégias poderiam ser adotadas para condicionar a comunicação em geral, a dissertação examina outras práticas, admitidas pelo direito brasileiro ou expressamente contidas na constituição, que são inconsistentes com a leitura de um dever de identificação ilimitado. O significado do dispositivo sobre o anonimato, em consequência, só pode ser uma questão de valor. Essa questão é primeiramente considerada a partir da melhor teoria sobre o propósito da liberdade de expressão. Ao adotar uma justificação constitutiva da liberdade de expressão, que a conecta à democracia, à legitimidade política e, em última análise, à dignidade, nós compreendemos como o anonimato deve ser protegido pela liberdade de expressão da mesma maneira que qualquer parte do conteúdo da expressão. A identificação é expressiva, e o anonimato também. A internet torna isso patente com a expressão pessoal anônima, que cria a possibilidade de “intimidade anônima”. Essa abordagem da justificação constitutiva da liberdade de expressão também é útil para a nossa compreensão do direito à privacidade. Ela nos fornece o melhor embasamento para a questão de o que há de errado com a vigilância, mesmo quando ela é bem sucedida. Assim concebido, o direito à privacidade demanda que o Estado não interfira com a vida privada dos indivíduos de uma maneira inconsistente com a sua dignidade. Rejeitando o paradigma da identificação, a dissertação apresenta uma nova interpretação do direito brasileiro em relação a ferramentas de anonimato online, plataformas anônimas e conteúdo anônimo

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INTRODUCTION

The problem of digital anonymity in Brazil

Making sense of our values on the digital era often seems overwhelming. Technological changes transform the practical possibilities for the exercise of both individual autonomy and state power. Our established conceptions about liberty and democracy often appear to fall short of providing answers for the barrage of arising challenges.

Anonymity presents one such challenge. This is particularly true in Brazil, where the constitution includes specific language by which ‘anonymity is forbidden’ (art. 5, IV)¹. This longstanding provision – which I will refer as the *anonymity clause* –, restated in every constitution since Brazil abandoned monarchy (except for the one adopted by the latest authoritarian regime in 1967, and for its 1969 constitutional amendment which effectively enacted a new constitution), has been held as unproblematic by the prevailing literature. It is regarded by leading scholars as establishing what we might call an *identification requirement*, even though they might have failed to acknowledge this.

Supporters of the identification-requirement interpretation of the constitution gauge identification as the price demanded for the enjoyment

¹ ‘Art. 5. Everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners residing in the Country the inviolability of the rights to life, liberty, equality, security and property, on the following terms: [...] IV— manifestation of thought is free, **but anonymity is forbidden**’, KEITH S. ROSENN, *Constitution of the Federative Republic of Brazil: October 5, 1988 (as Amended to September 15, 2015)*, Oxford, 2015 (emphasis added).

of freedom of expression. José Afonso da Silva, a leading constitutional scholar, is often quoted maintaining that:

*Freedom of expression has its burdens, such as that one exercising it must assume responsibility for the resulting expressed ideas, in order that, should it be the case, one may be held liable for the damage caused onto others.*²

This view is endorsed by other commentators³, who frequently associate anonymity with cowardice⁴. Thus, as per this reading of the anonymity clause of the constitution, all anonymous speech and all means enabling anonymous speech are proscribed: be it books, newspapers, magazines, radio broadcasting⁵, TV broadcasting, letters⁶ and posters⁷, **and even ‘internet messages’⁸**.

Based on this understanding of the constitution, courts and lawmakers alike have at various times sought to curb anonymity on the internet. At congress, bills have been introduced that would require internet service providers (ISPs) to retain records of internet activity linked to a

² JOSÉ AFONSO DA SILVA, *Art. 5º, IV*, in *Comentário contextual à Constituição*, Malheiros, São Paulo, 2012, p. 92. ‘*A liberdade de manifestação do pensamento tem seus ônus, tal como o de o manifestante identificar-se, assumir claramente a autoria do produto do pensamento manifestado, para, sendo o caso, responder por eventuais danos a terceiros*’.

³ ‘Free expression of thought is compensated by the prohibition of anonymity’ (‘A livre expressão do pensamento tem por contrapartida a proibição do anonimato’), MANOEL G. FERREIRA FILHO, *Art. 5º, IV*, in *Comentários à Constituição brasileira de 1988*, Saraiva, São Paulo, 2000, p. 31; similarly JULIANA ABRUSIO, *Os limites da liberdade de expressão na internet*, in *Educação digital*, 2016, p. 120; JOSÉ CRETELLA NETO, *Art. 7º*, in *Comentários à lei de imprensa*, Forense, Rio de Janeiro, 2008, pp. 76-78; ÊNIO S. ZULIANI, *Art. 7º*, in *Comentários à lei de imprensa*, RT, São Paulo, 2007, pp. 158-159; DARCY A. MIRANDA, *Art. 7º*, in *Comentários à lei de imprensa*, RT, São Paulo, 1994, p. 110; UADI L. BULOS, *Art. 5º, IV*, in *Comentários à Constituição Federal de 1988*, São Paulo, 2014¹¹, p. 122.

⁴ ÊNIO S. ZULIANI, *Art. 7º*, cit., p. 159; DARCY A. MIRANDA, *Art. 7º*, cit., p. 110.

⁵ FRANCISCO C. PONTES DE MIRANDA, *Liberdade de pensamento*, in *Comentários à Constituição de 1946*, vol. 4, Rio de Janeiro, 1960³, pp. 434-5.

⁶ ALEXANDRE DE MORAES, *Liberdade de pensamento*, in *Constituição do Brasil interpretada e legislação constitucional*, Atlas, São Paulo, 2011, p. 130.

⁷ FRANCISCO C. PONTES DE MIRANDA, *Liberdade de pensamento*, cit., p. 435.

⁸ ALEXANDRE DE MORAES, *Constituição do Brasil interpretada e legislação constitucional*, Atlas, São Paulo, 2011, p. 130.

government-issued ID. Mobile applications marketed as offering anonymity were the target of injunctions.

Bill no. 6.928/2017, introduced in February 2017 by representative Lieutenant Lúcio, would require ISPs and platforms alike to secure page content on the internet be signed using a government-regulated digital signature scheme. While that bill has since been withdrawn, another legislative proposal would go further: bill no. 8.043/2017, introduced in July 2017 by congressman Ricardo Izar, would impose on ISPs a mandate of keeping the individual taxpayer number (CPF)⁹ associated with users ‘opening pages on internet applications’. A different bill, bill no. 7.224/2017, proposed by representative Victor Mendes, would create a mandate for every website, blogs included, to ostensibly display information identifying those responsible for the website and for “the content” therein. Proponents of all bills cite the anonymity clause as direct basis for imposing those identification mandates.

A similar notion has been advanced at court. In August 2014, granting a request from a public prosecutor, a Brazilian judge in the state of Espírito Santo issued a preliminary injunction against Secret, a then-popular mobile application. Plaintiff had argued the app, which was marketed as a social network where users could post or comment without publicly disclosing their true identities, conflicted with Brazilian law. The court agreed: citing instances of defamation within the platform, it found the app to be illegally operating in Brazil, deriving its holding directly from the anonymity clause on constitution (art. 5, IV). Apple, Google and Microsoft (where the app was listed as Cryptic) were ordered to make the app unavailable on their official application repositories, and to remotely remove it from smartphones in which it had been installed¹⁰.

⁹ CPF stands for *Cadastro de Pessoas Físicas*, a national taxpayer database which in practice is necessary for everyday life in Brazil. It is akin to the Social Security Number in the United States and the National Insurance Number in the United Kingdom.

¹⁰ Case 0028553-98.2014.8.08.0024, 5ª Vara Cível de Vitória, Espírito Santo, judge Paulo César de Carvalho, decision of August 19th 2014. The ruling in Portuguese may be accessed through the court’s website, inserting the case number at <<http://aplicativos.tjes.jus.br/consultaunificada/faces/pages/pesquisaSimplificada.xhtml>>. I

The argument against Secret, then, was straightforward: since the constitution requires any person intent on exercising her freedom of expression to be duly identified as the author of her ideas, any means failing such *identification requirement* should be quashed. Yet the implications flowing from this reading of the constitution are not confined to that applications – nor to other platforms trading on anonymous or pseudonymous social media, like Sarahah. As admitted by lawmakers proposing bills that would impose new mandates, the internet is itself an enabler of anonymity. Supporters of the identification requirement consequently see the web as in conflict with the Brazilian constitution.

Suppressing any platform that permits anonymity might actually entail a ban on internet in Brazil itself: its current technological architecture does not preclude non-identified connections¹¹. Enforcing a ban on anonymity read as an identification requirement while avoiding a ban on the internet itself would, in turn, require drastic legal action for strict state policing of the web, through a real-name policy on connection and use (*ie* compelling registration with genuine identification before users are able to browse the web and post any content), the blocking of anonymity tools (such as

have also made it available here: <<https://www.dropbox.com/s/q0ze1239w7jnp49/MP-ES%20v%20Secret%20e%20outros%20-%20decis%C3%A3o%20liminar.pdf?dl=0>>.

¹¹ LAWRENCE LESSIG, *Code*, Basic Books, New York, 2006², p. 35; A M. FROMKIN, *From anonymity to identification*, «Journal of Self-Regulation and Regulation», 1 (2015), pp. 120–39 (arguing online anonymity is withering but still possible); BRUCE SCHNEIER, *Anonymity and the internet*, (2010) <https://www.schneier.com/blog/archives/2010/02/anonymity_and_t_3.html>, accessed 27.Aug.2017.

Tor¹², anonymous VPNs¹³ and proxies¹⁴), and strict content filtering (as to prevent anonymous content generated outside of Brazilian jurisdiction).

These are radical measures that might be too costly, inefficient or simply unviable; such intense constraints would, in any case, fundamentally alter the operation of the internet in Brazil. Suppressing anonymity without any reservations, as suggested by prevailing Brazilian legal scholars, would effect a momentous threat to the protection of privacy. Lawrence Lessig notes the internet ‘*gives an individual a kind of power that doesn't exist in real space. This is not just the ability to put on a mask; it is the ability to hide absolutely who one is*’¹⁵. To the extent that this is true (as absolutely hiding who one is realistically unfeasible), we must not fail to

¹² ‘Tor is an anonymity and censorship circumvention tool: it is a suite of software that uses anonymizing protocols designed to work over ordinary IPs. Tor nodes (computers running Tor networking software) build safe network circuits between the user seeking anonymity and the websites the user wants to access. Tor clients use intermediary systems called “relays,” computers that run Tor software and configured to create these circuits for anyone who needs them’ PETER LOSHIN, *Practical anonymity: Hiding in plain sight online*, Syngress, Waltham (MA), 2013, p. 5.

¹³ In simple terms, a virtual private network (VPN) that might be employed in the interest of anonymising internet connection is provided by a service that maintains no records of access, which would make it technically impossible to comply with a subpoena for specific subscriber information. A VPN in this sense is a network users remotely access on top of their internet connection and through which all internet traffic is directed. Cf. ‘VPN encrypts all of the packets sent out from client’s PC and send it to VPN server through a tunnel called “Secure VPN Tunnel” which is established between the client’s PC and the VPN server by the VPN software installed in client’s PC. The strength of VPN lie in the fact that once the environment is established, all packets that are sent out from the client’s PC are encrypted, regardless of the type of application they use. This way, even if ISP or hackers retrieve transferred packets, they will have difficulty of decrypting them in order to extract private information. The only way to decrypt those packets is to obtain the secret key from the VPN server’ NGUYEN P. HOANG & DAVAR PISHVA, *Anonymous communication and its importance in social networking*, (2016), p. 38.

¹⁴ ‘... a mechanism through which you can connect to a network, where the proxy system acts on your behalf. In other words, if you connect to a remote server through a proxy, the proxy connects to the Internet for you, and pretends to be you, for the purpose of connecting to that server—the server thinks that you are the proxy system, and doesn’t know where you are actually connecting to the Internet from’. PETER LOSHIN, *Practical anonymity: Hiding in plain sight online*, cit., p. 5.

¹⁵ LAWRENCE LESSIG, *Reading the Constitution in cyberspace*, «Emory Law Journal», 45 (1996), pp. 876-877.

appreciate that an absolute denial of anonymity on the internet creates a situation that would simply be unfeasible otherwise.

On the context of the internet, positive identification is not equivalent to simply not wearing a mask. Rather, it would represent wearing a badge or a name tag at all times, and not just any, but one that conveys, aside from name and photo, the record of all actions and opinions of the person wearing it, organised in such a fashion as to enable swift searches by anyone who might be of passing interest.

While such bizarre contrafactual examples would perhaps be rejected even by the most radical opponents of anonymity in Brazilian legal literature, we must recognise such a scenario would be compatible with an account that regards anonymity as an evil which the law should work to eradicate.

The internet thus clearly warrants re-examining the issue of the legal treatment of anonymity, which is the subject of this dissertation. I mean to answer the question of *what sense should we make of the anonymity clause in the Brazilian constitution in the face of the challenge the internet presents*¹⁶.

¹⁶ Very little work is available on this topic. Mariana Cunha e Melo has examined the problem by employing a proportionality test (MARIANA C. E. MELO, *The “Marco Civil da Internet” and its unresolved issues: free speech and due process of law*, CRV, Curitiba, 2016.). She turns to the record of legislative debate of the Brazilian constitutional convention of 1987-8, finding that ‘the framers’ intention was to identify the prohibition of anonymity with the protection of honor and reputation’ (at 64-5). Her conclusion is thus that ‘the Constitution does not ban anonymity to advance law enforcement interests not related to the protection of honor’ (at 64). So whenever ‘prohibiting anonymity would not foster the constitutional interests the rule was created to advance, anonymity should be not only permitted, but protected by the interpreter’ (at 56). She offers important insight. Basing the constitutional interpretation on legislative intention, however, is hardly a persuasive strategy. At any rate, it does seem that the interpretation endorsed by Cunha e Melo fails to account for clear instances where a general right to anonymity could not be sensibly claimed, for reasons other than risks to personal reputation. Voting is an example: the ballot itself may be secret, but voters are required to identify before casting a ballot, and information concerning who voted is registered. Cunha e Melo’s proposal, of a general right to anonymity except where reputation is implicated, does seem to fall prey to Scalia J’s objections in *McIntyre v Ohio Elections Commission* 514 US 334, 381-3 (1995) (Scalia J, dissenting). While he does not provide analysis supporting it, Walter Capanema similarly argues for reading the anonymity clause so that ‘the anonymity that the constitution forbids is only that which brings injury to others’. WALTER A. CAPANEMA, *O direito*

The foremost issue in answering that involves determining whether the traditional identification-requirement reading of the constitution stands in the digital era. I hope to show that – while that might have been a serviceable interpretation as applied to written media – technological transformations brought about particularly by the internet evince how it is a fundamentally flawed understanding that fails to account for its entailed repercussions to the foundational values of a democratic society.

At this point someone could perhaps object that inspecting anonymity generally, instead of a particular case, would be more fruitful. Frank Easterbrook famously excoriated the study of ‘*the law of cyberspace*’, which he deemed as pointless as the study of ‘*the law of the horse*’¹⁷. Part of the ensuing argument, however, is that we must attend to the practical consequences of the interpretation of the anonymity clause, and the discussion will be decisively affected by the digital context.

Of course, we cannot hope to arrive any worthwhile conclusions regarding this question of constitutional interpretation if we lack a theory of what the constitution, constitutional rights, and democracy itself stand for. The argument will accordingly explore those broader aspects at some length, to the extent that it is required for the question we have set out to answer. Yet there is another manner those encompassing question will be present in the argument. The challenge technology presents to constitutional interpretation will, I expect, prove profitable beyond the question of digital anonymity¹⁸. I believe it will contribute to our more

ao anonimato: uma nova interpretação do art. 5º, IV, CF, in *Jurisdição constitucional, democracia e direitos fundamentais*, 2012, pp. 543–58. (‘[...] propõe-se uma reinterpretação dessa norma [...] de modo a afirmar que o anonimato vedado pela Magna Carta é só aquele que cause prejuízos a terceiros’, at 556.) Similar objections apply.

¹⁷ That is, although ‘[l]ots of cases deal with sales of horses; others [...] with people kicked by horses; still more [...] with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows’, ‘[t]eaching 100 percent of the cases on people kicked by horses will not convey the law of torts very well’. This point would be better served by studying the general rules of tort, which will govern any cases concerning horses, dogs, etc. *Cyberspace and the law of the horse*, «The University of Chicago Legal Forum» (1996), pp. 207-208.

¹⁸ While I use *digital anonymity*, *online anonymity* and *anonymity on the internet* interchangeably, distinctions could be drawn. Digital anonymity is an encompassing phrase, which could refer generally to all sorts of digital or electronic communications. Online

general understanding of important issues of constitutional law, particularly to prevailing views of freedom of expression and the right to privacy in Brazil. In other words, as Lawrence Lessig contended in response to Easterbrook, I hope attending to the particular problem of digital of anonymity will ‘*illuminate the entire law*’¹⁹.

anonymity and internet anonymity may be taken as synonymous, both designating anonymity in contexts on network communications. So, while digital anonymity would include the use of an offline device, online (or internet) anonymity would not. While it is possible this distinction (between digital and online anonymity) could be relevant in some contexts, this dissertation does not go into situations that would merit an explicit distinction throughout the text; the terms are used interchangeably. A further terminological distinction is yet subtler, while perhaps more contentious, that between *internet anonymity* and *Internet anonymity*. For a long time, the prevailing usage of the word insisted in capitalising *internet* as means of distinguishing the global internet, as a historical development resulting from the work on the ARPANET and NSFNET networks, and any generic, perhaps non-public internet, or network of networks. While we should not fail to appreciate the distinction, context is generally sufficient to make clear which *internet* is referred (for instance, ‘*the internet*’, with no qualifications, absent any special context, clearly must refer to the global internet). Lowercase *internet* further favours legibility. It does seem to me that the most important aspect in all this is the acknowledgement that the internet as we experience it today is not exclusively the product of the pioneering work (mainly) in the 1970s and 1980s, but rather something integral to everyday social life – and decisively shaped by social practices that have had their own development and that differ from the vision those pioneers had for it. Capitalising it, as we would a proper name, does seem to ignore this. This is not to say lowercase *internet* is less sensitive to the revolution brought about by the internet; it is actually the opposite: it has been so successful as to be absorbed as a common noun. Thomas Kent, then the standards editor of the Associated Press, defended its shift to lowercase by making the case the internet is perceived by some as something that has ‘*always been there*’, ‘*like water*’. *Bulletin! The “Internet” Is About to Get Smaller* (2016) <<https://www.nytimes.com/2016/05/25/business/media/internet-to-be-lowercase-in-new-york-times-and-associated-press.html>> (emphasis added). (‘*Mr. Kent, of The A.P., said of the devotion to the capital I, “Some people feel sort of physically deep in their soul that it’s a proper noun.” “They would compare it to a physical place with a proper name. But I just don’t think most people see it that way anymore,” he added. “For younger people, it’s always been there; it’s like water.”*’.)

¹⁹ As Lessig wrote, “[b]y working through ... examples of law interacting with cyberspace, we will throw into relief a set of general questions about law’s regulation outside of cyberspace” *The law of the horse: what cyberlaw might teach*, «*Harvard Law Review*», 113 (1999), p. 502. Juliano Maranhão’s recent work offers similar insight, cf. JULIANO MARANHÃO, *Reconfiguração conceitual? O direito digital como metáfora de si mesmo*, in P. R. B. FORTES, R. J. F. DE CAMPOS, S. BARBOSA (eds.), *Teorias contemporâneas do direito: o direito e as incertezas normativas*, Juruá, Curitiba, 2016, pp. 97–128.

Revisiting anonymity

I will advance the argument that shifts brought by the internet compel us to abandon the reading of the anonymity clause as an identification requirement. My point is not that the technological advances of the internet create a need for ‘updating’ existing law or ‘translating’ it to a new digital era, but rather that the established interpretation of the clause fails to account for how our social and legal practices, when properly understood, already recognise how anonymity is employed in the service of vital constitutional values. By confronting us with an implication of our understanding of anonymity we are forced to see as absurd, the emergence of the internet prompts a re-examination of our conceptions. I will propose an alternative interpretation of the constitutional clause which offers a comprehensive account of *how freedom of expression and the right to privacy require respect for anonymity on the internet*.

My point is not to produce a general theory of anonymity²⁰, nor of digital anonymity even. Again, my goal is advancing an alternative interpretation of the anonymity clause of the Brazilian constitution that does not take it to be synonymous with requiring identification whenever ‘thoughts’ are ‘expressed’²¹.

Determining whether the identification-requirement reading of the constitution holds is not a question that will be helped by providing a definition of anonymity or by conceiving of an abstract theory of

²⁰ For that endeavour, see JEFFREY M. SKOPEK, *Anonymity, the production of goods, and institutional design*, «Fordham Law Review», 82/4 (2014), pp. 1751–809.

²¹ While art. 5, IV, of the Brazilian constitution, is generally cited as asserting the right to freedom of expression, I should highlight the language of that provision is quite encompassing. It reads: *‘é livre a manifestação de pensamento, sendo vedado o anonimato’*. I have above cited Keith Rosenn’s translation of the provision as ‘manifestation of thought is free, but anonymity is forbidden’, *Constitution of the Federative Republic of Brazil: October 5, 1988 (as Amended to September 15, 2015)*, cit. I would stress that *manifestation* might be replaced by *externalising* or *expressing*. I will adopt the latter as it seems more naturally intelligible on its own. At any rate, the key point here is that a constitutional right protecting *‘the expression of thought’* is remarkably broad, precluding language-based objections on whether it expressly applies beyond written speech, for instance.

anonymity. It is plainly an interpretive question about the practices of a community which assumes they are in the service of a point or value and, crucially, which recognises those practices to be ‘*sensitive to its point, so that... rules must be understood or applied or extended or modified or qualified or limited by that point*’²². The only manner of settling the question of whether that reading of the anonymity clause is sound is therefore to argue about whether its account of the constitution rests on the best case for understanding our legal practices and values. We thus sort out the dispute by engaging in interpretation, as we ‘*strive... to make an object the best it can be, as an instance of some assumed enterprise*’²³.

That is, of course, a statement of Ronald Dworkin’s legal interpretivism²⁴. Under this theory, arguing about interpretation is how we resolve controversies about the law. We assess an interpretation on two distinct, yet intertwined, dimensions²⁵: we examine how it *fits* existing practices

²² RONALD DWORKIN, *Law’s empire*, Harvard, Cambridge (Mass.) & London, 1986, p. 47.

²³ RONALD DWORKIN, *Law’s empire*, cit., p. 53.

²⁴ Dworkin is mostly known in Brazil for his 1967 article advancing the notion of legal principles as structurally different from legal rules. RONALD DWORKIN, *The model of rules*, «The University of Chicago Law Review», 35 (1967), pp. 14–46. See VIRGÍLIO AFONSO DA SILVA, *Princípios e regras: mitos e equívocos acerca de uma distinção*, «Revista Latino-Americana de Estudos Constitucionais», 1 (2003), p. 610; LUÍS R. BARROSO, *Here, there, and everywhere: human dignity in contemporary law and in the transnational discourse*, «Boston College International & Comparative Law Review», 35 (2012), p. 355; MARIANA C. E. MELO, *The “Marco Civil da Internet” and its unresolved issues: free speech and due process of law*, cit., p. 31. Yet Dworkin would, in the following years, veer from that early attack on legal positivism to this focus on interpretation, which is dominant in his later work. Ronaldo Porto Macedo Jr suggests Dworkin actually *rejected* this distinction as early as 1977, with *Taking rights seriously*. RONALDO P. MACEDO JR, *Do xadrez à cortesia: Dworkin e a teoria do direito contemporânea*, Saraiva, São Paulo, 2013, pp. 44-45.

²⁵ ‘[...] the two dimensions of fit and value represent different aspects of a single overall judgement of political morality’. RONALD DWORKIN, *Justice in robes*, Harvard, Cambridge (Mass.), 2006, p. 15. While bisecting the components of the argument is of use for the structure of the text, I should note the dimensions of fit and justification are not wholly separate, but interdependent. See: ‘It is important not only to notice this contrast between elements of artistic freedom and textual constraint but also not to misunderstand its character. ... For the constraints that you sense as limits to your freedom to read *A Christmas Carol* so as to make Scrooge irredeemably evil are as much matters of judgment and conviction, about which different chain novelists might disagree[...].’ RONALD DWORKIN, *Law’s empire*, cit., p. 234. See also DIMITRIOS KYRITSIS, *Shared authority: courts and legislatures in legal theory*, Hart, Oxford, 2015, pp. 57-63. Lawrence Solum has argued this connected notion of the two dimensions of interpretation is a development in the work of Dworkin: ‘Whereas the theory of interpretation offered in *Hard Cases* seemed to be a two-step theory, the theory offered in *Law’s Empire* looked like a one-step theory. Fit and justification were not two distinct moments in the interpretive enterprise; rather,

and whether its account offers compelling *justification* of the value instantiated by those practices²⁶.

Dworkin famously presented his account of an interpretive practice through the fanciful example of ‘*an invented community*’ governed by the ‘*rules of courtesy*’²⁷. At first, courtesy is taken to serve the ‘*show[ing] of respect to social superiors*’, and thus to command that peasants take their hats off to nobility. ‘*For a time*’, Dworkin explains, ‘*this practice has the character of taboo: the rules are just there and are neither questioned nor varied*’²⁸; this changes as the members of the community develop an interpretive attitude towards courtesy. Then, the very point of courtesy is disputed, and ‘*people begin to demand, under the title of courtesy, forms of deference previously unknown or to spurn or refuse forms previously honored, with no sense of rebellion, claiming that true respect is better served by what they do than by what others did*’²⁹.

As the community is persuaded by the arguments supporting those novel demands, the practice develops. The point of courtesy might be thought of as showing respect for age, rather than social class, and thus what the community had previously understood as a clear requirement of courtesy – for instance, that an old carpenter take his hat off to a boyish prince – might then be taken to instantiate the opposite, lack of courtesy. So what was once a paradigm of courtesy, ‘*that is, as requirements of courtesy if anything is*’³⁰, might be rejected when faced with transformations affecting the community. While generally endorsed, those paradigms are a touchstone for interpretation: ‘*argument against an interpretation will take the form, whenever this is possible, of showing that it fails to include or account for a paradigm case*’³¹. Yet paradigms are not invulnerable:

justification now does all the normative work and fit merely identifies that which must be justified’. *The unity of interpretation*, «Boston University Law Review», 90 (2010), p. 555.

²⁶ RONALD DWORIN, *Justice in robes*, cit., p. 15.

²⁷ RONALD DWORIN, *Law's empire*, cit., p. 47.

²⁸ RONALD DWORIN, *Law's empire*, cit., p. 47.

²⁹ RONALD DWORIN, *Law's empire*, cit., p. 48.

³⁰ RONALD DWORIN, *Law's empire*, cit., p. 72.

³¹ RONALD DWORIN, *Law's empire*, cit., p. 72.

given that the community endorses the interpretive attitude, a paradigm must yield if challenged by a new interpretation of the practice that is superior in fit and justification.

It is fair to admit the identification requirement reading of the Brazilian constitution is a paradigm of constitutional interpretation of anonymity and freedom of expression. It is a pervasive, long-held view of what the constitution requires. This dissertation will challenge that paradigm. I will argue it is ill-considered in its general negative outlook of anonymity and insufficient in its appraisal of freedom of expression and the right to privacy.

Again, I do not contend that the paradigm is made invalid *by the internet*, or does not hold for the *internet only*. An illustration provided by Dworkin is useful to make this point. Suppose the community of courtesy accepts for some time that the point of the practice is to show respect for women, so requiring, as paradigmatic of the practice, that men rise when a woman enters the room. Broader transformations affecting the community, Dworkin explains, might engender that paradigm to be discarded as ‘*an unrecognized anachronism*’, and so ‘*[y]esterday’s paradigm would become today’s chauvinism*’³². Yet that new realisation does not entail the practice was ever justified.

A roadmap of the argument

To understand disseminated claims about the anonymity clause, the argument begins at *chapter 1* with an examination of the Press Act of 1967, which seems to be the model basing the prevailing interpretation of the constitution. This act established a scheme for effecting the identification paradigm. We will inspect that scheme and consider its

³² RONALD DWORKIN, *Law's empire*, cit., pp. 72-73.

limitations as a project for implementing the identification requirement more generally.

Chapter 2 then inspects established practices in Brazilian law that are inconsistent with the claim of an unrestricted identification requirement and the view that securing liability is paramount in the Brazilian constitution. A number of instances – the secret ballot, secrecy of jury deliberations, reporter’s privilege and anonymous crime reporting – attest that it is not the case. Those cases show that the question must turn on the substantive issue.

We take up that issue starting in *chapter 3*, which considers three different theories of the justification of freedom of expression, the argument from truth, the argument from self-government and the argument from dignity. It establishes that only if we understand freedom of expression as (at least primarily) an aspect of dignity we are able to understand commitments from that constitutional right that fail to obtain under the other theories. This is clearly the case with the constitutional ban on censorship, and it is also the best understanding of the Brazilian Supreme Court holding for unauthorised biographies.

As we review, in *chapter 4*, the case for anonymity to be found in the precedents of the US Supreme Court, those three theories will serve us well. We will explore how the internet enables a transformation in social interaction by allowing anonymous personal expression. We probe arguments and objections considering all this, and focus particularly on how dignity offers an important insight to the court’s insistence that ‘*an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech*’³³. As we also see in chapter 4, the ramifications from this insight for anonymous internet access suggest an overlap between freedom of expression and the right to privacy.

³³ *McIntyre v Ohio Elections Commission* 514 US 334, 342 (1995).

As the right to privacy is generally understood as instrumentally valued and dignity insists conversely on an inherent-value account of freedom of expression, this might be taken to imply a conflict. Instead, as we will explore in *chapter 5*, appreciating the right to privacy as an aspect of dignity is essential to a reliable account of important questions in digital surveillance and constraints on government power. The right to privacy as an aspect of dignity will also illustrate how mandating identification – negating anonymity – fails to show concern for the private life of individuals.

These discussions are recollected and summarised in *chapter 6*, which examines the legal framework of the internet in Brazil and how the identification paradigm relates to it. It also proposes new understanding of the issues involved in anonymous internet access, anonymous platforms, and anonymous posts. A final section of the chapter puts forward procedural safeguards for online anonymous expression.

1. ANONYMITY AND THE IDENTIFICATION PARADIGM: THE PRESS ACT OF 1967

Brazilian legal literature ascribes no value to anonymity. On the contrary, anonymity is associated with cowardice³⁴, and equated to ‘*futile, unfounded speech, aimed only at infringing on private life, intimacy and the reputation of others, or even bent on subverting the legal system, the democratic order, and social welfare*’³⁵.

Prevailing constitutional scholars insist that ‘*the model of freedom of expression designed by the Constitution of 1988 is that of freedom alongside accountability*’³⁶. Anonymity fails that ideal, it is argued, as it enables would-be tortfeasors to evade liability they should face for irresponsible exercise of their freedom of expression. That understanding is articulated by José Afonso da Silva:

*Freedom of expression has its burdens, such as that one exercising it must assume responsibility for the resulting expressed ideas, in order that, should it be the case, one may be held liable for the damage caused onto others.*³⁷

³⁴ ÊNIO S. ZULIANI, *Art. 7º*, cit., p. 159; DARCY A. MIRANDA, *Art. 7º*, cit., p. 110.

³⁵ ALEXANDRE DE MORAES, *Liberdade de pensamento*, cit., p. 130.

³⁶ DANIEL SARMENTO, *Comentários ao art. 5º, IV*, in J. J. G. CANOTILHO, G. F. MENDES, I. W. SARLET, L. L. STRECK (eds.), *Comentários à Constituição do Brasil*, Almedina/Saraiva, São Paulo, 2013. (‘*O modelo de liberdade de expressão desenhado pela Constituição de 1988 é o da liberdade com responsabilidade*’).

³⁷ JOSÉ AFONSO DA SILVA, *Art. 5º, IV*, cit., p. 92. ‘*A liberdade de manifestação do pensamento tem seus ônus, tal como o de o manifestante identificar-se, assumir claramente a autoria do produto do pensamento manifestado, para, sendo o caso, responder por eventuais danos a terceiros*’.

That characterisation of the anonymity clause as representing a price for free speech is also present in Ferreira Filho, who more explicitly claims that ‘*Free expression of thought is compensated by the prohibition of anonymity*’³⁸. Hence, ‘*the prohibition of anonymity is directed precisely at enabling liability, through the identification of each expression*’³⁹.

That is the basis for the identification-requirement paradigm. It dictates identification so imposition of liability is never frustrated by anonymity. Yet identification is not a given, so this reading of the constitution cannot be properly understood if we do not attend to the legal provisions that would be demanded to attend that ideal supporters of the prevailing interpretation of the constitution ascribe to the anonymity clause.

The identification-requirement paradigm in the Press Act of 1967

While the constitution contains explicit language on anonymity generally, a similar general provision cannot be found in statutory law. A provision replicating the constitutional clause on anonymity was included in the Press Act of 1967 (statute no. 5.250/1967) that, while enacted under military-led dictatorship, was still in force as late as 2009, when the Brazilian Supreme Court held it inconsistent with the democratic constitution adopted in 1988⁴⁰. That statute mainly concerned publishers and news media companies, which were ostensibly free but effectively constrained by provisions enabling government to engage in censorship⁴¹.

³⁸ MANOEL G. FERREIRA FILHO, *Art. 5º, IV*, cit., p. 31. (*‘A livre expressão do pensamento tem por contrapartida a proibição do anonimato’*.)

³⁹ DANIEL SARMENTO, *Comentários ao art. 5º, IV*, cit. (*‘A proibição do anonimato destina-se exatamente a viabilizar esta possibilidade de responsabilização, por meio da identificação do autor de cada manifestação’*.)

⁴⁰ Brazilian Supreme Court, ADPF 130, Ayres Britto J., rapporteur, April 30, 2009.

⁴¹ ‘Art. 2. Publishing and distribution, within the national territory, of **books and newspapers and other periodicals is free**, except where clandestine (art. 11) or where affronting morality and proper standards’. (*‘Art. 2º É livre a publicação e circulação, no*

Art. 7, *caput*, of the Press Act of 1967 established what at first seems like a blanket ban on anonymity⁴², but following subsections contained provisions which concerned publishing and media companies. Art. 7, § 1, required ‘*all newspapers and periodicals to print, in its masthead, the name of the editorial manager or editor-in-chief*’, as well as ‘*the managing headquarters and the printing company*’ responsible for it⁴³. Art. 7, § 3, contained a similar provision for broadcasting companies, which were required to state, at the beginning and at the end of the transmission of ‘*news programmes, news reports, commentary, debates, and interviews*’, ‘*the name of the editorial manager or producer*’⁴⁴. Finally, the police were charged with apprehending ‘*all writing that is, through any means, distributed or made publicly available where there is no imprint containing the name of the author and the editor, as well as the company where it was printed, its headquarters and the date of printing*’⁴⁵.

That last provision could be literally read as applying to ‘all writings’. Yet that would entail the cumbersome implication that ‘all writings’ were legally required to have a responsible editor and be printed by an incorporated printing company. It would further mean the Press Act, almost exclusively limited to publishing, broadcasting, and news media

território nacional, de livros e de jornais e outros periódicos, salvo se clandestinos (art. 11) ou quando atentem contra a moral e os bons costumes). Compared that proclamation with art. 63, empowering the Minister of Justice, ‘where urgent circumstances warranted’, to unilaterally command the apprehension of writings ‘containing war propaganda or of race and class prejudice, as well as those advancing incitement to the subversion of the political and social order’ (art. 61, I) or ‘affronting morality and proper standards’ (art. 61, II).

⁴² ‘Art. 7. In the exercise of the freedom of expressing thoughts and of information, anonymity is not permitted. [...]’ (‘Art. 7º No exercício da liberdade de manifestação do pensamento e de informação não é permitido o anonimato’.)

⁴³ ‘Art. 7. [...]. § 1º Todo jornal ou periódico é obrigado a estampar, no seu cabeçalho, o nome do diretor ou redator-chefe, que deve estar no gozo dos seus direitos civis e políticos, bem como indicar a sede da administração e do estabelecimento gráfico onde é impresso, sob pena de multa diária de, no máximo, um salário-mínimo da região, nos termos do art. 10.’

⁴⁴ ‘Art. 7. [...]. § 3º Os programas de noticiário, reportagens, comentários, debates e entrevistas, nas emissoras de radiodifusão, deverão enunciar, no princípio e ao final de cada um, o nome do respectivo diretor ou produtor.’

⁴⁵ ‘Art. 7. [...] § 2º Ficará sujeito à apreensão pela autoridade policial todo impresso que, por qualquer meio, circular ou fôr exibido em público sem estampar o nome do autor e editor, bem como a indicação da oficina onde foi impresso, sede da mesma e data da impressão’.

companies, would apply to communication generally, which did not seem like proper statutory interpretation⁴⁶. Considering those factors, Darcy Miranda concluded that:

Thus, the provision must be interpreted as follows, so as to be in line to the statute rationale: ‘All writings presented as a newspaper or a periodical and that, through any means (secretly or overtly), comes to be distributed or is made publicly available, where it fails to imprint the name of the author and editor, as well as the company where it was printed, its headquarters and date of printing, shall be liable to apprehension by the police’, as [said material] is defined as an illegal newspaper (art. 11⁴⁷).⁴⁸

While Darcy Miranda cites mostly formal reasons to reject an interpretation which would impose the identification scheme specified in the Press Act of 1967 on ‘all writings’ generally, there are two additional reasons supporting that understanding, one pragmatic and one substantive.

⁴⁶ While some provisions in chapter I of the Press Act (such as art. 7, *caput* and § 2), were not explicitly limited to media, those were the exception. Arts. 2–7 contained provisions on people and corporations which were allowed in the media business (Art. 3, for instance, established foreigners were not). Chapter II provided for the civil register of newspapers, printing and media companies generally. Chapter III created harsher, special criminal offense acts for abusive speech imparted by ‘newspapers, other periodicals, broadcasting services and news agencies’ (art. 12). Chapter IV specified the conditions and the procedure for the exercise of the right of reply for victims of ‘publications within newspapers, periodicals, or via broadcasting’ (art. 29). Chapter V contained detail provisions on criminal liability and criminal procedure as established in chapter III. Chapter VI established civil liability and civil procedure for abusive speech (while art. 49, *caput* and § 3, were of general application). Chapter VII contained general miscellaneous provisions mainly concerned with broadcasting, publishing and media companies, and its professionals.

⁴⁷ Art. 11 provided that ‘newspapers and other periodicals failing registration with the civil register’ as specified for media companies in the Press Act were deemed illegal. (*‘Art. 11. Considera-se clandestino o jornal ou outra publicação periódica não registrado nos termos do art. 9º, ou de cujo registro não constem o nome e qualificação do diretor ou redator e do proprietário’.*)

⁴⁸ DARCY A. MIRANDA, *Art. 7º*, cit., p. 118. ‘[...] há que se interpretar o dispositivo da seguinte maneira, para adequá-lo à sistemática legal: “Todo o impresso que apresente a forma de jornal ou periódico e que, por qualquer meio (secreta ou abertamente), vier a circular ou for exibido em público, sem estampar o nome do autor e editor, bem como a indicação da oficina em que foi impresso, sede da mesma e data da impressão, ficará sujeito à apreensão da autoridade policial”, pois se trata de jornal clandestino (art. 11)’.

First, even though apprehension by the police was an instrument of enforcement of the blanket anonymity ban, the most important enforcement tool was more subtle and possibly more effective: it combined mandated registration of media and printing companies through a particular type of entry in the (general) civil register (art. 8) and strict liability for non-identified speech found to be abusive, as per art. 28:

Art. 28. Any writing published in newspapers or periodicals that do not identify its author is defined as written:

I – by the editor of the section in which it is published, if the newspaper or periodical maintains different sections under the responsibility of specific, determined editors, whose names be permanently imprinted on said sections;

II – by the editorial manager or editor-in-chief, if it is published in the editorial segment;

III – by the business manager or the owner of the printing companies, if it is published in the non-editorial segment.

§ 1. In broadcasting, if the author of the spoken words or the images transmitted is not identified, it is author is defined as:

a) the editor or producer of the programme, if stated during the broadcast;

b) the manager or editor listed at the register, as provided by art. 9, III, b, for news programmes, news reports, commentary, debates, and interviews;

c) the manager or the owner of the broadcasting station, for all other kinds of programs.

§ 2. News transmitted by a news agency is presumed as sent by the manager of the agency originating it, or by the business manager.⁴⁹

⁴⁹ ‘Art . 28. O escrito publicado em jornais ou periódicos sem indicação de seu autor considera-se redigido:

I – pelo redator da seção em que é publicado, se o jornal ou periódico mantém seções distintas sob a responsabilidade de certos e determinados redatores, cujos nomes nelas figuram permanentemente;

II – pelo diretor ou redator-chefe, se publicado na parte editorial;

As a pragmatic matter, as media companies and mass printing companies are in limited number, that regulatory approach was quite likely to succeed. Enforcement of the regulation was made easier by the very oligopolistic character of the media industry. By focusing on companies that were the main means of communication at the 20th century, the identification requirement was forcefully achieved – if not by definition, since the law provided for a presumption for when identification was not present. Compelling identification for all other forms of speech, however, would have profoundly different implications for enforcement.

There would be, of course, the problem that a registration scheme like that established by the Press Act for media and publishing companies would be unfeasible if aimed at all possible forms of expression. People ‘express thoughts’ not only in writing, but also using gestures and utterances⁵⁰. While, paradoxically, that kind of control of expression might be made available with surveillance in the digital era, it certainly was not available in 20th-century Brazil. In fact, perhaps not even the authoritarian minds behind the military dictatorship would have contemplated it.

Even considering writings exclusively, a blanket ban on anonymous writings would be very hard to police. The most obvious reason is that

III – pelo gerente ou pelo proprietário das oficinas impressoras, se publicado na parte ineditorial.

§ 1º Nas emissões de radiodifusão, se não há indicação do autor das expressões faladas ou das imagens transmitidas, é tido como seu autor:

a) o editor ou produtor do programa, se declarado na transmissão;

b) o diretor ou redator registrado de acôrdo com o art. 9º, inciso III, letra b, no caso de programas de notícias, reportagens, comentários, debates ou entrevistas;

c) o diretor ou proprietário da estação emissora, em relação aos demais programas.

§ 2º A notícia transmitida por agência noticiosa presume-se enviada pelo gerente da agência de onde se origine, ou pelo diretor da empresa.

⁵⁰ ‘Freedom [...] of expression extends to gesture. [...] Freedom of gesturing is inseparable from freedom of speech. FRANCISCO C. PONTES DE MIRANDA, *Comentários à Constituição de 1967, com a Emenda n. 1, de 1969*, vol. 5, Revista dos Tribunais, São Paulo, 1971², pp. 142-3. (‘A liberdade vai até o gesto. [...] A liberdade do gesto é inseparável da liberdade da palavra.’). While, as mentioned above, the language of the Brazilian constitution itself would suggest this conclusion, C. Edwin Baker makes a persuasive argument, which we will explore below, that protection of all expressive conduct is a key element in the value of free speech generally. See C E. BAKER, *Human liberty and freedom of speech*, Oxford, New York, 1989, p. 70 particularly et seq.

there would be no means of ensuring compliance for trivial, quotidian writings – be it in schools, workplaces, or even in the town squares. The main advantage of the scheme established by the Press Act is that enforcing it means supervision of a limited number of players. This is rather different from ensuring no written communication is disseminated *in all areas of social life*.

Yet there is another reason a blanket ban on all anonymous communication would be impracticable. Suppose the police were actually able to enforce a blanket ban on anonymity by apprehending all unsigned writings. It is not enough for the identification requirement that a piece of writing is signed with a name; it insists the name of the *person genuinely responsible for it be identified*⁵¹. And determining whether the name undersigning a writing actually corresponds to *a) an actual person b) who is the true responsible for it* would be effectively impossible⁵². Again, this

⁵¹ Pontes de Miranda notes ‘Pseudonymity is not anonymity where the work has been registered, or when the author, accepting liability [for it], is prepared to answer for “abuses” perpetrated by it, or to disclose in court the name of its author’. *Comentários à Constituição de 1967, com a Emenda n. 1, de 1969*, cit., pp. 154-155. (‘*O pseudônimo somente não é anonimato quando se registou a obra, ou quando o editor, assumindo a responsabilidade, se prontifica a responder pelos “abusos” que nela se cometeram, ou a revelar à justiça o nome do autor.*’). This is consistent with the definition provided by Otavio Luiz Rodrigues Junior, which highlights identification and liability: ‘Anonymity refers to the situation where someone produces and disseminates some writing or message to another where the identity of the author **or person responsible for the conduct is not disclosed**’. OTÁVIO L. RODRIGUES JR, *Artigo 5º, incisos IV ao IX*, in P. BONAVIDES, J. MIRANDA, W. DE MOURA AGRA, F. B. PINTO FILHO, ET AL. (eds.), *Comentários à Constituição Federal de 1988*, Forense, Rio de Janeiro, 2009, p. 97 hasis added). (‘*O anonimato é a condição de quem produz e difunde um texto ou enunciado a outrem, sob qualquer meio, sem identificação de sua autoria ou da responsabilidade de alguém pelo ato.*’). Helen Nissenbaum explores how the distinction between anonymity, in the sense of withholding a name, and pseudonymity might actually be secondary to the question of attribution. See HELEN NISSENBAUM, *The meaning of anonymity in an information age*, «The Information Society», 15/2 (1999), pp. 141–4. Leonardo Martins apparently ignores this point as he takes the anonymity clause to mean the constitution removes from the scope of protection of the freedom of expression ‘conduct [...] corresponding to free speech and dissemination of opinion **whose author is not disclosed in the act of transmitting the opinion.**’ LEONARDO MARTINS, *Lei de imprensa entre limite e configuração da ordem constitucional da comunicação social*, in *Liberdade e estado constitucional*, Atlas, São Paulo, 2012, p. 252 (emphasis added). (‘*Assim, o constituinte brasileiro excluiu, da área de proteção, aquele comportamento da área de regulamentação correspondente à livre expressão e circulação de opiniões, cujas autorias não fossem explicitadas no ato da transmissão da opinião*’).

⁵² While neither endorsing nor criticising the merits of the constitutional anonymity clause, Leonardo Martins calls it ‘idiotic’ and points out it is of ‘limited practical relevance’. LEONARDO MARTINS, *Lei de imprensa entre limite e configuração da ordem constitucional da comunicação social*, cit., p. 252. Nelson Hungria remarks that the secondary liability provisions established

contrasts sharply with the scheme established by the Press Act, which relies on registration: as unidentified writings had legally defined attribution to editors, managers, etc (as provided by art. 28 of the Act), the law is able to avoid any uncertainty by settling in a legal definition⁵³. Patently, this scheme is only available because it draws on the structure of traditional media⁵⁴.

So transposing the identification requirement as was provided for by the Press Act to a general imposition on communication would probably be unworkable. But aside from that question of enforcement of a general identification requirement, there is a distinct substantive question as well. As draconian and authoritarian as the Press Act of 1967 was, one could argue the scheme established by it as regards unidentified speech disseminated by traditional media expresses a much more limited

by art. 28 are needed to ‘quench impunity resulting from it’ NELSON HUNGRIA, *A disciplina jurídica da liberdade de pensamento e informação*, «Revista dos Tribunais», 57/397 (1968), p. 16.

⁵³ ‘Statute no. 5.250/1967 [*Press Act*], sensitive to the recurring practice in Brazilian press of using pseudonyms, established, with art. 7, section 4, a registrar of fictional names or pen names that media professionals use of in avoiding disclosure of personal identification. The rationale of the provision is quite specific; it is a scheme for officially institutionalising pseudonyms so that they are not used in defrauding the ban on anonymity. The manager or the person responsible for the media company must comply with this requirement, or face answering, personally, for that failure, since by not supplying positive proof of the actual identity of the individual that made use of a pseudonym in order to disseminate false accusations, for instance, the newspaper manager that publishes tacitly admits those writings to be anonymous, for which he is liable (Art. 28, II, statute no. 5.250/1967 [*Press Act*])’. ÊNIO S. ZULIANI, *Art. 7º, cit.*, p. 176. (*‘A Lei 5.250/67 [lei de imprensa], ciente de que é pratica recorrente na imprensa brasileira o emprego de pseudônimo, criou, pelo art. 7.º, § 4.º, o registro dos nomes irrealis ou de fantasia que os profissionais da mídia utilizam para não sofrerem identificação pessoal. A intenção do dispositivo é bem específica; trata-se de um mecanismo de oficialização do pseudônimo para que não se faça uso dele como fraude ao anonimato proibido. O diretor ou o responsável pela empresa de comunicação deverá cumprir esse requisito, sob pena de responder, em pessoa, pela falta, porque o não exibir a prova da real identidade daquele que se serve da pseudonímia para escrever calúnias, para dar um exemplo, o diretor do jornal que as publica, confessa, com o silêncio, tratar-se de texto anônimo, cuja responsabilidade é sua (art. 28, II, da Lei 5.250/67 [lei de imprensa])’.*)

⁵⁴ This would be true of other forms of communication besides those in the media business. Pontes de Miranda cites distribution of (presumably LP) ‘discs of unknown origin’ as an example of expression attracting the anonymity ban FRANCISCO C. PONTES DE MIRANDA, *Liberdade de pensamento*, cit., p. 435. A scheme similar to that of the Press Act could perhaps be established for that as well. But as to the other example he provides, anonymous posters, the remarks above would fully apply.

restraint on freedom of expression than what a general identification requirement would represent.

Actually, while provisions on mandated registration (art. 8–9) and the associated definition of ‘illegal newspapers’ (art. 11) as subject to apprehension by the police (art. 7, § 3) might be again held unconstitutional if they were re-introduced, a secondary liability scheme as established by art. 28 of the Press Act perhaps would not. In fact, even under current statutory law, a tort case in which claimant seeks to recover damages for unidentified defamatory writings published in a newspaper might yield an equivalent result, affirming secondary liability of the responsible editor, editor-in-chief, business manager, etc.

Traditional media are particularly defined by exertion of editorial judgement. People favour, for instance, one newspaper over another precisely because they prefer the curated content provided by it, or the manner how it is presented. So the decision to print an unsigned op-ed or to trust the unverified identify provided with a submission published in the letters section of a newspaper is a central aspect of the media business. From that perspective, it seems only reasonable to hold the media liable for speech it elected to disseminate. Any harm ensuing from publication is resulting from deliberate conduct by those who decided on publishing, either negligently or intentionally.

Secondary civil liability as applied to media might then be a conclusion consistent with familiar notions of liability and freedom of expression after all. It may be construed as compatible with our interpretation of broader legal rules and constitutional values⁵⁵. But now compare that with

⁵⁵ Indeed, Eric Barendt reports that a similar licensing scheme in English law ‘can be traced back to the reign of Henry VIII, when a Proclamation of 1546 issued under the Royal Prerogative required a printer to set out on each copy of a book his own name, that of the author and the date of printing’ ERIC BARENDT, *Anonymous speech in English law*, in *Anonymous speech: literature, law and politics*, Hart Publishing, 2016, p. 82. He further explains that ‘The obligation to disclose the name and address of the printer of any paper or book has been kept in force by Schedule 2 to the Newspapers, Printers and Reading Rooms Repeal Act 1869. Any publisher or person responsible for dispersing copies of material not complying with that obligation is liable to a fine of £5 for each offending copy. Newspapers must register their titles, and the names, occupations, places of business and residences of their proprietors. These requirements ensure that libel and other claimants can identify someone on whom writs may be served. But there is no comparable

imposing a blanket identification requirement on expression of thoughts. At the outset, we should note that pointing to practices like that provided for by the Press Act of 1967 will not suffice, for, as discussed above, the rationale for those provisions is located in concerns applying specifically to the media. The repercussions are also strikingly disparate.

Aside from the enforcement issues discussed above, we should note that claiming the correct interpretation of the anonymity clause in the Brazilian constitution imposes a blanket identification requirement would mean *that citizens are actually required to account and provide positive records for any conduct which might be construed as expression of thoughts*. Consider the impact of that. Could we offer justification for such an unrestricted, pervasive identification requirement? This implies that the Brazilian constitution, regarded as establishing ground rules for the functioning of a democratic society, holds as vital that expressive conduct by any individual be properly lodged for supervision by the appropriate government officials. *This interpretation effectively means the constitution assumes complete surveillance as an ideal for Brazilian society*.

The implication is that the law should strive to eradicate any expressive conduct failing identification. Pontes de Miranda apparently endorses that view when states ‘*anonymity is dangerous; criminal law could and should include provisions establishing crimes and misdemeanours of anonymity*’⁵⁶. Speech of any sort is thus assumed to be harmful, thus warranting strict supervision. Note this would not be limited to political speech, or speech which even hypothetically could be construed as causing anyone harm. We should question if the most authoritarian minds behind the military regime that enacted the Press Act of 1967 would be

obligation to disclose the name and address of authors, who are therefore free to write anonymously or under a pseudonym.’ ERIC BARENDT, *Anonymous speech in English law*, cit., p. 89.

⁵⁶ FRANCISCO C. PONTES DE MIRANDA, *Comentários à Constituição de 1967, com a Emenda n. 1, de 1969*, cit., p. 154. ([...] *o anonimato é perigoso, as leis penais podem e devem conter regras jurídicas que apontem os crimes e contravenções do anonimato*’.) See also ‘[...] criminal law should punish anonymous communication’, MANOEL G. FERREIRA FILHO, *Art. 5º, IV*, cit., p. 31. ([...] *a legislação penal deve punir as divulgações anônimas*’).

find the policing costs of such an intense constraint on expression worthwhile. Even an autocratic government, disapproving of freedom of expression, might conclude enforcing such a restraint is not among its priorities.

That should strike no one as an attractive account of the values endorsed by the Brazilian constitution and the limited-government, democratic system we take it to embrace. We will examine a different account in a moment. For now, it will be useful to inspect whether broader practices expressly endorsed by the constitution or conventionally admitted as complying with it are consistent with the understanding that identification is paramount. Regardless, the preceding discussion shows that even the Press Act of 1967 would not meet the requirements of the identification paradigm.

2. REVISITING ANONYMITY: PRACTICES THAT DO NOT FIT THE IDENTIFICATION PARADIGM

The identification paradigm insists securing liability resulting from expression is paramount, which is why it reads the constitution as mandating disclosure. Do we find such an unconditional precedence of identification and securing liability in Brazilian practices? The following examines established constitutional and legal practices to argue we do not. We find clear instances in the very constitution of practices tolerating anonymity and even actively severing possibilities for identification.

Secret ballot and secrecy of jury deliberations

An obvious example of safeguarding anonymity in Brazilian law is to be found in the very text of the constitution: the secret ballot, established expressly at art. 14, *caput*, of the Brazilian constitution⁵⁷. As Eric Barendt notes, voting ‘may intuitively seem very different from an entitlement to write anonymously’, ‘[b]ut the arguments for and against anonymity in both these contexts are strikingly similar’⁵⁸.

⁵⁷ ‘Art. 14. Popular sovereignty shall be exercised by universal suffrage, and by direct and **secret vote**, with equal value for all, and, as provided by law, by: [...]’ KEITH S. ROSENN, *Constitution of the Federative Republic of Brazil: October 5, 1988 (as Amended to September 15, 2015)*, cit. (Art. 14. Art. 14. A soberania popular será exercida pelo sufrágio universal e pelo **voto direto e secreto**, com valor igual para todos, e, nos termos da lei, mediante: [...].)

⁵⁸ ERIC BARENDT, *Anonymous speech, the secret ballot and campaign contributions*, in *Anonymous speech: literature, law and politics*, Hart Publishing, 2016, p. 155. In *McIntyre v. Ohio Elections Commission*, 514 US 334 (1995), a landmark US case concerning anonymity, the Supreme Court also cited the secret ballot as an example of ‘a respected tradition of anonymity’:

Indeed, while we currently may take the secret ballot for granted, voting anonymously was once a highly contentious issue⁵⁹. It was disputed by none other than John Stuart Mill⁶⁰. As with anonymity generally, it was once argued that the secret ballot would encourage dishonesty and run counter to civic spirit. Mill, for instance, contended that, as voting was conferred to electors in a trust, ‘*the voter is under an absolute moral obligation to consider the interest of the public, not his private advantage*’, and so, while exerting a public duty, the voter should be held to the same standards as other public officials, thus prepared to discharge the public duty ‘*under the eye and criticism of the public*’⁶¹.

Yet those objections were ultimately defeated by concern with voter intimidation⁶², as the secret ballot spread globally and ‘is now universally regarded as an essential aspect of the right to vote in free and fair elections’⁶³. In fact, Jeffrey Skopek notes that preservation of the anonymity of voting is required by a number of US states, with failure implicating invalidation of the ballot⁶⁴. In Brazil, under proposed interpretations of the current Electoral Code, a voter who captures a photo of herself casting the vote could be held in violation of art. 312, which makes ‘breaching or attempting to breach the secrecy of the vote’ a criminal offence punishable with up to two years imprisonment⁶⁵.

‘This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one’s conscience without fear of retaliation’ (at 343).

⁵⁹ The secret ballot was introduced in Brazil for national elections with the Electoral Code of 1932. FERNANDO W. D. CUNHA, *Evolução do direito eleitoral brasileiro*, «Revista de Informação Legislativa», 16/63 (1979), pp. 113–8 provides a brief overview. Fernando Limongi has recently questioned the impact of the secret ballot for dismantling voter coercion schemes. FERNANDO LIMONGI, *Fazendo Eleitores e Eleições: Mobilização Política e Democracia no Brasil Pós-Estado Novo*, «Dados», 58/2 (2015), pp. 371–400.

⁶⁰ JOHN S. MILL, JOHN GRAY (ed.), “*On liberty*” and other essays, Oxford, Oxford, 1998 Considerations on representative government, ch. X (Of the mode of voting).

⁶¹ JOHN S. MILL, “*On liberty*” and other essays, cit.

⁶² ERIC BARENDT, *Anonymous speech, the secret ballot and campaign contributions*, cit., p. 158.

⁶³ ERIC BARENDT, *Anonymous speech, the secret ballot and campaign contributions*, cit., p. 156.

⁶⁴ JEFFREY M. SKOPEK, *Anonymity, the production of goods, and institutional design*, cit., pp. 1752-1754 and p.1763-1764.

⁶⁵ ‘Art. 312. Violar ou tentar violar o sigilo do voto: Pena - detenção até dois anos’. See TRIBUNAL SUPERIOR ELEITORAL, *Eleições 2016: máquina fotográfica e celular são proibidos*

So non-identification is clearly pursued by the law as regards voting, which is certainly one of the most central aspects of democracy. Identification in this context would serve to curb ‘*futile and unfounded*’ opinions⁶⁶, promote the idea of ‘freedom and responsibility’ as well as enable the public to critically assess⁶⁷ vote-casting, all goals supporters of the identification-requirement paradigm cite as justification for it. Those claiming that the Brazilian constitution places identification above all else would have to at least concede an important exception.

Supporters of the identification paradigm might object, however, that voting is not an instance of conduct protected by the freedom of expression as provided for by the constitution. The very encompassing language of the provision - ‘expression of thoughts is free...’ – would probably recommend rejecting the objection. More importantly, that freedom of expression secures for citizens the ability to influence collective decisions and public policy is one of the few points of consensus between different, opposing theories about free speech, truth-based, self-government-based or dignity-based⁶⁸.

A similar point could be made respecting the secrecy of jury deliberations⁶⁹, also expressly provided for by the Brazilian constitution (art. 5, XXXVIII)⁷⁰. In addition to fostering responsible discharge of the solemn function jurors undertake, identification in this context would also

na cabina de votação, (2016) <<http://www.tse.jus.br/imprensa/noticias-tse/2016/Julho/eleicoes-2016-maquina-fotografica-e-celular-sao-proibidos-na-cabina-de-votacao>>, accessed 31.Jul.2017 (High Electoral Court judge advancing that interpretation).

⁶⁶ ALEXANDRE DE MORAES, *Liberdade de pensamento*, cit., p. 130.

⁶⁷ As it is argued for expression generally in DANIEL SARMENTO, *Comentários ao art. 5º, IV*, cit.

⁶⁸ We will discuss some of those theories below.

⁶⁹ JEFFREY M. SKOPEK, *Anonymity, the production of goods, and institutional design*, cit., pp. 1763-1764; SAUL LEVMORE, *The anonymity tool*, «University of Pennsylvania Law Review», 144 (1996), pp. 2216-2219.

⁷⁰ ‘Art. 5. [...] XXXVIII – the institution of the jury is recognized, with the organization given to it by law, assuring: [...] b) secret voting’ KEITH S. ROSENN, *Constitution of the Federative Republic of Brazil: October 5, 1988 (as Amended to September 15, 2015)*, cit. (‘Art. 5º. [...] XXXVIII - é reconhecida a instituição do júri, com a organização que lhe der a lei, assegurados: [...] b) o sigilo das votações.’.)

be useful in policing against undue influence on jury members⁷¹. Yet the constitution imposes secrecy, which is effected in statutory law providing for jury voting use of unidentified ballots which are counted only inasmuch as needed to arrive at a majority of the jury finding the defendant guilty or not guilty,⁷² further severing identification of how each juror voted.⁷³

Protection of anonymous sources

Yet another instance of Brazilian law conflicting with a general identification requirement is to be found within the constitution: the protection of anonymous sources. Under art. 5, XIV, ‘everyone is entitled free access to information, and the secrecy of sources shall be safeguarded where required for the practice of professional activities’⁷⁴. The Press Act of 1967 provided that ‘no journalists [...] shall be compelled or coerced to disclose the name of their source, or the source of their information, and silence concerning this may not prompt any sanctions, direct or indirect, nor any kind of punishment’ (art. 71)⁷⁵. While that Act was invalidated in full by the Supreme Court in 2009, a recent case shows the

⁷¹ Guilherme Nucci appreciates this issue, but minimises the risk associated with it: ‘it would take corruption of historical dimensions, for all those present [*within the special isolated room for jury deliberations*] – and there are many – to fail to report it’. GUILHERME DE S. NUCCI, *Tribunal do júri*, Forense, Rio de Janeiro, 2015⁶, p. 30. (‘[...] *haveria de ser uma corrupção histórica, envolvendo todos os presentes – e são muitos – para que ninguém possa denunciá-la*’.)

⁷² As per the Criminal Procedure Code, esp. art. 483, §§ 1–2, and art. 489. The jury is composed by seven people, thus whenever the count reaches four votes, the count is concluded and remaining ballots are discarded. Cf. GUILHERME DE S. NUCCI, *Tribunal do júri*, cit., pp. 407-411.

⁷³ Jurors are also barred from discussing the case; they are only allowed to ask the presiding judge’s to explain procedural questions and other sorts of clarification. GUILHERME DE S. NUCCI, *Tribunal do júri*, cit., pp. 405-406. This further contributes to non-identification.

⁷⁴ ‘Art. 5º. [...] XIV - é assegurado a todos o acesso à informação e resguardado o sigilo da fonte, quando necessário ao exercício profissional’.

⁷⁵ ‘Art. 71. Nenhum jornalista [...] poderão ser compelidos ou coagidos a indicar o nome de seu informante ou a fonte de suas informações, não podendo seu silêncio, a respeito, sofrer qualquer sanção, direta ou indireta, nem qualquer espécie de penalidade’.

court might be inclined to interpret the constitutional clause on the protection of anonymous sources as effectively equivalent to what was provided for by art. 71 of the Press Act⁷⁶.

In practice, it may be said this privilege that the constitution accords journalists provides them with immunity for disclosing information acquired illegally by their sources⁷⁷. Again, this runs counter to the identification paradigm, since it enables those who illegally obtained and divulged information to evade (civil and criminal) liability, which supporters contend is an underlying justification for the identification requirement.

An objection at this stage would be pointing out that, while the constitution safeguards affords a reporter's privilege (or generally a journalist's privilege; both are different terms for referring to the protection of anonymous sources), it nevertheless does not waive liability for harms resulting from the dissemination of information. Indeed, Nelson Hungria remarks that the secondary liability scheme established by the Press Act of 1967 'indirectly safeguards' the protection of anonymous sources⁷⁸. Journalists are therefore able to take on liability for the information shared with them by their anonymous sources in civil liability⁷⁹, which could be regarded of as satiating the demands of the

⁷⁶ See Brazilian Supreme Court, Rcl 21.504-AgR, 2nd Panel, Celso de Mello J. rapporteur, Nov 11, 2015.

⁷⁷ RODRIGO V. NITRINI, *Liberdade de informação e proteção ao sigilo de fonte: desafios constitucionais na era da informação digital*, Faculdade de Direito da Universidade de São Paulo, São Paulo, 2013, pp. 87-88.

⁷⁸ NELSON HUNGRIA, *A disciplina jurídica da liberdade de pensamento e informação*, cit., p. 16. 'É de notar que, com esse critério de autoria subsidiária, assegura-se, indiretamente, a inviolabilidade do segredo que outrora se denominava "segrêdo de redação" e que, hoje, mais adequadamente se deve dizer "segrêdo da fonte de informação"'.

⁷⁹ 'The safeguarding of anonymous sources is not absolute. By invoking anonymous sources, a professional or company take on full responsibility for the distribution of information, including civil and criminal liability for harms caused to third-party rights (e.g., reputation, intimacy, private life and image).' LENIO L. STRECK, *Comentários ao art. 5º, XIV*, in J. J. G. CANOTILHO, G. F. MENDES, I. W. SARLET, L. L. STRECK (eds.), *Comentários à Constituição do Brasil*, Almedina/Saraiva, São Paulo, 2013. ('O resguardo do sigilo da fonte não é absoluto. Quando o profissional ou a empresa invocam o sigilo da fonte, assumem a plena responsabilidade pelo teor da informação veiculada, inclusive respondendo cível e

identification requirement interpretation. Eric Barendt, a critic of a general constitutional right to anonymity, finds nevertheless a strong case can be made in favour of the protection of anonymous sources ‘insofar as the press and other media act as responsible intermediaries – by vouching for the credibility of their sources and the accuracy of the information they provide’⁸⁰. We should be careful to differentiate between a journalist employing anonymous sources for a news article and anonymous speakers generally, who are not bound by the same institutional commitments as media professionals are⁸¹.

That notwithstanding, it is clear that, by concealing the identity of a source, journalists also subtract from the public relevant data for assessing the information disseminated by the anonymous source – and the possibility of that assessment of the credibility of the speaker is also offered as a basis for the blanket anonymity ban⁸². Furthermore, while journalists may be held liable if the information itself is determined to cause harm⁸³, the traditional understanding of a journalist’s constitutional privilege in Brazil would nevertheless shield the anonymous source from being held liable for breach of confidentiality, for instance. So the privilege may not apply where the information itself is false and the journalist acted negligently (or with intent), but it would still apply if the disclosure itself is illegal but the publishing of information is not (for instance, in cases of breach of confidentiality) – thus providing cover for illicit behaviour on the part of the anonymous source. The identification

criminally por eventuais danos causados a direitos de terceiros (e.g., honra, intimidade, vida privada e imagem).’)

⁸⁰ ERIC BARENDT, *The protection of anonymous sources*, in *Anonymous speech: literature, law and politics*, Hart Publishing, 2016, p. 115.

⁸¹ Saul Levmore also stresses the role of the media in intermediating information provided by anonymous sources. SAUL LEVMORE, *The anonymity tool*, cit., pp. 2233-2234.

⁸² DANIEL SARMENTO, *Comentários ao art. 5º, IV*, cit.

⁸³ For instance, suppose a journalist is misled by an anonymous source and a publication prints an article based on false information which leads to loss of employment to the subject portrayed by the report. If the journalist is found to have failed standard verification and her conduct is deemed as exhibiting civil negligence (in the United States, under the *Sullivan* doctrine, this would require holding her as displaying reckless disregard for the truth), the subject of her report could recover damages from her.

requirement is taken to prevent precisely that, speakers evading legal liability.

At any rate, our point here is not to equate journalists with anonymous speakers, and we need not negate the different contexts surrounding them. As stated earlier, our interest in this section is only to account for cases where the constitution (or law generally) clearly rejects the claim to identification as an overriding concern in the expression of thoughts. The constitutional clause on the protection of anonymous sources is an unambiguous instance of that.

Anonymous reporting of criminal activity

Since 1995, Brazilian states like Rio de Janeiro and Sao Paulo, as well as federal government, have adopted anonymous hotlines for reporting criminal activity, modelled after the *Crimestoppers* programs that have spread globally⁸⁴. In Rio de Janeiro, *Disque-Denúncia* is operated by an NGO which forwards reports to the police. While not officially run by state government, it is nevertheless closely associated with it, like *Crimestoppers* programs typically are⁸⁵. It collects information regarding any criminal activity. In São Paulo, statute n. 10.461/1999 mandates the executive to provide an anonymous hotline reporting criminal activity. It is also run by an NGO, in collaboration with law enforcement. Starting in 2013, the service has also been provided via a website⁸⁶. Brazilian federal

⁸⁴ Discussing the initiative developed in the city of Rio de Janeiro, Marco Aurélio Rudiger and Vicente Riccio claim that ‘inspired in the *Crime Stoppers* program, originally appearing in the United States, [it is] currently found in more than 1.000 cites around the world’. MARCO A. RUEDIGER & VICENTE RICCIO, *Mídia, Estado e Sociedade Civil: a mobilização social da segurança pública pelo Disque-Denúncia* (2009), p. 1.

⁸⁵ MARCO A. RUEDIGER & ÂNGELA BRITTO, *Criminalidade, sociedade e a prática da denúncia anônima de crimes*, «*Questio Juris*», 3/1 (2007) <<http://www.e-publicacoes.uerj.br/index.php/quaestioiuris/article/view/3941/0>>; MARCO A. RUEDIGER & VICENTE RICCIO, *Mídia, Estado e Sociedade Civil: a mobilização social da segurança pública pelo Disque-Denúncia*, cit.

⁸⁶ See *decreto* 60 640/2014, art. 2, IV (establishing *Disque-Denúncia* as a component of a state intelligence center), and art. 8 (providing for the collaboration with the NGO responsible

government operates a similar service, managed by a department of the Ministry of Human Rights, focusing on violations of human rights and crimes against vulnerable population⁸⁷.

While anonymous crime reporting is a contentious topic⁸⁸, it has nevertheless been admitted by courts. This is an important case contradicting the identification-requirement paradigm, since, in contrast to the other practices discussed so far, justification for this cannot be found within the language of the constitution. That led courts in the past to dismiss criminal charges based on anonymous information relayed to law enforcement officials citing the anonymity clause directly as justification⁸⁹.

Yet the Brazilian Supreme Court, starting with a 2005 case, rejected that understanding, in a 10–1 ruling⁹⁰. The court concluded that, while anonymous reports could not serve as basis for formal indictments or investigation, the police could (and should) nevertheless engage in preliminary investigation to check the substance of the report. If preliminary investigation is able to find evidence of wrongdoing, a formal investigation is warranted, and criminal charges may be brought regardless of the support on anonymous reports. The court seemed particularly concerned that a different conclusion might effectively

for effectively running the hotline). See also *Diário Oficial da Cidade de São Paulo*, Dec 18, 2013, *São Paulo*, 58 (239), p. 121, and *Diário Oficial do Estado de São Paulo*, 123 (222), p. 1.

⁸⁷ See *Disque 100 – Disque Direitos Humanos*, <<http://www.sdh.gov.br/disque100/disque-direitos-humanos>>. See *decreto* 9 122/2017, art. 5, IV (providing that ‘confidentiality of the source of the information’ collected by the service shall be secured ‘when requested by an informant’).

⁸⁸ GUSTAVO BADARÓ, *A boca do leão: validade das interceptações telefônicas decretadas com base em notitia criminis anônima*, «*Revista dos Tribunais*», 927 (2013), pp. 529–53; ELISA O. GIACOBBO, *A “notitia” anônima de crime e a vedação do anonimato*, «*Revista Jurídica*», 57/386 (2009), pp. 95–147.

⁸⁹ See High Court of Justice, *questão de ordem na notícia-crime n. 280, Corte Especial*, Nilson Naves J. rapporteur, Aug 18, 2004. Also Supreme Court, HC 84 827, 1st Panel, Marco Aurélio J. rapporteur, Aug 7, 2007.

⁹⁰ Supreme Court, Inq 1 957, Carlos Velloso J. rapporteur, May 11, 2005.

provide immunity for criminal activity reported anonymously to law enforcement.

Some of the justices were also of the opinion that crime reporting did not engage art. 5, IV, of the constitution, which concerns freedom of expression⁹¹. As Celso de Mello J observed, however, the rationale for a general veto on anonymity – fostering responsible exercise of expression, discouraging wrongdoing, assuring liability for abusive expression – is clearly present in the context of anonymous crime reporting⁹². In fact, more so, we should think; those concerns are particularly magnified in expression of thought that might entail prosecution. Cezar Peluso J (at 259) admits this by noting that the criminal offence of falsely reporting a crime is met with harsher punishment in case the report is anonymous⁹³. So it is surprising that Celso de Mello J comes to the conclusion that a balancing of the interest in criminal prosecution and the interest underlying the anonymity ban should favour the former (at 265-6). We would be hard-pressed to conceive of circumstances more favouring of the case for compelling identification, especially considering the court did not limit the holding to cases where coercion and intimidation might be presumed (as with drug-trafficking by violent organisations, for instance).

⁹¹ Sepúlveda Pertence J, at 280: 'First, I do not grasp the issue to be located in art. 5, IV, which concerns freedom of expressing thoughts' (*'Primeiro, não vejo que a sede do problema seja o art. 5º, IV, que trata de liberdade de expressão do pensamento'*). Ayres Britto J, at 282: 'Anonymous criminal reporting is only comprised of a piece of information, and not the result of mental conceptualization like the expression of thoughts which is covered by art. 5, IV [of the Brazilian constitution]' (*'A delação anônima contém apenas um elemento informativo, não é produto de uma elaboração mental, como, sim, a manifestação do pensamento de que trata o art. 5º, inciso IV'*).

⁹² At 261: '*Sabemos, Senhor Presidente, que o veto constitucional ao anonimato, nos termos em que enunciado (CF, art. 5º, IV, "in fine"), busca impedir a consumação de abusos no exercício da liberdade de manifestação do pensamento e na formulação de denúncias apócrifas, pois, ao exigir-se a identificação de seu autor, visa-se, em última análise, com tal medida, a possibilitar que eventuais excessos derivados de tal prática sejam tornados passíveis de responsabilização, "a posteriori", tanto na esfera civil quanto no âmbito penal, em ordem a submeter aquele que os cometeu às consequências jurídicas de seu comportamento.'*

⁹³ Criminal Code, art. 339, § 1.

At any event, the court has since then affirmed that understanding in a number of other cases⁹⁴, to which commentators have mostly subscribed⁹⁵.

This further case is of crucial interest, as noted above, because here supporters of the identification paradigm cannot offer a reply that it too represents an exception expressly provided by the constitution to the general rule of identification. Also, as discussed above, this is an instance where the interest in identification is likely as forceful as it could be. The argument for interpreting the anonymity clause on the constitution as establishing a general identification requirement seems decisively compromised. It is clear that it fails to hold unconditionally, as supporters argued.

No unconditional identification requirement

Contrary to the prevailing, widely disseminated understanding of the Brazilian constitution, the discussion of the above cases attests that an unconditional identification requirement does not hold. The constitution contains provisions that explicitly conflict with that proposition and is interpreted to allow for other practices not expressly provided for by it that are also inconsistent with the identification paradigm. So the intuitional reading of the constitution that equates the anonymity clause

⁹⁴ See HC 99 490, 2nd Panel, Joaquim Barbosa J rapporteur, Nov 11, 2010; HC 95 244, 1st Panel, Dias Toffoli J rapporteur, Mar 23, 2010; RMS 29 198, 2nd Panel, Cármen Lúcia J rapporteur, Oct 30, 2012 (concerning a federal police officer who was punished with loss of pension after investigation originated by anonymous reports); HC 124 677, 1st Panel, Roberto Barroso J rapporteur, Apr 7, 2015; HC 109 598-AgR, 2nd Panel, Celso de Mello J rapporteur, Mar 15, 2016.

⁹⁵ JOSÉ AFONSO DA SILVA, *Art. 5º, IV*, cit., pp. 92-93; UADI L. BULOS, *Art. 5º, IV*, cit., p. 122; GUSTAVO BADARÓ, *A boca do leão: validade das interceptações telefônicas decretadas com base em notitia criminis anônima*, cit. (albeit condemning in its use as basis for wiretapping orders); ELISA O. GIACOBBO, *A “notitia” anônima de crime e a vedação do anonimato*, cit.

with requiring all expression of thought to be duly lodged – as the Press Act demanded of traditional media – must be rejected.

As acknowledged in considering the cases, it could be argued that each one of those instances reflects a particular judgement that would hold for those specific circumstances exclusively, resulting from justification that is peculiar to each. We need not ignore that. We need not deny that the secret ballot may be understood as a contingent institutional arrangement designed in the interest of well ordered democracies. Or that the secrecy of the jury instantiates not protection of anonymity generally but rather of the proper functioning of the criminal system. Nor that anonymous reporting of criminal activity and the protection of anonymous sources are not readily equated with a conclusion favouring anonymity generally.

We should not be troubled by admitting that, because our claim is not that we may infer such a conclusion directly from those cases. At this point, it is enough to recognise what those cases indisputably evidence: that a blanket identification requirement does not hold unconditionally; that the law yields to anonymity and in effect protects it *where proper justification is present*. So the question concerning anonymity is clearly a question which is not beyond interpretation. Rather, interpretation which accounts for the values endorsed by the constitution is crucial in determining precisely what the anonymity clause means. We lack such an interpretation as regards the internet and our digital lives generally. We will next turn our attention to exploring how our most basic values are engaged by the transformations engendered to our social life by the technological shifts brought by the internet. Before we do that, however, I would like to examine some proposed readings of the constitution which would seemingly bypass the problem.

No bypassing the problem

A 2014 case tested the identification paradigm. It concerned Secret, a mobile application which operated an anonymous social media of sorts.

A post in the platform did not identify who was behind it; that information was kept from users. Yet they were able to interact much like in other social media, in two different ways. Users were connected to others based on their location and also to contacts listed on the address books of their phones and on social media platforms Facebook and Twitter⁹⁶. As a particular post was displayed on the screen, it contained only limited information on the poster, according to those two forms of connection.

If the post was included in the user feed on the basis of location, it would show the area broadly – the city of São Paulo, for instance. If the post appeared on the user feed because the poster was a contact, it would reveal only that, that one of your contacts posted that message, or a contact of one of your contacts. The key innovation of the app was precisely at that: while concealing identification, it nevertheless provided sufficient context for users to interact meaningfully. Other apps offering similar platforms were soon to follow⁹⁷, Facebook was also reported to be in the process of developing its own product based on anonymity⁹⁸.

As some posts on the platform were found to contain defamation and harassment, a public prosecutor in the state of Espírito Santo filed suit demanding that Secret be made unavailable for download from the Apple, Google and Microsoft app stores, as well remote removal of the app from devices to which it had already been installed. The court granted a preliminary injunction to that effect, offering the language of the anonymity clause as direct basis for holding the app as infringing Brazilian law⁹⁹.

⁹⁶ JENNA WORTHAM, *New social app has juicy posts, all anonymous*, published in *New York Times*, 2014, p. A1.

⁹⁷ KIT EATON, *Surprising, scandalous, serious, even inspiring*, published in *New York Times*, 2014, p. B10.

⁹⁸ MIKE ISAAC, *Facebook developing app that allows anonymity*, (2014) <<https://bits.blogs.nytimes.com/2014/10/07/facebook-readies-app-allowing-anonymity>>, accessed 31.Aug.2017.

⁹⁹ Case 0028553-98.2014.8.08.0024, 5ª Vara Cível de Vitória, Espírito Santo, judge Paulo César de Carvalho, decision of August 19th 2014. The ruling in Portuguese may be accessed through the court's website, inserting the case number at <<http://aplicativos.tjes.jus.br/consultaunificada/faces/pages/pesquisaSimplificada.xhtml>>. I

The order was later vacated by the Espírito Santo State Court, in a majority decision delivered by a panel of three appellate judges¹⁰⁰. The majority did concede that the anonymity clause on the Brazilian constitution was meant to block tools fully concealing identification, but nevertheless was not convinced that Secret was such a tool, since the records suggested that the platform retained the IP address of users accessing the app.

Many commenting the case endorsed that view. In an op-ed, Ronaldo Lemos argued that Secret offered only ‘an appearance of privacy’¹⁰¹, as users were identified when downloading it from an app store, and had to sign up to the platform providing other credentials. Others have made similar arguments.¹⁰² The basis for it is that we should read the constitution strictly when it mentions ‘anonymity’: anonymity is indisputably forbidden, the argument goes, but pseudonymity is surely not. As all activity on the internet may be associated with an IP address, which, in turn, an internet service provider may use to link particular activity to a specific subscriber, then apps such Secret *are legal* to the extent that they are not truly anonymous, but rather pseudonymous¹⁰³. The IP address operates as a pseudonym in this context, just as a pen name would. This sounds persuasive because, even when a name is not disclosed, it would make no sense to refer to someone as ‘anonymous’ if

have also made it available here: <<https://www.dropbox.com/s/q0ze1239w7jnp49/MP-ES%20v%20Secret%20e%20outros%20-%20decis%C3%A3o%20liminar.pdf?dl=0>>.

¹⁰⁰ Case 0030918-28.2014.8.08.0024, 3^a *Câmara Cível*, Robson Luiz Albanes J., rapporteur, July 21, 2015. The decision, in Portuguese, may be accessed at the court’s website, by providing the case number at <<http://aplicativos.tjes.jus.br/consultaunificada/faces/pages/pesquisaSimplificada.xhtml>>. I have also made it available at <<https://www.dropbox.com/s/1w89s9irlif86ed/MP-ES%20v%20Secret%20e%20outros%20-%20agravo%20de%20instrumento%20sobre%20liminar.pdf?dl=0>>.

¹⁰¹ Carlos Affonso de Souza argued Secret offered only the ‘appearance of anonymity’ CARLOS A. P. DE SOUZA, *As cinco faces da proteção à liberdade de expressão no Marco Civil da Internet*, in N. DE LUCCA, A. SIMÃO FILHO, C. R. P. DE LIMA (eds.), *Direito & Internet III: Marco Civil da Internet (Lei n° 12.965/2014)*, Quartier Latin, São Paulo, 2015, p. 394.

¹⁰² See DENNYS M. ANTONIALI, FRANCISCO DE B. CRUZ & MARIANA G. VALENTE, *Existe um “direito de saber quem é quem” na Internet?*, (2014) <<http://link.estadao.com.br/blogs/deu-nos-autos/existe-um-direito-de-saber-quem-e-na-internet/>>, accessed 11.Sep.2017.

¹⁰³ I thank Dennys M. Antonialli for suggesting this point to me.

we have assembled enough information to enable tracing the would-be anonymous individual to the identity of an actual living person¹⁰⁴.

Yet arguments of this sort do not settle the question. While the identification paradigm does admit pseudonymity, it does so only to the extent that liability is secured. The Press Act of 1967 provided for this by creating, alongside the legally-defined attribution of anonymous writings discussed in chapter 1, a registrar for pen names, official records for pseudonyms publishers were required to keep¹⁰⁵. This is why Pontes de Miranda noted that ‘*[p]seudonymity is not anonymity only if the work has been registered, or when the author, accepting liability [for it], is prepared to answer for “abuses” therein perpetrated, or to disclose in court the name of its author*’¹⁰⁶.

What is suggested by Pontes de Miranda is that, under the identification paradigm, any writing by a pseudonym we are unable to link to a

¹⁰⁴ See generally HELEN NISSENBAUM, *The meaning of anonymity in an information age*, cit.; KATHLEEN A. WALLACE, *Anonymity*, «Ethics and Information Technology», 1 (1999), pp. 23–35.

¹⁰⁵ ‘Statute no. 5.250/1967 [*Press Act*], sensitive to the recurring practice in Brazilian press of using pseudonyms, established, with art. 7, section 4, a registrar of fictional names or pen names that media professionals use of in avoiding disclosure of personal identification. The rationale of the provision is quite specific; it is a scheme for officially institutionalising pseudonyms so that they are not used in defrauding the ban on anonymity. The manager or the person responsible for the media company must comply with this requirement, or face answering, personally, for that failure, since by not supplying positive proof of the actual identity of the individual that made use of a pseudonym in order to disseminate false accusations, for instance, the newspaper manager that publishes tacitly admits those writings to be anonymous, for which he is liable (Art. 28, II, statute no. 5.250/1967 [*Press Act*])’. ÊNIO S. ZULIANI, *Art. 7º*, cit., p. 176. (‘*A Lei 5.250/67 [lei de imprensa], ciente de que é pratica recorrente na imprensa brasileira o emprego de pseudônimo, criou, pelo art. 7.º, § 4.º, o registro dos nomes irrealis ou de fantasia que os profissionais da mídia utilizam para não sofrerem identificação pessoal. A intenção do dispositivo é bem específica; trata-se de um mecanismo de oficialização do pseudônimo para que não se faça uso dele como fraude ao anonimato proibido. O diretor ou o responsável pela empresa de comunicação deverá cumprir esse requisito, sob pena de responder, em pessoa, pela falta, porque o não exibir a prova da real identidade daquele que se serve da pseudonímia para escrever calúnias, para dar um exemplo, o diretor do jornal que as publica, confessa, com o silêncio, tratar-se de texto anônimo, cuja responsabilidade é sua (art. 28, II, da Lei 5.250/67 [lei de imprensa])*’.)

¹⁰⁶ *Comentários à Constituição de 1967, com a Emenda n. 1, de 1969*, cit., pp. 154-155. (‘*O pseudônimo somente não é anonimato quando se registou a obra, ou quando o editor, assumindo a responsabilidade, se prontifica a responder pelos “abusos” que nela se cometeram, ou a revelar à justiça o nome do autor.*’)

particular individual should be regarded as anonymous writing. Again, this makes sense for supporters of that prevailing interpretation of the constitution, since such a pseudonym would fail the touchstone of securing liability. Pseudonymity is of course different from anonymity in the sense that, even if we know nothing else that would enable us to connect it to a particular individual, a pseudonym still offers us some information about the author of a message, which is enough to produce the identity of a *persona*¹⁰⁷. But this is insufficient for the identification-requirement reading of the anonymity clause, as we cannot be awarded damages in court from that *persona*, the ensuring of which that interpretation of the constitution deems to be demanded by the clause.

Thus, even if usernames or even IP addresses may be thought of as pseudonyms, the problem we are considering is not solved¹⁰⁸.

We should stress that the pseudonymity strategy concedes a crucial point: that the anonymity clause on the constitution must mean identification is paramount and attribution should always be feasible, and so any medium or tool failing that is effectively interdicted at the level of constitutional law.

¹⁰⁷ '[...] the distinction between anonymous and pseudonymous messages is a subtle one. The first time that a novel was published under the name "Mark Twain," one appropriately may have considered this an "anonymous" text, the equivalent of publication under the name "Anon." I obtain no more information about the identity of the "true"—biological—author of the book in the former case than in the latter. Why then is "Mark Twain" considered a pseudonym while "Anon." is not? The answer, of course, is that [...] over time the identifier "Mark Twain" came to be associated with a distinct set of characteristics that may be considered assets – “reputational capital” – of the pseudonym itself. Without these associations there is indeed no meaningful difference between anonymity and pseudonymity; had Samuel Clemens chosen to publish each of his novels under a different pseudonym, that would have been essentially equivalent to publishing all of his novels under the single pseudonym "Anon." or "John Doe." But by the time *The Adventures of Huckleberry Finn* was published, we could no longer say that the designation of "Mark Twain" as the author gave us no information about the originator of the text; the originator of the text is the fictional entity Mark Twain.' DAVID G. POST, *Pooling intellectual capital: thoughts on anonymity, pseudonymity, and limited liability in cyberspace*, «The University of Chicago Legal Forum» (1996), p. 152.

¹⁰⁸ While he did consider the Secret app case from the perspective of pseudonyms, Carlos Affonso de Souza explicitly acknowledges that the anonymity question is a discrete problem. CARLOS A. P. DE SOUZA, *As cinco faces da proteção à liberdade de expressão no Marco Civil da Internet*, cit., p. 395.

The argument thus inadvertently affirms the identification paradigm as an interpretation under which the Brazilian constitution contains a mandate for surveillance of expression. But, as we have learned from the preceding discussion, we find no justification for it from established practices the constitution is regarded as protecting. Particularly telling of how this approach does not settle the question is that commentators frequently cite the anonymity clause as the legal basis for data retention mandates¹⁰⁹ such as those established by Marco Civil da Internet, a point which shall be explored below.

So re-framing the problem in terms of pseudonymity does not escape the issue. We do need to examine how our values are engaged in the internet. This shall be our project below.

¹⁰⁹ ‘At first glance, these rules should not be regarded as infringing the constitution, which itself proscribes anonymity in the exercise of freedom of expression [...]’. ULISSES S. VIANA, *Liberdade de expressão, comunicação e expressão do pensamento como princípios fundamentais do marco civil*, in G. S. LEITE, R. LEMOS (eds.), *Marco civil da internet*, Atlas, São Paulo, 2014, p. 139. (‘*Em primeira análise, essas regras não estariam em confronto com a Constituição, isso porque ela própria veda o anonimato no exercício da liberdade de expressão [...]*’). See also BRUNO MAGRANI, *Systematic government access to private-sector data in Brazil*, «International Data Privacy Law», 4/1 (2014), p. 32.: ‘Unlike other jurisdictions, anonymous speech is forbidden in Brazil. One of the main consequences of this provision is that courts have ruled that judicial authorization is not required for the Police or the Public Prosecutor’s Office to have access to subscriber-identifying data from companies’. Indeed, Renato Opice Blum argues for extending the data retention mandates as required for compliance with the anonymity clause. RENATO O. BLUM, *Portas lógicas de origem: identificação e caos jurídico*, (2016) <<https://jota.info/artigos/direito-digital-portas-logicas-de-origem-dificuldade-de-identificacao-e-o-caos-juridico-26102016>>, accessed 31.Aug.2017.

3. THREE THEORIES OF FREEDOM OF EXPRESSION: TRUTH, SELF-GOVERNMENT AND DIGNITY

There are evidently a wide array of questions concerning freedom of expression and the internet. This dissertation examines issues concerning anonymity, which may generally be discussed in terms of anonymous access to the internet and anonymous internet posting. Put differently, we may approach anonymity as regards the conduct of connecting to the internet and browsing it and as regards expressive content shared through the internet.

The very question of whether freedom of expression covers the conduct of accessing the internet is likely to be a contentious point. It might be argued that accessing the internet is clearly not an instance of activity protected by freedom of expression. Internet connection may be regarded as machine communication, as opposed to human communication – and humans, rather than machines, are at the centre of free speech.

We cannot hope to adjudicate those questions before we are able to offer an answer to *what is the point freedom of expression*. If we only value freedom of expression as means for its benefits in promoting better public policy, for instance, we will likely find little reason for generally safeguarding anonymous connection to the internet, as it does seem dubious that collective decisions could be made better by allowing users to browse the internet unidentified.

We must therefore examine the proposals of different theories on the value of freedom of expression before assessing the extent to which it may provide basis for any claims in support of anonymity.

Truth and the marketplace of ideas

One of the most cited defences of freedom of expression is that by protecting it we all partake in the benefits flowing from free discussion of ideas; suppression of ideas is inimical to the discovery of truth.

This notion is to be found in John Stuart Mill's *On liberty* essay. Speech should be free, Mill argued, because '*we can never be sure that the opinion we are endeavouring to stifle is a false opinion*'¹¹⁰. If nothing else, Mill submits, history provides ample proof that human knowledge is fallible. Some of our most fundamental beliefs currently were once considered heretical. What is worse, we are still lacking a method for definitive testing of ideas, one that provides absolute certainty an idea is either false or true. So, as we must admit we are not infallible, we must also recognise that '*All silencing of discussion is an assumption of infallibility*'¹¹¹.

Further, Mill contends, even if we are right to believe that an idea contradicting our opinions is false – that is, even if we could find infallible answers –, we would still be wrong to silence it, because preventing our opinions to be challenged deprives them the character of living truth and instead produces in us the attitude of those who hold opinion as dead dogmas.

Those sound like persuasive arguments, not the least because they could also be offered as the basis of a general endorsement of science and rationality¹¹². Yet it does seem like an incomplete vindication of truth,

¹¹⁰ JOHN S. MILL, "*On liberty*" and other essays, cit.

¹¹¹ JOHN S. MILL, "*On liberty*" and other essays, cit.

¹¹² Although Eric Barendt finds this as showing fault with the argument: 'There is perhaps something paradoxical about Mill's thesis. The argument for a free speech principle from truth is said to be particularly applicable to types of expression, which can only rarely, if ever, establish truths with the same degree of assurance that obtains in mathematics or the natural sciences' ERIC BARENDT, *Why protect free speech?* in *Freedom of speech*, Oxford, Oxford, 2005, p. 10.

science and rationality, because the very idea of human infallibility is itself an idea we would have reason to hold as fallible. It would seem the survival of living truth is dependent on the preserving of one fundamental, overarching ‘dead dogma’.

In responding to that concern, the argument could be revised as supporting evidence-based opinion and rationality. This would state we need not hold any principle as infallible (including this one), but that our reasoning should always be found on the best available evidence – and evidence warrants a conclusion for the protection of free discussion of ideas.

Yet, while a general principle favouring free speech could be thus affirmed, it is unclear whether that general principle would apply unconditionally, as Mills seems to argue. In other words, it is unclear that it will always be the case that censorship fosters the dissemination of false ideas and that free discussion always brings about true ideas¹¹³. Indeed, that seems to assume an ideal of human rational behaviour¹¹⁴ that is inconsistent with what research has shown about motivated reasoning. The defence of freedom of expression offered by Mill seems to rest on a notion Oliver Wendell Holmes Jr would endorse in his much-cited dissenting opinion in *Abrams v United States*, ‘that the best test of truth is the power of the thought to get itself accepted in the competition of the market’¹¹⁵. But it is plain that truth does not always prevail, and specially not by the mere virtue of being true¹¹⁶.

¹¹³ ‘[...] the greatest difficulty with Mill’s argument is its implicit assumption that freedom of discussion necessarily leads to the discovery of truth or, more concretely, to better individual or social decisions’ ERIC BARENDT, *Why protect free speech?*, cit., p. 9.

¹¹⁴ LYRISSA B. LIDSKY & THOMAS F. COTTER, *Authorship, audiences, and anonymous speech*, «Notre Dame Law Review», 82/4 (2007), p. 1582 et seq.

¹¹⁵ *Abrams v United States*, 250 US 616, 630 (1919) (Holmes J., dissenting).

¹¹⁶ ‘But it is difficult to make the same assumptions about the role of free speech in society. It is not clear that unregulated speech always leads to the reception of truth. Indeed, some historical experience suggests the contrary; the Nazis came to power in Germany in 1933, although there had been (relatively) free political dis- course under the Weimar Republic during the 1920s’. ERIC BARENDT, *Why protect free speech?*, cit., p. 9.

People continue to hold clearly false ideas even when truth is openly available. In fact, research has identified that people not only insist on false beliefs *after having been presented with the best evidence showing the opposite to be true*, but also that they report to be *more convinced of the false belief* than they reported before being introduced with evidence contradicting it¹¹⁷. This has been labelled the *backfire effect*. Research has shown it applies particularly for the most important beliefs we hold, so that, while we would discard a false belief where it seems irrelevant to our identity (for instance, the proposition that the Great Wall of China is the only human-made structure visible from outside the planet), the backfire effect is activated where it concerns a ‘protected value’, or challenges a belief that is characteristic of political identity, for instance¹¹⁸.

The argument from truth also fails as justification because it is simultaneously under-inclusive and over-inclusive of what we take freedom of expression to protect. It would offer no grounds for protecting speech which has no claim to be true. If the reason why suppressing speech is wrong is the fact that we might be deprived of the evidence suppressed speech could present, perhaps there would be no speech-related concerns in restricting the publishing of works of fiction the majority regards as of bad taste¹¹⁹. Paradoxically, the argument from truth would protect clear instances where it makes no sense to protect knowingly false, harmful statements – like causing panic by falsely shouting ‘*Fire!*’ in a crowded theatre, an illustration the very same Oliver Wendell Holmes Jr cited as an absurd example while upholding the

¹¹⁷ BRENDAN NYHAN & JASON REIFLER, *When corrections fail: the persistence of political misperceptions*, «Political Behavior», 32/2 (2010), pp. 303–30.

¹¹⁸ JONAS T. KAPLAN, SARAH I. GIMBEL & SAM HARRIS, *Neural correlates of maintaining one’s political beliefs in the face of counterevidence*, «Scientific Reports», 6/1 (2016), p. 217; JONAS T. KAPLAN, SARAH I. GIMBEL, MORTEZA DEGHANI, MARY H. IMMORDINO-YANG, ET AL., *Processing narratives concerning protected values: a cross-cultural investigation of neural correlates*, «Cerebral Cortex» (2016), p. bhv325.

¹¹⁹ ‘In any event, Mill’s theory is difficult to apply to types of expression where it seems absurd even to look for an element of truth, or to propositions which are quite obviously factually false, such as “the moon is made of green cheese”. ERIC BARENDT, *Why protect free speech?*, cit., p. 10.

conviction of draft protesters, on the basis their conduct presented a ‘clear and present danger’ and could thus be restricted¹²⁰.

A different approach to Mill’s arguments is available, however. We may take his insistence on fallibility and his concern for ‘dead dogmas’ not at its epistemological face value, but as reflecting a particular limitation on government, *ie* that government should not be in the business of *legislating truth*. Alan Haworth makes the point that this is the fundamental insight we should derive from Mill: ‘*Mill’s argument is, in effect, the argument that the exercise of executive authority can never entail the possession of epistemic authority*’¹²¹. In other words, while government may legitimately conform human behaviour as it sees fit to promote general social welfare, it should not dictate which ideas are to be believed and which are not. Wielding power to that effect while appealing to the broader executive function of government, Haworth contends, is a kind of fallacy, which he calls the authoritarian fallacy¹²².

This emphasis on the proper role of government in Mill’s argument offers another reading of the notion of the ‘free trade in ideas’ as maintained by Holmes J in his dissent in *Abrams v United States*:

*But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.*¹²³

Under this understanding, government may regulate speech and expression as long as it does not endorse or censor a particular view.

¹²⁰ *Schenck v United States*, 249 US 47, 52 (1919).

¹²¹ ALAN HAWORTH, *On Mill, infallibility, and freedom of expression*, «Res Publica», 13/1 (2007), p. 85.

¹²² ALAN HAWORTH, *On Mill, infallibility, and freedom of expression*, cit., p. 85.

¹²³ *Abrams v United States*, 250 US 616, 630 (1919) (Holmes J., dissenting).

Restrictions on speech are admitted where they are content-neutral. Constraints on time, place and manner of speech are thus consistent with the marketplace of ideas view, since those limitations do not prevent people from reaching their own conclusion about the truth of an idea¹²⁴. In fact, regulation of that sort may be indeed required precisely to assure the proper functioning of the market¹²⁵. This strand of the marketplace-of-ideas theory would consequently admit restrictions on speech the majority rejects not on the grounds of untruthfulness, but simply on the grounds it finds the speech annoying, for instance. It would still be under-inclusive of what we take freedom of expression to protect.

The Madisonian ideal and self-government

A different theory also grounds freedom of expression in a concern about government, but instead of expressing a limitation on government, it emphasises the ideal of self-government. Freedom of expression here is taken to instantiate the notion that every citizen must be allowed to have a say in the working of government. This is regarded as required so that government may be said to be of the people, by the people, to the people. It expresses the commitment for the central concept of popular sovereignty. Ronald Dworkin refers to this as the Madisonian ideal of representative self-government¹²⁶.

¹²⁴ ‘The marketplace of ideas theory—the view that wise counsels will prevail over false ones in the clash of free public debate and “that the best test of truth is the power of the thought to get itself accepted in the competition of the market”—has dominated scholarly and judicial thinking about the first amendment. This theory allows the conclusion that reasonable time, place, and manner restrictions do not “abridge” the right of peaceable assembly or the freedom of speech’. C E. BAKER, *Human liberty and freedom of speech*, cit., p. 131.

¹²⁵ Ronaldo Porto Macedo Jr suggests further points concerning market regulation are made possible by the marketplace metaphor. RONALDO P. MACEDO JR, *Freedom of expression: what lessons should we learn from US experience?*, «Revista Direito GV», 13/1 (2017), pp. 287-288.

¹²⁶ RONALD DWORKIN, *Why must speech be free?* in *Freedom's law*, Oxford, Oxford, 1999, p. 200.

Under this theory, freedom of expression is about the proper functioning of democratic government: it is both a safeguard against usurping officials and an instrument in controlling government decisions and holding government accountable¹²⁷. As Barendt remarks, ‘*This is probably the most easily understandable, and certainly the most fashionable, free speech theory in modern Western democracies*’¹²⁸. It is also central to the prevailing understanding of freedom of expression in Brazil. As Ronaldo Porto Macedo Jr notes, this is connected to the Brazilian constitution as a charter enacted in the aftermath of, and largely in response to, an authoritarian regime¹²⁹. The judicial accent on democracy certainly makes sense.

Yet self-government cannot be all there is to freedom of expression, particularly in Brazil, where the constitution contains an explicit provision under which ‘the expression of intellectual, artistic, scientific and communication undertakings is free, independent of censorship or licensing’ (art. 5, IX)¹³⁰. While many intellectual and scientific undertakings may be relevant to effective government and to proper public policy (as the work of a philosopher or of a marine biologist might be), many will not. Many valuable undertakings will be marginally relevant. And even if we were able to advance a notion that those undertakings may, as artistic undertakings also might, help form the convictions at the basis of citizens’ assessment of government measures – by furthering our sensibility to issues affecting society, let us suppose – it does seem unlikely that we would be able to frame all poetry, and

¹²⁷ ERIC BARENDT, *Why protect free speech?*, cit., p. 18; RONALD DWORKIN, *Why must speech be free?*, cit., p. 201; RONALDO P. MACEDO JR, *Freedom of expression: what lessons should we learn from US experience?*, cit., pp. 285-286.

¹²⁸ ERIC BARENDT, *Why protect free speech?*, cit., p. 18.

¹²⁹ ‘The Brazilian Constitution is the result of the democratization process that followed the end of the authoritarian regime. For this reason, its main political rationale is based on the liberal idea that free speech is a central instrument for the protection of the democratic regime’. RONALDO P. MACEDO JR, *Freedom of expression: what lessons should we learn from US experience?*, cit., p. 280.

¹³⁰ ‘Art. 5º. [...] IX - é livre a expressão da atividade intelectual, artística, científica e de comunicação, independentemente de censura ou licença’.

music, and history of music, etc, as ultimately speaking to the current state of political affairs¹³¹.

So it is clear this theory cannot be the single basis for freedom of expression, because it fails to provide justification covering a clear instance of it¹³². But the self-government theory is afflicted with more fundamental problems, calling into question its ability to act as justification for freedom of expression even if accompanied by a different theory.

If freedom of expression is defined in terms of the utility it delivers to self-government and popular sovereignty, we lack a reason why the people should not engage in censorship where it may be found, through the proper democratic institutions, to be in the interests of the majority. As Ronald Dworkin observes:

Madison's argument that free speech is necessary if people are to be in charge of their own government does explain why government must not be allowed to practice clandestine censorship which the people would reject if they were aware of it. But that argument does not explain why the majority of people

¹³¹ 'Abstract art and compositional music, found, for example, in the Court's dicta referring to Jackson Pollock and Arnold Schönberg's music, require a stretch to justify as political speech or truth propositions to test in a marketplace of ideas. [...] Though Post might treat these as part of public discourse that affects the public opinion, which democratic government should reflect, this is seldom the aim of the communication and this ground for protection surely feels far from the heart of why most people engage in these forms of expression or why they should be protected. In contrast, the liberty of the creators or performers and their audiences is clearly at stake and, in a free society, should be legally respected'. C E. BAKER, *Autonomy and free speech*, «Constitutional Commentary» (2011), pp. 271-272.

¹³² 'Insofar as the argument is couched in terms of the need to expose citizens to a wide variety of views and to provide it with enough information to hold government to account, a free speech clause would only cover political expression; there would be little justification for extending its protection to literary and artistic discourse, let alone sexually explicit material or commercial advertising'. ERIC BARENDT, *Why protect free speech?*, cit., p. 18. 'Indeed, some scholars who accept the instrumental view as the exclusive justification of free speech have argued, as Robert Bork did, that the First Amendment protects nothing *but* plainly political speech, and does not extend to art or literature or science at all'. RONALD DWORKIN, *Why must speech be free?*, cit., p. 201.

*should not be allowed to impose censorship it approves and wants.*¹³³

So the majority could very well empower government to suppress offensive speech and, as long as the government discharged of censorship transparently, there could be no available claim of abridgement of freedom of expression. Ronald Dworkin cites the hate speech case *Brandenburg v Ohio*¹³⁴ as an example of this: there is plainly nothing to gain in terms of self-government from permitting hate speech, which in actuality can only be said to be detrimental to democracy¹³⁵. But, as a matter of fact, the point could be made that freedom of expression defined in terms of self-government would be consistent even with official censorship of the media. It would be consistent with the provision contained in the Press Act of 1967 under which it was a criminal offence 'to insult morality and proper standards' (art. 17)¹³⁶, as long it could be said Congress endorsed the provision.

Crucially, if we understand it as a function of the utility to self-government, freedom of expression cannot be said to be an individual right in the proper sense of the term, that is, as interdicting the majority or the government from pursuing what it finds to be in the public interest at the expense of the right¹³⁷. Yet that is at the heart of what we take

¹³³ RONALD DWORKIN, *Why must speech be free?*, cit., p. 203.

¹³⁴ 395 US 444 (1969).

¹³⁵ That is, hate speech itself is certainly detrimental to democracy, and menacingly so. A different question is whether hate speech should be held as covered by freedom of expression. Dworkin has notoriously argued it should:

RONALD DWORKIN, *Pornography and hate*, in *Freedom's law*, Oxford, Oxford, 1999, pp. 214–26; RONALD DWORKIN, *Justice for hedgehogs*, Harvard, Cambridge (Mass.) & London, 2011, pp. 372–373. See also LEONARDO G. P. ROSA, *O liberalismo igualitário de Ronald Dworkin: o caso da liberdade de expressão*, Universidade de São Paulo, Faculdade de Direito, São Paulo, 2014, pp. 199–221; CLARISSA P. GROSS, *Pode dizer ou não? Discurso de ódio, liberdade de expressão e a democracia liberal igualitária*, Faculdade de Direito da Universidade de São Paulo, 2017 generally.

¹³⁶ 'Art. 17. Ofender a moral pública e os bons costumes [...]'.

¹³⁷ 'Note, first, that constitutional provisions, especially those providing for individual rights, limit majoritarian, presumably welfare-advancing or collective self-definitional, decision making. In fact, the notion of a right is that the right claimant, whether an individual or group,

freedom of expression to protect. Popular ideas and fashionable expression need no constitutional protection; they are not at jeopardy. The right to freedom of expression is only genuinely enjoyed by those who engage in unpopular speech and in expression the majority finds objectionable. But the function of utility to self-government inversely correlates with safeguarding unpopular speech: the more an opinion is found objectionable by the majority, the less support we have for finding a right has been infringed by its suppression¹³⁸.

Ronald Dworkin, democracy and dignity

So how could we provide freedom of expression with a justification that is consistent with recognising it as an individual right? Ronald Dworkin's proposal insists on its connection to our account of government and democracy. But Dworkin rejects the notion that freedom of expression may be exclusively defined in terms of its utility to self-government, public policy, or to the political community generally. Although part of what we take as freedom of expression (and freedom to access information as a part of it) may have an *instrumental justification* at its basis – that is, even though some practices are better understood as policy promoting accountable government and competent decisions by public officials –, the core of the protection is one that concerns a matter of principle¹³⁹.

should be able to override the preferred outcome of the party against whom the right is asserted'. C E. BAKER, *Human liberty and freedom of speech*, cit., p. 48.

¹³⁸ RONALD DWORKIN, *Taking rights seriously*, Harvard, Cambridge, 1977, pp. 197-204.

¹³⁹ 'Professor Schauer argues, in his last paragraph, that all arguments made under the First Amendment are arguments of policy. If that is correct, then my argument would prove too much, because it would prove that free speech must always yield to competing rights based on principle. But surely that is not correct. I do not deny (contrary to his statement of what I think) that some arguments that have been made under the Amendment are arguments of policy. I said that the "core" of the First Amendment, including the right of political dissent, is a matter of principle'. FREDERICK SCHAUER, VIRGINIA HELD, JOHN L. HESS & RONALD DWORKIN, *The Rights of M.A. Farber: An Exchange*, published in *New York Review of Books*, 1978

This principle offers a *constitutive justification* for freedom of expression: democratic societies should protect it not as a privilege magnanimously conferred by the community to its members, but rather as a basic right the members of a community must enjoy because it would be wrong to deny them as much. Because infringing on freedom of expression would contradict the claim of a community *to be a democracy*, a society committed with treating every citizen with equal respect and concern, and which is therefore deeply concerned with the idea that coercion by the government should be justified, that power should never be exercised arbitrarily.

Freedom of expression is central in this conception of democracy on grounds that ‘*government is not legitimate, and so has no moral title to coerce, unless all those coerced have had an opportunity to influence collective decisions*’¹⁴⁰. This concern with the legitimate authority of government simultaneously manifests why freedom of expression and democracy are inextricably linked with *equality*. Individuals are not shown equal concern and respect if they are ruled by a government that silences them; those individuals would be at no political obligation to comply with government decisions¹⁴¹. But we understand democracy as insisting decisions adopted by appropriate institutions, following proper procedure, *command obedience from all* its members. So freedom of expression must be at the heart of asserting the status of individuals as *equal members* of a political community¹⁴².

<<http://www.nybooks.com/articles/1978/12/07/the-rights-of-ma-farber-an-exchange/>> (Ronald Dworkin replies).

¹⁴⁰ RONALD DWORKIN, *Justice for hedgehogs*, cit., p. 372.

¹⁴¹ ‘The majority has no right to impose its will on someone who is forbidden to raise a voice in protest or argument or objection before the decision is taken’. RONALD DWORKIN, *A new map of censorship*, «Index on Censorship», 35/1 (2006), p. 131.

¹⁴² On these grounds, Dworkin famously contended freedom of expression extends to hate speech: ‘It is as unfair to impose a collective decision on someone who has not been allowed to contribute to that moral environment, by expressing his political or social convictions or tastes or prejudices informally, as on someone whose pamphlets against the decision were destroyed by the police. This is true no matter how offensive the majority takes these convictions or tastes or prejudices to be, nor how reasonable its objection is. The temptation may be near overwhelming to make exceptions to that principle – to declare that people have no right to pour the filth of pornography or race-hatred into the culture in which we all must live. But we cannot

We should note how this account of democracy is unmistakably contrasting to a popular understanding of democracy as meaning nothing more than majority rule. Under a majoritarian conception, democracy refers to the procedural and institutional arrangements under which decisions adopted by government may be said to enjoy the endorsement of the majority of citizens. According to Dworkin:

*Should we accept or reject what I shall call **the majoritarian premise**?*

This is a thesis about the fair outcomes a political process: it insists that political procedures should be designed so that, at least on important matters, the decision that is reached is the decision that a majority or plurality of citizens favors, or would favor if it had adequate information and enough time and reflection.¹⁴³

This understanding of democracy must take the very idea of a constitution containing a bill of rights to be a compromise on democratic government, since the enforcement of constitutional rights prevents government from acting as the majority would see fit¹⁴⁴. The *partnership conception of democracy* proposed by Ronald Dworkin avoids that problem by construing the notion of constitutional rights as integral to the recognition of legitimate political authority and, consequently, to the circumstances where political obligation is present. ‘*The partnership conception ties*

do that without forfeiting our moral title to force such people to bow to the collective judgements that do make their way into the statute books. We may and must protect women and homosexuals and members of minority groups from specific and damaging consequences of sexism, intolerance and racism. We must protect them against unfairness and inequality in employment or education or housing or the criminal process, for example, and we may adopt laws to achieve that protection. But we must not try to intervene further upstream, by forbidding any expression of the attitudes or prejudices that we think nourish such unfairness or inequality, because if we intervene too soon in the process through which collective opinion is formed, **we spoil the only democratic justification we have for insisting that everyone obey these laws, even those who hate and resent them**’. RONALD DWORKIN, *A new map of censorship*, cit., pp. 131-132.

¹⁴³ RONALD DWORKIN, *Freedom's law*, Oxford, Oxford, 1999, pp. 15-16.

¹⁴⁴ ‘The normally accepted account of our constitutionalism is that it protects certain rights even from majority override’. C E. BAKER, *Human liberty and freedom of speech*, cit., p. 50.

*democracy to the substantive constraints of legitimacy*¹⁴⁵, so that freedom of expression as individual right held by every member of the community is not a notion in tension with democracy, but rather constitutive of it¹⁴⁶.

While the focus on the equal status of members of a political community might seem to suggest this understanding of freedom of expression focuses exclusively on *political expression*, this is not so. Equal concern and respect for all individuals in a community requires that expression be protected not only as it is pertaining to the formation of the decisions the community will adopt as law, but rather more generally, wherever suppression of speech and expressive behaviour would entail depriving individuals of the status of equal members of the community.

The core case of non-political expression Dworkin discusses is pornography¹⁴⁷. Pornographic material cannot be said to be in any way relevant to the ability of individuals to influence collective decisions and issues concerning public officials. Yet suppressing pornography would deny individuals equal status in the community because it would be inconsistent with appreciating that members of the community are endowed with *ethical independence*¹⁴⁸. Members of a community cannot be said to work as partners if the majority presumes to dictate which expression is and isn't valuable. That would negate the political legitimacy of government, as individuals cannot be said to be treated with respect when power is wielded in a manner which is inconsistent with assuming the ability – and, indeed, the responsibility – of every person to

¹⁴⁵ RONALD DWORKIN, *Justice for hedgehogs*, cit., p. 384.

¹⁴⁶ Baker advanced a similar argument, connecting legitimacy and autonomy: 'The legitimacy of the legal order depends, in part, on it respecting the autonomy that it must attribute to the people whom it asks to obey its laws'. C E. BAKER, *Autonomy and free speech*, cit., p. 251.

¹⁴⁷ RONALD DWORKIN, *Is there a right to pornography?*, «Oxford Journal of Legal Studies», 1/2 (1981), pp. 177–212; RONALD DWORKIN, *Pornography and hate*, cit.; RONALD DWORKIN, *Justice for hedgehogs*, cit., p. 372.

¹⁴⁸ 'Sexually explicit material is protected by a right to free speech, not because it expresses a political position—that is far-fetched—but because the only available arguments for banning it are, as I said, offensive to ethical independence'. RONALD DWORKIN, *Justice for hedgehogs*, cit., p. 372.

elect and pursue a valuable life¹⁴⁹. Speech and expressive behaviour are particularly engaged in this, for communication is central to any conception of valuable life (save the absolute eremite)¹⁵⁰.

This might seem to suggest that people have a right to unlimited, unrestricted speech, and that would be inconsistent with trivial constraints on speech and expressive behaviour, such as traffic code limitations on honking, or city ordinances on maximum noise levels. But this would ignore an important distinction between freedom of expression and liberty as licence, or absence of legal restraints, and as independence, which reflects ‘the status of a person as independent and equal rather than subservient’¹⁵¹.

If we take liberty to mean the former, unrestricted licence to do as we would please, then all of law is *prima facie* affronting liberty. Supporters of this view of liberty recognise this, which is why they call for balancing the reasons for restricting liberty with the arguments favouring the affected right¹⁵². So the criminal code interferes with liberty by making murder a felony punishable by imprisonment, but this is a justified, admissible constraint on liberty.

But if liberty is read as independence, murder is evidently not covered by it, not even *prima facie*. The criminal code provision on the criminal offence of murder is not an affront to the ethical independence of citizens;

¹⁴⁹ ‘Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is as human beings who are able of forming and acting on intelligent conceptions of how their lives should be lived’. RONALD DWORKIN, *What rights do we have?* in *Taking rights seriously*, Harvard, Cambridge, 1977, pp. 272-273.

¹⁵⁰ ‘Preventing someone from speaking his conscience and conviction to other people is a particularly grave harm. People develop their ethical and moral personalities most effectively in conversation and exchange with others. Speaking out for what one believes—bearing witness and testimony—is in any case for most people an essential part of believing; it is part of the total phenomenon of conviction’. RONALD DWORKIN, *Is democracy possible here?*, Princeton, Princeton, 2008, p. 153.

¹⁵¹ RONALD DWORKIN, *Liberty and liberalism*, in *Taking rights seriously*, Harvard, Cambridge, 1977, p. 262.

¹⁵² VIRGÍLIO AFONSO DA SILVA, *Direitos fundamentais: conteúdo essencial, restrições e eficácia*, Malheiros, São Paulo, 2014², p.98-99.

it does not deny them status as equal members of the community. Instead, this conception of liberty shows how legal regulation is often necessitated precisely to secure the equal status of citizens. What is at stake is not a balancing of the interests of the would-be murderer and her would-be victims. The would-be murderer does not hold such an interest, even if murder is a crucial aspect of her identity, because her claim is inconsistent with the requirement that government show all members of the community equal respect and concern. A government which does not act to prevent murder evidently cannot be said to treat its members as humans possessing dignity¹⁵³.

Dworkin's later work is dedicated to articulating his conception of dignity in connection to morality, ethics, democracy, liberty and the law generally. In *Justice for hedgehogs*, he takes on the ambitious enterprise of stating how a proper understanding of those concepts offers an interpretation of the values they show to be integrated in unity. He weaves all those notions with the thread of dignity, in its two principles of self-respect and authenticity¹⁵⁴. The first principle states that '*Each person must take his own life seriously: he must accept that is a matter of importance that his life be a successful performance rather than a wasted opportunity*'¹⁵⁵. The second, that '*Each person has a special, personal responsibility for identifying what counts as success in his own life; he has a personal responsibility to create that life through a coherent narrative or style that he himself endorses*'¹⁵⁶. Those two principles correspond to the requirements for legitimate government¹⁵⁷: it must

¹⁵³ 'But a collective decision to impose a duty not to kill and to threaten a serious sanction for any violation is not in itself an insult to the dignity of subjects. On the contrary, your dignity as an equal citizen requires that government protect you in this way'. RONALD DWORKIN, *Justice for hedgehogs*, cit., p. 367.

¹⁵⁴ RONALD DWORKIN, *Justice for hedgehogs*, cit., pp. 203-204.

¹⁵⁵ RONALD DWORKIN, *Justice for hedgehogs*, cit., p. 203.

¹⁵⁶ RONALD DWORKIN, *Justice for hedgehogs*, cit., p. 204.

¹⁵⁷ 'The principles are not in themselves political, but they have striking political implications because anyone who accepts them must also accept that a government compromises its legitimacy when it does not provide equal concern for everyone over whom it claims dominion or does not protect the rights that people need in order to exercise personal responsibility for their own lives'. RONALD DWORKIN, *Is democracy possible here?*, cit., p. 161.

appreciate the objective value of all members of the community and it also must recognise the ethical independence of individuals in exercising responsibility for the lives they create¹⁵⁸.

This shows how dignity is at the centre of a constitutive justification for freedom of expression, as an aspect of liberty. It also shows the limits of the right, where its exercise is inconsistent with the recognition of respect for others. We would include Holmes's famous example of shouting fire in a crowded theatre in this category¹⁵⁹. The conclusion of the US Supreme Court in *Brandenburg* admitting restraints on speech where it 'is directed to inciting or producing imminent lawless action' is also an example of this¹⁶⁰. Both point to circumstances where the speaker cannot claim to be protected by freedom of expression as expression is irreconcilable with the affirmation of the dignity of all members of the community. Blackmail and (knowingly) false accusations of criminal behaviour are also instances of unprotected speech resulting from the conclusion that government shows no respect to individuals if it allows such degrading conduct.

We should be careful, however, not to equate the withholding freedom of expression with (merely) false speech. What is key is that government must not afford protection to speech where this would reflect indignity to an individual. Blackmail involves no untruthfulness, and still is not covered by freedom of expression. The problem is not about the blackmailer conveying false speech; serious threats are those the victim takes to be true. The point is that the blackmailer manipulates his victim to his benefit in a way that negates the objective worth of the victim's life. The monumental decision of the US Supreme Court in *New York Times v*

¹⁵⁸ RONALD DWORKIN, *Justice for hedgehogs*, cit., p. 14; LEONARDO G. P. ROSA, *O liberalismo igualitário de Ronald Dworkin: o caso da liberdade de expressão*, cit., pp. 111-112; STEPHEN GUEST, *Ronald Dworkin*, Stanford, Stanford, 2012³, pp. 117-118.

¹⁵⁹ RONALD DWORKIN, *Taking rights seriously*, cit., p. 202.

¹⁶⁰ *Brandenburg v Ohio*, 395 US 444, 447 (1969): '[...] the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action'.

Sullivan (which led to Dworkin's commentary where he proposed the constitutive justification) stands for the inverse case; it found:

*The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.*¹⁶¹

Dworkin rightly argues the same standard of 'actual malice' should be applied generally, not just as pertaining to public officials¹⁶². He contends the protection should be extended 'for the benefit of all speakers and writers on any subject'¹⁶³. He writes:

*It would hardly be unfair to require a libel plaintiff to show at least that the press was in some way at fault in publishing what it did. That is the normal standard in almost all other civil actions for damages. I cannot make you pay on every occasion when you do something that injures me in some way – by damaging my property, for example. **I must show that the injury was your fault, that it was the result of your not having acted, as lawyers say, reasonably in the circumstances.***¹⁶⁴

The emphasised text provides a crucial insight into how dignity is engaged in determining the extension, and the limits, or freedom of expression in the context of false speech. Clarissa Piterman Gross shows how the discussion of deliberate harm and competition harm in *Justice for hedgehogs* is important in defining the constitutional right¹⁶⁵.

¹⁶¹ *New York Times v Sullivan*, 376 US 254, 279-80 (1964).

¹⁶² RONALD DWORKIN, *Why must speech be free?*, cit., pp. 209-213.

¹⁶³ RONALD DWORKIN, *Why must speech be free?*, cit., p. 210.

¹⁶⁴ RONALD DWORKIN, *Why must speech be free?*, cit., p. 210.

¹⁶⁵ CLARISSA P. GROSS, *Pode dizer ou não? Discurso de ódio, liberdade de expressão e a democracia liberal igualitária*, cit., pp. 207-8.

Dworkin illustrates the distinction with an example of two different scenarios:

Here are two sad stories. (1) You are hiking in the Arizona desert with a stranger, you are both bitten by rattlesnakes, and you both see a vial of antidote lying in the scrub. Both race for it, but you are nearer and grab it. He pleads for it, but you open and swallow it yourself. You live and he dies. (2) As before, but this time he is closer to the antidote, and he grabs it. You plead for it, but he refuses and is about to open and swallow it. You have a gun; you shoot him dead and take the antidote yourself. You live and he dies.¹⁶⁶

The first scenario (1) shows bare competition harm. Other people are at a disadvantage because of our actions, we have not wronged them in any way. In fact, life frequently pits our projects with the projects of others. In pursuing our ambitions, again and again we frustrate the aspirations of others. But we do not show contempt for the value of their lives when we prevail, say, at a job interview; our action is consistent with appreciating the objective value of the life of the other candidates and with the special responsibility we have over our own life. The second scenario (2), in contrast, represents deliberate harm. We fail to exhibit respect for the life of others when we intentionally seek to harm them.

This shows why impeaching someone with knowingly false accusations is not covered by freedom of expression. It is an instance of deliberate harm. But the *Sullivan* standard of actual malice is not limited to knowingly false statements; it also withholds protection from statements made with ‘reckless disregard’ for the truth. This is a different way we fail to show respect for the value of the life of other people.

If our conduct is not in keeping with reasonably caring for not accidentally harming others affected by our actions, we cannot be said to appreciate the dignity of others. Government showing equal respect and concern of all individuals will enforce liability resulting from negligence,

¹⁶⁶ RONALD DWORKIN, *Justice for hedgehogs*, cit., p. 285.

and this will involve stipulations of standards for particular circumstances where the activity entails more risk to others and warrants greater care, specially where care is not particularly burdensome. Such is the rationale of strict liability, for instance, which rests on considerations of both principle and policy.

But just as government would fail dignity if it did not hold people liable to any standard of negligence, it would also fail dignity if it stipulated a general standard of strict liability, that is, one in which we are always held liable, regardless of whether we acted with reasonable care. As Dworkin notes, '*It would destroy my life, not enhance it, if I were to take as much care as is possible not to harm others. I could not even cultivate my garden*'¹⁶⁷. So, while the law should work to prevent harm, it should not prioritise harm prevention in a manner that is inconsistent with the ability of individuals to pursue valuable lives.

For freedom of expression, this means that the law cannot hold speakers to a standard that would make it effectively impossible for them to engage in meaningful debate. Holding speakers liable for false statements, regardless of negligence or intent, would have that effect. This explains how dignity warrants the extension of the actual malice standard established in *Sullivan* to all speakers, as Dworkin has advanced. I believe it also shows why a different, perhaps more efficient strategy for reducing harm is met with near universal condemnation. I am referring to prior restraint.

Dignity and prior restraint: what is wrong with censorship?

Prior restraints are traditionally regarded as a particularly objectionable abridgement of speech. In fact, freedom of expression was long taken to

¹⁶⁷ RONALD DWORKIN, *Justice for hedgehogs*, cit., p. 291.

mean exclusively the absence of prior restraints. This understanding was epitomised by an excerpt of William Blackstone¹⁶⁸:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.

Under this notion, prior restraints are excluded, but government is unconstrained in subsequent punishment, civil or criminal. Rejection of that notion is at the heart of the development of the modern conception of the constitutional right to freedom of expression¹⁶⁹. The preceding discussion shows that freedom of expression must be taken to require more, that government must not restrict expression in a manner that denies the ethical independence of citizens. So an interdict on prior restraint cannot be all there is to freedom of expression. But is it sound to regard prior restraint as inherently disreputable¹⁷⁰?

Eric Barendt is sceptical. He argues that, though it may be said that prior restraint is particularly restrictive as ‘*[a]n order not to publish material means that it can never legally see the light of day*’¹⁷¹, the chilling effect of subsequent punishment should not be understated and ‘*may in fact be rather greater, as the publisher faces the twin uncertainties of a possible prosecution and an unpredictable sentence*’¹⁷². Of course, censorship

¹⁶⁸ As quoted in THOMAS I. EMERSON, *The doctrine of prior restraint*, «Law and Contemporary Problems», 20/4 (1955), p. 651.

¹⁶⁹ RONALD DWORKIN, *Why must speech be free?*, cit., pp. 197-198.

¹⁷⁰ For an account and a proposal for revision of US Supreme Court doctrine of a ‘heavy presumption against its constitutional validity’, see MARIN SCORDATO, *Distinction without a difference: a reappraisal of the doctrine of prior restraint*, «North Carolina Law Review», 68 (1989), pp. 1–35.

¹⁷¹ ERIC BARENDT, *Prior restraints*, in *Freedom of speech*, 2005, p. 119.

¹⁷² ERIC BARENDT, *Prior restraints*, cit., p. 118.

could be exercised with the intention of curbing criticism on government, particularly where the officials in the executive branch are responsible for it. But an independent, quasi-judicial tribunal could be created to overcome those questions, which could also be assigned to the judiciary. It could be said such a system would be in the interest of publishers, who, at little cost, might obtain clearance for publishing the work, thus mitigating the chances of subsequent prosecution, which would mean the publisher 'may have more confidence in his decision to publish and in his financial investment'¹⁷³. In light of all this, Barendt proposes a 'reformed system of censorship':

Arrangements might be made for 'censorship' decisions to be taken by an impartial tribunal (appointed by an independent commission rather than by the government), which would be required to apply detailed and precise standards and to conduct an open hearing at which the publisher is legally represented. The initial decision might be made subject to full and prompt review. Such arrangements would meet many of the objections to censorship systems raised in the preceding paragraphs. It would even be possible to arrange, as Chafee suggested in his classic book, Free Speech in the United States, for a 'play jury' to assess a dramatic performance before it was commercially staged. In these eventualities, it is hard to see any significant difference between a previous restraint and a subsequent penalty, unless there is some sort of right to have an idea or piece of information enter the marketplace at least once. Such a right hardly seems of great value, and in any case – unless the penalties for refusing to go before the censor are severe — is no more effectively abridged by a prior restraint than by the prospect of a criminal prosecution.

Barendt's proposal presents an important challenge for theories on the value of freedom of expression¹⁷⁴. It would seem that self-government is

¹⁷³ ERIC BARENDT, *Prior restraints*, cit., p. 119.

¹⁷⁴ Barendt does not actually recommend this reformed system of censorship; he entertains it only as a device to criticise the concept of prior restraints. He admits that the reformed system 'exists only in Utopia'. ERIC BARENDT, *Prior restraints*, cit., p. 124. His main argument is that

not at risk by such a system of prior restraint, specially if such a scheme is assigned to the judiciary. If censorship is carried out by a public official answerable to the executive or to the legislative, that official is likely to show a bias against speech criticising government. He would also have an incentive to ‘*adopt an unsympathetic attitude to the publications he is required to inspect. Otherwise his job would be redundant.*’¹⁷⁵ But a court would not. We trust courts to act as independent arbiters in disputes affecting the government. We would therefore have no reason to assume access to information relevant to issues concerning government would be curbed. The marketplace of ideas would also not be impaired, provided the system was operated in good faith – that is, provided no material that would survive subsequent challenges be suppressed. If we trust courts generally, we would have no reason to presume against a reformed, judicial censorship system.

Yet we are repulsed by the very idea of censorship, as financially and pragmatically attractive as Barendt’s proposal may sound. The Brazilian constitution embraces that by making no qualifications: it repudiates ‘censorship’ (art. 5, IX)¹⁷⁶, not administrative censorship or a particular system of censorship. We need to appreciate freedom of expression as an aspect of dignity to understand why we reject Barendt’s reformed system of censorship.

Again, if we endorse dignity as the basis of freedom of expression, we must insist that government act in a manner which is consistent with respecting each individual as capable of electing and pursuing a valuable life. An official censorship scheme negates this, for it perceives all expression as hazardous. Barendt seems to suppose the harm of prior restraint is limited to the cases where it is incorrectly administered, thus

the suspicion over prior restraints should not extend to judicial orders falling into that category. Yet, as the following paragraphs show, Barendt’s argument proves too much.

¹⁷⁵ ERIC BARENDT, *Prior restraints*, cit., p. 122.

¹⁷⁶ ‘Art. 5. [...] IX – the expression of intellectual, artistic, scientific and communication undertakings is free, independent of censorship or licensing’. (*Art. 5º. [...] IX - é livre a expressão da atividade intelectual, artística, científica e de comunicação, independentemente de censura ou licença*)

preventing protected expression from ‘*seeing the light of day*’. This is perhaps a particularly grievous injustice. But dignity shows that the scheme he suggests is ruinous even when the correct standards are applied. Partners who respect one another do not subject expression which they generally have no reason to suspect to official validation before it is made public. Barendt’s reformed system would suggest he strives for a democratic model of censorship. But our partnership conception of democracy shows there can be no ‘democratic censorship’, an expression we cast aside as an oxymoron.

So we need dignity to understand why the Brazilian constitution spurns censorship both as connected to freedom of expression generally (art. 5, IX) and as connected to the constitutional guarantees for the media (art. 220, §§ 2 and 5)¹⁷⁷.

Biographies and censorship

I believe dignity also offers a proper understanding of the rationale of the judgement of the Brazilian Supreme Court in the case where it confronted

¹⁷⁷ ‘Art. 220. The expression of thoughts, creation, speech and information, through whatever form, process or vehicle, shall not be subject to any restrictions, observing the provisions of this Constitution.

[...]

§ 2. Any and all censorship of a political, ideological and artistic nature is forbidden.

[...]

§ 6. Publication of printed means of communication shall not require a license from any authority’. KEITH S. ROSENN, *Constitution of the Federative Republic of Brazil: October 5, 1988 (as Amended to September 15, 2015)*, cit.

(‘Art. 220. A manifestação do pensamento, a criação, a expressão e a informação, sob qualquer forma, processo ou veículo não sofrerão qualquer restrição, observado o disposto nesta Constituição.

[...]

§ 2º É vedada toda e qualquer censura de natureza política, ideológica e artística.

[...]

§ 6º A publicação de veículo impresso de comunicação independe de licença de autoridade.’)

the provisions of the civil code¹⁷⁸ which were interpreted as empowering individuals to prevent the publishing of biographies to which they did not consent¹⁷⁹. In an atypical unanimous vote where the justices broadly concurred in opinion as well as on judgement, that interpretation of the civil code was held as inconsistent with the constitution by infringing freedom of expression.

The pivotal basis for this relied on the court's understanding that the prevailing interpretation of the civil code entailed a form of censorship by individuals (but enforced by government, we might add) and that the constitution proscribes all forms of censorship. Cármen Lúcia J offered an analysis of censorship that emphasises the aspect of dignity engaged by it:

*Censorship is a means for control of information: someone, not the author of the thought and that which would be expressed, obstructs the creation, the circulation and the dissemination of thought or, in the case of artistic works, of sentiment. Speech or the form of expression is thus controlled. **It may be said that one is controlled oneself. Someone – the censor – undertakes the role of master not only of the expression of thought or***

¹⁷⁸ ‘Art. 20. Unless consented, or where necessary to the administration of justice or to the preservation of public order, the disclosure of writings, the broadcasting of the spoken words, or the publication, exposition or use of the image of an individual may be interdicted, at the individual's request and regardless of damages the individual may recover, if [said disclosure, broadcasting, publication or exposition are] affecting the individual's reputation, good name or respectability, or [said disclosure, broadcasting, publication or exposition are] for commercial purposes.

[...]

Art. 21. The private life of natural persons is inviolable, and a court, at the request of the interested person, shall adopt all necessary measures to prevent or to discontinue any action infringing on this provision.’

(‘Art. 20. Salvo se autorizadas, ou se necessárias à administração da justiça ou à manutenção da ordem pública, a divulgação de escritos, a transmissão da palavra, ou a publicação, a exposição ou a utilização da imagem de uma pessoa poderão ser proibidas, a seu requerimento e sem prejuízo da indenização que couber, se lhe atingirem a honra, a boa fama ou a respeitabilidade, ou se se destinarem a fins comerciais.

[...]

Art. 21. A vida privada da pessoa natural é inviolável, e o juiz, a requerimento do interessado, adotará as providências necessárias para impedir ou fazer cessar ato contrário a esta norma.’)

¹⁷⁹ Supremo Tribunal Federal, ADI 4 815, Cármen Lúcia J rapporteur, June 10, 2015.

*sentiment, but also – and this is a further issue – controls the set of information one is able to impart to others.*¹⁸⁰

That is consistent with the reason we have identified above for why censorship is inherently wrong: where it operates, citizens are not partners who appreciate the ethical independence of each other; rather, ‘[s]omeone – the censor – undertakes the role of master’.

The court thus overturned the interpretation of the civil code which empowered individuals to prevent publication of biographical works in which they are portrayed. This overturned interpretation created a scheme where the portrayed individual was entitled to suppress information which could not be said in any way to be false or even offensive. That is, a scheme even more radical than the strict liability we imagined above, since it would empower the portrayed individual to exert control over expression that could not be said to be at any fault.

Yet this scheme could be reformed, much like the reformed system of censorship Barendt proposed. Instead of abandoning the scheme altogether, the Supreme Court could have held the civil code provisions should be interpreted as placing a temporary embargo on unauthorised biographies, pending a ruling on whether the portrayed individual is *justified* in requesting that publication be prevented. A court would only enforce the request of the portrayed individual if it found the biography to infringe on the private life of its subject or to engage in defamation. This reformed scheme would seem to strike a perfect balance, because it would neutralise the risk of harm while permitting non-harmful expression.

¹⁸⁰ ADI 4 815, at 53, ¶ 29 (Cármem Lúcia J). ‘*Censura é forma de controle da informação: alguém, não o autor do pensamento e do que quer se expressar, impede a produção, a circulação ou a divulgação do pensamento ou, se obra artística, do sentimento. Controla-se a palavra ou a forma de expressão do outro. Pode-se afirmar que se controla o outro. Alguém – o censor – faz-se senhor não apenas da expressão do pensamento ou do sentimento de alguém, mas também – o que é mais – controla o acervo de informação que se pode passar a outros*’.

The court did not entertain this reformed scheme. Yet its judgement warrants the conclusion for rejecting it just as well. Carmén Lúcia J is again particularly illuminating:

*There is risk for abuses. Not only in speaking, but also in writing. Life is experiencing risks. There is always risk, in all we do. But law proclaims the manner under which abuses are remedied. All else is censorship.*¹⁸¹

Other opinions reflected this. Marco Aurélio J joined Cármen Lúcia in concluding remedy must be pursued after publication¹⁸².

Roberto Barroso J noted that *'[t]he ban on censorship actually establishes one of the most important guarantees for freedom of expression'*¹⁸³ and that, while the risk of abuse is present, it is impossible *'to eliminate the risk of abuse without undermining democracy itself and other essential protected values, like human dignity, the pursuit of truth and the preservation of collective culture and memory'*¹⁸⁴.

¹⁸¹ ADI 4 815, at 24 (Cármen Lúcia J). (*'Há o risco de abusos. Não apenas no dizer, mas também no escrever. Vida é experiência de riscos. Riscos há sempre e em tudo e para tudo. Mas o direito preconiza formas de serem reparados os abusos, por indenização a ser fixada segundo o que se tenha demonstrado como dano. O mais é censura.'*)

¹⁸² ADI 4 815, at 258 (Marco Aurélio J). (*'Há de aguardar-se – não desconheço a cláusula de acesso ao Judiciário para afastar ameaça de lesão a direito ou lesão a direito – a veiculação do que elaborado para, posteriormente, se for o caso, chegar-se às consequências, especialmente no campo cível, considerada a verba indenizatória, já que não passa pela minha cabeça adentrar o campo penal, tendo em conta o instituto da calúnia'*)

¹⁸³ ADI 4 815, at 162 (*'A vedação à censura constitui, em verdade, uma das principais garantias da liberdade de expressão.'*).

¹⁸⁴ ADI 4 815, at 162-3 (*'A vedação à censura constitui, em verdade, uma das principais garantias da liberdade de expressão. [...] ela decorre do reconhecimento, historicamente comprovado, da impossibilidade de eliminar a priori os riscos de abusos sem comprometer a própria democracia e os demais valores essenciais tutelados, como a dignidade humana, a busca da verdade e a preservação da cultura e da memória coletivas.'*). The opinion continues with a remark that seems like endorsing a self-government justification for the ban on censorship, *'In a democratic society, it is preferable to bear the social risks resulting from possible harms caused by expression'* (at 163, *'Em uma sociedade democrática, é preferível arcar com os custos sociais que decorrem de eventuais danos causados pela expressão do que o risco da sua supressão.'*). But Barroso's insistence that prior restraint should not be exercised *'[u]nless in excidingly exceptional, extreme, teratological cases [...] e.g. a biographical work that contains personal attacks exclusively and the malicious disclosure of false patently false*

Rosa Weber J remarked that in a democratic society ‘*freedom of expression is the norm; constraints are admitted only in exceptional cases*’ and concluded that censorship is ‘*profoundly inconsistent*’ with democracy¹⁸⁵.

Luiz Fux J also held that ‘*censorship, be it discharged by public bodies or private individuals, thoroughly obliterates the essential core of the constitutional rights of freedom of expression and of information, as well as, consequently, undermining all other rights and guarantees protected by the constitution*’¹⁸⁶.

Dias Toffoli J stressed that ‘*a central aspect of the constitutional right to freedom of expression – an aspect which must be the more enhanced the more democratic a society is – is that, as a general rule, prior restraints on that liberty are not admissible*’¹⁸⁷.

Ricardo Lewandowski CJ insisted the judgement affirmed the doctrine of ‘*absolute freedom of expression unhampered by prior censorship*’¹⁸⁸.

information capable of severely damaging the individual portrayed’ is best explained with the understanding of dignity we have discussed.

¹⁸⁵ ADI 4 815, at 188 (Rosa Weber J). (‘*No Estado Democrático de Direito, a liberdade de expressão é a regra, admitida a sua restrição somente em situações excepcionais e nos termos da lei que, em qualquer caso, deverá observar os limites materiais emanados da Constituição. Mostra-se substantivamente incompatível com o Estado Democrático de Direito a imposição de restrições às liberdades de manifestação do pensamento, expressão, informação e imprensa que traduzam censura prévia.*’)

¹⁸⁶ ADI 4 815, at 206 (Luiz Fux J). ([...] *a censura prévia, seja ela executada por órgãos públicos ou por particulares, aniquila completamente o núcleo essencial dos direitos fundamentais de liberdade de expressão e de informação, bem como, por via de consequência, fragiliza todos os demais direitos e garantias que a Constituição protege.*’)

¹⁸⁷ ADI 4 815, at 227 (Dias Toffoli J). (‘[...] *um dos aspectos centrais do direito fundamental à liberdade de expressão – aspecto esse que deve ser reforçado tanto mais democrática for dada sociedade – é, que, como regra geral, não são admitidas restrições prévias ao exercício dessa liberdade*’). Dias Toffoli J goes on to discuss exceptional circumstances where a prior restraint may be admitted. These included the advisory scheme rating for TV broadcasting, movies and games (though Dias Toffoli J holds restrictions based on advisory rating to be unconstitutional) and ‘*exceedingly exceptional rare cases constituting a serious violation of constitutional rights*’ (at 229).

¹⁸⁸ ADI 4 815, at 266 (Ricardo Lewandowski CJ). (‘*Então eu quero dizer que nós hoje estamos reafirmando uma tese cara ao Tribunal, que é essa absoluta liberdade de expressão sem qualquer censura prévia[...]*’.)

Only Gilmar Mendes J seemingly did not subscribe to that doctrine¹⁸⁹. He nonetheless concurred in judgement by holding that the interpretation under which portrayed individuals were entitled to prevent publication of biographies failed a proportionality test since it entails ‘*serious harm to freedom of communicating, to scientific freedom, to artistic freedom*’, while, conversely, legal means are available for mending the damages resulting from abuse, the right of reply included¹⁹⁰.

Granted, different opinions offered different, often conflicting theories of freedom of expression¹⁹¹. But the concern justices expressed for censorship and the controversy about prior restraints imposed by a judicial order are best interpreted as reflecting dignity as justification.

¹⁸⁹ Celso de Mello J did not file an opinion.

¹⁹⁰ ADI 4 815, at 252-3 (Gilmar Mendes J). (*‘Nesse contexto, entendo que a prévia autorização para publicação de obras de biografia gera sério dano à liberdade de comunicação, à liberdade científica, à liberdade artística e que, por outro lado, na ocorrência de eventuais transgressões, a Constituição Federal assegura mecanismos para possíveis reparações, inclusive direito de resposta’*.)

¹⁹¹ Ronaldo Porto Macedo Jr, after discussing important freedom of expression cases: ‘The most salient feature to be stressed is the lack of a more deep and refined reflection that could reveal some theoretical coherence that could lie behind these cases’. RONALDO P. MACEDO JR, *Freedom of expression: what lessons should we learn from US experience?*, cit., p. 281.

4. FREEDOM OF EXPRESSION AND ANONYMITY

We have thus far examined how what the prevailing interpretation of the Brazilian constitution would call for effecting a taxing identification requirement for all communication, the likes of which was not to be found even in the exceedingly authoritarian Press Act of 1967 (chapter 1). We surveyed other practices explicitly provided for in the constitution or otherwise admitted that are in consisted with an unrestricted identification requirement, concluding that such a requirement must be assessed in light of the values involved in each particular circumstance (chapter 2). We consequently explored theories for the value of freedom of expression, and adopted the inherent-value, dignity-based theory provided by Ronald Dworkin as the one that is most suited to provide us with justification for what we take freedom of expression to protect (chapter 3).

We will now consider what value is to be found in anonymity. The chapter will rely heavily on US first amendment caselaw doctrine, for the rich discussion it has produced concerning anonymity. We will also inspect how the internet has enabled new forms of meaningful social engagement which add new dimensions to the value that has been claimed to anonymity.

‘A shield from the tyranny of the majority’ — US first amendment doctrine on anonymity

The United States has a long tradition in support of anonymity, which may be traced back to colonial influences¹⁹². The most renowned example of anonymous speech is of course to be found in the *Federalist* papers, of tantamount importance in the foundation of the United States¹⁹³, which were published by Alexander Hamilton, John Jay and James Madison under the undisclosed pseudonym of Publius. The practice of discussing crucial public affairs by anonymous writings was vigorous for many years after the debates on the ratification of the US constitution: aside from Chief Justice Marshall, ‘[b]etween 1789 and 1809 no fewer than six presidents, fifteen cabinet members, twenty senators, and thirty-four congressmen published political writings either unsigned or under pen names’¹⁹⁴.

It should then come as no surprise that US constitutional doctrine takes a very different approach to anonymity than the one prevailing in Brazil. An early leading case in US Supreme Court precedent on anonymity is *Talley v California*¹⁹⁵, which concerned a Los Angeles City ordinance banning the distribution of handbills failing mandated identification¹⁹⁶. Manuel D. Talley had been distributing handbills calling for a boycott against businesses carrying ‘products of “manufacturers who will not offer equal employment opportunities to Negroes, Mexicans, and

¹⁹² CHESA BOUDIN, *Publius and the petition: Doe v. Reed and the history of anonymous speech*, «The Yale Law Journal», 120 (2011), pp. 2151-2152; *The constitutional right to anonymity: free speech, disclosure and the devil*, «The Yale Law Journal», 70 (1961), pp. 1084-1088.

¹⁹³ CHESA BOUDIN, *Publius and the petition: Doe v. Reed and the history of anonymous speech*, cit., pp. 2153-2154.

¹⁹⁴ *The constitutional right to anonymity: free speech, disclosure and the devil*, cit., p. 1085.

¹⁹⁵ *Talley v California*, 362 US 60 (1960).

¹⁹⁶ JASMINE MCNEALY, *Textual analysis of the influence of McIntyre v. Ohio Elections Commission in cases involving anonymous online commenters*, «First Amendment Law Review», 11/1 (2013), pp. 155-156; A M. FROOMKIN, *Legal issues in anonymity and pseudonymity*, «The Information Society», 15/2 (1999), pp. 117-118.

Orientalists”¹⁹⁷. He was arrested, tried, and fined \$10 under the ordinance. In a 6–3 ruling, the Supreme Court held this infringed his freedom of expression. It stressed ‘[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind’¹⁹⁸, citing colonial insurgence against ‘[t]he obnoxious press licensing law of England’. It did not, however, provide any conceptual elaboration.

In *McIntyre v Ohio Elections Commission*¹⁹⁹, the court offered what might be the most frequently mentioned first-amendment endorsement for anonymity: ‘*Anonymity*’, Justice Stevens wrote for the court, ‘*is a shield from the tyranny of the majority*’, based on ‘*an honorable tradition of advocacy and dissent*’²⁰⁰. The case concerned an Ohio statute requiring all political campaign material to identify its authors. Margaret McIntyre was fined \$100 under that statute, after she distributed leaflets opposing a proposal for levying school tax, signed ‘concerned parents and tax payers’. The state of Ohio argued that such a restriction of free speech was necessary to prevent electoral fraud. Justice Stevens, joined by 6, rejected that argument, observing that ‘the prohibition [of anonymous campaigning] encompass[ed] documents that are not even arguably false or misleading’²⁰¹, such as Mrs McIntyre’s leaflets.

The three theories of freedom of expression we examined above may be identified in the opinion. Citing *Talley*, the court again expressed concern for government intimidation and illegitimate prosecution which are enabled by mandated identification, as exemplified by ‘*England’s abusive press licensing laws and seditious libel prosecution*’²⁰². This is a reflection of the self-government theory. In this context, anonymity operates as a long-term safe harbour against government abuse. Self-government is also engaged by the notion of the ‘tyranny of the majority’,

¹⁹⁷ 362 US 60, 61 (1960).

¹⁹⁸ 362 US 60, 64 (1960).

¹⁹⁹ 514 US 334 (1995).

²⁰⁰ 514 US 334, 357 (1995).

²⁰¹ 514 US 334, 351 (1995).

²⁰² 514 US 334, 342 (1995).

in a qualified form which takes freedom of expression to be a sensible strategy for the long-term preservation of self-government. It also reflects self-government as an aspect of positive liberty and democratic participation.

The court also ponders that ‘*the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry*’²⁰³, a clear reference to the Millian argument from truth.

Finally, we can identify a constitutive aspect consistent with the dignity theory we discussed above in the court’s dismissal of an interest in the public knowing the identity of the author of a writing on the grounds that ‘*an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment*’²⁰⁴.

Those contextualised propositions will help us adjudicate the case for anonymous speech under the different theories of freedom of expression we have discussed above. We now turn to that.

²⁰³ 514 US 334, 342 (1995).

²⁰⁴ 514 US 334, 342 (1995) (emphasis added). See also, at 348, ‘Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think 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. [...] The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit.’

Inspecting the value in anonymous speech

Eric Barendt examines these justifications for protection of anonymous speech in *McIntyre* – which he frames as *instrumental* and *rights-based* – and finds them lacking²⁰⁵.

The marketplace of ideas is not generally impoverished by mandating identification, Barendt argues. Instead, identification is often crucial in evaluating the truth in the contents of a publication. The public thus has an interest in the disclosure of the identity of the author of a given publication if only to make critical assessment of it easier. It also has an interest in identification insofar as anonymity ‘*may also make it easier for the speaker to manipulate readers and listeners*’²⁰⁶. It may be that, as the court maintained, ‘*the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry*’²⁰⁷, but holds only when valuable information would be subtracted as a result of mandated identification. An unqualified conclusion in favor of anonymity is thus unwarranted. Instead, toleration for anonymity should be tailored for the specific circumstances where the public interest in acquiring information itself is clearly greater than its interest in the disclosure of identity²⁰⁸. This is why Barendt supports safeguards for whistle-blowing and the protection of anonymous sources²⁰⁹. But this is a very limited endorsement of anonymity, as opposed to the enthusiastic support of the *McIntyre* court for anonymity in general.

²⁰⁵ ERIC BARENDT, *Anonymity and freedom of speech*, in *Anonymous speech: literature, law and politics*, Hart Publishing, 2016, pp. 56–80.

²⁰⁶ ERIC BARENDT, *Anonymity and freedom of speech*, cit., p. 66.

²⁰⁷ 514 US 334, 342 (1995) (emphasis added).

²⁰⁸ ERIC BARENDT, *Anonymity and freedom of speech*, cit., p. 80.

²⁰⁹ Similarly see GEORGE R. LUCAS JR, *Privacy, anonymity, and cyber security*, «Amsterdam Law Forum», 5/2 (2013), p. 112.

The same reasoning goes to the court's concerns with minorities interests and government abuse, which we have identified above as reflecting the Madisonian ideal of self-government. Anonymity might be in certain circumstances '*a shield from the tyranny of the majority*', as the opinion of the court has it, but '*it seems to justify the ascription of rights only to members of vulnerable groups*'²¹⁰; again, the all-embracing defence of anonymity found in *McIntyre* does not follow²¹¹.

Barendt also takes issue with the notion that a disclosure requirement like that in *McIntyre* may be held as '*a direct regulation of the content of speech*', as the court had it²¹². '*The reason for suspicion of restrictions on the content of speech*' is clearly not present, he argues, because government does not approve or disapprove of any ideas by requiring disclosure, nor does it limit information '*relevant to the conduct of government*'²¹³.

Barendt is probably right in his scepticism for the instrumental justification of anonymity provided by *McIntyre*²¹⁴. If we value freedom of expression only instrumentally, it is difficult to maintain anonymity will always, or typically even, offer sufficient benefits to outweigh any competing interests. We could cite a number of instances where anonymity is advantageous, such as those we examined in chapter 1 and others we did not entertain such as double-blind peer review. Barendt would simply reply those instances are legitimate exceptions to which we arrive only by considering and balancing the interests at play.

A further complication is that the question before the court in *McIntyre* was not a fresh assessment of the benefits and costs of anonymity. Rather,

²¹⁰ ERIC BARENDT, *Anonymity and freedom of speech*, cit.

²¹¹ Scalia J adopted a similar strategy in his dissent, citing *NAACP v. Alabama ex rel. Patterson*, 357 US 449 (1958) as an example where disclosure could be exempted on the grounds of respect for freedom of expression; that case concerned a

²¹² *McIntyre v Ohio Elections Commission*, 514 US 334, 345 (1995).

²¹³ ERIC BARENDT, *Anonymity and freedom of speech*, cit., p. 60.

²¹⁴ *Contra*, see MARGOT E. KAMINSKI, *Real masks and real name policies: applying anti-mask case law to anonymous online speech*, «Fordham Intellectual Property, Media and Entertainment Law Journal», 23/3 (2013), pp. 824-825.

it was a judicial review of the negative evaluation of anonymity enacted into law following proper democratic procedure. We might speculate that anonymity is generally advantageous to the discovery of truth or to self-government. Yet, given the accommodations offered by Barendt (and Scalia J, in his dissent) for situations where the benefits clearly outweigh the costs – where a balancing approach could entail invalidation for disproportionate restraint on anonymity –, in other circumstances it does seem like there is no good reason to invalidate the policy judgement endorsed by elected officials. As we have discussed above, this is a crucial shortcoming of instrumental justification theories of freedom of expression: we would be hard-pressed to supply reasons why the majority cannot democratically limit freedom of expression. The same reasoning would probably engender a similar conclusion supporting the identification requirement reading of the Brazilian constitution.

So we should probably concede to Barendt that the instrumental justification of freedom of expression does not sanction the holding in *McIntyre*. But what about the different question of the constitutive justification contained in the opinion of the court?

Barendt rightly identifies this in the court's insistence that '*an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment*'²¹⁵. But Barendt limits his analysis on this to freedom of expression read as individual autonomy as 'an essential aspect of the right to self-development and fulfilment',²¹⁶ and then promptly discards it after posing this rhetorical question:

How does the mask of anonymity claimed by someone who prefers to remain nameless or to publish under the disguise of a

²¹⁵ 514 US 334, 342 (1995).

²¹⁶ ERIC BARENDT, *Anonymity and freedom of speech*, cit., p. 62.

*pseudonym advance that person's self-development as an individual?*²¹⁷

Self-development cannot be attained in communication unless, Barendt submits, there is ‘*an identifiable speaker known to others who will appreciate the contribution his speech makes to his self-development*’²¹⁸. This derides anonymous expression as somehow inherently flawed, of inferior value. Barendt seems to disregard a genuine transformation to speech enabled by the internet, which has so far been missing from the discussion on the value of anonymity: anonymous personal expression.

A genuine transformation enabled by the internet: anonymous personal expression

Barendt assumes meaningful human relationships can only take place where people are fully known by each other. This is certainly how our offline lives are typically structured. We value our friendships precisely because we discover more about ourselves and the world in the company of people who we hold dear. We have a stronger friendship with someone who we know more fully, and in a sense this is constitutive of the relationship: we are not genuinely friends with someone who knows us as little as a complete stranger does. In this traditional understanding of human relationship, surely no valuable connection can be found between people who do not even know each other's name.

But the internet has genuinely transformed that. It enables people to have long-lasting, intimate relationships with those they know only by a username. They can discuss their political beliefs, share their deepest secrets, give and receive personal advice, etc, in an unquestionably

²¹⁷ ERIC BARENDT, *Anonymity and freedom of speech*, cit., p. 63.

²¹⁸ ERIC BARENDT, *Anonymity and freedom of speech*, cit., p. 63.

meaningful manner. Technology has changed the limits, and thus the nature, of available personal relationships:

New modes of connecting have given rise to new forms of human intimacy. Traditionally, anonymity is associated with strangers and intimacy with friends. Anonymous strangers become intimate friends mainly through face-to-face interaction in corporeal copresence. In the online world, however, people can get to know each other very well without ever seeing each other. Disembodied online contacts can therefore generate a relationship characterized by ‘anonymous intimacy’ or ‘intimate anonymity.’ Through online text chat, for example, individuals can be intimately familiar with and completely anonymous to each other at the same time. Research has shown that such anonymous friendships can produce a major impact on a person’s social life.²¹⁹

A crucial example of how anonymity may be instrumental to self-development is provided by Helmi Noman’s survey of Arab online communities focused on religion and atheism.²²⁰ These forums are an obvious example of how people may engage in profound conversation in religious topics, clearly central to self-development.

Yet anonymous personal expression is not of value only in authoritarian contexts, as indicated in the excerpt above. A study on Open Diary, a platform that ran from 1998 to 2014, found that users showed a strong sense of community and partook in a culture of support in honest diary-keeping that was enabled by the anonymity enjoyed in the community, which effectively ‘discouraged posting of personally identifying information’²²¹. While concealing their identities, users ‘*did not abstain from personal disclosure, but wrote about their deepest thoughts and*

²¹⁹ SHANYANG ZHAO, *The internet and the transformation of the reality of everyday life: toward a new analytic stance in sociology*, «Sociological Inquiry», 76/4 (2006), pp. 458–74.

²²⁰ HELMI NOMAN, *Arab religious skeptics online: anonymity, autonomy, and discourse in a hostile environment*, (2015), pp. 1–30.

²²¹ ANNAMARI MARTINVIITA, *Online community and the personal diary: Writing to connect at Open Diary*, «Computers in Human Behavior», 63 (2016), p. 679.

*feelings openly*²²². In fact, the obvious intimate nature of diaries meant that anonymity was essential to the community.

Even more patent example of intimate online sharing are provided by communities on Reddit (or ‘subreddits’). While registration is required for posting to subreddits (but generally not for accessing), the platform is explicitly tolerant of throwaway accounts²²³. Signing up for an account requires only creating an username and password; even an email is not required. Users are thus able to create as many accounts as they see fit, effectively achieving anonymity even though the posts on the platform are identified with usernames²²⁴.

Two particular use cases of the anonymity enabled by the platform are subreddits on mental health²²⁵ and sexual exhibitionism²²⁶. These are perhaps two of the most intimate topics and forms of expression, and these communities are built on anonymity²²⁷. Mental health help is of course available in other forms, but the easily-accessible peer support made available on subreddits like r/BipolarReddit, r/Depression and r/SocialAnxiety is unique. r/Gonewild, examined in a case study by Emily van der Nagel and Jordan Frith²²⁸, is also impressive because of the

²²² ANNAMARI MARTINVIITA, *Online community and the personal diary: Writing to connect at Open Diary*, cit., p. 679.

²²³ See *Frequently asked questions*, <<https://reddit.com/wiki/faq>>: ‘Is it okay to create multiple accounts? Yes, you can create multiple/throwaway accounts as long as you do not do so to ghost vote your own submissions.’

²²⁴ ALEX LEAVITT, “*This is a throwaway account*”: *temporary technical identities and perceptions of anonymity in a massive online community*, (2015), pp. 317–27.

²²⁵ MUNMUN DE CHOUDHURY & SUSHOVAN DE, *Mental health discourse on reddit: self-disclosure, social support, and anonymity*, (2014).

²²⁶ EMILY VAN DER NAGEL & JORDAN FRITH, *Anonymity, pseudonymity, and the agency of online identity: Examining the social practices of r/Gonewild*, «First Monday», 20/3 (2015).

²²⁷ ‘[...] we observe that such anonymity does not hinder the quality of social support redditors receive—in fact they garner more comments on such postings, and as we observe, tend to provide greater emotional sustenance, and are generally more involving and helpful in their suggestions and feedback’. MUNMUN DE CHOUDHURY & SUSHOVAN DE, *Mental health discourse on reddit: self-disclosure, social support, and anonymity*, cit.

²²⁸ EMILY VAN DER NAGEL & JORDAN FRITH, *Anonymity, pseudonymity, and the agency of online identity: Examining the social practices of r/Gonewild*, cit. I subscribe to their disclaimer: ‘The r/gonewild subreddit can obviously be criticized for the way it objectifies women and celebrates the male gaze in which Redditors who are typically male rank and comment on female

obvious risk for harassment associated with sharing sexual content depicting oneself, and even unconsented sharing of explicit images. Yet the rules adopted by the community creates an environment largely free of those problems, mainly by demanding positive verification the posting of the content is consented²²⁹, and by enforcing norms on constructive user interaction²³⁰.

While the examples above trade in some form of alternative identity (at least typically or facially, in the case of Reddit), so that anonymity in those contexts may be benefited by the reputation associated with a username, applications like Yik Yak, Whisper and Secret are different, because posts are presented dissociated from usernames. Still, studies

bodies. However, the subreddit also enables women to exert some control over their sexuality by choosing to consensually post material, as evidenced by the verification system, and respond to commenters. The point of this article is not to criticize or praise the types of amateur pornography found on r/gonewild; rather, we are interested in how the site's pseudonyms allow for the playful sexual expression of the women who create and share the content consumed by the mostly male audience'.

²²⁹ 'For the audience, a large part of the appeal of r/gonewild is that they are viewing, commenting and voting on photos that are submitted consensually for an exhibitionist thrill. This is formalized by r/gonewild's process of verification: people must prove they have taken the photographs willingly, specifically for the site, by posting a picture that includes a handwritten sign with their Reddit username, a mention of r/gonewild, and the date. A moderator explains the verification process as one that is meant to protect those who submit: "We care about the person in the photographs and want to make sure he or she is not being exploited" (xs51, 2014).' EMILY VAN DER NAGEL & JORDAN FRITH, *Anonymity, pseudonymity, and the agency of online identity: Examining the social practices of r/Gonewild*, cit.

²³⁰ 'As previously discussed, there is no shortage of arguments that trolling abounds on the Internet and that many people equate anonymity and pseudonymity with incivility, particularly in online spaces where this is the norm. But rather than ban anonymous comments in the hopes that this will curb antisocial interactions, it may be more helpful to foster a respectful culture within the site itself, which is the aim of the sidebar rules and Frequently Asked Questions document on r/gonewild. In another reminder that identity debates are crucial to the political economy of the Internet, it is in Reddit's commercial interests to aim for the kinds of interactions that will attract more users, and therefore more user-contributed data they can sell to advertisers to profit from. Therefore, Redditors are allowed to present the identity they choose, but this does not mean they exist in an unregulated space: there are Reddit-wide and subreddit-specific rules about what content can be posted, and what kind of conduct is accepted. Reddit-wide rules about behavior can be summed up by the first rule: "remember the human" (Reddiquette, 2014), which amounts to being respectful of others and contributing meaningful content. People on r/gonewild are asked to be courteous by not being an "asshole," or making "creepy, threatening, or malicious comments" (xs51, 2014); those who do not comply are reported to the moderators, who are able to delete comments or ban the users' pseudonymous account as punishment'. EMILY VAN DER NAGEL & JORDAN FRITH, *Anonymity, pseudonymity, and the agency of online identity: Examining the social practices of r/Gonewild*, cit.

show that users take advantage of these anonymous social media to ‘*share their personal opinions, experiences and confessions with others on anonymous applications, for the reasons of seeking or providing social validation, building connections, avoiding problems of context collapse and impression management on identified social media, and sharing momentary feelings*’²³¹. While it may at first seem counterintuitive that social support may develop in this context, the apps promoted engagement by creating a kind of ‘situated anonymity’ so that while users were not provided with information on the person responsible for the post, it still identified the post was shared by ‘a contact on Facebook’, or ‘someone in Sao Paulo’, which was sufficient to achieve a sense of community²³².

These by no means form a complete list of platforms enabling anonymous personal expression²³³; they are just examples meant to illustrate how Barendt is surely wrong in his assessment that self-development is unfeasible where the communication takes place between strangers.

Anonymity and identification as expressive

We should now go back to our examination of grounds for protecting anonymity contained in *McIntyre*. We have conceded that Barendt is right in his objections to the instrumental justification the court offered. We now inspect the constitutive justification it also supplied. The preceding section shows that Barendt ignores an important transformation to expression enabled by the internet, anonymous personal expression,

²³¹ RUOGU KANG, LAURA A. DABBISH & KATHERINE SUTTON, *Strangers on your phone: Why people use anonymous communication applications*, (2016), p. 368.

²³² ARI SCHLESINGER, ESHWAR CHANDRASEKHARAN, CHRISTINA A. MASDEN, AMY S. BRUCKMAN, ET AL., *Situated anonymity: impacts of anonymity, ephemerality, and hyper-locality on social media*, (2017), pp. 6912–24.

²³³ See also EDWARD STEIN, *Queers anonymous: lesbians, gay men, free speech, and cyberspace*, «Harvard Civil Rights–Civil Liberties Law Review», 38/1 (2003), pp. 159–213; LAWRENCE LESSIG, *Code*, cit., p. 88 ff.

which makes his claim that self-development cannot be achieved in anonymity patently incorrect.

But our theory of freedom of expression is not centred in allowing for self-development, though that is certainly valuable. We are concerned with freedom of expression as an aspect of dignity and the commitment to democratic government. So let us delve back into the opinion of the court in *McIntyre* to explore how an argument in favour of anonymity could be articulated in such terms.

Again, we have identified the constitutive justification for anonymity in *McIntyre* in the court's affirmation that '*an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by First Amendment*',²³⁴ which proscribes the adoption of '*a state requirement that a writer make statements or disclosures she would otherwise omit*',²³⁵.

This rights-based approach is in fact more visibly reflected in a subsequent case before the court regarding an identification requirement, *Watchtower Bible & Tract Society of New York v Village of Stratton*²³⁶. Stratton created a permit scheme for obtaining the 'privilege' of door-to-door solicitation; those engaging in solicitation that failed to register and to obtain a permit were liable to a misdemeanour charge. Citing *McIntyre* and *Talley*, the court found the identification requirement to infringe First Amendment rights of Jehovah's Witnesses, who brought the constitutional challenge²³⁷. The opinion of the court in *Watchtower*, again delivered by Stevens J, unambiguously endorsed a constitutive justification of freedom of expression:

It is offensive – not only to the values protected by the First Amendment, but to the very notion of a free society – that in the

²³⁴ 514 US 334, 342 (1995).

²³⁵ 514 US 334, 348 (1995).

²³⁶ *Watchtower Bible & Tract Society of New York v Village of Stratton*, 536 US 150 (2002).

²³⁷ *Watchtower Bible v Stratton*, 536 US 150, 166 (2002).

*context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. Even if the issuance of permits by the mayor's office is a ministerial task that is performed promptly and at no cost the applicant, a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition.*²³⁸

The court then adds that those considerations are supported by the three repercussions of the solicitation permit scheme adopted by Stratton: it violated the protection of anonymous speech the court had upheld in *Talley* and *McIntyre*; it conflicted with 'World War II era cases' affirming the prior restraint doctrine, and harmed 'a significant amount of spontaneous speech',²³⁹.

Requiring citizens to obtain a permit to engage in freedom of expression fails dignity because it implies that official validation is necessary for the exercise of that constitutional right. As the court submits, this is just offensive as prior censorship is, however well-intentioned. As we have discussed above, there can be no 'democratic censorship': in a partnership conception of democracy, that is an oxymoron. Government can claim no legitimate authority to coerce *unless all members of the community are shown equal respect and concern*. This is why Brazilian commentators are wrong when they suggest that identification is 'the price to be paid' by the exercise of freedom of expression²⁴⁰. It is inappropriate to interpret the Brazilian constitution as deliberately establishing 'burdens' on freedom of expression, as José Afonso da Silva maintains²⁴¹. Speech is

²³⁸ *Watchtower Bible v Stratton*, 536 US 150, 165-6 (2002).

²³⁹ *Watchtower Bible v Stratton*, 536 US 150, 166-7 (2002).

²⁴⁰ 'Free expression of thought is compensated by the prohibition of anonymity' ('A livre expressão do pensamento tem por contrapartida a proibição do anonimato'), MANOEL G. FERREIRA FILHO, *Art. 5º, IV*, cit., p. 31.

²⁴¹ 'Freedom of expression has its burdens, such as that one exercising it must assume responsibility for the resulting expressed ideas, in order that, should it be the case, one may be held liable for the damage caused onto others.' JOSÉ AFONSO DA SILVA, *Art. 5º, IV*, cit., p. 92. ('A liberdade de manifestação do pensamento tem seus ônus, tal como o de o manifestante identificar-se, assumir claramente a autoria do produto do pensamento manifestado, para, sendo o caso, responder por eventuais danos a terceiros').

not a ‘privilege’ magnanimously accorded by the majority; it is what enables majority to command obedience for its decisions.

Of course, in a sense, expression may be burdened in a number of ways, but simply burdening expression cannot be whole the point of a limitation. Freedom of expression does not cover intentional defamation because no one can claim a right to deliberately harm another person. It likewise does not protect blackmail. But defamation and blackmail are punishable precisely because government *must be concerned* with harms a member of the community intentionally causes another; it is clear it would show contempt for the objective importance of lives of the victims otherwise.

It is also clear, however, that the government must not target expression itself otherwise, as that would not show *equal respect* for the life of the person whose expression is suppressed. Viewpoint censorship of ideas is a clear instance of government disapproving of opinions held by individuals; it presents the censored individual in a lesser standing within the community²⁴². Barendt is certainly right that ‘*restrictions on the content of speech [...] clearly run counter to the values of freedom of speech*’²⁴³. But viewpoint censorship is not all there is to the protection of freedom of expression. It also forbids government from prescribing *how* one should express one’s thoughts. This is particularly true of artistic expression: the provocative, perhaps vulgar tone of an off-putting poem denouncing social inequality is integral to the message it conveys; in fact, it is part of the message itself.

This indicates how Barendt fails to appreciate the force of the argument the opinion in *McIntyre* offered when it equated disclosure of identification with the content of the message itself. Consider artistic expression again. An intimate recital and a blind audition of the same pianist interpreting the same sonata are decidedly two different artistic

²⁴² ‘Government must not restrict freedom when its justification assumes the superiority or popularity of any ethical values controversial in the community’. RONALD DWORKIN, *Justice for hedgehogs*, cit., p. 369.

²⁴³ ERIC BARENDT, *Anonymity and freedom of speech*, cit., p. 60.

performances. Of course, they are different in an obvious way: one is a test, the other isn't. But the blind audition is also distinct in the sense that the pianist and the audience are dispossessed of the added layer of expressivity which we have in a regular presentation.

The pianist conveys emotion in her gestures, which the audience takes on in its appreciation of the performance and which effectively create another form of expressive communication with the audience²⁴⁴. Of course, many may question whether this should interfere with the appreciation of the music, particularly in classical music. This dispute about the value of a performance actually confirms the point that the added layer which the blind audition lacks is part of artistic expression. Musicians will show different talent and appreciation for what is called stage demeanour, which is patently artistic expression²⁴⁵. A performance where we see the pianist is a different performance from one where we do not; that the pianist would prefer either reflects her belief of the importance of elements other than sound to her artistic statement. This aesthetic judgement on her part is precisely what freedom of expression (artistic expression, in this case) protects.

We now understand the force of the argument of the *McIntyre* court with regards to anonymous speech. An author's decision to remain anonymous or to disclose her identity may not be part of the content of her text, as Barendt rightly observes, but it is clearly a decision *about her expression*,

²⁴⁴ A study where participants watched different video of different pianists coupled with soundtrack from another performer found that participants had significantly different assessments of the performances. 'In conclusion, when individuals are presented with multimodal sensory information, one stream of information can overtake another, giving rise to perceptual illusions. This finding is particularly relevant for situations in which individuals are used to perceive clear differences and are thus more susceptible to manipulations. Furthermore, essential features of musical structure are parsed through expressive body movements, which can enhance the perceivers' experiences of the music and its structural organization. Since music is most often the outcome of human movement, audience members may experience enhanced sensitivity and a more holistic appreciation of the music when they both see and hear the actions of musical performers'. KLAUS-ERNST BEHNE & CLEMENS WÖLLNER, *Seeing or hearing the pianists? A synopsis of an early audiovisual perception experiment and a replication*, «Musicae Scientiae», 15/3 (2011), p. 341.

²⁴⁵ KAORI KUROSAWA & JANE W. DAVIDSON, *Nonverbal behaviours in popular music performance: A case study of The Corrs*, «Musicae Scientiae», 9/1 (2016), pp. 111–36.

just as a blind audition is not different in terms of the music being played, but it is still a different artistic performance. The instances of anonymous personal expression we have discussed above also clearly show this. Keeping a public diary while identified is an act of expression distinct from keeping an anonymous diary. The ‘intimacy between strangers’ enabled by different platforms establishes a relationships and communities which are uniquely different from what we knew as possible before the emergence of the internet. Anonymous social media create a different type of communication. Anonymous sexual exhibitionism is different from public nudity generally. Identification is not a trivial addition; it is expressive, just as anonymity is.

These forms of anonymous interaction enabled by the internet are central examples of how a different kind of communication and human relationship is made possible by anonymity. But this is by no means exclusive to the internet; Robert Post articulates this when discussing the ideal of public sphere:

All speech, of course, is simultaneously communication and social action,[citing Wittgenstein, ‘Words are deeds’] and in everyday life it is quite difficult and unusual to separate these two aspects of speech. In most circumstances we attend as carefully to the social status of a speaker, and to the social context of her words, as we do to the bare content of her communication. We thus cannot understand Habermas and Gouldner's characterization of discussion within the public sphere as descriptive. It must be understood rather as articulating a regulative ideal for the legal structure of public discourse. This ideal is reflected, for example, in the first amendment right to engage in public discourse anonymously, so that speakers can divorce their speech from the social contextualization which knowledge of their identities would necessarily create in the minds of their audience²⁴⁶.

²⁴⁶ ROBERT C. POST, *The constitutional concept of public discourse: outrageous opinion, democratic deliberation, and Hustler Magazine v. Falwell*, «Harvard Law Review», 103/3 (1990), pp. 640, emphasis added.

Government would fail the test of equal respect and concern for all individuals if it insisted on dictating what the majority takes to be the proper manner of expression. This is why freedom of expression is violated when government regulation is *directed* at curtailing a kind of expressive behaviour, or the tone of the speech. These as matters for an individual must make in light of the values and purposes she assigns to her life. It is illegitimate for the law to prescribe how she must carry herself. This would be offensive to the ethical independence it must appreciate in all members of the community.²⁴⁷

Of course, government must act to prevent harm, but it must not do so by treating all anonymous expression as not valuable or suspicious. Freedom of expression does not protect anonymous harm-causing, but we should not assume all anonymous speech is directed at harm, just as we should not assume that speech generally is. Our partnership conception of democracy leads us to reject this, just as it rejects any scheme of censorship, as partners should not assume the ordinary life of each other sanctions government supervision. That would be inconsistent with dignity by negating ethical independence. Harm prevention must not be implemented in a manner that is inconsistent with the ability of individuals to pursue valuable lives, as we have discussed above.

Does freedom of expression protect anonymous internet access?

A tempting objection at this point would take exception with equating internet access with constitutionally protected speech. It might be argued that, while online speech itself, like social media posts, must be regarded

²⁴⁷ ‘The second principle of dignity makes ethics special: it limits the acceptable range of collective decision. We cannot escape the influence of our ethical environment: we are subject to the examples, exhortations, and celebrations of other people’s ideas about how to live. But we must insist that that environment be created under the aegis of ethical independence: that it be created organically by the decisions of millions of people with the freedom to make their own choices, not through political majorities imposing their decisions on everyone’. RONALD DWORKIN, *Justice for hedgehogs*, cit., p. 371.

as protected by freedom of expression, online *connection* must not. No idea is conveyed with internet access; the only communication that takes place is between computers transmitting and receiving packets structured in accordance with technical protocols. These are relevant points, requiring clarification.

Under the marketplace of ideas theory, unhindered access to the public forum is patently required so that truth may emerge from the ‘competition of the market,’ as Holmes J envisioned.²⁴⁸ A very recent US Supreme Court case concerning social media access restrictions for registered sex offenders affirmed this notion clearly: ‘*A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more*’²⁴⁹. Government violates truth as the rationale for freedom of expression when individuals are prevented from accessing ‘social media’, and, *a fortiori*, the internet generally, which users ‘*gain access to information and communicate with one another about it on any subject that might come to mind*’²⁵⁰. Exclusion of participants from this digital marketplace of ideas impairs competition and might be said to make it less likely that truth will prevail²⁵¹.

The Madisonian ideal of self-government would also protect connection to the internet. Even if it might not provide solid basis for safeguarding non-political use of the internet, it would at the very least insist that *access* to it be secured, since so much of public debate is now digital. This is reflected in the US Supreme Court case *Reno v American Civil Liberties Union*²⁵², in which the court invalidated provisions of the

²⁴⁸ *Abrams v United States*, 250 US 616, 630 (1919) (Holmes J., dissenting).

²⁴⁹ *Packingham v North Carolina*,
582 US ___, ___ (2017) (slip op., at *4).

²⁵⁰ *Packingham v North Carolina*,
582 US ___, ___ (2017) (slip op., at *8).

²⁵¹ *Reno v American Civil Liberties Union*, 521 US 884 (1997), discussed below, contains explicit language referring to the internet as a ‘new marketplace of ideas’ (at 885).

²⁵² *Reno v American Civil Liberties Union*, 521 US 844 (1997).

Communications Decency Act criminalising ‘indecent transmission’ and ‘patently offensive display’ of messages to minors:

*Through 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.*²⁵³

So both the argument from truth and the self-government rationale would afford the protections of freedom of expression to internet connection. They would do so, however, we must acknowledge, on contingent grounds; given they offer instrumental justifications of freedom of expression, they would extend this constitutional right to digital access insofar as the grounds for valuing it are present. Yet, while no one would dispute that the internet is a great resource for acquiring information and sharing knowledge, or that it has become a crucial tool for civic engagement, we should not pretend this is all there is to it. People use of the internet for less intellectual, public-minded pursuits; they share memes and videostream trivial parts of their daily lives; they play online games and join discussion boards about their hobbies. A constitutive justification regards all those activities as worthy of protection in themselves. These must be regarded as embodying what an individual considers as valuable expression of her priorities and goals in life. Internet access is a central component in the conception of a valuable life held by billions of people.

So under any theory of freedom of expression, government would violate it by interfering with access to the internet. Yet this does not address the question of whether *anonymous* access to the internet is also protected.

Our discussion about the value of anonymous expression shows that it would be wrong to censor platforms enabling anonymity or anonymous posts, as that would be an abridgement of freedom of expression insofar

²⁵³ *Reno v American Civil Liberties Union*, 521 US 844, 870 (1997).

as it curtails a kind of communication and socialising individuals in which individuals may wish to engage, in light of the ethical values they elect for their lives. But we must admit connection to the internet is not in itself expressive. Devices connect to the internet mechanically; machines transmit and receive packets that cannot be attributed to any effort of human expression. Freedom of expression does not entitle individuals to a particular architecture of the internet or to particular protocols.²⁵⁴

Anonymous internet access might be relevant for particular kinds of expression where platforms disclose identification by default. Suppose someone writes a book and would like to distribute it by seeding a torrent, for example, which discloses the user's IP address. Anonymous expression in online forums might also require anonymous connection, even where the platform operates with pseudonyms. Yet this provides us with only a contingent reason, for instance, to protect anonymous web browsing under freedom of expression.

The right to listen (or read or browse) is surely a part of the freedom of expression just as the right to speak (or write or post) is, for the reasons discussed just above. It nevertheless makes less sense to regard identification as expressive in the right to listen. If we go back to the hypothetical anonymous piano recital we discussed above, while the concealment of the artist is manifestly part of her artistic expression, it seems far-fetched to say the same about the identification of individuals passively sitting in the audience.

Similarly, it seems like anonymity does not alter any expressive conduct we might find in using a search engine or accessing a particular website. We get the search results or browse the webpages we requested all the same, anonymous or not; the expression itself (acquiring information) is unchanged whether or not our IP address or other identifying information is disclosed.

²⁵⁴ Tor is peculiar in this analysis as it operates both a network hosting content of its own (which would implicate the protection of anonymous expression) – and a suite for attaining anonymous connection to the regular internet (which would not).

A different approach might be more fruitful. When we examined the rights-based argument for anonymity offered by *McIntyre*, that an author's decision to disclose her identity is protected by freedom of expression just as her decisions about the content of her message are, we noted how this is best understood as an account of freedom of expression as an aspect of dignity, which requires government to respect the ethical independence of individuals. For speakers, ethical independence supports their decisions to disclose or conceal identification in the expression of their beliefs (be they artistic, political, scientific, etc). This, we concluded, is part of the expression itself. We should take a step back from this to understand the freedom of expression interests of readers.

Although readers join the communication process and communication generally assumes readers as well as speakers²⁵⁵, ethical independence engages readers differently. If we are unconvinced of the expressive aspect of anonymous internet connection (which we understand as corresponding to the position of a reader), we are right, yet we ask the wrong question. Readers are not speakers, obviously, but that does not mean they don't make ethical decisions about how to join the conversation. Communication involves both the imparting *and the receiving*²⁵⁶, and this entails different individual choices on how to take part of it. Concealment of identification may thus be understood as a reader's decision about how best to take part in communication processes. While not expressive, this is still an important aspect of ethical independence.

Highlighting ethical independence and dignity enables us to reconcile the implications of freedom of expression for anonymity with the evident connection it has to the right to privacy. Freedom of expression is not all

²⁵⁵ 'Freedom of speech is an empty guarantee unless one has something – anything – to say.' JULIE E. COHEN, *A right to read anonymously: a closer look at "copyright management" in cyberspace*, «Connecticut Law Review», 28 (1996), p. 1006.

²⁵⁶ See JULIE E. COHEN, *A right to read anonymously: a closer look at "copyright management" in cyberspace*, cit., pp. 1004-1006. Cohen suggests that 'the distinction between "active" expression and "passive" receipt is less clear than one might suppose'. JULIE E. COHEN, *A right to read anonymously: a closer look at "copyright management" in cyberspace*, cit., p. 1005.

there is to online anonymity. Our interests in controlling the disclosure of identifying information about us are patently also about our right to privacy online. There is an overlap between the two, just as the *McIntyre* court underlined²⁵⁷.

This link between freedom of expression and the right to privacy, however, seemingly introduces a problem. If what we are concerned with is control over information, this suggests an obvious limitation: complete control is unfeasible. As Andrei Marmor observes, '*nobody has a right to an absolute or a maximal level of control about what aspect of themselves they reveal to others*'²⁵⁸. Protection of privacy, Marmor argues, is only afforded where it is reasonable, where individuals have a legitimate interest against interference.

Should we then approve of a different interpretation of the anonymity clause of the Brazilian constitution, one that rejects the reading requiring disclosure of identity to the general public or to anyone in particular²⁵⁹, but instead adopts a reading establishing a mandate of traceability, so that no unlawful behaviour goes unpunished? It would not seem reasonable for individuals to claim a legal interest against traceability from public officials even when officials have met the legal standards for obtaining identifying information.

This would entail that the correct interpretation of Brazilian constitution *commands surveillance*. Even if we interpret this as regulation not directed at expression, I believe we should reject this view, which negates dignity in a different manner, by infringing on the constitutional

²⁵⁷ 'The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible'. *McIntyre v Ohio Elections Commission*, 514 US 334, 341-2 (1994). This was echoed in *Watchtower Bible v Stratton*, 536 US 150, 166-7 (2002): the court recognised an interest in anonymity and privacy even where identification is publicly disclosed.

²⁵⁸ ANDREI MARMOR, *What is the right to privacy?*, «Philosophy & Public Affairs» (2015), p. 12.

²⁵⁹ Contrary to what is suggested by LEONARDO MARTINS, *Lei de imprensa entre limite e configuração da ordem constitucional da comunicação social*, cit., p. 252; and also (although less explicitly) by DANIEL SARMENTO, *Comentários ao art. 5º, IV*, cit.

guarantee of private life²⁶⁰. But we need to understand this guarantee as an aspect of dignity to understand that, and this contrasts with the prevailing instrumental interpretation of the right to privacy. We now turn to those issues, not with the goal of undertaking a general restatement of the right to privacy. That would be beyond the limits of this dissertation; instead, we will explore how understanding the right to privacy from the perspective of dignity may illuminate an important connection, which is decisive to our examination of anonymity.

²⁶⁰ ‘Art. 5. [...] X – personal intimacy, private life, honor and reputation are inviolable [...]’. KEITH S. ROSENN, *Constitution of the Federative Republic of Brazil: October 5, 1988 (as Amended to September 15, 2015)*, cit. (‘Art. 5. [...] são invioláveis a intimidade, a vida privada, a honra e a imagem das pessoas [...]’.)

5. PRIVACY CONFRONTS THE IDENTIFICATION REQUIREMENT

A balance between privacy and surveillance?

The usual defences for privacy resemble the instrumental justifications for freedom of expression we have discussed in the last chapter. Indeed, in an influential paper, Daniel Solove ‘contend[s] that privacy should be valued instrumentally’²⁶¹. Recent landmark judgements by the European Court of Justice adopted language that suggests an instrumental approach as well: in invalidating Swedish and British mandates for general and indiscriminate retention of traffic and location data, the court expressed concern that ‘*[t]he fact that the data is retained without the subscriber or registered user being informed is likely to cause the persons concerned to feel that their private lives are the subject of constant surveillance*’²⁶².

While the court did state that, aside from privacy itself, freedom of expression was also implicated in surveillance (at para. 101), it did not articulate how those values relate. Neil Richards’s theory purports to do

²⁶¹ *Conceptualizing privacy*, «California Law Review», 90 (2002), p. 1144.

²⁶² Judgement of 21 December 2016, *Tele2/Watson*, joined cases C-203/15 and C-698/15, EU:C:2016:970, para. 100. That was also the court’s reasoning in a challenge from Digital Rights Ireland against the data retention provisions contained in EU Directive 2006/24/EC: ‘the fact that data are retained and subsequently used without the subscriber or registered user being informed is likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance’. Judgement of 8 April 2014, *Digital Rights Ireland*, joined cases C-293/12 and C-594/12, EU:C:2014:238, para. 37. See LUCIA ZEDNER, *Why blanket surveillance is no security blanket: data retention in the United Kingdom after the european data retention directive*, in R. A. MILLER (ed.), *Privacy and Power (A Transatlantic Dialogue in the Shadow of the NSA-Affair)*, Cambridge University Press, Cambridge, 2017, pp. 564–85.

just that, by recasting constitutional doctrine on free speech, freedom of thought, as well as traditional privacy precedents, in terms of intellectual privacy. He supplies a rich theory of intellectual privacy²⁶³, by which he means ‘*the ability... to develop ideas and beliefs away from the unwanted gaze or interference of others*’²⁶⁴. Essentially, his argument is that privacy is necessitated by the foundational civil liberties ‘*commitment to free and unfettered thought and belief*’²⁶⁵. Surveillance is inconsistent with that commitment, since ‘*surveillance of the activities of belief formation and idea generation can affect those activities profoundly and for the worse*’²⁶⁶. In short, ‘*surveillance is harmful because it can chill the exercise of our civil liberties*’. So Richards is also troubled with the **chilling effect** surveillance exerts.

An evident objection to the chilling-effect approach is anticipated by Richards himself:

*Truly secret and unexpected surveillance, from this perspective, might appear not to violate our intellectual privacy at all. If we have no inkling that we are being watched, if we really do not care that we are being watched, or if we fear no consequences of being watched, it could be argued that our intellectual freedom is unaffected. It can thus be argued that if the NSA Wiretapping Program had never leaked, it would have posed no threat to intellectual privacy.*²⁶⁷

His own response is rather feeble, and relies on contingent reasons. First, ‘*no program of widespread surveillance is likely to remain secret*

²⁶³ Note that *intellectual* is employed as contrasting spatial privacy: ‘intellectual privacy is not just for intellectuals; it is an essential kind of privacy for us all’ NEIL M. RICHARDS, *The dangers of surveillance*, «Harvard Law Review», 126/7 (2013), p. 1946.

²⁶⁴ *Intellectual privacy*, «Texas Law Review», 87 (2008), p. 389.

²⁶⁵ NEIL M. RICHARDS, *The dangers of surveillance*, cit., p. 1946; see also VOLKER BOEHME-NEBLER, *Privacy: a matter of democracy. Why democracy needs privacy and data protection*, «International Data Privacy Law», 6/3 (2016), pp. 222–9 (advancing privacy as necessary for the development of ‘democratic conditions’).

²⁶⁶ NEIL M. RICHARDS, *The dangers of surveillance*, cit., p. 1946.

²⁶⁷ NEIL M. RICHARDS, *The dangers of surveillance*, cit., p. 1952.

*forever*²⁶⁸. Second, although an Orwellian-type of authoritarian surveillance seems far-fetched, secret surveillance may nonetheless be liable to abuse by public officials.

Those replies seem to undermine the significance of intellectual privacy. The first one invites the counter-argument that perhaps the appropriate response would be to further weaken accountability schemes, so as to preserve the secrecy of surveillance; maybe simply involving less officials (and holding them to confidentiality backed by felony charges) would work. The second seems trivial: abuse of power is always possibility in the exercise of public office; in fact, the policing of poor neighbourhoods – be it in Brazil, in the US and elsewhere –, reveals it to be a frequent, disparaging reality.

Of course, one of the most important roles of the rule of law is precisely to curb abuse of power. But while we strive for the goal of eliminating it, we do not always elect the alternative that entails the least likelihood of abuse. We accept a police officer's account of the arrest of someone accused of drug trafficking, for instance, even though we are familiar with several cases of officers planting incriminating evidence in the possessions of suspects. More generally, criminal guilty is subject to a 'reasonable doubt' standard, which is not the most exacting standard we could conceive, but rather the one we believe provides the appropriate balance to the right of those charged with a crime and the public interest in crime prevention and repression²⁶⁹.

So why can't we justify digital surveillance in the same way, by resorting to the idea of the need for balancing interests? Yes, surveillance may instil an uncomfortable feeling of being watched. But isn't that feeling preferable to the fear of terrorist attacks, or of violent crime, or of abuse against women and other minorities? Yes, we might be more exposed to abuse of power, but aren't we always exposed to it? Given the undoubted benefits flowing from surveillance, perhaps the appropriate way of

²⁶⁸ NEIL M. RICHARDS, *The dangers of surveillance*, cit., p. 1952.

²⁶⁹ RONALD DWORKIN, *A matter of principle*, Oxford, Oxford, 1985.

tackling the issue is to devise stronger oversight schemes and hold institutions involved to higher transparency standards. Indeed, those are frequent recommendations from privacy scholars²⁷⁰.

While oversight and transparency are certainly lacking, we are still short of answers as to why it would be wrong, even for a hypothetical perfectly transparent and democratic oversight institution, to accede to the implementation of surveillance such as that made possible by the EU data retention mandate invalidated in *Digital Rights Ireland*. Note that mandate is puny in comparison to what the identification requirement reading of the Brazilian constitution would call for, since the mandate did not preclude the use of anonymity tools. So the answer to that question will also provide us with the key to understanding why the identification requirement should be rejected.

General warrants and privacy

I believe the answer to those questions – the question of why surveillance is wrong, as well as to the question of why we should not take the Brazilian constitution as requiring every person be identified at all times – is to be found in the constitutive value in privacy, as opposed to the instrumental value typically espoused in privacy literature.

We can find that value by examining the justification offered for the prohibition on general warrants inscribed in the Fourth Amendment to the US Constitution, which provides, in its second part, ‘*no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized*’.

²⁷⁰ ‘There is a way to reconcile privacy and security: by placing security programs under oversight, limiting future uses of personal data, and ensuring that the programs are carried out in a balanced and controlled manner’, DANIEL J. SOLOVE, “*Nothing to hide*” – *The false tradeoff between privacy and security*, Yale, New Haven, 2011, p. 207.

As Laura Donohue demonstrates, the enactment of the Fourth Amendment as a prohibition of general warrants can be traced to colonial discontent with arbitrary encroachment by British officials:

*The War of Independence was fought in part because of the Crown's effort to exercise writs of assistance, a form of general warrant wherein government officials failed to specify the precise place or person to be searched, or to provide evidence under oath to a third-party magistrate of a particular crime suspected. In the shadow of the French and Indian War, Britain had begun to make ever-greater use of the writs, sowing the seeds of revolution.*²⁷¹

That rejection of general warrants in turn was an influence of English case law on trespass, formed by a series of precedents where those who had been subject of search, seizure, and arrest empowered by general warrants successfully recovered damages for the intrusion of Crown officials. Leading cases such as *Entick v Carrington*, *Wilkes v Wood* and *Leach v Money* draw upon then-prevailing ideas of natural rights to affirm a 'right of a man to be secure in his own home', except where provided for by a specific warrant²⁷². Those cases were also guided English legal treatises which held general warrants as inimical to liberty.

While that seems to express concern for trespass into private homes, we would profit from reading those ideas 'from the perspective of a concern for the arbitrary exercise of state authority', as Lisa Austin argues²⁷³.

This dimension was lost with the development of the current reading of the Fourth Amendment,²⁷⁴ which focuses on a 'reasonable expectation of privacy' standard, as established in the US Supreme Court case *Katz v*

²⁷¹ LAURA K. DONOHUE, *The original Fourth Amendment*, «The University of Chicago Law Review», 83/3 (2016), p. 1194.

²⁷² LAURA K. DONOHUE, *The original Fourth Amendment*, cit.

²⁷³ LISA M. AUSTIN, *Enough about me: why privacy is about power, not consent (or harm)*, in *A World without Privacy (What Law Can and Should Do?)*, Cambridge, New York, 2014, p. 162.

²⁷⁴ LISA M. AUSTIN, *Enough about me: why privacy is about power, not consent (or harm)*, cit., p. 163.

*United States*²⁷⁵. It is nonetheless to be found in the debate around the adoption of the Fourth Amendment, which was revolved around anxiety that public officials be empowered with such an alarming prerogative as that conferred by general warrants; as Donohue concludes after thoroughly reviewing historical evidence, ‘*The Founders’ fundamental insight was that the executive branch could not be impartial when its interests were involved*’²⁷⁶.

The common law trespass origins of the prohibition of general warrants may hold a valuable lesson in reconfiguring the *Katz* test, which for long has been criticised as inadequate for the digital era, as it insists on a confidentiality perspective, taking privacy to mean exclusively a ‘right to be left alone’. As people share intimate information via the internet everyday, *Katz* affords them no Fourth Amendment protections. Yet the same doctrine holds that squeezing the bag of a bus passenger is a warrantless search, triggering the exclusionary rule in the Fourth Amendment²⁷⁷. So, as Daniel Solove notes, ‘*a little squeeze of a bag on a bus is fully regulated whereas systematic surveillance is not*’²⁷⁸.

In a recent case, *US v Jones*²⁷⁹, the US Supreme Court noted that puzzle by considering whether the warrantless use, by the police, of a GPS device to monitor a suspect’s car amounted to an unreasonable search. The case offered clear embarrassments to the ‘reasonable expectation of privacy’ standard, as driving a car through city streets can hardly be a confidential activity. The court turned to the origins of the Fourth Amendment to tackle the problem. Two strands formed: the opinion of the court, delivered by Justice Scalia, ‘retreat[ed] back to an explicit property focus’²⁸⁰; it insisted the attachment of the device was trespass

²⁷⁵ *Katz v United States*, 389 US 347 (1967).

²⁷⁶ LAURA K. DONOHUE, *The original Fourth Amendment*, cit., p. 1323.

²⁷⁷ *Bond v US*, 529 US 334 (2000).

²⁷⁸ DANIEL J. SOLOVE, *Fourth Amendment pragmatism*, «Boston College Law Review», 51 (2010), p. 1526.

²⁷⁹ *United States v Jones*, 565 US (2012) (slip opinion).

²⁸⁰ LISA M. AUSTIN, *Enough about me: why privacy is about power, not consent (or harm)*, cit., p. 164.

and so required a warrant. But the concurring opinion by Justice Sotomayor turned to the question of arbitrary exercise of power, questioning ‘the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment’s goal to curb arbitrary exercises of police power to and prevent “a too permeating police surveillance”’,²⁸¹.

Interestingly, while insisting on the test set by *Katz*, the concurring opinion by Justice Alito provides useful insight. Alito held the use of GPS monitoring as inconsistent with a reasonable expectation of privacy because it allowed the government to keep track of the suspect for a long period (about a month, in that case), at minimal cost – which ‘a reasonable person could not have anticipated’²⁸². He then noted the framers could not have conceived of the long, close-quarters monitoring enabled by the use of GPS devices except by way of ‘a gigantic coach, a very tiny constable, or both’²⁸³.

That jesting footnote remark points to an important issue which we should have in mind when considering surveillance and identification on the web. Recent technological changes expose how our understanding of the limits on government power are not exclusively base on legal constraints, but also on technological constraints, as Lawrence Lessig observes:

*The warrant requirement is a legal constraint on police action; that the police, unlike Superman, don't have x-ray vision is a technological constraint. We don't think much about technological constraints when thinking of the constraints of law. We usually just take them for granted. But we should.*²⁸⁴

²⁸¹ *United States v Jones*, 565 US ___, ___ (2012) (Sotomayor J, concurring, at *18) (slip op.).

²⁸² *United States v Jones*, 565 US ___, ___ (2012) (Alito J, concurring, at *13) (slip op.).

²⁸³ *United States v Jones*, 565 US ___, ___ (2012) (Alito J, concurring, at *23, footnote 3) (slip op.).

²⁸⁴ LAWRENCE LESSIG, *Reading the Constitution in cyberspace*, cit., p. 870.

Dignity and surveillance: privacy and power

Faced with technological shifts, a common response is to call for a new balancing between the capabilities of individuals and government officials. After noting the constitution is ‘not particularly well-designed’ to regulate information gathering, Solove, for instance, advances a ‘pragmatic approach’ which would ‘sweep aside all the tests for Fourth Amendment coverage, stop all the game-playing, and start focusing on the hard practical issue of how best to regulate government information gathering’²⁸⁵. This sort of approach calls for us to make fresh, *tabula rasa* value judgements, relinquishing what we may learn from our established practices. It capitulates too soon because it fails to entertain how the value we assign privacy, as inferred from current practices, can be construed as to illuminate what we previously did not account for – precisely because technological reality did not demand it.

A constitutive justification of the right to privacy does that. If we understand the guarantee of private life contained in the Brazilian constitution²⁸⁶ as also connected to dignity, we are to seem to question in a framing quite similar to our earlier discussion of democratic censorship. Respect for private life, we would then say, must be interpreted as insisting that government appreciate the ethical independence of individuals in conducting their private lives without accounting for government officials except where that is necessary to prevent harm or illegal activity. Pervasive surveillance and permanent traceability infringe that as they interfere with private life unnecessarily; they show no concern for the private lives of individuals.

²⁸⁵ DANIEL J. SOLOVE, *Fourth Amendment pragmatism*, cit., pp. 1527-1528.

²⁸⁶ ‘Art. 5. [...] X – personal intimacy, private life, honor and reputation are inviolable [...]’. KEITH S. ROSENN, *Constitution of the Federative Republic of Brazil: October 5, 1988 (as Amended to September 15, 2015)*, cit. (‘Art. 5. [...] são invioláveis a intimidade, a vida privada, a honra e a imagem das pessoas [...]’.)

Surveillance and identification (as called for by the identification requirement reading of the Brazilian constitution) are demeaning, and so do injury to members of the community, because they regard every person as a suspect. Just as we have concluded in regards to censorship, this is inconsistent with a partnership conception of democracy. They further compromise dignity as they call for rearranging social life into a government-centred setting, one in which all forms of life are conformed. Surveillance and identification thus convey a negative judgement upon the members of a political community, where the government – be it through fiat of government officials, or with the consent of the majority – perceives every member as unfit to conduct their lives without government supervision.

The debate about general warrants is useful here, albeit under a different perspective: the central issue is not that surveillance might be prone to abuse (while that is of course relevant), but rather that members of a political community subject to indiscriminate surveillance – in and of itself – are not shown the dignity a democracy requires for its citizens. In other words, regardless of abuse, granting government officials such an overwhelming and unjustified power is inconsistent dignity. As Annabelle Lever argues:

[...] people have important personal and political interests in confidentiality, which are intimately related to democratic ideas about the way power should be distributed, used and justified in a society. On that view, ordinary people, with their familiar moral failings and limited, though real, capacities for sensitivity, altruism and wisdom, are entitled to govern themselves and, in so doing, to take responsibility for the lives of others. This suggests that they are not in need of constant hectoring or supervision in order to act well, although they are rightly accountable to appropriate public authorities for their exercise

*of public powers, their use of public resources and their respect for others' rights.*²⁸⁷

Particularised suspicion searches and specific warrants are consistent with dignity and do not infringe on privacy as they show respect for the objective value of life, in the same way procedural rules on trial for felony charges do. While imperfect and risking accidental injustice, as when an innocent person is convicted or is subject to searches – according to a more or less exacting standard –, they nonetheless preclude deliberate harm²⁸⁸, by exercising coercion only when individualised reasons are present. This shows concern for the life of every member of the political community. We find evidence of this concern in other constitutional guarantees like the presumption of innocence and the secrecy of private communications which we may reframe as also reflecting respect for private life conceived as an aspect of dignity.

This shows how banning tools enabling anonymous connection to the internet further violates privacy. We instead appreciate how anonymity is actually essential in rearranging the circumstances to force government officials to act upon particularised suspicion²⁸⁹. It would be inconsistent with dignity because it would express a collective judgement that the would-be anonymous user pursues a less valuable life, where that is not strictly necessary for the preserving of the dignity of other members of the community²⁹⁰.

²⁸⁷ ANNABELLE LEVER, *Privacy, democracy and freedom of expression*, in B. ROESSLER, D. MOKROSINSKA (eds.), *Social Dimensions of Privacy (Interdisciplinary Perspectives)*, Cambridge University Press, Cambridge, 2015, p. 178.

²⁸⁸ RONALD DWORKIN, *A matter of principle*, cit., pp. 72-103.

²⁸⁹ ‘At the same time that the transparent citizen undercuts the state’s faithfulness to the rule of law, transparency challenges private respect for the rule of law. Anonymity tools developed by the network community empower citizens to respond to the erosion of privacy.,’ JOEL R. REIDENBERG, *The transparent citizen*, «Loyola University Chicago Law Journal», 47 (2015), p. 454.

²⁹⁰ RONALD DWORKIN, *Justice for hedgehogs*, cit., pp. 371-374.

6. REINTERPRETING THE LAW ON ONLINE ANONYMITY AND IDENTIFICATION IN BRAZIL

Let us recapitulate the discussion so far before we consider its implications to particular questions of digital anonymity. Our argument has been that a dignity-based conception of freedom of expression and the right to privacy rejects the identification requirement reading of the constitution. The anonymity clause cannot be interpreted as invalidating those basic values of a democratic society.

The identification paradigm does that. Based on an improper understanding of freedom of expression as a magnanimous privilege conferred by the majority chiefly on its own interest – and which it may thus withhold where it is no longer instrumentally valuable –, it would apply the rationale in the licensing requirements once imposed for traditional media to all individuals engaging on expression. It is hard to fathom how that would work for all manners individuals ‘express thoughts’, from the soapbox to gestures.

The licensing scheme provided by the Press Act of 1967, limited to the media business, resolved the enforcement problem by resorting to a secondary liability scheme. In effect, anonymous writings could still be published; the law was satisfied by providing for liability a legally-defined author to answer in the anonymous wrongdoer’s stead. Could this be extended to all expression?

This question was put to test in practice with a recent change to the Elections Act (statute n. 9 504/1997), which added art. 57-D to it (statute n. 12 034/2009). Art. 57-D, *caput*, essentially replicates the anonymity clause contained in art. 5, IV, of the constitution: ‘Manifestation of thought is free, while anonymity is forbidden during electoral campaign,

through the worldwide computer network – the internet [...]’²⁹¹. Art. 57-D, § 2, establishes a considerable fine for infringement of that provision, from R\$5,000 up to R\$30,000²⁹². In a case in which the public elections prosecutor applied for a preliminary injunction for the removal of a blog supporting then presidential candidate Dilma Rousseff citing those provisions, the Brazilian Superior Electoral Court nevertheless held that infringement was not present unless there was a showing of an independent violation of elections law. ‘[Simply] claiming anonymity is not enough’, the court concluded.²⁹³

It is hard to see how this could be different. While a disclosure mandate may apply to campaign material, it does seem absurd to impose the same mandate to all online content. Would users be compelled to disclose full names and other identifying information every time they posted a comment favouring or disfavouring an individual running for office? Even if they were, how could we check that disclosure is authentic? These vexations recommend a different interpretation, which the court endorsed in its holding, that anonymity cannot be understood as in itself illicit.

In fact, this is not merely an enforcement or a policy problem. Anonymity may be a factor of additional punishment when associated with unlawful conduct or speech (as the concealment of identity may *then* be said to aim at evading liability), but the point of regulation cannot be to constrain legitimate expression for the sake of it. From the perspective of the right to privacy, we cannot find justification for denying individuals anonymity as a means of controlling information about themselves. Both perspectives are founded on respect for ethical independence. There are

²⁹¹ ‘Art. 57-D. É livre a manifestação do pensamento, vedado o anonimato durante a campanha eleitoral, por meio da rede mundial de computadores - internet, assegurado o direito de resposta, nos termos das alíneas a, b e c do inciso IV do § 3º do art. 58 e do 58-A, e por outros meios de comunicação interpessoal mediante mensagem eletrônica.’

²⁹² ‘Art. 57-D. [...] § 2º A violação do disposto neste artigo sujeitará o responsável pela divulgação da propaganda e, quando comprovado seu prévio conhecimento, o beneficiário à multa no valor de R\$ 5.000,00 (cinco mil reais) a R\$ 30.000,00 (trinta mil reais).’

²⁹³ Tribunal Superior Eleitoral, AgR-AC 1384-43.2010.6.00.0000, Henrique Neves J, June 6, 2010, at 18. (‘[...] não basta a alegação de se tratar de matéria anônima, é necessário demonstrar que o conteúdo divulgado caracteriza ofensa às regras eleitorais.’)

no grounds for casting dignity aside in exchange for an unrestricted identification requirement.

Identification is certainly warranted where harm is present. A targeted identification requirement may also be merited within the bounds of particularised suspicion of illegal activity or, generally, where it is not inconsistent with dignity. For instance, members of congress are typically required to disclose their votes; they generally cannot vote anonymously²⁹⁴. This is not inconsistent with their dignity; it does not violate their ethical independence that the majority has chosen this particular political arrangement. There is no right over the design of structures of representative government; this is a domain where there can be no claim *against the general interest*, like, properly understood, claiming a right is²⁹⁵. No one is entitled to be invested in public office *regardless of what has been provided for by the majority through proper democratic procedure*²⁹⁶.

Those are broad propositions, of course. They do not offer a complete understanding of the anonymity clause for all possible issues. We mentioned one issue, licensing and secondary liability for the media business and other intermediaries of anonymous content which in effect may be regarded as publishers in their own right, for the editorial judgement they enjoy. There are other issues, like protesters concealing their faces with masks at public demonstrations. The general ideas about freedom of expression, privacy and dignity we debated would certainly help in this issue, but discussion is clearly necessary, for this and certainly other issues. But our project is not to develop a complete theory of the anonymity clause. We are concerned with issues bearing on digital anonymity.

We should now consider the practical implications resulting from our preceding discussion for the internet in Brazil. We will next discuss how

²⁹⁴ ERIC BARENDT, *Anonymous speech, the secret ballot and campaign contributions*, cit., pp. 158-9.

²⁹⁵ RONALD DWORKIN, *What rights do we have?*, cit.

²⁹⁶ RONALD DWORKIN, *Freedom's law*, cit., p. 17.

these apply to anonymous internet connection (and online anonymity tools), anonymous platforms and anonymous posts. Before that, it will benefit our investigation to explore the legal framework governing the internet in Brazil and how it correlates with the identification paradigm.

Anonymity and identification online: reviewing the legal framework governing the internet in Brazil

A complete ban on anonymity would require us to demand every person be identified in his or her every action online.²⁹⁷ Ensuring liability, as prevailing Brazilian literature calls for, would entail substantial transformations to the current internet legal framework. Of principal interest on this topic are the data retention mandates established by *Marco Civil da Internet* (statute n. 12.965/2014)²⁹⁸.

It should be noted those provisions were absent from the bill as introduced by President Dilma Rousseff²⁹⁹. The bill provided for the opposite: it ‘expressly mentioned that providers of applications had no obligation to

²⁹⁷ As a matter of fact, a complete ban on anonymity could not be implemented unilaterally by a particular country. The best it could achieve is denying anonymity to its citizens and those living in its territory. Of course, people connecting from other countries would still be able to make use of anonymity. Filtering the web so as to only allow content from platforms imposing real-name policies would contribute to the aim of eliminating anonymity (although the availability of anonymity-permitting means such as Tor and VPN make that a cat-and-mouse game)– but at a great cost to freedom of expression. One I expect even the staunchest opponents of anonymity would not be willing to bear.

²⁹⁸ An excellent analysis of *Marco Civil da Internet* can be found in FRANCIS A. MEDEIROS & LEE A. BYGRAVE, *Brazil's 'Marco Civil da Internet': Does it live up to the hype?*, «Computer Law & Security Review», 31/1 (2015), pp. 120–30. *Marco civil* is often advertised as ‘the internet bill of rights’: Medeiros and Bygrave find that epithet ‘hyperbolic’ *Brazil's 'Marco Civil da Internet': Does it live up to the hype?*, cit., p. 121.

²⁹⁹ MARCEL LEONARDI, *A garantia fundamental do direito à privacidade e à liberdade expressão nas comunicações como condição ao pleno exercício do direito de acesso à internet*, in G. S. LEITE, R. LEMOS (eds.), *Marco civil da internet*, Atlas, São Paulo, 2014, p. 624; RENATO L. MONTEIRO, *Da proteção aos registros, aos dados pessoais e às comunicações privadas*, in F. DEL MASSO, J. ABRUSIO, M. A. FLORÊNCIO FILHO (eds.), *Marco civil da internet: lei 12.965/2014*, RT, São Paulo, 2014, p. 142.

record and keep any access logs³⁰⁰. Such provisions were added to the bill during legislative debate by majority vice-leader Alessandro Molon³⁰¹ as a compromise ‘*aimed at reconciling the pressure from civil society against any form of data retention and the wishes of law enforcement agencies*’³⁰². Challenged as they be³⁰³, however, the data retention provisions from *Marco Civil da Internet* (statute n. 12.965/2014) are insufficient to meet the demands of the identification-requirement reading.

At the outset, we should note that the scheme established by *Marco Civil* is patently suboptimal concerning identification. It relies on two separate data retention mandates, one for what it refers to as ‘internet access providers’, or internet service providers (ISPs), and another for what it defines as ‘internet application providers’, loosely described as ‘a set of functionalities’ available through the internet (art. 5, VII), which are perhaps better understood as platforms³⁰⁴. ISPs are required to keep one year of network ‘connection logs’ and barred from keeping ‘internet applications access logs’ (art. 14)³⁰⁵. Platforms retain six-month logs consisting of ‘a set of information relative to the date and time of use of

³⁰⁰ FRANCIS A. MEDEIROS & LEE A. BYGRAVE, *Brazil's ‘Marco Civil da Internet’: Does it live up to the hype?*, cit., p. 128.

³⁰¹ MARCOS A. A. CABELLO, *Da guarda de registro de acessos a aplicações de internet*, in G. S. LEITE, R. LEMOS (eds.), *Marco civil da internet*, Atlas, São Paulo, 2014, p. 714.

³⁰² FRANCIS A. MEDEIROS & LEE A. BYGRAVE, *Brazil's ‘Marco Civil da Internet’: Does it live up to the hype?*, cit., p. 128.

³⁰³ *Frente Parlamentar pela Internet Livre e Sem Limites* (Parliamentary Front for Free and Limitless Internet), a caucus of 211 members of congress filed an *amicus curiae* brief in a case pending before the Brazilian Supreme Court concerning *Marco civil da internet*, ADI 5.527, arguing against the data retention mandate. At the time the bill was being considered by Congress, several civil society organizations issued a joint declaration denouncing the data retention provisions: <http://www.convergenciadigital.com.br/inf/carta_mci_entidades_10fev2014.pdf>.

³⁰⁴ While it is sensible to describe ‘internet application providers’ as *platforms* – suggesting online environments where people interact and data is kept–, ‘a set of functionalities’ could be literally understood as referring to a script merely made available online, as trivial as that script might be: a simple web calculator, for instance.

³⁰⁵ FRANCIS A. MEDEIROS & LEE A. BYGRAVE, *Brazil's ‘Marco Civil da Internet’: Does it live up to the hype?*, cit.

a given internet application from a given IP address' (art. 4, VIII)³⁰⁶. While both ISPs and platforms may be ordered, on specific cases, to keep data for longer periods, the data retention mandate specifies an exemption for platforms maintained by natural persons and for nonprofit platforms provided by organisations (art. 15). Identification thus requires combining the logs kept by ISPs and platforms³⁰⁷. This need for requesting data from two sources in itself undermines identification.

Even joined together, however, the data retention mandates on ISPs (network connection logs, art. 5, VI) and platforms (platform access logs, art. 5, VIII) are circumscribed to a specific network *terminal* (defined as 'a computer or any device connecting to the internet', art. 5, II). Some terminals, such as a smartphone connecting via 3G, are directly connected to the internet; yet others, such as laptops connecting via a Wi-Fi network, are not³⁰⁸. Laptops and desktops are also often shared³⁰⁹. While other evidence might be available (for instance, from logs kept voluntarily by public Wi-Fi networks administrators) and identification might be inferred from context³¹⁰, the identification requirement is not met under

³⁰⁶ Note the provision does not explicitly refer to the actual internet activity itself. Commentators seem to understand that as implied, however. See MARCOS A. A. CABELLO, *Da guarda de registro de acessos a aplicações de internet*, cit., p. 712.

³⁰⁷ MARCOS A. A. CABELLO, *Da guarda de registro de acessos a aplicações de internet*, cit., p. 712.

³⁰⁸ While some commentators take this to be an unresolved issue in *Marco civil*, the fact is that the language of provision on the data retention mandate for ISPs is expressly limited to 'the administrator of an autonomous system', which those sharing internet access provided by ISPs are not. See, however, ADRIANO M. GODINHO & WILSON F. ROBERTO, *A guarda de registros de conexão: o Marco Civil da Internet entre a segurança na rede e os riscos à privacidade*, in G. S. LEITE, R. LEMOS (eds.), *Marco civil da internet*, Atlas, São Paulo, 2014, p. 759.: 'The language of *Marco civil da internet* also failed to elucidate whether the data retention mandate applies likewise to those who route internet traffic via Wi-Fi or some other means of sharing [internet] access, given that, by sharing access, they too become, hypothetically, internet access providers' ('O texto *Marco Civil da Internet* não esclareceu se o dever de manter os logs de acesso também será obrigatório para os que roteiam o sinal de Internet por meio de Wi-Fi ou outra tecnologia de compartilhamento de acesso, tendo em vista que, ao ocorrer tal compartilhamento, aqueles também passam a ser, em tese, provedores de acesso à internet.').

³⁰⁹ São Paulo state law (Statute n. 12.228/2006) requires *cybercafés* to demand government-issued ID before patrons are able to use computers to browse the internet, and to keep records of user activity (Art. 2, § 2) for 5 years (Art. 2, § 4).

³¹⁰ An example of which can be found in the English case *Applause Store Productions and Firsh v Raphael*, [2008] 1781 (QB). The defendant in that case insisted defamatory content posted using his computer (as identified by the IP address) was not authored by him but rather

current law. Since it construes the anonymity clause as to demand identification be always attainable, the current internet legislative framework is inconsistent with such a reading of the constitution.

Complying with that reading would call for overturning the exemption for platforms provided by natural persons and for nonprofit platforms. That would be just the start. The identification requirement demands positive identification, which in turn entails making **internet access dependent on personal identification of every user**. But even that would not do. Personal identification-dependent internet access does not preclude **anonymity-granting tools, such as anonymous VPNs and Tor, which are able to provide anonymity by masking internet activity**³¹¹.

Online anonymity tools (and limits)

Virtual private networks (VPNs) were not designed to serve as a privacy-enhancing technology for the general public, but rather as a tool corporations could use to provide remote access to internal resources³¹².

by acquaintances who had stayed at his flat. The judge rejected that allegation as implausible, ‘on the basis of his assessment of the evidence concerning the Facebook activity log and the movements of people at the flat’, ERIC BARENDT, *Anonymity on the Internet*, in *Anonymous speech: literature, law and politics*, Hart Publishing, 2016, pp. 143-144.

³¹¹ WALTER A. CAPANEMA, *O direito ao anonimato: uma nova interpretação do art. 5º, IV, CF*, cit., p. 556.

³¹² See Bruce Scheiner's paper on the weaknesses of an early, now obsolete, protocol for VPNs: ‘Many organizations and institutions are not centralized. Branch offices, virtual corporations, and traveling employees make the notion of running dedicated network connections to each location logistically impossible. The concept of virtual networking provides a solution to this problem by tunneling cojoined network space over other, transitory and insecure, networks (such as the Internet), thus enabling remote locations to appear to be local. This is done without the expense incurred from running leased lines or dedicated cabling to each location, and is sometimes called a “tunnel.” While virtual networks solve the problem of decentralized machines, they create a new problem. They open up traffic that was previously considered internal to the company, to any prying eyes on the networks it traverses. Authentication and encryption are required to keep this virtual network traffic not only tamperproof but private. The result, virtual networking connections combined with

They are still used for those purposes today, for instance, by universities that provide access to academic resources over the web. Aside from that use, however, VPNs are able to provide anonymity by masking internet activity and protecting traffic data with encryption³¹³ and not keeping logs on internet activity from users connect to its network³¹⁴. They thus act as secure tunnels³¹⁵.

Someone connecting to the internet via such a VPN will bypass data retention from an ISP, which will only record that particular user connecting to the VPN server, not the specific websites or services he or she effectively accessed. All traffic generated from the user is tunneled: while the ISP will still forward all communications from and to the user, VPN providers will encrypt all packets. Providers typically accomplish this by employing OpenVPN³¹⁶, a protocol which uses open-source software that makes use of OpenSSL³¹⁷, a software library containing an open-source implementation of the TLS (Transport Layer Security) protocol (previously named SSL, for Secure Sockets Layer) that is also behind secure web browsing (HTTPS) and email protocols (SMTP).

Only the VPN provider will be able to keep actual connection records, and this is where a no-logs, or zero-log, policy enables anonymous VPNs.

cryptographic protections, is a Virtual Private Network (VPN).’ BRUCE SCHNEIER & MUDGE, *Cryptanalysis of Microsoft's point-to-point tunneling protocol (PPTP)*, (1998), p. 132.

³¹³ Note that, while VPNs provided by universities for academic purposes are generally limited to authentication, VPNs as privacy-enhancing technologies route all internet traffic from a given user.

³¹⁴ MARK FRARY, *Leave no trace: Five ways to increase your privacy when browsing online*, «Index on Censorship», 45/3 (2016), pp. 51–3; ERIC BARENDT, *Anonymity on the Internet*, cit., p. 125; UNITED NATIONS. HUMAN RIGHTS COUNCIL, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye*, (2015) para. 10.

³¹⁵ NGUYEN P. HOANG & DAVAR PISHVA, *Anonymous communication and its importance in social networking*, cit., p. 38.

³¹⁶ ‘OpenVPN... is offered by almost all VPN service providers’, I I. SAVCHENKO & O Y. GATSENKO, *Analytical review of methods of providing internet anonymity*, «Automatic Control and Computer Sciences», 49/8 (2016), p. 697.

³¹⁷ I I. SAVCHENKO & O Y. GATSENKO, *Analytical review of methods of providing internet anonymity*, cit., p. 697.

Some providers accept anonymous BitCoin payments, which in any event would make matching activity to a particular person more difficult.

VPNs are nonetheless not a perfect solution for anonymity³¹⁸. Reputable VPNs providers generally charge around US\$10 a month³¹⁹, a price which would impair access to most Brazilians.

Users still need to trust the provider in its claims not to keep logs (an information that is not usually subject to independent verification)³²⁰. Even if no logs are typically kept, a VPN provider may still be forced to comply with a court order for monitoring and retaining data. Some providers seek to base operations in jurisdictions where internet regulation is still incipient, and where mutual legal assistance requests for data are unlikely to succeed. Some pledge to notify users of data requests ‘where legally permitted’, individually or by employing ‘warrant canaries’³²¹. Cryptostorm.is goes further: it swears by a ‘privacy seppuku’

³¹⁸ In the wake of the a resolution passed by the US Congress and signed by the President overturning a Federal Communications Commission regulation imposing limits on the use of personal data by broadband providers, many recommended using VPNs, while others advised caution. See: KLINT FINLEY, *VPNs won't save you from congress' internet privacy giveaway*, (2017) <<https://www.wired.com/2017/03/vpns-wont-save-congress-internet-privacy-giveaway/>>, accessed 28.Apr.2017; AMUL KALIA, *Here's how to protect your privacy from your internet service provider*, (2017) <<https://www.eff.org/deeplinks/2017/04/heres-how-protect-your-privacy-your-internet-service-provider>>, accessed 31.Jul.2017.

³¹⁹ See the ‘Detailed VPN comparison chart’ at *That One Privacy Site*, <<https://thatoneprivacysite.net/vpn-comparison-chart/>>, a resourceful website which has been recommended by EFF: AMUL KALIA, *Here's how to protect your privacy from your internet service provider*, cit.

³²⁰ Users also need to trust the provider to safeguard the network and their data against attacks. See I I. SAVCHENKO & O Y. GATSENKO, *Analytical review of methods of providing internet anonymity*, cit., p. 698. Note, however, that this issue is also at play with ISPs.

³²¹ Warrant canaries are ‘regularly published statements that document the absence of an NSL [National Security Letter, a subpoena issued directly by US law enforcement and intelligence agencies] (or other secret surveillance order). If the company receives an NSL with a gag [a nondisclosure provision], it kills the canary. From silence, audiences my infer receipt’. REBECCA WEXLER, *Warrant canaries and disclosure by design: the real threat to national security letter gag orders*, «Yale Law Journal Forum», 124 (2015), p. 159. The reasoning behind negative statements (such as ‘As of July 31, 2017, we have not been served with any surveillance order’) is that government would have to compel false speech in order to prevent disclosure of surveillance. Yet generic, website-wide warrant canaries proved of little practical use, chiefly for two reasons: *a.* their absence, though expressive, failed to convey information which might guide public response; *b.* warrant canaries used by different websites were quite varied, which impaired effective monitoring. Those reasons were cited by the Electronic Frontier Foundation

(a reference to Japanese ritual suicide) pledge, a commitment it will discontinue its services rather than forced to comply with surveillance of its users³²².

Aside from hosting ‘deep web’ content, **Tor** also acts as a layer of anonymity over the usual internet. Its software suite encrypts internet communications three ways, and distributes them through three nodes: an entry node, a transit node and an exit node. When a Tor user accesses a page online, the request for that page is sent through those three nodes, randomly determined from a network of nodes. Those nodes hold information only on the immediate nodes³²³. Again, Tor is not a perfect solution for anonymity. Chiefly, if the Tor user does not employ end-to-end encryption on traffic sent through the network, he or she is also vulnerable to eavesdropping on the end node³²⁴.

Both Tor and VPNs are also susceptible to other vulnerabilities on the operating system and other applications, which are not uncommon. Crucially, users may also inadvertently reveal their identities in more

when it announced the end of Canary Watch, a coalition project to monitor canaries. See: COOPER QUINTIN, *Canary Watch – one year later*, (2016) <<https://www.eff.org/deeplinks/2016/05/canary-watch-one-year-later>>, accessed 31.Jul.2017. To address those issues, Abhishek Bose-Kolanu has proposed ‘Aviary’, ‘a distributed, tamper-proof, per-user warrant canary system intended to automate and replace obsolete canary practices’:

ABHISHEK BOSE-KOLANU, *Aviary: Distributed, Tamper-Proof, Per-User Warrant Canaries* (2016), pp. 1–19.

³²² ‘[...] Privacy Seppuku Pledge (or, previously, "corporate seppuku"): rather than allow our service to be turned into indiscriminate, dragnet #snitchware, we publicly asserted our choice to shut the company down - wipe the network, delete the customer datafiles entirely - if efforts to coerce our complaisance continued despite all attempts to stop them otherwise’, *Privacy seppuku pledge*, available at <<https://cryptostorm.is/seppuku>>. See also *cryptostorm: our privacy policy*, available at <<https://cryptostorm.org/viewtopic.php?f=47&t=3077>>.

³²³ See TOMÁŠ MINÁRIK & ANNA-MARIA OSULA, *Tor does not stink: Use and abuse of the Tor anonymity network from the perspective of law*, «Computer Law & Security Review», 32/1 (2016), pp. 111–27; ERIC JARDINE, *The dark web dilemma: Tor, anonymity and online policing*, (2015).

³²⁴ TOMÁŠ MINÁRIK & ANNA-MARIA OSULA, *Tor does not stink: Use and abuse of the Tor anonymity network from the perspective of law*, cit., p. 113.

obvious ways, like using the same username for an pseudonym and for real-name platforms like Facebook.

Identification is also available through means other than IP session logging, like cookie tracking and browser (or cookie-less) fingerprinting³²⁵. Cookie tracking is dependent on storage of a very small file (a cookie), and so users are generally able to avoid that kind of tracking, either by blocking a website from generating cookies or deleting cookies after accessing the website. Browser fingerprinting relies on a large set of browser configuration data, such as the extensions installed on the browser, fonts loaded on the device, screen resolution, system timezone, etc. While trivial and unprotected (because they are typically used so as to load the best version of a web page given those browser configurations), those pieces of data may be aggregated so as to generate a fingerprint that is specific to a particular user³²⁶. Part of the software for the Tor project is a browser that is configured to match every other Tor browser, mitigating browser fingerprinting.

Identification and anonymity under *marco civil da internet*

The demands of the identification requirement are not met by the Brazilian legislation on internet use.

First, as noted above, nonprofit platforms are exempted of the data retention mandates. This might seem at first glance like an exception of little repercussion given that so much what users typically access online is operated by multibillion-dollar businesses, like Facebook, Google, etc. But this provision is what quashes any question about online anonymity

³²⁵ PETER LOSHIN, *Practical anonymity: Hiding in plain sight online*, cit., p. 4.

³²⁶ Panopticlick, a project from the Electronic Frontier Foundation (EFF), allows users to check for browser fingerprinting; see <<https://panopticlick.eff.org/about>>.

tools, which are typically free and open source software (FOSS), like Tor and I2P³²⁷.

By selecting only for-profit organisations, the data retention mandates are best understood as a regulation on business activity, rather than on digital anonymity itself, precisely because they still spare the most important tools for achieving anonymity online. Of course, in practice, the data retention mandates create a default of digital identification, and limit the options for achieving anonymity online. Yet this, of itself³²⁸, does not implicate any constitutional right in the strong sense, that is, as a right against the public interest³²⁹. As we have examined in the final section of chapter 4, we cannot claim a right to a particular architecture of internet communications, or to a specific scheme of internet governance. If anonymous tools are available to those who would use it, then those users are not shown disrespect, even if the business-targeted mandates create an inconvenience for them.

Second, the data retention mandate is insufficient to ensure identification, as discussed above, as it is not enough to ascertain the person responsible for a specific use in all cases. This would not be an issue for the identification paradigm if the law provided for secondary liability where identification fails, as the Press Act established. But MCI provides for the opposite: it endows providers with immunity from liability³³⁰. Art. 18

³²⁷ STEPHANIE WINKLER & SHERALI ZEADALLY, *An analysis of tools for online anonymity*, «International Journal of Pervasive Computing and Communications», 11/4 (2015), pp. 436–53; TOMÁŠ MINÁRIK & ANNA-MARIA OSULA, *Tor does not stink: Use and abuse of the Tor anonymity network from the perspective of law*, cit.; BRUCE SCHNEIER, KATHLEEN SEIDEL & SARANYA VIJAYAKUMAR, *A worldwide survey of encryption products*, (2016), pp. 1–24.

³²⁸ We should be careful not to overstate the point: while anonymity interests are served by the exemption established by MCI, the right to privacy would be seriously undermined if the law showed no concern for the data protection of the majority of users who do not browse anonymously.

³²⁹ RONALD DWORKIN, *What rights do we have?*, cit.

³³⁰ See CHIARA A. S. DE TEFFÉ, *Responsabilidade civil e liberdade de expressão no Marco Civil da Internet: a responsabilidade civil dos provedores por danos decorrentes de conteúdo gerado por terceiros*, «Revista de Direito Privado», 16/63 (2015), pp. 59–83; CÍNTIA R. P. DE LIMA, *A responsabilidade civil dos provedores de aplicação de internet por conteúdo gerado por terceiro antes e depois do Marco Civil da Internet (Lei n. 12.965/14)*, «Revista da Faculdade de Direito da Universidade de São Paulo», 110 (2015), pp. 155–76.

establishes general immunity for access providers. Art. 19 prescribes immunity for application providers as long as they do not fail to remove content after a court order; a notice-and-takedown scheme applies only concerning sexually explicit content shared without the consent of the person depicted.

So the identification requirement reading of the constitution would require changes to the Brazilian legislation on the internet. What about our preceding discussion? Is it consistent with *Marco civil da internet*? I believe it is.

Although the data retention mandates create an environment of default identification, users are able to access the internet anonymously when they deem it necessary. While the majority might have conformed the background to which all individuals must adapt, no one is deprived of ethical independence.

The fragmentation of the data retention mandates is also evidence of concern for the objective value of the life of all members of the community insofar as it limits the information on the private life of individuals to which providers have access. The procedural safeguards established by *Marco civil*, subjecting the access to logs by law enforcement and other officials to a court order is also a strong showing of concern. This was emphasised by the Court of Justice of the European Union in *Digital Rights Ireland*, the case concerning the data retention directive³³¹, and *Tele2/Watson*, the case concerning data retention mandates from Sweden and the UK³³².

The requirement of a court order for producing data is an important limitation on the power government officials hold over individuals. Compare this with a scheme where officials have direct access to the data; that would be surveillance inconsistent with dignity in itself. Further, as

³³¹ Judgement of 8 April 2014, *Digital Rights Ireland*, joined cases C-293/12 and C-594/12, EU:C:2014:238, paras. 61-2.

³³² Judgement of 21 December 2016, *Tele2/Watson*, joined cases C-203/15 and C-698/15, EU:C:2016:970, paras. 118-121.

the Brazilian data retention scheme is structured, however, it does not interfere with the private life of members of the community, since the mandates are built upon data that is created in normal internet operation. Retaining IP addresses and timestamps as *marco civil* provides for may entail additional financial costs for providers, yet – as long as the mandate is not incorrectly construed to require retention of any other data – it does not preclude any service or platform³³³. Anonymous speech is actually not in jeopardy.

Further, the immunity from liability accorded to providers is also instrumental in the protection of freedom of expression. It effectively validates anonymous platforms. Under art. 19 (immunity as long as the provider complies with a court order for content removal) and art. 21 (immunity as long as the provider complies with a legitimate notice for removal of unconsented sexual content), only harmful content is excluded from protection, which is as it should be.

An objection at this point might be that the immunity from secondary liability providers are afforded for acts of its users should not be interpreted as supplying providers with general immunity empower them to avoid any responsibility for abuse enabled by an application they maintain and have control over. It should not, in other words, exempt providers from a general duty of acting diligently. We need not dispute this principle. Yet it is crucial to refine our understanding of diligence with respect to online platforms. Endorsing the identification paradigm, courts have at times held that diligence meant providers should adopt reasonable efforts for ensuring identification of users of applications.³³⁴

³³³ *Decreto no. 8 711/2016*, a regulation of *marco civil da internet* complementing it, makes that point clear with art. 11, § 1, which states providers that do not collect subscriber data may ‘convey that fact to a requesting official, by which [*the provider*] is exempted from providing that data’. (‘Art. 11. [...] § 1º § 1o O provedor que não coletar dados cadastrais deverá informar tal fato à autoridade solicitante, ficando desobrigado de fornecer tais dados.’)

³³⁴ A leading case establishing that doctrine is the oft-cited judgement of the Superior Court of Justice in REsp 1 186 616, 3rd Senate, Nancy Andrighi J rapporteur, August 28, 2011. The court held that, while content providers were not compelled to monitor user postings, they were still required to ‘supply the means through which identification of each one of its users is made possible, thus curbing anonymity and ascribing a certain and determined author to each particular expression’. (‘[...] deve o provedor de conteúdo ter o cuidado de propiciar meios para que se

Implicit here is the assumption that anonymity is itself a vice providers should aim to curb.

Yet, as we have seen with Reddit communities for mental health and sexual exhibitionism, that is not the case. Anonymity is one factor influencing the behaviour of users of a community, but other factors, like rules of conduct and community norms, are just as important factors. The commonplace assumption that anonymity induces negative behaviour – the deindividuation effect – has been consistently contradicted by evidence supporting what social psychologists refer to as the social identity model of deindividuation effects (SIDE).³³⁵ Providers may therefore be held responsible for enforcing community rules inductive of healthy user conduct as well as fostering constructive norms, which in fact may be more effective for conforming user behaviour than banning anonymity³³⁶.

possa identificar cada um desses usuários, coibindo o anonimato e atribuindo a cada manifestação uma autoria certa e determinada.’)

³³⁵ ‘Earlier theories used to explain the effects of anonymity suggested that in anonymous contexts, such as crowds, people were more likely to behave anti-normatively due to an experience of reduced self-awareness and accountability (e.g., classic deindividuation theory; Zimbardo, 1969). However, more recent studies find that people who are less focused on personal identity markers are actually more likely to conform to group norms in anonymous contexts. The application of the Social Identity Model of Deindividuation Effects (SIDE) to computer-mediated communication suggests that a reduction of individuation cues can contribute to a strong sense of collective identity (Spears & Lea, 1994), where people experience “more of a sense of we and less a sense of me” (Baym, 2010, p. 114). Deindividuation effects in large anonymous groups have been found to strengthen a shared sense of communal identity and adherence to group norms, critically important for concerted political action (Bernstein, et al, 2011; Coleman, 2011)’. ROBERT BODLE, *The ethics of online anonymity or Zuckerberg vs. “Moot,”* «ACM SIGCAS Computers and Society», 43/1 (2013), p. 27. Also KIMBERLY M. CHRISTOPHERSON, *The positive and negative implications of anonymity in Internet social interactions: “On the Internet, Nobody Knows You’re a Dog,”* «Computers in Human Behavior», 23/6 (2007), pp. 3038–56; JANNE BERG, *The impact of anonymity and issue controversiality on the quality of online discussion,* «Journal of Information Technology & Politics», 13/1 (2015), pp. 37–51. ‘[...] the consistent findings have confirmed that the SIDE model is supported in both offline and online contexts with meta-analytic evidence. It is further demonstrated that the SIDE model is not confined to a specific type of medium or a specific form of communication channel; instead, it is a general theoretical model dealing with the interaction between human behaviors and technological features’ GUANXIONG HUANG & KANG LI, *The effect of anonymity on conformity to group norms in online contexts: a meta-analysis,* «International Journal of Communication», 10 (2016), p. 410 (providing literature review and meta-analysis).

³³⁶ Another interesting example of this is r/ChangeMyView, a successful community on Reddit where users are made the case for a belief they would hold but would like to see

Adjudicating anonymity

The preceding discussion leads to two conclusions for two important questions for digital anonymity: online anonymity tools are legal and so are anonymous platforms. We should now examine how anonymous content itself should be treated.

Particularly important to this are procedural questions. Indeed, the landmark US case *New York Times v Sullivan*³³⁷ crucially involved a holding of procedural standard required by the constitution³³⁸. It will prove useful to consider US developments on this subject.

US John Doe subpoenas

While the US Supreme Court is yet to hear a case concerning online anonymity, other courts have drawn on *McIntyre* to develop tests for assuring first amendment rights on the internet. These deal with the so-called ‘John Doe subpoenas’, in which plaintiff seeks a court order compelling an application or internet service provider (ISP) to disclose information that may lead to the identification of the defendant, so he may respond for damages claimant asserts he has caused³³⁹.

An early case is *Dendrite International, Inc v John Doe no. 3*, in which plaintiff, an IT company, sued for damages arising from comments it

challenged. This is examined in CHENHAO TAN, VLAD NICULAE, CRISTIAN DANESCU-NICULESCU-MIZIL & LILLIAN LEE, *Winning arguments: interaction dynamics and persuasion strategies in good-faith online discussions*, (2016), pp. 613–24.

³³⁷ *New York Times v Sullivan*, 376 US 254 (1964).

³³⁸ See LACKLAND H. BLOOM, *New York Times v. Sullivan*, in *Do great cases make bad law*, 2014, pp. 259-260.

³³⁹ NATHANIEL GLEICHER, *John Doe subpoenas: toward a consistent legal standard*, «The Yale Law Journal», 118 (2008), pp. 340-344; LYRISSA B. LIDSKY, *Anonymity in cyberspace: what can we learn from John Doe?*, «Boston College Law Review», 50 (2009), p. 1374.

deemed defamatory that were posted on a bulletin board hosted by Yahoo!. The trial judge granted the order for Yahoo! to disclose information on two (John Doe no. 1 and no. 2) of the four handles responsible for the comments; Dendrite appealed insisting on user ‘xxplrr’, John Doe no. 3. The Superior Court of New Jersey affirmed the trial court’s decision, holding the appellant Dendrite had not satisfactorily shown ‘a *prima facie* cause of action against the fictitiously-named anonymous defendants’. This was a more rigid approach than the one espoused by an earlier case, argued before the Virginia Circuit Court, which had established a lower ‘good faith’ standard in *In re subpoena duces tecum to America Online, Inc.* (52 Va Cir 26 (2000))³⁴⁰.

A subsequent case, argued before the Supreme Court of Delaware, *Doe v Cahill* (884 A 2d 451 (SC Del 2005)), adopted an even more rigorous standard, which calls for plaintiff to show cause of action ‘sufficient to dismiss a summary judgment motion’ (at 460)³⁴¹.

This was ratified in *Re anonymous online speakers* (611 F 3d 653 (9th Cir 2010)), argued before the United States Court of Appeals for the 9th Circuit, which is likely to remain the prevailing test, ‘on the grounds that the most popular social media platforms are hosted by companies, such Google, Facebook, Twitter and Yahoo!, which geographically fall within the realm of the 9th Circuit [which has jurisdiction over US district courts in California, aside from Alaska, Arizona, Hawaii, Idaho, Montana, Nevada and Washington]’,³⁴².

These precedents further establish plaintiff is required to take reasonable efforts to notify the anonymous defendant before applying for a

³⁴⁰ ANNA VAMIALIS, *Online defamation: confronting anonymity*, «International Journal of Law and Information Technology», 21/1 (2013), p. 53.

³⁴¹ SUSANNA MOORE, *The challenge of internet anonymity: protecting John Doe on the internet*, «John Marshall Journal of Computer and Information Law», 26/4 (2009), pp. 469–85 (arguing for the standard established in Dendrite).

³⁴² ANNA VAMIALIS, *Online defamation: confronting anonymity*, cit., p. 55; see also ETHAN B. SILER, *Yelping the way to a national statutory standard for unmasking internet anonymity*, «Wake Forest Law Review», 51 (2016), pp. 189–210 (calling for a national statute providing standards for the unmasking of internet users).

subpoena³⁴³. This is vital, as ‘[w]ithout a challenge, the subpoena is reviewed *ex parte* and often complied with after little or no review’³⁴⁴.

Revisiting the process Doe is due in Brazil

Our understanding of freedom of expression as protecting anonymous expression means we should reject a widespread understanding of the anonymity clause as empowering individuals to seek the disclosure of the identification of the unnamed person responsible for post, or its suppression³⁴⁵. Yet anonymous posts sometimes are defamatory or otherwise cause injury, and in these cases the individuals patently wronged by them have a right to seek reparation. We should stress, however, that a claimant must show content on the internet is harmful to her. If the content claimant requests to be removed does not pertain to her, she has no standing and the action must be dismissed. She must also give evidence the content is harmful to her, as her standing to seek disclosure of identification or suppression of content is limited to circumstances where she has been wronged.³⁴⁶

³⁴³ NATHANIEL GLEICHER, *John Doe subpoenas: toward a consistent legal standard*, cit., pp. 345-349 (discussing whether the third party target of the subpoena should also be required to notify the defendant and the means through which the notification should be arranged).

³⁴⁴ NATHANIEL GLEICHER, *John Doe subpoenas: toward a consistent legal standard*, cit., p. 345.

³⁴⁵ See the survey cited in DENNY M. ANTONIALI, FRANCISCO DE B. CRUZ & MARIANA G. VALENTE, *Existe um “direito de saber quem é quem” na Internet?*, cit.

³⁴⁶ These are implicit from the language of *Marco civil da internet*: ‘Article 19. In order to ensure freedom of expression and prevent censorship, providers of Internet applications can only be civilly liable for **damages resulting from content** generated by third parties if, after specific court order, they do not make arrangements to, in the scope and technical limits of their service and within the indicated time, make unavailable the content identified as infringing, otherwise subject to the applicable legal provisions. [...] § 3. Lawsuits that deal with **compensation for damages arising from content made available on the Internet**, related to honor, reputation or personality, as well as the unavailability of such content by Internet application providers, may be brought before special courts’. CHAMBER OF DEPUTIES (BRAZIL), *Civil framework of the Internet*, F. B. ALICE (trad.), Chamber of Deputies (Brazil), Brasília, 2016, p. 32 (emphasis added).

A recent case shows important repercussions of these two elementary considerations. After the creation of a Facebook event satirising his administration's policy on a popular festival hosted by the city government, the mayor of São Paulo filed suit requesting the disclosure of the identification of the users responsible³⁴⁷. Mr Doria claimed the mere call for a protest at his residential address was itself illicit. It was unclear whether the Facebook event was meant as a fictitious satire (it called for the festival to take place at his street) or not. The court was unpersuaded that the Facebook event was illegal, yet, citing the anonymity clause, it still ordered disclosure of their identification.

A third consideration is more complex. Claimants typically filed suit against the application provider; courts have generally granted orders compelling providers to disclose identification (and suppression of content) with no audience of the user responsible, who is not even served with notice of court proceedings.³⁴⁸ The individual is there constrained in her freedom of expression and right to privacy and yet is not afforded an opportunity to defend her interests in court. This is a clear breach of the right to due process provided by the Brazilian constitution: 'no one shall be deprived of liberty or property without due process of law' (art. 5, LIV).³⁴⁹ Usual justifications for this practice cite the procedural rule relating to formal aspects of pleading requiring that the claim must specify the name, address, occupation, marital status, email, and the individual taxpayer number of the defendant (art. 319, II, civil procedure code)³⁵⁰.

³⁴⁷ MARCOS S. SILVA, *Site deve dizer quem são os críticos de Doria, decide juiz*, published in *Folha de São Paulo*, 2017, p. B3.

³⁴⁸ MARIANA C. E. MELO, *The "Marco Civil da Internet" and its unresolved issues: free speech and due process of law*, cit., p. 72; MARIANA C. E. MELO, *Anonimato, proteção de dados e devido processo legal: por que e como conter uma das maiores ameaças ao direito à privacidade no Brasil*, (2017), p. 4.

³⁴⁹ MARIANA C. E. MELO, *The "Marco Civil da Internet" and its unresolved issues: free speech and due process of law*, cit.; MARIANA C. E. MELO, *Anonimato, proteção de dados e devido processo legal: por que e como conter uma das maiores ameaças ao direito à privacidade no Brasil*, cit., p. 4.

³⁵⁰ Art. 319. A petição inicial indicará: II - os nomes, os prenomes, o estado civil, a existência de união estável, a profissão, o número de inscrição no Cadastro de Pessoas Físicas

Surely, however, this formal procedural requirement should not be applied in a manner inconsistent with the constitutional guarantee of due process. Proper interpretation of statutory law on procedure in fact does not require that³⁵¹. In fact, the civil procedure code has long made stipulations for a very different circumstance where specification of the defendant would run counter to due process: the little-cited action of annulment and replacement of bearer instruments (*ação de anulação e substituição de títulos ao portador*), which was provided for in detail by the civil procedure code of 1973.

This action allows the person legally entitled to a bearer instrument who had been wrongfully dispossessed of it (by a burglar, for instance) to obtain a judgement compelling the restitution of the instrument or, where the claimant cannot name the person who dispossessed her of the instrument, that the debtor who issued the bearer instrument either issue a new one.³⁵² As the claimant in most cases cannot name the person who wrongfully holds the instrument (and the instrument may have been lost or destroyed), the law provided that the particulars of the claim should specify the instrument and the circumstances in which the claimant was dispossessed of it. This addressed both the formal requirement of specification of the defendant (whoever holds the title described in the claim) and the substantive question that the claimant may not be the legally entitled to the instrument (he might have lawfully traded it and then claim he was illegally dispossessed of it, for instance). A summons was then effected by public notice (*citação por edital*).

While the civil procedure code of 2015, now in effect, no longer contains the detailed procedure for this action, it is still referred in its provisions

ou no Cadastro Nacional da Pessoa Jurídica, o endereço eletrônico, o domicílio e a residência do autor e do réu’.

³⁵¹ In spite of what is argued at MARIANA C. E. MELO, *Anonimato, proteção de dados e devido processo legal: por que e como conter uma das maiores ameaças ao direito à privacidade no Brasil*, cit., p. 16; and MARCEL LEONARDI, *Responsabilidade civil dos provedores de serviços de internet*, Juarez de Oliveira, São Paulo, 2005, p. 206.

³⁵² FRANCISCO C. PONTES DE MIRANDA, *Comentários ao código de processo civil*, Forense, Rio de Janeiro, 2005², pp. 83-99; OVÍDIO A. B. D. SILVA, *Comentários ao código de processo civil*, vol. 13, RT, São Paulo, 2000, pp. 144-168.

for cases of summons by public notice (art. 259³⁵³). The current civil procedure code actually contains explicit provisions mitigating the requirement of specification of the defendant. Art. 319, § 2, stipulates that a claim shall be admitted regardless of lack of specification of the defendant as long as the information supplied in it is sufficient to serve the defendant with summons³⁵⁴. Art. 319, § 3, creates a further exception to the requirement, which is exempted its application makes access to justice ‘impossible for excessively onerous’³⁵⁵. Finally, art. 319, § 1, provides that a claimant may petition the court for assistance with acquiring information on the defendant³⁵⁶.

Combined, these provisions make it possible that cases concerning anonymous or pseudonymous content follow procedure that is consistent with the due process rights of the user. What follows is a tentative suggestion of how it could operate. After the action of annulment and replacement of bearer instrument, the claimant could be required only to specify the content he requests be suppressed and the information available to him on the user responsible for it. He could then petition the court to order the provider of the platform to which the content was posted to assist in serving the user with a summons, under art. 319, § 1 of the civil procedure code. Art. 20 of *marco civil da internet* (establishing that providers must relate information about content removal to the affected users wherever this is feasible) could provide basis for enlisting the assistance of providers in this. Alternatively, where this is possible, claimant could himself serve the defendant with summons using the platform. An issue here is that there is no way to verify the receipt of the summons by the defendant. The defendant could very well read the

³⁵³ ‘Art. 259. Serão publicados editais: [...] II – na ação de recuperação ou substituição de título ao portador’.

³⁵⁴ ‘Art. 319. A petição inicial indicará: [...] § 2º A petição inicial não será indeferida se, a despeito da falta de informações a que se refere o inciso II, for possível a citação do réu’.

³⁵⁵ ‘Art. 319. A petição inicial indicará: [...] § 3º A petição inicial não será indeferida pelo não atendimento ao disposto no inciso II deste artigo se a obtenção de tais informações tornar impossível ou excessivamente oneroso o acesso à justiça’.

³⁵⁶ ‘Art. 319. A petição inicial indicará: [...] § 1º Caso não disponha das informações previstas no inciso II, poderá o autor, na petição inicial, requerer ao juiz diligências necessárias a sua obtenção’.

summons and ignore it, knowing it would have no effect on his stand in the proceedings. Yet in many cases it will be the interest of the defendant to come forward and attend to the proceedings. By so doing, he would be able to represent himself in court, which surely would enhance his chance of succeeding. Even if does not obtain a favourable ruling, however, he has an interest in representing himself to limit the costs he will inevitably be ordered to pay. That is so because, in case the service of summons with the help of the platform fails, summons will then be served by public notice (art. 256, I, of the civil procedure code) and, should defendant not attend, a public defender will be assigned to him (Art. 72, II)³⁵⁷. This typically will cost more than what ordinary representation of the defendant by an attorney or, if the suit is filed before a small claims court, by himself.

The defendant then has an interest to attend to the summons and appear in court to represent himself. Ordinarily, this would entail publicly disclosing his full identity in court proceedings. Yet the concealment of his identity is precisely what is in question, so this requirement must be set aside in the interest of due process. After the action of annulment and replacement of bearer instrument, I suggest the civil procedure could make accommodations for this by requiring the defendant to provide evidence to the court that he is the person responsible for the content in question, or is otherwise the person the claimant seeks. He would supply the court with full disclosure of his identity, but only court would have access to this, pending the resolution of the case. This information would be kept in sealed court records and, pending litigation, the defendant would proceed as John Doe. This scheme, while admittedly unorthodox, would ensure the interests of anonymous speakers and potential victims are offered due process the constitution affirms.

³⁵⁷ MARIANA C. E. MELO, *Anonimato, proteção de dados e devido processo legal: por que e como conter uma das maiores ameaças ao direito à privacidade no Brasil*, cit.

CONCLUSION

The internet presents a special challenge for the established understanding of anonymity in Brazilian constitutional law. Anonymity has long been held in disrepute by the prevailing literature.³⁵⁸ The traditional understanding of freedom of expression assigns it no value; it insists on a reading of the constitution under which freedom of expression may only be claimed by those in compliance with the identification requirement it establishes.

Identification is paramount, it is asserted, as the constitution insists on a model of ‘freedom and responsibility’³⁵⁹, so there must always be someone who will be held liable for abusive speech. The identification requirement is the price to be paid by exercising freedom of expression, and it is a reasonable price to pay, many argue³⁶⁰. José Afonso da Silva provides a perfect illustration of this understanding:

Freedom of expression has its burdens, such as that one exercising it must assume responsibility for the resulting

³⁵⁸ ÊNIO S. ZULIANI, *Art. 7º*, cit., p. 159; DARCY A. MIRANDA, *Art. 7º*, cit., p. 110; ALEXANDRE DE MORAES, *Liberdade de pensamento*, cit., p. 130.

³⁵⁹ DANIEL SARMENTO, *Comentários ao art. 5º, IV*, cit.

³⁶⁰ ‘Free expression of thought is compensated by the prohibition of anonymity’ (‘A livre expressão do pensamento tem por contrapartida a proibição do anonimato’), MANOEL G. FERREIRA FILHO, *Art. 5º, IV*, cit., p. 31; similarly JULIANA ABRUSIO, *Os limites da liberdade de expressão na internet*, cit., p. 120; JOSÉ CRETTELLA NETO, *Art. 7º*, cit., pp. 76-78; ÊNIO S. ZULIANI, *Art. 7º*, cit., pp. 158-159; DARCY A. MIRANDA, *Art. 7º*, cit., p. 110; UADI L. BULOS, *Art. 5º, IV*, cit., p. 122.

*expressed ideas, in order that, should it be the case, one may be held liable for the damage caused onto others.*³⁶¹

Chapter 1 examined the Press Act of 1967, considering how the identification requirement could be implemented in practice – an important point which the literature has so far ignored. We explored how the strategies employed by that act – mandated registration, the associated notion of ‘illegal newspapers’ subject to apprehension by the police, and secondary liability determined by legally-defined attribution of otherwise anonymous writings – draw heavily on the structure of traditional media. The oligopolistic character of that industry is crucial for enforcement of its implementation of the identification paradigm.

We further considered how a substantive question is also context-dependent: as traditional media are particularly defined by editorial judgement, it might make sense to hold a newspaper, for instance, liable for an anonymous text it elected to disseminate. Yet, transposing those strategies to a general imposition on anyone engaging in ‘expression of thought’ is an entirely different question – one commentators of the Press Act of 1967 mostly rejected as unworkable and, we should again highlight, substantively distinct. Even the authoritarian Press, Act, we noted, did not meet the more encompassing demands of the identification paradigm. Nor could it, because it would simply be unfeasible to monitor every utterance of expressive act for identification. Applying the identification requirement to the internet would make this kind of surveillance possible, profiting from its architecture. Yet, is this the proper understanding of the Brazilian constitution, that it mandates surveillance of all expression?

We then turned to the question of whether the identification-requirement paradigm is truly an adequate account of practices the Brazilian constitution is conventionally thought to protect. **Chapter 2** thus

³⁶¹ JOSÉ AFONSO DA SILVA, *Art. 5º, IV*, cit., p. 92. 'A liberdade de manifestação do pensamento tem seus ônus, tal como o de o manifestante identificar-se, assumir claramente a autoria do produto do pensamento manifestado, para, sendo o caso, responder por eventuais danos a terceiros?'

considered instances where the constitution clearly does not hold identification and liability to be paramount. The secret ballot, an essential feature of Brazilian democracy, is a patent example of this³⁶², and so is the secrecy of jury deliberations. While liability in these cases could be an issue (voters and jurors may engaging in vote selling, for instance), it is limited by context, of course. This still does not alter the fact that identification itself is not pursued in these instances. The opposite, actually: the law seeks anonymity.

The protection of anonymous sources is also an example of the constitution safeguarding anonymity at the expense of the identification requirement. It may of course be said that journalists and media are responsible intermediates and act as gatekeepers in this context³⁶³, but again the identification requirement is not met, and liability itself is in jeopardy. While the privilege does not secure journalists from being ordered to pay damages for negligence in verification and lack of professional diligence as regards the information itself, the protection of anonymous sources effectively operates as a shield for liability from the manner the information was acquired. It protects cover for illicit conduct of the anonymous source who, for instance, violates a confidentiality duty.

These are all instances provided by the constitution explicitly, so an objection could be raised that exceptions to the general rule of identification must be explicitly provided for in the constitution. Yet the case law on anonymous reporting of criminal activity, and the adoption of *Crimestopper* schemes by government agencies attest otherwise. This is a case where the identification requirement would have the strongest claim, since answering to criminal investigation or prosecution is a very

³⁶² SAUL LEVMORE, *The anonymity tool*, cit., p. 2219 ff.; JEFFREY M. SKOPEK, *Anonymity, the production of goods, and institutional design*, cit., p. 1763. *Contra*, Eric Barendt argues that the secret ballot is not an instance of anonymity; yet it is still a clear case that identification is not always preferred. ERIC BARENDT, *Anonymous speech, the secret ballot and campaign contributions*, cit.

³⁶³ ERIC BARENDT, *The protection of anonymous sources*, cit.

serious repercussion resulting from anonymous speech, which the prevailing understanding of the constitution regards as of no value.

These cases show that a general identification requirement cannot be affirmed. The constitution contains provisions explicit inconsistent with it, and other admitted practices are also incompatible with it. A proper appreciation of what is at stake cannot be reached before we consider what values anonymity may serve.

In *chapter 3*, we began considering that question, starting with freedom of expression. We discussed theories providing justification for freedom of expression. We inspected the widely disseminated argument from truth, most famously put forward by John Stuart Mill, and the marketplace of ideas variant. We found that we have strong reasons to be sceptical of it, mainly for it seems unclear truth is always best served by freedom of expression. At best, the argument from truth and the marketplace theory are decisively underinclusive of what we take freedom of expression to protect.

We then considered the theory which associates freedom of expression with self-government, which we referred as the Madisonian ideal. While certainly valuable, self-government does not provide a theoretical basis for our understanding of freedom of expression. It condemns clandestine government censorship, as Dworkin put it, yet cannot explain why the majority would be wrong to democratically opt for censorship. Lastly, we turned to Ronald Dworkin's theory which connects freedom of expression to a partnership conception of democracy and to dignity.

If government is to have a moral title to coerce, this theory holds, it must respect freedom of expression. This constitutive justification of freedom of expression attaches political legitimacy to equality and dignity. We found it provides a better account of our understanding of freedom of expression, and we examined how censorship is a clear example of it. The Millian argument from truth or the Madisonian ideal would offer no reason why the majority cannot empower government to transparently censor individuals; they would consent to democratic censorship. A constitutive justification of freedom of expression would not, however: it

would reject ‘democratic censorship’ as an oxymoron. This provides a powerful basis for the provisions against censorship in the Brazilian constitution, and it also seems essential to understanding the holding of the Brazilian Supreme Court in the unauthorised biographies case (ADI 4 815).

Chapter 4 then turned to anonymity itself. It surveyed US first amendment doctrine on anonymity, as reflected by the Supreme Court cases *Talley*, *McIntyre*, and *Watchtower Bible*. We conceded to the criticism of Eric Barendt that instrumental justifications did seem insufficient. The same cannot be said, however, of a constitutive justification approach. We understood the force of the argument of the *McIntyre* court that disclosure of identification was as a decision for the author just as much as additions or omissions in the content of the speech were. We surveyed online platforms for anonymous communication and found that Barendt is wrong in contending that anonymity prevents meaningful communication. Internet anonymity enables new forms of communication and social engagement. In light of this, we concluded that identification is expressive, and freedom of expression must protect this decision of speakers – this is the strong argument the *McIntyre* court offers us.

As we considered, in the final sections of chapter 4, what those freedom of expression principles mean to internet access and internet posting, we noted that the protection it offers is entangled with what we take the right to privacy to safeguard. That entanglement suggested an important tension, since privacy is widely considered to be instrumentally valuable.

Chapter 5 then addressed that tension, drawing on our conclusions about anonymity, proposed a tentative account of privacy as an inherently valuable aspect of dignity. Discussing the proscription of general warrants under this new light, we explored how such an interpretation of the value of privacy is better equipped to deal with emerging conflicts. A constitutive justification of the right to privacy, focusing on power, dignity, and equality, in similar fashion to our constitutive justification of freedom of expression, has important implications for the protection of anonymity, we noted. It also illuminates how privacy is a critical aspect

of the ethical independence and respect democratic communities must appreciate in all its members.

Finally, in chapter 6, we considered the implications of these discussions in reinterpreting Brazilian law concerning anonymity. We noted *Marco civil da internet* does not abide by the identification requirement reading of the constitution, and rightly so. Instead, it clearly allows for the use of online anonymity tools such as Tor, a free and open source solution, thus explicitly exempted from the data retention mandate. We also examined how the immunity that statute confers on application providers makes it possible for anonymous platforms to operate, as long as they comply with court orders for removal of infringing content. We then turned to anonymous content itself and reflected on a suggestion for ensuring users are shown the due process the Brazilian constitution affords them.

We have considered a number of theoretical and practical questions relating to anonymity. Those discussions offered fatal grounds for rejecting the identification paradigm. We did not, however, arrive at a formulation of the anonymity clause which provides a clear test for when it would be wrong to compel identification. I am afraid no litmus test is available here, as none is available with freedom of expression or the right to privacy more generally. This should not be thought of as a shortcoming of the argument: as we acknowledge those are interpretative questions of our values and practices, a promptly-administrable rule or a definitional phrase would be less productive than many would expect. Instead, this points to an important conclusion of our discussion: supporters of the identification paradigm seem to espouse the notion that the anonymity clause may be interpreted without reference to basic values endorsed by the Brazilian constitution. The argument we have entertained insists we must never lose sight of those values in adjudicating identification and anonymity.

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