PF Topic Analysis
Nationals 2015

The Nationals topic for Public Forum debaters is **Resolved: The benefits of First Amendment protection of anonymous speech outweigh the harms.** Today, we're going to take a look at some options for building strong, strategic cases worthy of the honor of national competition!

To begin with, let's consider the **terms in the resolution.**

The phrase **"benefits… outweigh the harms"** should be familiar to any Public Forum debater seasoned enough to make it to Nationals, so I will not waste much time here. You just need to win that your side comes out on top in a standard cost-benefit analysis.

"First Amendment protection" means legally protected by the constitution's guarantee of the right to free speech. It is important to note here that the Supreme Court (SCOTUS) has ruled many times that there *are* limits on absolutely free speech. These are instances when the value of the speech has been determined to be dramatically less significant than the degree of harm it will inflict. For example, you cannot deliberately incite violence, you cannot commit libel or slander, etc. For a full list of these existing limitations, look here.

"Anonymous speech" is the only phrase in this resolution that is a bit ambiguous. First, it is important to know that the United States constitution (as interpreted by SCOTUS) protects not just your ordinary, literal definition of "speech" (speaking or writing words), but also other forms of expression that are legally considered protected speech. For example, symbolic gestures (such as burning the flag or wearing a protest t-shirt), silence (such as refusing to say the pledge of allegiance), monetary contributions (such as to candidates or causes) are all considered speech and therefore are protected by the constitution. Of course, some of these things might not be all that relevant to your debates… it is fairly difficult to anonymously wear a protest t-shirt!

It also may be worthwhile to consider the difference between anonymity and secrecy. Although related, the two are legally distinct. Recognized rights to secrecy apply to communications between 2 (or a small group of) private citizens, and concern the *content* of the speech. In other words, the government cannot read your mail or listen to your phone calls without a warrant. Secrecy is based on the right to privacy, and is related to fourth amendment concerns.

Anonymity, on the other hand, does not concern *content*, but *identity*. Anonymity allows a person to hide that a communication came from them. This may seem obvious, but the reason why the distinction is worthy of ruminating on is that many legal arguments based on the right to *privacy* or *secrecy* do not necessary justify *anonymity*. The court generally sees those interests as separate concerns. Here is some **evidence** discussing this:

> *(Vincenzo Zeno-Zencovich, University of Rome Department of Law, "Anonymous speech on the internet," published in Media Freedom and Regulation in the New Media World (edited by A. Koltay), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487735, 1/31/2014)*
>
> The uncertainty is increased by the existence of legal notions which are in various ways related to that of anonymity. Most contemporary constitutions and international conventions that this right—pertaining to physical mail—is extended to digital correspondence, such as e-mails. However, on the Internet the notion of correspondence—meaning an interpersonal communication between two specified persons—is blurred, considering the possibility of sending the same message to a very high number of persons (eg a mailing list), and the possibility that receivers may, with the greatest of ease, forward such a message to third parties. But is secrecy the same as anonymity? Generally speaking the right to secrecy means that others (typically public authorities) may not apprehend the content of the communication, but it does not mean that they are prevented from knowing who is writing to (or telephoning) whom.
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> This is because what is protected is the privacy—in the sense of seclusion—of the persons involved. Reflecting this approach are the provisions which require—even after the death of one of the parties of a correspondence—the consent of both to render public the content of the letters. On the Internet, instead, the situation is different: the content of the communication is public, and is meant to be so. Anonymity is used to hide not the content but its referability to a specified person. What is primarily protected is not privacy but discourse in the public arena, although what may also be relevant is the possibility of creating multiple, digital, identities.
>
> The difference between the two notions—anonymity and secrecy—is made even clearer when one considers a vital institution of any democratic system, ie voting. Voting in elections is secret,

in the sense that nobody may establish how one has cast the ballot. But surely voting is not anonymous. To the contrary, every precaution is taken in order to verify the identity of the voter and prevent attempts to vote in the place of someone else. As a matter of fact, the risk of fraudulent voting identities is one of the main obstacles to the introduction of electronic (ie digital, on-line) voting systems.

Additionally, signing a piece of writing with a misleading name (such as to suggest the writer has credentials he/she does not, or is aligned with groups he/she is not, etc.) *can* qualify as anonymity, but tends to amplify its negative effects. Some cons may find that argument useful. Here is **evidence**:

(Vincenzo Zeno-Zencovich, University of Rome Department of Law, "Anonymous speech on the internet," published in Media Freedom and Regulation in the New Media World (edited by A. Koltay), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487735, 1/31/2014)

In fact one should consider that, commonly, anonymity is not meant—as it is in the material world—as an unsigned message (eg an anonymous letter), but instead is a message signed with a pseudonym (or nick-name). This pseudonym (ie false name) may simply be the product of imagination, but often it can convey a deceitful impression, such as using someone else's identity or posing as a certain entity in order to attract disapproval (eg a right wing group which disseminates its views pretending it is a left wing group, or *vice versa*). Therefore, in a wider sense, anonymity does not only conceal one's identity; it may be used to disguise it with someone else's clothes.

Now that we understand the basic definitions of all of the topic's terms, we will turn to some critical **background information.**

The first thing debaters need to keep in mind is that the SCOTUS has *not* established a clear doctrine on this issue. While they have ruled on several anonymous speech cases, the court's opinions have been vague and even contradictory. You should not expect to be able to just be able to cleanly lift your cases from court precedent. Here is **evidence** discussing that problem:

> *(Lyrissa Barnett Lidsky & Thomas F. Cotter, University of Florida Levin College of Law & University of Michigan Law faculty, "Authorship, Audiences, and Anonymous Speech," UF Law Scholarship Repository-Faculty Publications, http://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1105&context=facultypub, 1/1/2007)*
>
> The Supreme Court has held that the First Amendment protects anonymous speech, but the scope of that protection is murky. The two main decisions, *McIntyre* and *McConnell,* rely on conflicting assumptions about how audiences respond to anonymous or pseudonymous speech and, ultimately, conflicting assumptions about its value. The Court's jurisprudence has thus generated conflicting approaches to balancing such speech against other important rights.

Another crucial note concerns existing limitations on first amendment protections, which we have already briefly touched on. As stated above, the American legal system already recognizes plenty of valid limitations that can be placed on free speech without violating the constitution. Usually, these limitations are established based on a recognized compelling social interest. For example, you cannot stand in the street encouraging people to riot, because the harms associated with a riot are seen as significantly outweighing your desire to scream angrily. Similarly, restrictions of students' speech in

schools are often allowed, because the compelling social interest is that students need a distraction-free learning environment.

In this topic, the reality of allowable limitations on free speech somewhat complicates the debate. It is important for you to realize that this debate will *not* be about "totally free speech with no restrictions whatsoever" versus "intense tyrannical censorship." All of the relevant literature is going to occupy more of a middle ground. Really, what you are discussing is more along the lines of "when in conflict, do the benefits of broadly protecting anonymous speech outweigh the problems anonymous speech may cause?"

Here is a piece of **evidence** that discusses this balancing act. Depending on how your case is structured, you may want to use it on either side. The pro might use it to advocate the "privilege" for anonymous speech, or the con may want it as impact mitigation (arguing that limiting anonymity in some instances doesn't mean totally banning anonymous speech):

> *(Lyrissa Barnett Lidsky & Thomas F. Cotter, University of Florida Levin College of Law & University of Michigan Law faculty, "Authorship, Audiences, and Anonymous Speech," UF Law Scholarship Repository-Faculty Publications, http://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1105&context=facultypub, 1/1/2007)*
>
> Our normative analysis nevertheless suggests a way of resolving this indeterminacy. Traditional First Amendment theory suggests two presumptions that can assist in weighing the relevant costs and benefits of anonymous speech. The first is that the audience for "core" First Amendment speech is both educated and critical-and thus able to defend itself, in large part, from the effects of harmful anonymous speech. 13 This presumption is not empirically based, to be sure, but it is consonant with versions of democratic

> theory that assume that citizens are rational and capable of self-government. The second is that more speech is, in general, better than less, and therefore that measures designed to reduce the quantity or diversity of speech are inherently suspect. To the extent the anonymity option makes otherwise reluctant speakers more willing to speak, therefore, it is presumptively a social good, despite some risk that it will induce some harmful speech as well. Taking these assumptions as touchstones, we advocate (in the context of claims involving torts such as defamation) a constitutional privilege for anonymous speech, which privilege may be overcome only when the party seeking disclosure of the speaker's identity presents sufficient evidence from which the trier of fact may conclude that the speaker has committed the tort at issue, and that disclosure of that person's identity is essential to the alleged victim's case. Laws requiring disclosure in the context of political speech, on the other hand, should be (if anything) even more difficult to justify; in the context of commercial speech, however, the assumption of a rational, critical audience may give way to more paternalistic assumptions and thus make it relatively easy for the state to compel disclosure.

You should also be aware that in print, tv, radio, etc., the publisher is legally liable for any content they publish, even if the author remains anonymous. So, for example, if the New York Times prints an article that is libelous, the paper can be sued. It does not matter if the original article was written by someone not employed by the Times, and/or if the Times didn't know it contained libel. As the publisher, they are legally responsible for everything they print. Any other news outlets who then repeat the Times's libelous story may also be sued. This is true not just for newspapers, but for all kinds of media… *except the internet.*

Because many cases on this topic are likely to focus on online speech, it is important that you understand the relevant law. Due to Section 230 of the Telecommunications Decency Act of 1996,

internet speech is not subject to the same jurisprudence as other forms of media. According to Section 230, no ISP or website administrator can be held legally liable for harmful content perpetrated by others while using their services. So, for example, a website owner is not considered responsible for anything a user writes on the site's message board or comments section. The result of online anonymous speech, therefore, is that a victim of libel may have no one to hold accountable, and therefore be unable to seek justice.

In the context of this resolution, discussion of Section 230 will get a bit sticky. This is because it is a *legislative* issue, not a *constitutional* one. Although Section 230 is critical to any discussion of online free speech, it has no effect whatsoever on how judges interpret *the first amendment itself*. Section 230 only has to do with who may be found liable, should it become clear that some form of unprotected speech (such as libel) has occurred. In other words, eliminating Section 230 *would not impose any new restrictions on speech*, it would only change who may be found liable for violating existing restrictions (again, such as libel).

Now, with these factors in mind, we'll dive into **strategic considerations**.

What all of the preceding discussion means is that the pro has a tricky option available to them: they may choose to argue that "first amendment protections" in the resolution should be interpreted to include *standard limitations on speech*. They could then try to use the possibility of eliminating Section 230 as defense against con internet harassment impacts. This would allow them to argue that many significant con arguments can be resolved simply by making a *legislative change* that allows existing law to be more robustly enforced, and *not* by adding any *new* restrictions/reducing protections for anonymous speech. Here is **evidence**:

> *(Brian Leiter, edited by Saul Levmore & Martha C. Nussbaum, "The Offensive Internet: Privacy, Speech, and Reputation," Harvard University Press, 2010)*
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> Since cyber-cesspools are in large part beyond the reach of regulation by the state in America because of constitutional protections, a number of commentators3 have suggested enhancing private remedies by, for example, making intermediaries-those who host blogs or perhaps even service providers-liable for tortious harms on their sites. This would require repeal of Section 230 of the Communications Decency Act (47 U.S.C. §230), which provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The effect of that simple provision has been to treat cyber-cesspools wholly differently from, for example, newspapers that decide to publish similar material. Whereas publishers of the latter are liable for the tortious letters or advertisements they publish, owners of cyber-cesspools are held legally unaccountable for even the most noxious material on their sites, even when put on notice as to its potentially tortious nature. But why should blogs, whose circulation sometimes dwarfs that of many newspapers, be insulated from liability for actionable material they permit on their site?4 Although it is common for cyber libertarians to talk as if *all* speech is immune from legal regulation, even U.S. constitutional law permits the law to impose penalties for various kinds of

"low-value" speech, such as defamation. So why should the law, via Section 230, treat cyberspace differently than the traditional media? Defenders of Section 230 worry about what I shall refer to as "spillover effects": because website owners are more likely to err on the side of caution when facing legal liability, so the argument goes, if they do not have Section 230 immunity, they will be more likely to "censor" speech, including "valuable" speech. This is probably true, but it has a flip side: namely that insulation from liability via Section 230 will increase the prevalence of low-value speech, as well as speech that causes dignitary harms, as anyone familiar with cyberspace can attest. Why think the balance should be struck in one direction rather than the other? In all kinds of contexts newspapers, classrooms, workplaces, and courtrooms-we restrict speech not only for the sake of legally protected interests but also for the sake of avoiding dignitary harms, no doubt at the cost of spillover effects. If no academic institution or newspaper would permit its classrooms or pages to turn into the analogue of cyber-cesspools, why should the law encourage that outcome in the virtual world?

More **evidence**, connecting it to anonymity:

(University of Chicago Faculty Law Blog, "The Internet's Anonymity Problem," summary of spoken word lecture given by the Dean of the University of Chicago Law School Saul Levmore, http://uchicagolaw.typepad.com/faculty/2008/11/chicagos-best-i.html, 11/12/2008)

Thanks to the different legal regime, the internet does not exert the same controls on speakers as other media do. Television, for example, is subject to a fair amount of government regulation, and consumer demand constrains what appears on television as well. (Consumer demand is the real reason why Big Bird will not drop the f-bomb on *Sesame Street* any time soon.) Bathroom stalls are cleaned occasionally, and the harm is less because--unlike Juicy Campus--they are not searchable. Soapboxes, such as in London's Hyde Park, are regulated by social sanctions; everyone can see who the speaker is. Newspapers are occasionally subjected to defamation lawsuits, but they are more often protected from speech regulations. Consumer demand prevents them from publishing anonymous, defamatory letters to the editor. But the internet does not have any of those controls. Posting is anonymous, and ISPs usually

refuse to give up the names associated with IP addresses. Thus, neither the ISP nor the speaker face legal liability, and the speaker is shielded from social constraints. Consumer demand does not help; a website can support itself with only niche demand, but any internet user may stumble across the page because the message boards are searchable.

This strategy would be very effective against con cases based on the harms of internet anonymity, but not effective at all against offline impacts.

The pro may also build impact defense by arguing that the status quo internet is not complete anarchy— if the offense is severe enough, a court may subpoena an ISP to reveal the perpetrator's identity. Once they are "unmasked," the case will continue according to normal procedures. This answers lots of internet-related con arguments. Here is **evidence**:

(Eric J. Sinrod, attorney specializing in internet, tech, & communications who has argued before the Supreme Court, "Freedom of anonymous online speech has potential limits," http://www.mondaq.com/unitedstates/x/329768/IT+internet/Freedom+Of+Anonymous+Online+Speech+Has+Potential+Limits 7/23/2014)

Yes, the right to speak anonymously is within the ambit of freedom of speech safeguarded by the First Amendment to our Constitution. And courts have held that this right has been extended to Internet speech. So, are we done with the analysis? Can people say anything online without concern for repercussions? No!

To the extent speech (including Internet speech) is false and causes harm to someone else, there is a potential cause of action for defamation and recoverable damages.

The tricky part for the victim is not only proving defamation/damages, but also ascertaining the identity of the actual defendant/defamer when the online speech at issue has been anonymous (usually presented under a pseudonym). Without the ability to "unmask" the actual author of the communication, there is no point in further trying to pursue legal action. Thus, can the speaker's true identity be unmasked? It depends.

Often, the victim of alleged online defamation files a lawsuit against a "John Doe" defendant. From that defamation legal action, the victim/plaintiff then issues a subpoena to a third-party Internet Service Provider (ISP) seeking the true identity of the Doe defendant to insert into the defamation lawsuit.

The ISP usually notifies the actual online communicator of the issuance of the subpoena. The communicator who was the author of the Internet speech then has the ability to file a motion to quash the subpoena, arguing that his right to speak anonymously online would be compromised by the ISP revealing his true identity. If a motion to quash is not timely filed, the ISP then might go ahead and provide the identifying information.

When a motion to quash is filed, the battle is joined. The Internet speaker argues in favor of his anonymous speech rights, and the victim/plaintiff asserts that she has been the victim of defamation and that she will not be able to seek legal redress without obtaining the identity of the Internet speaker.

What happens next? The court is called upon to balance these important and competing interests. But how?

Courts have fashioned different tests, but the test set forth in *Highfields Capital Mgmt. L.P. v. Doe*, 385 F.Supp. 2nd 969 (N.D. Cal. 2005), is fairly representative. In that case (in which I successfully represented the Doe defendant), the court created a two-prong test:

First, it is incumbent on the plaintiff to submit competent evidence supporting each element necessary for the defamation claim (namely, falsity of the online statement and actual resulting harm).

> Second, if the plaintiff meets that initial burden, then the court has to decide whether the magnitude of harm that would be suffered by the plaintiff in the event of an adverse ruling would outweigh that of the defendant.
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> Clearly then, online communicators still have significant protections for their anonymous speech. But equally clear from the foregoing is that people cannot say whatever they want on the Internet and think that they can walk away free from all consequences. If an Internet communication is false about someone else (whether a person, organization or company), and if that false communication causes true harm, and that harm outweighs the harm of the Internet speaker's identity being unmasked, then unmasking will take place and legal action will continue to be pursued against the speaker in his true identity -- and the damages eventually awarded to the victim could be significant.
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> Free speech, and even anonymous speech, are vitally important. But there are limits -- and freedom of speech protections do not guarantee freedom to speak anonymously to the serious harm of others.

The con can respond to this type of pro impact defense in a number of ways.

One option is to argue that, because of the immaterial nature of the internet, anonymity makes it tremendously more difficult to charge someone with a crime, even if one has been committed. Here is **evidence**:

> *(Vincenzo Zeno-Zencovich, University of Rome Department of Law, "Anonymous speech on the internet," published in Media Freedom and Regulation in the New Media World (edited by A. Koltay), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487735, 1/31/2014)*
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> On the other plate we have, again, public and private interests. First of all, that of the prevention and repression of crimes. If it is impossible or extremely difficult to identify the authors, this means that the Internet is actually a lawless environment.20 What is a crime—even a hideous crime—in the material world becomes without sanction if committed on the Internet. All contemporary societies are based on a balance between individual freedom and social protection which is ensured by the law. The contract between citizens and institutions has as an implied term that certain interests will be protected and that the law will be enforced by the public authorities. The answer is clearly a question of degrees, and it is quite easy to list the areas in which everybody, in a civilized community, agrees that offences should not go unpunished. Generally speaking, therefore, there cannot be a right to anonymity when it comes to prosecuting and punishing crimes. There clearly is a grey zone which is open to debate, but this is not about anonymity, but rather whether certain behaviours should, or should not, be considered a criminal offence.
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> There are also important private interests which deserve protection—both patrimonial and non-patrimonial—and that are defenceless if whoever is considered responsible can hide behind anonymity. If one thinks of it, anonymity as a shield from private action is against the basic rules of natural law, which impose a duty not to harm others (*neminem laedere*) and to make good those who have been damaged by one's illicit behaviour. Again the debate is generally placed on the wrong perspective, which is not a case of being in favour of, or against, anonymity but of whether certain interests deserve protection, wherever and however they are violated. Insisting on a right to anonymity is simply an indirect way of asserting that those

interests are legally worthless or that, on the Internet, they can receive only very limited and exceptional protection. Obviously this can be a matter open to debate, but one has to clarify the policy reasons behind a dual legal system based on the distinction between material activity and digital activity

Another solid bet for the con is to point out that not all harms associated with anonymous speech are legally actionable. In other words, words posted anonymously may be deeply hurtful, traumatic, and harmful to those affected, but still not meet the criteria required to actually sue someone. Here is **evidence** that impacts out to human dignity:

(Brian Leiter, edited by Saul Levmore & Martha C. Nussbaum, "The Offensive Internet: Privacy, Speech, and Reputation," Harvard University Press, 2010)

I shall use the term "cyber- cesspool" to refer to those places in cyberspace-chat rooms, websites, blogs, and often the comment sections of blogs1-which are devoted in whole or in part to demeaning, harassing, and humiliating individuals: in short, to violating their "dignity." Privacy is one component of dignity-thus its invasions represent an attack on dignity. But they are not the only such affront: implied threats of physical or sexual violence also violate dignity; so too non-defamatory lies and half-truths about someone's behavior and personality, so too especially demeaning and insulting language, so too tortious defamation and infliction of emotional distress. Cyber-cesspools are thus an amalgamation of what I will call "tortious harms" (harms giving rise to causes of action for torts such as defamation and infliction of emotional distress) and "dignitary harms," harms to individuals that are real enough to those affected and recognized by ordinary standards of decency, though not generally actionable. The Internet is currently full of cyber- cesspools. For private individuals without substantial resources, current law provides almost no effective remedies for tortious harms, and none at all for dignitary harms. Dignitary harms are off-limits for legal remedy because U.S. constitutional law effectively subordinates the dignity of persons to a particular conception of

liberty. Speech, however, causes real harms (dignitary and otherwise), so much so that the only reason to think government ought not protect against such harms is that government actors have too many obvious incentives to overreach in placing restrictions on speech.

Here is some useful impact framing **evidence** for the above:

(Brian Leiter, edited by Saul Levmore & Martha C. Nussbaum, "The Offensive Internet: Privacy, Speech, and Reputation," Harvard University Press, 2010)

The harm of speech in cyberspace is sufficiently serious that we should rethink the legal protections afforded cyber speech that causes dignitary harms. Thanks to Google (and similar search engines), cyber speech tends to be (1) permanent, (2) divorced from context, and (3) available to anyone. If the law should not remedy this problem, it must be because the value of speech that inflicts dignitary harms or the value of the speech swept up in the spillover effects is such that legal regulation is not justified. As I argue below, it is not clear whether either case can be made. Let us first begin, however, with some case studies. I will quote *verbatim,* because too often academic discussion of this topic whitewashes what is really going on in the cyber-cesspools. Those easily offended-even those not so easily offended-are duly warned.

Furthermore, the con's interest in reducing anonymity may not be to figure out who to sue, but rather to discourage the harmful speech from happening in the first place. People are much more likely to behave badly when hidden by anonymity, and the social pressures of having their offline identity linked to their offensive online behavior can be a powerful deterrent. Here is **evidence**:

> *(Farhad Manjoo, tech columnist for the New York Times, "Anonymous Comments: Why We Need to get Rid of Them Once and For All," Slate, http://www.slate.com/articles/technology/technology/2011/03/troll_reveal_thyself.2.html, 3/9/2011)*
>
> That should come as no surprise. Anonymity has long been hailed as one of the founding philosophies of the Internet, a critical bulwark protecting our privacy. But that view no longer holds. In all but the most extreme scenarios—everywhere outside of repressive governments—anonymity damages online communities. Letting people remain anonymous while engaging in fundamentally public behavior encourages them to behave badly. Indeed, we shouldn't stop at comments. Web sites should move toward requiring people to reveal their real names when engaging in all online behavior that's understood to be public—when you're posting a restaurant review or when you're voting up a story on Reddit, say. In almost all cases, the Web would be much better off if everyone told the world who they really are.
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> What's my beef with anonymity? For one thing, several social science studies have shown that when people know their identities are secret (whether offline or online), they behave much worse than they otherwise would have. Formally, this has been called the "online disinhibition effect," but in 2004, the Web comic Penny Arcade coined a much better name: The Greater Internet [obscenity] Theory. If you give a normal person anonymity and an audience, this theory posits, you turn him into a total [obscenity]. Proof can be found in the comments section on YouTube, in multiplayer Xbox games, and under nearly every politics story on the Web. With so many [obscenity] everywhere, sometimes it's hard to understand how anyone gets anything out of the Web.
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> Advocates for anonymity argue that [obscenity] is the price we have to pay to ensure people's privacy. Posting your name on the Web can lead to all kinds of unwanted attention—search engines will index you, advertisers can track you, prospective employers will be able to profile you. That's too high a price to pay, you might argue, for the privilege of telling an author that he completely blows.

> Well, shouldn't you have to pay that high a price? I'm not calling for constant transparency. If you're engaging in private behavior—watching a movie online, posting a dating profile, gambling, or doing anything else that the whole world shouldn't know about—I support and celebrate your right to anonymity. But posting a comment is a public act. You're responding to an author who made his identity known, and your purpose, in posting the comment, is to inform the world of your point of view. If you want to do something so public, you are naturally ceding some measure of your privacy. If you're not happy with that trade, don't take part—keep your views to yourself.

If you plan to make this argument, it might benefit you to do some research into the psychology of the disinhibition effect.

Finally, the con might argue that Section 230 should rightfully be con ground. To do this, they would posit that enforcing liabilities against internet publishers *would* significantly reduce free speech online, but that this is justified and necessary. Moreover, they may suggest that online anonymous speech should enjoy significantly *less* protection than other forms of speech, due to its broad reach, lack of context, and ability to permanently tarnish an innocent person's reputation. Here is an excellent (but very long!) piece of **evidence** that makes all of these claims, as well as provides a detailed analysis of why there is no compelling reason to protect anonymous online harassment:

> (Brian Leiter, edited by Saul Levmore & Martha C. Nussbaum, "The Offensive Internet: Privacy, Speech, and Reputation," Harvard University Press, 2010)
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> All young children are advised at some point to remember that "Sticks and stones can break your bones, but names can never hurt you." Like many things told to young children, this isn't true. Indeed, on its face, the advice is a non sequitur: there are harms other than broken bones, and there is no reason at all to think that "names," that is, words, are not capable of causing them. To be sure, "names" do not

break bones, but humans are creatures whose lives are suffused in meaning, and these meanings constitute their sense of self and large parts of their well-being. Words may not be the unmediated cause of a fracture, but they can certainly cause humiliation, depression, debilitating anxiety, incapacitating self-doubt, and devastating fear about loss of safety, respect, and privacy. There are three standard rationales offered for permitting speech, even when it causes some harm: individual autonomy, democratic self-governance, and the discovery of the truth ("the marketplace of id eas"). I will assume that something like John Stuart Mill's "Harm Principle" should be a limitation on individual liberty, and that certain degrees of harm can override the value of speech. I will also assume (contra, perhaps, Mill) that "harms" can include psychological ones- such as dignitary harms to reputation and privacy interests, as well as tortious harms that our law does recognize. 16 Since no one contests the propriety of regulating tortious harms, I concentrate on speech that causes dignitary harms, as well as speech that is included in the spillover effects of more effective regulation of tortious harms through the abolition of Section 230 immunity for website owners. The question, in short, is what value the speech on cyber-cesspools can be said to have. If there is any legally significant difference between the virtual and actual worlds, it is that speech in the virtual world may be more likely to cause harms because of its ability to reach a wide audience stripped of relevant context thanks, in large part, to Google. Notice, to start, that cyber-cesspools, at least insofar as they target private individuals, will get no help from considerations of democratic self-governance: 17 the viability of informed democratic decision making is not at stake when an anonymous poster on AutoAdmit reports that Jane Doe has herpes or that he would like to [sexually assault her]. That means that if there is a reason not to regulate the kind of abusive speech that is the hallmark of cyber-cesspools it must come from the other two considerations: individual autonomy and/or the discovery of the truth ("the marketplace of ideas"). Let us consider the "marketplace of ideas" rationale first. Mill believed that discovering the truth (or believing what is true in the right kind of way) contributes to overall utility, and that an unregulated "marketplace of ideas" was most likely to secure the discovery of truth (or believing what is true in the right kind of way). Mill's commitment to the so -called "marketplace" is based on three claims about truth and our knowledge of it. First, Mill thinks we are not justified in assuming that we are infallible: we may be wrong, and that is a reason to permit dissident opinions, which may well be true. Second, even to the extent our beliefs are partially true, we are more likely to appreciate the whole truth to the extent we are exposed to different beliefs that, themselves, may capture other parts of the truth. Third, and finally, even to the extent our present beliefs are wholly true, we are

more likely to hold them for the right kinds of reasons, and thus more reliably, to the extent we must confront other opinions, even those that are false. For this line of argument to justify a type of speech, the speech in question must be related to the truth or our knowledge of it, and discovering this kind of truth must actually help us maximize utility. Now one might wonder whether some of the purported "truths" that cyber-cesspools proffer-- for example, the purported truth that Jane Doe has herpes-are actually truths that contribute to maximizing utility. But, from the utililtarian perspective, that is not even the right way of framing the question: for the real question is whether claims about Jane Doe's alleged herpes on Internet sites by anonymous individuals with unknown motives (it is even unknown whether they have any interest in the truth!) are likely to maximize utility. It would seem not unreasonable, I venture, to be, at most, agnostic about an affirmative answer to this question, especially once we factor in the likely harms in the event that the claim is false. But Mill, it is important to recall, did not actually accept the thesis about our fallibility in its strongest form. For Mill held that there is no reason to have a "free market" of ideas and arguments in the case of mathematics (geometry in particular) since "there is nothing at all to be said on the wrong side of the question [in the case of geometry]. The peculiarity of the evidence of mathematical truths is that all of the argument is on one side."18 This is all the more striking a posture in light of the fact that Mill is a radical empiricist, and so denies that there is any a priori knowledge: even logical and mathematical truths are a posteriori, vindicated by inductive generalizations based on past experience. On Mill's view, then, there simply would not be any epistemic case for making room for the expression of opinions on which there is no contrary point of view that could make any contribution to the truth . This point is particularly important to bear in mind when it comes to material on cyber-cesspools aimed at private individuals. Permit me to take what I hope is not a very controversial position, namely, that there actually are not two sides to the question of whether Jane Doe ought to be [sexually assaulted]. If there are any moral truths, surely all the epistemic bona fides are on just one side of this issue. In other words, the explicit and implied threats of sexual violence central to cyber-cesspools like AutoAdmit simply have no moral standing based on the "marketplace of ideas": they are in the same boat, for any Millian, as a website devoted to establishing that the square of the hypotenuse of a right triangle is equal to the product, rather than the sum, of the squares on the other two sides. But what of dignitary harms more generally, and what of the spillover effects attendant upon a legal regime in which website owners face intermediary liability?

Surely some speech that causes dignitary harms actually does facilitate the discovery of the truth, and surely much of the speech that falls within the scope of spillover effects from more effective regulation of tortious harms in cyberspace would do so as well (and some of it might even affect democratic self-governance). If we are to be genuine utilitarians, we must weigh the competing utilities and disutilities of different schemes of regulation of speech. I shall advance two claims: first, dignitary harms are much more harmful in the age of Google; and, second, spillover effects of more effective regulation of tortious harms in cyberspace will have little effect on the discovery of truth or democratic self-government. The AutoAdmit sociopath no doubt had his analogue in an earlier era: call him the Luddite Sociopath. The Luddite Sociopath could indeed tell his friends and acquaintances that Jane Doe is a "[slur]" with herpes, but there is little reason to think the law ought to provide redress, except in extreme circumstances. The reasons are worth emphasizing. The Luddite Sociopath, in the first instance, reaches hardly anyone with his hateful message. We cannot control, and would not in any case want the law to control, the thoughts of others. People may think whatever they want, however false, foolish, disgusting, or demeaning. Even when the Luddite Sociopath articulates his thoughts, the impact is minimal: a small circle of acquaintances, perhaps, hear it, and some of them, thanks to their familiarity with the Luddite Sociopath, may appropriately discount them. The harm to Jane Doe is still almost nonexistent: she is insulated both by the size of the audience and the availability to the audience of their experience with the Luddite Sociopath. Jane Doe may prefer, understandably, that no one think these thoughts or express them, but that is not a preference the law can satisfy. Suppose, now, that the Luddite Sociopath is dissatisfied with his limited audience, and with the fact that his audience generally knows a fair bit about him-for example, his propensity to rant and rave, or his misogyny, or his inability to interact normally with other people, or his membership in fringe political groups, and the like. The Luddite Sociopath wants the world at large to "know" about Jane Doe, he wants to harm Jane Doe with his words. Our Luddite Sociopath needs an intermediary who can broadcast his words far beyond any audience he can reach, and who can detach his words, and their meaning, from him so that they are free- standing meanings that supply no context for interpretation that might defuse their force. 19 The Luddite Sociopath thus sends letters to the editors of newspapers, tries to place ads in magazines, and

tries to weasel his way on to radio and cable television programs that will give him a potent forum for his message about Jane Doe. But now, of course, the law steps in and places some obstacles in his path. For the law declares that any one of these intermediaries who picks up the Luddite Sociopath's "message" about Jane Doe can be liable for defamation and infliction of emotional distress. None of these intermediaries can say, "We did not say those nasty things, the Luddite Sociopath did! " Thus, the law gives every intermediary a significant incentive to be cautious, to investigate what the Luddite Sociopath says before broadcasting it, and to look into the Luddite Sociopath's background and motivations. Notice, too, that even in the absence of intermediary liability, most of the traditional media also give weight to dignitary harms in deciding what ought to be published about private persons. In the age of blogs, Internet chat rooms, and Google, our formerly Luddite Sociopath has new intermediaries who have no current incentive to place any obstacles in his way. With the help of a chat room or blog, he can disseminate his message about Jane Doe to those who know nothing about him, and with the help of Google, the Sociopath's message can now be widely disseminated well beyond the blog or chat room to anyone with any interest in Jane Doe. Because the law, through Section 230, insulates the intermediaries from any liability, the law no longer puts any obstacles in the way of the Sociopath: no blog owner, or chat room administrator, or search engine operator, has any legal reason to make it harder for the Sociopath to express his thoughts about Jane Doe, to express them with no contextual information about the Sociopath or his target, and to do so in ways that are no longer ephemeral, but etched into the Internet's permanent memory, thanks to Google, for anyone, anywhere to discover. Both Tortious harms and dignitary harms are, in consequence, more harmful than ever before. As Internet sources gradually displace or replicate the functions of other media, the reasons for thinking that they, unlike their old media counterparts, should be exempt from familiar forms of legal regulation will seem increasingly bizarre. Let us assume, then, that Section 230 will be repealed or significantly modified. Hopefully we shall then see the application of ordinary tort law not to Internet service providers, but to the intermediaries more proximate to the harmful words: for example, blog proprietors and chat room administrators/owners. The result would unquestionably be a significant reduction in the freedom with which individuals, especially anonymous individuals, are able to speak on the Internet.

That effect would be enhanced if the law were also to provide remedies for some dignitary harms in cyberspace. There would, however, be no reduction at all in the ability of individuals to speak freely, just in their ability to exercise that purported right to speak freely in cyberspace. It is important to emphasize purported, since, as with Ciolli and Cohen's defense of AutoAdmit, appeals to "free speech" are invoked on behalf of speech that in fact enjoys no special legal or moral standing (e.g., defamation of private individuals). Repeal of Section 230 together with causes of action for some dignitary harms will undoubtedly reduce, dramatically, the number of comments sections on blogs, since most blog proprietors fail to monitor the content on their sites. Why that would be a greater loss in cyberspace than it is in the traditional media, which do not permit nearly as much unregulated anonymous selfexpression, is a question I have not seen addressed. Certainly anyone who has spent much time reading anonymous comments on blogs would not conclude that they are an especially notable repository of human wisdom, rational insight, or moral acuity. Indeed, if the entire Internet vanished tomorrow, we would still have all the traditional media and the traditional fora of communication: not just the so-called "mainstream media," but the alternative newspapers and presses, the foreign newspapers, the libraries, the scholarly periodicals, the satellite radio and the cable television, and on and on. The issue, though, is not the Internet, but only certain sites on the Internet, like blogs and chat rooms, which are the primary loci of cyber-cesspools. The world is not obviously better because of these parts of the Internet, and in many ways it is obviously worse. Prior to blogs and chat rooms and Google, female law students were not subjected to campaigns of anonymous vicious harassment accessible to thousands of other students and lawyers around the country. Prior to blogs and chat rooms and Google, it was rather harder to irresponsibly invade privacy, circulate defamatory statements, or threaten sexual and criminal violence with seeming impunity. What precisely are the contributions to human knowledge and wellbeing that are attributable solely to these aspects of the Internet, that would have been impossible without its existence in its current unregulated form?20 It is far from obvious that there are any, at least in otherwise democratic societies. The preceding considerations leave us, it seems, with only one free speech argument for not regulating cyber-cesspools: namely, the value of permitting individuals to express themselves freely. But what exactly is valuable about such expressive freedom or autonomy? Consider the idea that the value of autonomy resides not in free choice per se but in choosing wisely or valuably. 21

If autonomy or freedom per se has value, then we should think it better that Hitler chooses freely to kill the Jews of Europe than that he does so because of a chemical imbalance in his brain. But most of us think the opposite: freedom of choice, exercised poorly, has even less value than the same action performed unfreely! 22 The line of thought I am criticizing here trades on an ambiguity about the "value" of an action: between, that is, its blameworthiness (which is increased when one autonomously chooses badly) and its utility for the agent. What is really at stake is the idea that an individual is better off when he can "express" himself than if he has to "bottle up" who he is, what he feels, and so on. There may well be a type of value for the agent in his being able to express himself: Hitler feels better, one suspects, if given the opportunity to rant and rave about the Jews. But that fact leaves unanswered key questions. Is Hitler's "feeling better" a relevant criterion of utility? Can his "feeling better" be outweighed by the disutility to others? We should not conceive of utility in terms of preference-satisfaction alone, so that if Hitler's preference is to spew his venom about the Jews, then it creates utility to let him do so. Satisfying many kinds of preferences makes people worse off: the heroin addict's ability to satisfy his preference for more heroin does not add to his well-being. Even if self-expression has utility for the self that gets to express itself- however depraved or ignorant or foolish-we still need to weigh the utility of others. Let us assume the AutoAdmit sociopath gets utility, in the sense of preference-satisfaction, from his ability to express his desire to [sexually assault] Jane Doe. It surely is not plausible that this utility outweighs the harm to Jane Doe of having that message broadcast, repeatedly and widely. But in that case, we no longer have a justification for permitting such speech. I conclude that there is no clear reason to think that speech about private individuals on cyber-cesspools has any moral standing as free speech that should be protected, and there is no reason to think spillover effects of better regulation of cyber-cesspools will not be offset, many times over, by all the other avenues by which knowledge is shared and opinions expressed, both on the Internet and in the other media of communication. Legal defenses already exist against abuse of legal process, in the form of SLAPP (strategic lawsuit against public participation) suits against meritless defamation actions whose intent is to

suppress protected speech . Yet the main prophylactic against such abuse is to restrict remedies against cyber-cesspools to "private" individuals, as understood in American libel law. 23 "Private" individuals, unlike public figures, are less likely to have the resources to mount frivolous assaults on cyber-cesspools and, by the same token, speech about them is less likely to implicate democratic values or truths that really maximize utility. This is, after all, the solution we have preferred in the rest of American law. The real question is why cyberspace should be treated more protectively when it comes to tortious harms and why it should not, in fact, be treated more restrictively when it comes to dignitary harms, given how much more harmful they are in cyberspace.

Returning to the pro side, many teams will want to argue that anonymity is critical to freedom and democracy. They may point out that many of America's founding fathers chose to participate in political discussions anonymously, and that there are a number of compelling reasons why a person may want to remain anonymous when speaking about certain subjects, especially those with political significance. Here is **evidence**:

(Cheesa Boudin, Yale Law Student, "Publius and the Petition: Doe v. Reed and the History of Anonymous Speech," Yale Law Journal, pp. 2152-2154, 2011)

Anonymous publications have profoundly shaped American history going back to the colonial era. A series of essays about free speech and liberty known pseudonymously as "Cato's Letters" appeared in 1720. 50 Other colonial era examples include a series of pamphlets criticizing Tory-minded English ministers that were published in the London Political Advertiser and reprinted incolonial newspapers under the pseudonym "Junius."51 The famous pamphlet Common Sense, widely recognized for its impact on the nascent independence movement, was originally published under the simple pseudonym "An Englishman."52 The Supreme Court has recognized that anonymous forms of speech "have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest."53 While these examples do not establish the prevalence or frequency of anonymous speech in the colonial era, they

indicate its existence, acceptance, and political significance. Crucially, however, these colonial-era anonymous pamphlets and writings were not used as part of any legislative process but rather as pure speech on issues of public concern.

After independence, anonymous speech continued to play a major role in the development of national politics, yet it still did not arise in the context of legislation. Many of the Framers chose to participate anonymously54 in the debates surrounding ratification of the Constitution. The Federalist papers— now known to have been authored by Alexander Hamilton, John Jay, and

James Madison—were all signed with the same pseudonym: Publius. Justice Thomas recounts the history: "There is little doubt that the Framers engaged in anonymous political writing. The essays in the Federalist Papers, published under the pseudonym of 'Publius,' are only the most famous example of the outpouring of anonymous political writing that occurred during the ratification of the Constitution."56 In fact, Justice Thomas suggests that pseudonymous or anonymous publication was "universal."57 Certainly some opponents of ratification also engaged in pseudonymous debate under names including "Cato," "Centinel," "Brutus," "Federal Farmer," and "The Impartial Examiner."58 Yet, tellingly, none of these anonymous publications that make up much of the historical record on the ratification debates were part of the actual ratification process. The distinction between the debates and the ratification process is significant. While some of the national and local debate leading up to the state conventions was anonymous, the identities of the representatives at the conventions were public knowledge.59 The legislative process for ratification was determined by each sovereign state, in compliance with Article VII of the Constitution,60 but in no state was the ratification process anonymous or secretive.61 Thus, to the extent that the anonymity of the Federalist papers and the broader ratification history are relevant today, they seem to suggest an acceptance of anonymous speech but not of anonymous legislative processes.

More **evidence**, which also specifically defends online anonymous speech:

(Miguel Larios, "ePublius: Anonymous Speech Rights Online," Rutgers Law Record, Volume 37, 2010)

The U.S. Supreme Court has held that anonymous speech is protected under the First Amendment, and that online speech receives no less constitutional protection than any other speech.61 Courts have explicitly combined these two concepts – the right to speak anonymously and the free speech rights of those who use the Internet – to find a First Amendment right to speak anonymously online.62 Put simply, courts have recognized that anonymous speech merits protection regardless of the medium.

Increasing attempts by governmental agencies or private parties to identify particular Internet users will likely hamper innocuous online speech. Users who fear that their online identities are public knowledge will be more hesitant to contribute to the marketplace of ideas. Historically, laws infringing upon the right to engage in anonymous speech were largely ignored, including by the founding fathers, because they understood that intellectual freedom necessarily constricts when the deliverer of a message is forcibly identified.

The role of the Internet in our lives cannot be understated. With the possible exception of the printing press before it, no other invention has done more to democratize the distribution of ideas than the Internet.63 Any person may, with minimal expense, speak freely to an international audience of millions.64 Also, like the anonymous pamphlets of the past, the acceptance of online pseudonyms has contributed to the robust nature of Internet discussions by allowing speakers to freely experiment with unpopular or unconventional ideas.65

CONCLUSION The Internet is an incredible innovation comparable with the printing press. Early, strict restrictions on publications failed to prevent the spread of unorthodox ideas. The Framers knew this well, as many of them distributed their controversial thoughts in the form of anonymous pamphlets. Had the Internet been available in 1791, they likely would have taken advantage of its ability to rapidly distribute information anonymously. The right to speak anonymously is a protected and cherished right. Anonymous speech played a large role in American history and still contributes immensely to

the marketplace of ideas. Our society cannot tolerate a system of First Amendment protection that varies based on the type of media used. Today's weblog post merits the same protection as yesterday's pamphlet.

The con might respond by saying that anonymous speech actually *compromises* democracy, because it eliminates citizens' ability to determine who is speaking, and what their underlying motives might be. The following piece of **evidence** makes that argument, as well as suggests that this lack of transparency leads to totalitarianism:

(Vincenzo Zeno-Zencovich, University of Rome Department of Law, "Anonymous speech on the internet," published in Media Freedom and Regulation in the New Media World (edited by A. Koltay), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487735, 1/31/2014)

If individuals are granted—subject to certain conditions—a right to anonymity (or are not obliged to disclose their identity), is the same right valid for entities that group individuals together? Is public discourse by political or social groups regulated in the same way as that of individuals—and should it be? The answers to these questions are heavily influenced by political options. It is necessary to state clearly—in order to avoid any misunderstandings—that we are talking about democratic regimes of the western world. What may be appropriate for these can be seen in a totally different light when analysing non-democratic and / or non-western political systems.

If one looks at European constitutional tradition, anonymous political activity in the form of political parties, movements and groups appears to be contrary to its basic principles, which have been established and have evolved over the last 60 years. The excruciating experiences which brought the downfall of liberal governments in the first decades of the twentieth century have demonstrated the venomous effects of hidden and disguised political action, and how it paved the way to dictatorships in most of Europe. As a result of this lesson the most important post-war constitutions have expressly barred secret associations.13 The reasons are self-evident. If one—quite rightly—requires that government be transparent, that same requirement applies to those who wish to influence or change government. An 'open society' cannot be limited to the upper spheres, but must involve all those who wish to play a role in it.14

> An essential element of this 'open society' is the right of citizens to know who is speaking in the public arena, in order to evaluate fairly and correctly their credibility. Knowing the identity of a speaker allows us to know about their past and their relations with others, and to have an idea about their motive and purpose. Furthermore, knowing the identity of the speaker in a public arena is necessary to establish their financial sources and whether their message is authentic or simply comes from a paid piper. This concern is behind the widespread legislation that requires political parties and movements to publish their balance sheets and the sources—above a certain (generally small) sum—of their income.15 If this is true of traditional political activity, it is even more so on the Internet, where the possibility of altering people's perception of reality is extremely high: the number of contacts, the relevance of a piece of news, the creation of mirror effects. With the Internet becoming the most important arena for opinions to be discussed and formed and decisions taken, it would be paradoxical for it to be shrouded in the mist of anonymity.

The con can use the very long piece of Leiter evidence above to answer pro arguments about democracy, as well.

Cons may also want to argue that internet hate speech has no real political value, but does cause real harms. Here is a piece of **evidence** making that argument in the context of a young girl's suicide:

> *(Andrew Keen, writer on online privacy issues,"the law vs online hate speech," Christian Science Monitor, http://www.csmonitor.com/Commentary/Opinion/2008/0311/p09s02-coop.html, 3/11/2008)*
>
> The cartoon isn't as amusing as it once was. "On the Internet, nobody knows you're a dog," one Web-surfing canine barked to another in that 1993 classic from the New Yorker. Back then, of course, at the innocent dawn of the Internet Age, the idea that we might all be anonymous on the Web promised infinite intellectual freedom.

Unfortunately, however, that promise hasn't been realized. Today, too many anonymous Internet users are posting hateful content about their neighbors, classmates, and co-workers.

This isn't illegal, of course, because online speech – anonymous or otherwise – is protected by the First Amendment and by the Supreme Court's much-cited 1995 McIntyre v. Ohio Elections Commission ruling protecting anonymous speech. But is today's law adequately protecting us? What happens, for example, when anonymous Internet critics go beyond rude and irremediably blacken the reputations of innocent citizens or cause them harm? Should there be legal consequences?

The most notorious case is the cyber-bullying of Megan Meier, a 13-year-old girl from a St. Louis suburb. In 2006, Megan, a troubled, overweight adolescent, became embroiled in an intense, six-week online friendship with "Josh Evans" on MySpace. After "Josh" turned against Megan and posted a comment that, "The world would be better place without you," the girl hanged herself. Later, when it became known that the fictitious Josh Evans was Lori Drew, a neighbor and mother of a girl with whom Megan had argued, there were calls for criminal prosecution. But the St. Charles County Sheriff's Department didn't charge Ms. Drew.

Fortunately, Megan's suicide is making officials get more serious about holding anonymous Internet users accountable. Online free speech fundamentalists, no doubt, would cite the McIntyre ruling in any defense. Yet that was a ruling focusing on anonymous "political speech"; Justice John Paul Stevens's opinion for the court cited the example of the Federalist Papers, originally published under pseudonyms, as proof that anonymity represents a "shield from the tyranny of the majority" and is, therefore, vital to a free society. But such a defense doesn't work for cases like the Meier suicide, in which the anonymous speech was anything but political.

The Web 2.0 revolution in self-published content is making the already tangled legal debate around anonymity even harder to unravel. Take the case of a couple of female Yale Law School students whose reputations have been sullied on an online bulletin board called AutoAdmit. The plaintiffs had to drop Anthony Ciolli, the law student in charge of AutoAdmit, from the suit. This is because the law treats websites differently from traditional publishers in terms of their liability for libelous content.

In Section 230 of the 1996 Communications Decency Act, Congress granted websites and Internet service providers immunity from liability for content posted by third parties. So a paper-and-ink newspaper can be sued for publishing a libelous letter from a reader, but, under Section 230, Web bulletin boards such as AutoAdmit have no legal responsibility for the published content of their users. Thus the students are now pursuing the identities of their defamers independently of AutoAdmit – a near impossible task.

Such cases indicate that the Supreme Court soon might need to rethink the civic value of anonymous speech in the Digital Age. Today, when cowardly anonymity is souring Internet discourse, it really is hard to understand how anonymous speech is vital to a free society.

That New Yorker cartoon remains true: On the Internet, nobody knows you're a dog. But it is the responsibility of all of us – parents, citizens, and lawmakers – to ensure that contemporary Web users don't behave like antisocial canines. And one way to achieve this is by introducing more legislation to punish anonymous sadists whose online lies are intended to wreck the reputations and mental health of innocent Americans.

Finally, the con might want to connect arguments about hate speech and harassment to issues with sexism and gender disparity. People affected by online harassment are disproportionately women, and the staunchest defenders of absolute freedom tend to be male. The following piece of **evidence** makes the argument that, because these men are much less likely to personally experience severely disturbing harassment, they are inclined to undervalue its true impact, and therefore create inappropriate policy and legal responses:

> *(University of Chicago Faculty Law Blog, "The Internet's Anonymity Problem," summary of spoken word lecture given by the Dean of the University of Chicago Law School Saul Levmore, http://uchicagolaw.typepad.com/faculty/2008/11/chicagos-best-i.html, 11/12/2008)*
>
> A possible addition to that explanation for exceptional rules for the internet is gender disparity. The victims are disproportionately female, and the unfettered internet's most vocal defenders are mostly male. Not only are the victims mostly female, the hurtfulness of many of the comments is premised on the target's gender. Levmore implicitly acknowledged these facts through his use of examples (though he doesn't discuss it): his paradigm example was "Amy X is a slut," and "fat" and "small-breasted" were other examples. He does not press further because the vast majority of examples would be too vile for the classroom. (This is not to say all remarks are directed towards women; sometimes speakers target businesses as "cheats," and sometimes speakers target males such as, for example, Levmore himself.) Those who want the internet to be completely unregulated, on the other hand, are much more likely to be male. As a rough proxy, more than 80 percent of undergraduate engineering students are male. Those with a more technical bent are keenly aware of the benefits of a free flow of information on the internet, but--since this group is mostly male--they will undervalue the costs of antisocial behavior on the internet. Disparaging comments are less commonly directed at them, and the most harmful comments lose their meaning if directed at males. A skewed understanding of the costs and benefits translates into the policy choices that the organized internet interest group lobbies for at the expense of the diffuse potential victim group.

In response, the pro has a number of possible arguments. First, SCOTUS has ruled many times that both hate speech and anonymous speech are protected, as long as they don't fall into one of the previously-discussed exceptions (such as libel). This is because censoring speech because we find it unpleasant or hurtful creates a dangerous slippery slope, and may quash important future ideas. Furthermore, there are already laws in place to handle truly illegal activity (again, like libel). Here is **evidence** on these points:

> *(Kristian Stout, practicing attorney (JD from Rutgers) specializing in technology & cyberlaw, "Sticks & stones may break my bones, but hate speech is constitutional," https://ricochet.com/sticks-and-stones-may-break-my-bones-but-hate-speech-is-constitutional/, 2/27/20215)*
>
> Yik Yak, a controversial social media app, has colleges embroiled in debate as to the proper extents of speech on campuses. Yik Yak is a program that gives the user a "a live feed of what everyone's saying around you." On campuses around the country this can lead to predictable results when you combine adolescents, newly freed from the control of their parents, with the ability to spontaneously broadcast whatever they happen to be feeling in that moment within a 10-mile radius.
>
> As noted by one writer at LSU, the results can often be what is popularly considered "hate speech." Noting some of the truly terrible things that her fellow students feel free to share through the app, she writes:
>
> This app shows there are students on this campus who still equate black people with monkeys. There are people here who believe murder is justifiable if a transgender person doesn't reveal their biological sex before entering into a relationship. These people gleefully passed around links to a sex tape that involved an LSU student, calling her a whore while doing so.
>
> This student then issued an opinion that while "[f]ree speech is constitutionally protected[,] [h]ate speech is not." This is flatly untrue (for instance, R.A.V. v. St. Paul), but she does raise an interesting question. While colleges are not free to stop politically or personally offensive expressions of their students, are they free to prevent students from importing into campus new platforms from which students may speak?
>
> The Huffington Post ran an opinion piece on the same issue a few months ago. The author, citing similar instances on various campuses, hangs his argument's hat on the fact that Yik Yak allows for anonymous speech. In that author's opinion:
>
> [C]ollege administrations should permanently ban Yik Yak and any other forums that allows people to post comments anonymously.

He then at least has the forthrightness to call his proposal what it is: censorship. He writes:

It sounds a lot like censorship, which is quite the dirty word these days. But make no mistake – censorship is exactly what I'm advocating.

There are two issues here: first, can or should a campus ban a technological tool because it can facilitate offensive, hateful, or even extremely hurtful speech, and second, does the anonymous nature of the communication somehow change the calculus of the typical free speech argument?

In the case of Yik Yak, there will certainly be many instances where the students would be using LSU's own network for downloading and using the app. A first impulse may be to say that a school has the right to restrict outside content on their own networks. However, I suspect a viable argument could be made that the campus network constitutes some kind of limited public forum.

Under this theory, the campus couldn't discriminate against content or viewpoint directly – thus any kind of ban would have to be toward a whole class of speakers, regardless of content. I'm not certain exactly how this would look in practice, but I imagine it would be something like a ban social media apps in general, and not just ones that are offensive, or could be offensive.

The LSU student also advocates that LSU ask Yik Yak directly to turn off access to the students of its schools. Nothing immediately springs to mind as to why this would be per se unconstitutional, but it certainly strikes me as highly paternalistic with regards to the students – people who we assume are being groomed for adulthood. While this might not be unconstitutional, it certainly feels wrong, and like a policy that can lead to increasingly more restrictive speech environments on campus.

Does the anonymous nature of the communication change how we think about the speech issues? 4Chan is a well-known example of anonymous speakers who can and do say truly horrible things. Comment sections in general are frequently terrible, terrible places. There are obvious solutions to this from the content provider's perspective – i.e. the Ricochet model of requiring users to pay. However, should a college campus regard the wide-open and anonymous speech in comments and social media apps as something that justifies restricting speech? No.

The recent limitations that we see in cases like Yelp v. Hadeed Carpet Cleaning notwithstanding, the Supreme Court has consistently held that there is a right to anonymity when speaking. For instance, in McIntyre v. Ohio Elections Comm., the Court held:

'Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.' Great works of literature have frequently been produced by authors writing under assumed names. Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation

may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, 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.

In 1960, I am sure the Court had no idea that Yik Yak was coming, but the law is able to handle novel cases. While I personally doubt that a great writer will take to Yik Yak to compose his next masterpiece, that is irrelevant. The fact is, anonymous speech is protected. Importantly, such speech should be protected, because we have no idea who will use what new device or platform to create the next set of socially beneficial expressions. Just because we extremely disagree with the hateful or offensive comments – comments which might have zero intellectual value themselves – does not in any way recommend a policy of censorship.

The contours of how we deal with speech through social media and as-yet unknown future technologies are not fully described in law or society. My inclination will, perhaps predictably, be for greater freedom in these contexts. While Yik Yak may be used for extremely offensive expression, it still remains that the only people who receive that information are voluntary users of the service. Further, bodies of law already exist to handle actual harms – situations when any of the language on the platform crosses into defamatory or threatening territory.

While the speech may be unpleasant, hurtful, or even hateful, I would be disappointed if colleges enacted bans on Yik Yak and other such platforms. To get at the best set of ideas we need to unfortunately allow room for the truly terrible ones as well.

Pros can also make arguments about freedom of the press. Many of the most important stories throughout history have only become known because of anonymous whistleblowers and unnamed sources. Here is some **evidence**:

(Michelle C. Gabriel, lawyer, "Plugging Leaks: The Necessity of Distinguishing Whistleblowers and Wrongdoers in the Free Flow of Information Act", 40 Loy. U. Chi. L. J. 531, http://lawecommons.luc.edu/luclj/vol40/iss3/5, 2009)

From the Federalist Papers33 to the Pentagon Papers, 34 some of the greatest pieces of journalism have been the product of anonymous sources and authors. For this reason, freedom of the press has long been linked to journalists' ability to guarantee confidentiality to their sources. 35 One of the first investigations surrounding an anonymous source was a criminal case that took place before the First Amendment was even written. In 1735, printer John Peter Zenger was jailed for refusing to reveal the authors who published criticisms of the Crown Governor of New York in the New York Weekly Journal.36 When the governor could not learn the identities of his critics, Zenger went to jail for eight months for seditious libel. 37 He was eventually acquitted, but his case stands out as an early example of the link between free press and source confidentiality.

During the Revolutionary period, members of the Continental Congress blocked a Massachusetts delegate's attempt to force the printer of the Pennsylvania Packet to reveal the identity of an author who criticized the Congress in his newspaper. 38 A representative from Virginia, Merriweather Smith, challenged the efforts of the Massachusetts delegate, saying that "[w]hen the liberty of the .Press shall be restrained ... the liberties of the People will be at an end." 39 Other representatives agreed that source confidentiality was essential to a free press, and neither the printer of the paper nor the author of the article was forced to face Congress.40 That same year, a similar situation played out in the New Jersey legislature, which voted not to

force the printer and editor of a newspaper to reveal the identity of an author who anonymously published an attack on the governor.

More **evidence**:

> *(Michelle C. Gabriel, lawyer, "Plugging Leaks: The Necessity of Distinguishing Whistleblowers and Wrongdoers in the Free Flow of Information Act", 40 Loy. U. Chi. L. J. 531, http://lawecommons.luc.edu/luclj/vol40/iss3/5, 2009)*
>
> In the world of elite journalism, there is no question that anonymous sources are essential to groundbreaking stories. Under the mask of anonymity, confidential sources have revealed everything from government scandals to steroid use by professional athletes.1 Some of these sources would lose their jobs if their names were revealed with the stories they leak.2 Some simply prefer to keep their identity a secret. Regardless of the circumstances, these sources rely on journalists' promises of confidentiality. 3

Next, here is some **evidence** (from the same actor) to help the con respond to freedom of the press arguments. It points out that shield laws do not apply to anonymous sources with malicious intent:

> *(Michelle C. Gabriel, lawyer, "Plugging Leaks: The Necessity of Distinguishing Whistleblowers and Wrongdoers in the Free Flow of Information Act", 40 Loy. U. Chi. L. J. 531, http://lawecommons.luc.edu/luclj/vol40/iss3/5, 2009)*
>
> As discussed above, some will claim that an exception that requires disclosing the identity of anonymous sources will have a chilling effect on the press. 140 However, a federal shield law should not protect information that is leaked with malicious intent that does not meet the "public value" test in the proposed exception. A source that unlawfully discloses information with malicious intent is not engaging in behavior that a shield law would want to encourage and should not receive protection under the law. 141 First Amendment jurisprudence makes exceptions for malicious behavior and there is no reason

why sources who engage in such behavior should be protected under a federal shield law. For instance, protection is not afforded for speech that would incite imminent lawless action, 142 or speech that is considered libelous. 143 Not all speech receives protection under the First Amendment, and it follows that not all anonymous leaks should receive protection under the Free Flow of Information Act, especially when the information is leaked with malicious intent.

Moreover, including an exception for malicious leaks in the Free Flow of Information Act is consistent with exceptions to other privileges. Clients who consult attorneys about how to commit a "perfect crime" are not protected by attorney-client privilege, 144 and a patient who consults a doctor about how to defraud his or her insurance company is not protected by doctor-patient privilege. 145 This is the case regardless of whether the doctor or the lawyer knew the patient's or client's intent at the time of the consultation. 146 As is the case with doctors' and lawyers' privileges, reporters' privilege is not intended to encourage anonymous sources who leak information with malicious intent.

More con **evidence**, saying that protections for anonymous sources often along wrong-doers to manipulate these privileges to hide their own transgressions:

(Michelle C. Gabriel, lawyer, "Plugging Leaks: The Necessity of Distinguishing Whistleblowers and Wrongdoers in the Free Flow of Information Act", 40 Loy. U. Chi. L. J. 531, http://lawecommons.luc.edu/luclj/vol40/iss3/5, 2009)

First Amendment purists will object to the proposed exception, arguing that Congress should literally "make no law ... abridging the freedom of speech or the press." 9 1 However, in recent years, malicious leakers have abused journalists' guarantees of anonymity, and some have used journalists' privileges to perpetrate their own wrongdoings. 92 These are far from the intended

> beneficiaries of federal shield legislation. By including an exception for malicious wrongdoers, the statute would also have a desirable chilling effect on anonymous sources.[93] It would dissuade leakers from sharing information with journalists in an attempt to further their own agendas or perpetrate their own wrongdoings. [94]

As one last note, no matter which side you are on, remember to weigh your impacts! This resolution is *not* asking *whether* anonymous speech is constitutionally protected, but rather whether those protections are *a good or bad idea*. You are highly unlikely to win that either side has *no* good arguments in their favor—everyone agrees free speech is important, and no one likes being harassed or violated. Rather, the way to win these debates is to successfully convince your judge that your side offers the best chance of appropriately *balancing* the *competing interests* of free speech and societal interests. This means you will need to be directly refuting your opponents' arguments and explaining how your arguments interact. Your speeches should contain plenty of "even if they win [X], we should still win the debate because [Y]" statements.

That concludes our introduction to the basics of the 2015 Nationals PF topic. You should be ready to build some solid cases. Don't forget to thank Debate Central when you're up on that stage accepting your championship!

As always, you can also email completed cases to **Rachel.Stevens@NCPA.org** for a free, confidential case critique! We'll get them back to you, with personalized comments, as soon as we can.