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ANONYMITY, SIGNALING, AND SILENCE AS SPEECH

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SPEECH

Paul Horwitz*

INTRODUCTION

Martin Redish's contribution to this Symposium, *Freedom of Expression, Political Fraud and the Dilemma of Anonymity*, is a characteristically thought-provoking work. Redish's contribution is literally unsettling: it aims to raise doubts about the merits of anonymity as a First Amendment right, despite the seemingly well-established status of this right.¹

Professor Redish writes in a typically careful and thoughtful fashion, zeroing in on the danger posed by anonymous speech that is politically fraudulent – that is, anonymous speech that amounts to a “conscious effort to deceive the public solely for political or ideological purposes.”² The danger, Redish writes, is that stripping the identity of the speaker from the speech prevents listeners from properly judging that speech and, in appropriate cases, disregarding it for reasons of bias, inaccuracy, and so forth. He writes that “[i]t is a reality of communication that who the speaker is will, in many instances, appropriately affect a listener's perception of and judgment about the expression.”³ Ultimately, he argues that the “abolition of the right of expressive anonymity is fully justified as a prophylactic means of deterring and diluting the serious First Amendment harms caused by political fraud.”⁴

* Associate Professor, University of Alabama School of Law. I am grateful to Austin Sarat for organizing the symposium, to Martin Redish for his provocative paper, and to Shahar Dillbary for offering comments on a draft of this response.

¹ See, e.g., *Talley v. California*, 362 U.S. 60 (1960); *McIntyre v. Ohio*, 514 U.S. 334 (1995); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999); *Watchtower Bible & Tract Soc'y v. Vill. Of Stratton*, 536 U.S. 150 (2002).

² Martin H. Redish, *Freedom of Expression, Political Fraud and the Dilemma of Anonymity* (manuscript at 3).

³ *Id.* (manuscript at 6); see also R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 Am. Econ. Rev. 384, 386 (1974) (“It is difficult to know how much credence to give to information or to check on its accuracy if one is ignorant of the source.”).

⁴ Redish, *supra* note __ (manuscript at 36).

Professor Redish's contribution adds complexity to an area of First Amendment doctrine – the right to speak anonymously – that, as he notes, has received too little attention from mainstream First Amendment scholarship.⁵ This is a fair claim. Still, other bodies of legal scholarship *have* made useful contributions to at least some of the issues raised by Professor Redish. In this commentary, I use these cognate lines of scholarship to make two central claims and a couple of subsidiary ones.

First, I hope to contribute to Professor Redish's project by adding another layer of complexity to the picture of anonymous speech that he offers. Drawing on a substantial body of scholarship concerning Internet speech and intellectual property law, I want to suggest that it is not enough to focus on the general category of "anonymous" speech. Instead, we must break this category down into at least two sub-sets: *anonymous* and *pseudonymous* speech. I will show that even if we accept Professor Redish's account of the dangers of anonymous politically fraudulent speech, our concerns and our prescriptions may vary depending on what kind of "anonymous" speech we are talking about.

Second, drawing on the literature on signaling theory, I want to offer a more direct critique of Professor Redish's argument. Although he varies somewhat in his description, Professor Redish often characterizes anonymity as a "sub-category of the right not to speak."⁶ Signaling theory, however, suggests that the decision to speak anonymously sends an important message about the reliability of that speech. Thus, instead of viewing anonymity as a form of silence, we should view anonymity (and pseudonymity) as a highly expressive form of speech – one whose signals about the reliability of the speaker may diminish or obviate concerns about the harms of anonymous speech, and that may thus reduce or eliminate the need for the more radical solution that Professor Redish tentatively suggests: the elimination of anonymity.

In addition to calling Professor Redish's argument into question, the signaling approach has two secondary

⁵ See *id.* (manuscript at 9) (noting that "relatively little of [the] theoretical inquiry [into the First Amendment] has focused on the basis for an individual's right not to express himself"); see also *id.* (manuscript at 8) (suggesting that his focus on the relationship between anonymity and political fraud is entirely novel).

⁶ *Id.* (manuscript at 13).

implications for the jurisprudence of anonymous speech. First, contrary to Professor Redish's argument, it is impossible to effectively divide "First Amendment anonymity" into separate categories of "expressive anonymity and associational anonymity."⁷ Professor Redish wants to remake doctrine in the former category while leaving the right to anonymous association untouched. I will suggest that the two are actually inseparable; indeed, protecting associational anonymity helps maintain the preconditions under which anonymous speech serves a vital signaling function. Second, my approach underscores the well-recognized tension between the Supreme Court's First Amendment doctrine protecting anonymous speech, and its more skeptical view of anonymity in the area of campaign finance regulation. Although a full treatment of that issue is beyond the scope of this response, I tentatively suggest that the Court's famously troubled doctrine in the campaign finance area ought to be modified, justified on stronger grounds, or abandoned altogether.

I. ANONYMITY AND PSEUDONYMITY

I begin with a needed clarification. Professor Redish writes in general terms about "the right of anonymity," which he defines as "the right not to reveal one's identity when exercising one's affirmative right to express oneself."⁸ If we are to properly understand and examine the "dilemma of anonymity," however, it may be necessary to take a more fine-grained approach to the general category of anonymous speech. Happily, there is a burgeoning legal literature dealing with the taxonomy of anonymous speech, much of it stemming from Internet law and some of it stemming from intellectual property law.⁹ That literature may help provide further clarity about what is at stake when we consider "anonymous" speech.

⁷ *Id.* (manuscript at 7).

⁸ *Id.* (manuscript at 1).

⁹ *See, e.g.*, Lyrisa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 *Notre Dame L. Rev.* 1537 (2007); Carole Lucock and Michael Yeo, *Naming Names: The Pseudonym in the Name of the Law*, 3 *U. Ottawa L. & Tech. L.* 53 (2006); Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 *Notre Dame L. Rev.* 1377 (2005); Tal Z. Zarsky, *Thinking Outside the Box: Considering Transparency, Anonymity, and Pseudonymity as Overall Solutions to the Problems of Information Privacy in the Internet Society*, 58 *U. Miami L. Rev.* 991 (2004);

For present purposes, the crucial distinction is between *anonymity* and *pseudonymity*.¹⁰ Anonymous speech can be understood in a straightforward fashion as “a message that provides the recipient with no information . . . concerning the identity of the message originator.”¹¹ Genuinely anonymous speech provides no clues as to who is speaking. A commentator on a blog post on the Internet who chooses to post as “anonymous,” for example, gives us no background information by which to judge the credibility of his or her remarks. It is often possible for other readers, or at least the manager of the blog, to determine something about the commentator’s identity, such as the originating address from which the comment is sent. For now, however, assume the speech is perfectly anonymous – as it may be, if the message is sent from a remailer or otherwise stripped of any identifying information.¹² Perfectly anonymous speech would appear to raise in the starkest terms the concerns voiced by Professor Redish. It is speech that gives its recipient no clue as to who is speaking, and thus gives the recipient no cues that might “affect [the] listener’s perception and judgment about the expression.”¹³

We can contrast anonymity with its “close cousin, pseudonymity.”¹⁴ Pseudonymous speech is speech that “is anonymous,” but that “contains some information about the identity of some cognizable entity that is the originator of the message.”¹⁵ It is thus a subset of anonymity,¹⁶ but with the crucial difference that it contains some identifying information

David G. Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, 1196 U. Chi. Legal F. 139 (1996); Lee Tien, *Who’s Afraid of Anonymous Speech?* McIntyre and the Internet, 75 Or. L. Rev. 117 (1996); Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 Yale L.J. 1639 (1995).

¹⁰ David Post, on whom much of the following discussion is drawn, adds a third relevant element: traceability, the ability to trace the identity of an anonymous or pseudonymous speaker. See Post, *supra* note __, at 150-51. I leave the issue of traceability for the most part to one side.

¹¹ *Id.* at 149.

¹² Of course, even perfectly anonymous speech of this sort says *something* about the identity of the speaker; it tells us, at least, that the speaker is someone who was willing to go to the effort and expense of maintaining perfect anonymity. I will address this aspect of perfectly anonymous speech below, and it need not detain us for now.

¹³ Redish, *supra* note __ (manuscript at 6).

¹⁴ Post, *supra* note __, at 142.

¹⁵ *Id.* at 152.

¹⁶ See *id.* at 154.

about the speaker. Some, but not all, of the speakers that have been discussed by the courts as examples of anonymous speech are thus actually pseudonymous speakers: Publius, for example, the pseudonym for the authors of *The Federalist*, or “Concerned Parents and Taxpayers,” the pseudonymous author of the leaflet that was in fact written and distributed by Margaret McIntyre.¹⁷

Pseudonymous speech must be further divided into a number of categories. Consider the following three matched pairs. A pseudonym can be non-misleading, in the sense that it conceals the author’s identity but does not attempt to misdirect its recipients (for instance, the unhelpful pseudonym “X”), or it can be misleading, in the sense that the author uses a name that affirmatively attempts to cause recipients to make inaccurate assumptions about the speaker’s identity (for example, a pro-drilling group that calls itself “Citizens for a Clean Earth,” or a white male writer who comments on the Internet under the name “blackwoman”).¹⁸ A pseudonym can be used on one occasion only, or it can be part of a continuing series of communications. Finally, and relatedly, a pseudonym can be constant, in the sense that it is used by the same speaker across a range of continuing communications, or it can be shifting, in the sense that the speaker chooses a different pseudonym every time she speaks. And we must add one further detail. Both pseudonymous and anonymous speech can be mediated or unmediated. In some cases, no one will know who the speaker is. In other cases, the speech is “published through the intermediation of a publisher who is likely to know the speaker’s identity.”¹⁹

Both the distinction between anonymous and pseudonymous speech and the further distinctions I have offered here significantly affect Professor Redish’s arguments against anonymous speech. Again, Professor Redish’s basic argument is that speaker identity can be helpful in evaluating the recipient’s judgment about the accuracy, reliability, and potential bias of a particular speech act, and thus that the “abolition of the right of expressive anonymity is fully justified as a prophylactic means of deterring and diluting the serious

¹⁷ See *McIntyre*, 514 U.S. at 337.

¹⁸ See Redish, *supra* note __ (manuscript at 8) (drawing this distinction).

¹⁹ Lidsky & Cotter, *supra* note __, at 1567.

First Amendment harms caused by political fraud.”²⁰ But the merits of this argument will vary significantly depending on the precise nature of anonymous speech that is involved.

Genuinely anonymous speech, affirmatively misleading pseudonymous speech, and single-occasion pseudonymous speech all seem to fall within the scope of Professor Redish’s concerns. But that hardly accounts for all, or even most, pseudonymous speech. Some pseudonymous speech has accurate descriptive value: a speaker who properly labels himself “A Medical Professional” provides at least some information that might help readers evaluate the credibility of his comments on medical issues. Other pseudonyms may be largely unhelpful in and of themselves; “Publius” is an example. But if that pseudonymous speaker engages in a continuing series of communications over time, her speech will take on common characteristics that have some attributional value, and readers will be able to evaluate the trustworthiness and credibility of her pseudonymous communications by judging them against the background of all she has already said. Readers of *The Federalist* were surely in a different position in judging *Federalist* #85 than they were in judging *Federalist* #1, because they had a substantial record against which to judge Publius’s arguments.

Indeed, a pseudonym can ultimately take on every bit as much meaning as an actual name. As Laura Heymann observes, “there is no difference in the reader’s perception of authorship between ‘Mark Twain’ and ‘John Grisham,’ even though the former is a pseudonym for Samuel L. Clemens and the latter is, presumably, the author’s true name.”²¹ A pseudonymous speaker who maintains a constant identity can accumulate “reputational capital” in that name over time.²² That capital can accrue or diminish depending on the content of the speech. A pseudonymous speaker who generally shows herself to be trustworthy over time can earn as much or more credibility than a speaker who uses her actual name; conversely, a pseudonymous speaker who engages in political fraud or reveals an underlying ideological agenda can be discounted if she uses the same pseudonym on subsequent occasions.

²⁰ Redish, *supra* note __ (manuscript at 36).

²¹ Heymann, *supra* note __, at 1396.

²² Post, *supra* note __, at 142.

Finally, whether an anonymous or pseudonymous speaker is speaking in a mediated or unmediated fashion may also affect the weight of Professor Redish's arguments. Even an unmediated pseudonymous speaker, we have seen, may accumulate reputational capital in a way that helps us evaluate his speech. But some anonymous speakers are mediated; some intermediary is aware of their real-world identity. If that intermediary is trustworthy or cares about his own reputation, there is less reason to discount the reliability of the pseudonymous speaker. Thus, if a reliable publisher vouches for the credibility of a pseudonymous author and will suffer a reputational loss if that author commits political fraud, then we have reason to believe the publisher will filter out bad pseudonymous speech.²³

In sum, I suggest that Professor Redish needs to further refine the categories of "anonymous" speech that he discusses. Anonymity is too blunt a tool to be useful for legal analysis. Pseudonymous speech is not necessarily the same thing as anonymous speech, and even pseudonymous speech can vary greatly in its credibility and in the reader's ability to evaluate it: "Not every pseudonym, so to speak, is a 'Jane Doe.'"²⁴ If, as he suggests, Professor Redish is concerned with weighing the costs and benefits of restrictions on anonymity,²⁵ then these distinctions will require us, and help us, to engage in a finer-grained balancing of the costs and benefits of this sort of speech.²⁶

²³ See Saul Levmore, *The Anonymity Tool*, 144 U. Pa. L. Rev. 2191, 2201-02 (1996); see also Clayton P. Gillette, *Reputation and Intermediaries in Electronic Commerce*, 62 La. L. Rev. 1165 (2002).

²⁴ Lucock and Yeo, *supra* note __, at 93.

²⁵ Redish, *supra* note __ (manuscript at 8).

²⁶ I should note in fairness that these arguments are directed at the initial draft of Professor Redish's symposium paper. At the symposium itself, Professor Redish made clear that he recognized some of the distinctions I have discussed here. His prescriptions were also more closely tailored at the oral delivery of his remarks: he suggested, somewhat contrary to the thrust of his initial paper, that he would permit absolutely anonymous speech, including the use of pseudonyms such as "Publius," on a "buyer beware" theory, while still prohibiting the use of false or misleading pseudonymous political speech. I welcome his clarifications. For reasons I pursue below, however, I think they may significantly undermine his positive case for prohibiting any forms of anonymous speech. For now, it is simply worth noting that if, as his paper suggests, Professor Redish's proposals involve a balancing of the costs and benefits of anonymous political speech, the apparently limited scope of his proposal also suggests that he can put fewer gains into the scale when engaging in that cost-benefit analysis.

II. ANONYMITY AS SIGNAL

The discussion so far has been clarifying rather than critical. It suggests some additional factors that may help evaluate Professor Redish's argument and its applicability to particular situations, but it does not criticize his underlying conclusion about the dangers of anonymous speech. In this section, I want to offer a more directly critical view of Professor Redish's argument in favor of abolishing a right of expressive anonymity. As with the last section, I shift the ground from general First Amendment theory, which is the terrain on which Professor Redish stands, by identifying the contribution that another strand of legal scholarship may make in considering the issue of anonymous speech. That field, signaling theory, has been employed in a rich legal literature. One of its leading practitioners is Eric Posner, and I will draw primarily on his work here.

Posner, who is himself drawing on a rich literature in economics and game theory, offers signaling as an account that helps explain the mechanisms of cooperation in repeated interaction between two or more parties. Imagine two "types," he says: a "good" or cooperative type with a low discount rate, and a "bad" or opportunistic type with a high discount rate.²⁷ In seeking a partner for repeated interactions, a party with some interest in long-term cooperation would prefer a good type. In order for good types to distinguish themselves from bad types, they send signals. One signal "is to incur large, observable costs prior to entering a relationship."²⁸ By incurring such costs, the good type signals that he has a low discount rate – that he is interested in a long-term investment. For example, a bank might signal potential investors by building expensive headquarters; this signals that the bank is a good type "because only good types can reap high enough future payoffs to recover their costs."²⁹ Posner argues that "any costly action can be a signal, that is, a mechanism for establishing or preserving one's reputation."³⁰ These signals, he suggests, include many of the norms of public interaction –

²⁷ Eric A. Posner, *Law and Social Norms* 18 (Harvard University Press, 2000).

²⁸ *Id.* at 19.

²⁹ *Id.* at 21.

³⁰ *Id.* at 24.

manners, dress, business norms, gift-giving, courtship rituals, and others – that form the stuff of daily life. Signals thus form and constitute our social norms.³¹

This is a decidedly brief description of signaling theory, and I have left out the criticisms that have been raised against it,³² but it should suffice for our purposes. The relevance of signaling theory is that it suggests that the type of speech one engages in – attributed, anonymous, or pseudonymous – can itself be a sort of signal.³³ This insight suggests itself, albeit in reverse fashion, if one considers the standard justifications for anonymous speech. As the Supreme Court noted in *McIntyre*, “[t]he decision in favor of [anonymous speech] 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.”³⁴ In short, attributed speech is costly. A speaker who attaches her name to particular speech acts incurs all the potential costs of identifying herself, such as condemnation or retaliation. Thus, a willingness to attribute speech to one’s own true identity is a form of signaling mechanism. It alerts potential recipients of that speech that the speaker is willing to be held accountable for his speech. Incurring this cost thus signals that the speaker should generally be held to be more likely to be a trustworthy and reliable participant in ongoing public dialogue.

Conversely, anonymous speech can be another form of signal: it can alert the recipient of the speech that the anonymous speaker is more likely to be a “bad” type. Such a speaker, by cloaking himself in anonymity, signals his unwillingness to incur any costs for his speech. The *McIntyre* Court was surely right to say that there are many plausible reasons why even a good person might choose to speak

³¹ See *id.* at 22-27.

³² For some representative criticisms, see, e.g., Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner’s Law and Social Norms*, 36 U. Rich. L. Rev. 367 (2002); Kristin Madison, *Government, Signaling, and Social Norms*, 2001 U. Ill. L. Rev. 867 (reviewing Posner, *supra* note ___).

³³ For discussions of the relationship between speech, including anonymous speech, and signaling, see, e.g., Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 Nw. U. L. Rev. 1667 (2008); Steven A. Hetcher, *Cyberian Signals*, 36 U. Rich. L. Rev. 327 (2002).

³⁴ *McIntyre*, 514 U.S. at 341-42; see also Redish, *supra* note ___ (manuscript at 2) (anonymous speech protections are “designed to avoid chilling the speaker’s willingness to contribute fully and frankly to public discourse without fear of retribution from either government or private power centers”).

anonymously. Nevertheless, the decision to speak anonymously signals that the speaker has a high discount rate: he is unwilling to invest in his long-term public reputation by incurring the immediate costs of attribution. Whether or not he has legitimate reasons to do so, such a speaker signals that listeners should be more suspicious of the reliability and trustworthiness of this speaker, and less willing to invest in repeated public dialogue with him.

To complete the picture, a variety of signals can be sent by pseudonymity, depending on the particular kind of pseudonymous speech. A pseudonymous speaker who uses a name that could be traced to his actual identity, or who uses the same pseudonym in repeated interactions, or who puts his identity in the hands of a trusted intermediary, is sending a particular level of signal about his reliability by incurring at least some potential reputational and other costs. By contrast, a pseudonymous speaker who uses an utterly unrevealing name, or a misleading one, or who engages in pseudonymous speech, such as a one-time communication or the use of shifting pseudonyms, suggests a higher discount rate and thus less reliability as a speaker.³⁵

In short, attributed, anonymous, and pseudonymous speech, as viewed through the lens of signaling theory, can be seen as sending a variety of signals about the reliability or accuracy or good character of the speaker, depending on the precise nature of the attributional choice made by the speaker. They are all forms of signals sent to the universe of potential listeners, and will be valued or deprecated accordingly by their recipients.³⁶

³⁵ To be sure, one may not know at the outset that a pseudonymous speaker is using shifting pseudonyms, or a misleading pseudonym, or is engaging in only a one-shot communication. But this presents little difficulty, since we can begin with the assumption that the reliability of *any* pseudonymous speaker starts out at a low level, and only increases as it becomes clear that the pseudonymous speaker is in fact willing to incur costs, such as if the speaker continues using the same pseudonym. In practice, this is little different from attributed speech: we are likely to attach less value to attributed speech the first time a particular person speaks, and to attach more value to the speech as we become convinced of that person's reliability and persuasiveness.

³⁶ A somewhat similar point is made, although not in terms of signaling theory, by Larry Ribstein. See Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 *Wm. & Mary L. Rev.* 185, 194-95 (2006) ("Amateur journalists . . . can reduce [] private costs [such as reputational damage] by not identifying themselves. Indeed, current technology probably allows bloggers

This account, in my respectful view, raises serious difficulties for Professor Redish's account of anonymity as a First Amendment right. Although he is very cautious on this point and should not be read as making this point too starkly, Professor Redish tends to view anonymity as "a sub-category of the right not to speak."³⁷ Elsewhere, he describes it as "[a] traditionally recognized sub-category of the constitutional guarantee of silence."³⁸ Although I do not think this conclusion significantly drives Professor Redish's analysis, for some readers the treatment of anonymity as a form of silence rather than a form of speech may dilute the perceived interest in preserving anonymous speech.

On the signaling account of anonymous speech that I have offered here, however, it is inaccurate to describe anonymous speech as a form of silence or not speaking. Instead, this account leads us to view *anonymity as a form of speech*. This is somewhat similar to the Court's claim in *McIntyre* that "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."³⁹ In other words, anonymity, as part of the suite of editorial decisions about what to include or exclude from a particular speech, is itself a speech act, and regulation of that decision is a form of content-based regulation. But my focus is somewhat different here.

The choice of attribution is a choice about what level of costs the author is willing to incur, and thus what kind of signal he is willing to send to readers. By using his real name, a speaker incurs high costs and send a signal about his substantial reliability and his willingness to be held accountable for his speech. By using a consistent pseudonym, a speaker sacrifices some transparency and thus trustworthiness (more so if the pseudonym is misleading, although that advantage will fade over time as the pseudonym's body of writing becomes familiar), but still incurs some costs by using a constant name that will accrue positive or negative reputational capital. On the other hand, an anonymous

who are willing to pay the costs of total anonymity to avoid any constraints on their activities, including [] reputational constraints However, anonymity also reduces the private benefits . . . and therefore the incentive to blog that most amateur journalists have.").

³⁷ Redish, *supra* note __ (manuscript at 9).

³⁸ *Id.* (manuscript at 1).

³⁹ *McIntyre*, 514 U.S. at 348.

speaker, or one with a shifting pseudonym, sends a much stronger signal that she has a high discount rate and should be treated with great skepticism. Each of these signals positively communicates something about the author; each of them must therefore be treated as an aspect of speech, not silence.

Recall again that Professor Redish's argument in favor of abolishing expressive anonymity is, with suitable caution, based on a balancing of the "expressive costs" and "expressive benefits" of anonymity, particularly in the context of political fraud.⁴⁰ If that is so, then it should be clear by now that a description of anonymity and pseudonymity as signaling acts or speech acts may alter the cost-benefit calculus in a way that significantly obviates the need to eliminate anonymity. Even if political fraud is harmful, and even if anonymity incentivizes or contributes to this harmful sort of speech, the signaling effect of various attribution choices also serves as a meaningful safeguard against the worst of these harms. Listeners will respond to political or other speech with varying degrees of trust depending on whether the speaker is signaling through attribution that he is a "good" type or a "bad" type or falls somewhere in between. A speaker who uses honest attribution will be treated with a greater level of trust, at least as a default; a speaker who uses a consistent pseudonym similarly can build a level of trustworthiness by incurring at least some costs for speaking; a purely anonymous speaker, or a one-shot speaker, attributed or otherwise, or one who uses a shifting pseudonym, sends a different kind of signal and will receive less trust.

We might still worry about "false" or misleading pseudonyms,⁴¹ but that concern is not as great as it may seem. Since *all* one-shot speakers will likely be treated with less trust because they have neither incurred significant costs nor accumulated reputational capital, they will *all* be discounted by their listeners. A misleading pseudonym that is used on a consistent and repeated basis will already be treated more skeptically than fully attributed speech. Its repeated nature also means the speech advanced by this speaker will ultimately be subject to critique and disproof. A speaker who labels

⁴⁰ Redish, *supra* note __ (manuscript at 8).

⁴¹ Recall that Professor Redish's oral remarks at the symposium suggested he might ultimately limit his willingness to prohibit anonymous political speech to this narrow category. See *supra* note __.

himself “Environmental Man,” but who writes regularly against a host of environmental laws, may eventually be disbelieved or discredited in the eyes of his readers.

The only remaining concern in this category may be the case of speakers who falsely use a *non*-pseudonymous name: for example, a representative of the Republican Party places a scandalous advertisement that is falsely labeled as coming from a particular Democratic Party candidate. In that case, however, the real candidate already has ample incentive to monitor for and respond to this kind of outright lie, and will likely have recourse to existing civil remedies. We hardly need remake First Amendment doctrine concerning anonymous speech for such marginal reasons.

Thus, with respect to political fraud or any other kinds of speech, the signaling effect of various kinds of attribution choices, including the choice to speak anonymously or pseudonymously, will send meaningful measures about the reliability of that speaker. We *will* know something about “who the speaker is” for purposes of “judging the value, completeness of sincerity” of that expression.⁴² We may not know everything about the speaker, but her attribution choices will give us enough signals to assign different levels of trust or distrust to various categories of speaker. For this reason, many cases of anonymously or pseudonymously authored political fraud are unlikely to be given much credence. Once we view anonymity as signal and speech, it is even more doubtful that we ought to sacrifice the potential benefits of anonymity because of the feared costs of political fraud associated with anonymity.⁴³

⁴² *Id.* (manuscript at 32). Of course, there are other criticisms of the argument that identity is important in evaluating speech because of what it tells us about the reliability of the speaker – a line of argument that Daniel Solove labels the “judgment and trust critique.” Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 Duke L.J. 867, 975 (2003). For criticisms of the “judgment and trust critique” of anonymity, see, e.g., *id.* at 1032-64; Heymann, *supra* note __, at 397-98; Tien, *supra* note __, at 145 (arguing that “the very utility of reputation as a proxy for judgment also carries costs for speech in the form of bias,” since we may overvalue speech by people we like and respect and undervalue speech by people we dislike or do not know). Although I find these arguments powerful, and believe they also support the case against Professor Redish’s proposal, they have been made well elsewhere, and I leave them to one side here.

⁴³ For similar arguments, see, e.g., Tien, *supra* note __, at 143 (noting that the ability to evaluate the credibility of anonymous speech will be greater where we are

III. THE PRECONDITIONS FOR ANONYMOUS SPEECH AS SIGNAL AND THE DISAGGREGATION OF EXPRESSIVE AND ASSOCIATIONAL ANONYMITY

The argument I offered in the last section has an important subsidiary implication that again suggests a line of criticism of Professor Redish's article. The subject of this criticism is his suggestion that "First Amendment anonymity can appropriately be sub-divided into two categories: expressive anonymity and associational anonymity."⁴⁴ Our discussion so far has concerned expressive anonymity; associational anonymity concerns "private associational choices that an individual makes, whether grounded in ideological, political, moral or religious considerations."⁴⁵

The right of associational anonymity has been upheld by the Supreme Court in a series of cases, many of them dating from the prime of the civil rights movement. In those cases, the Court generally rejected state efforts to force groups such as the NAACP to reveal the names of its members, on the grounds that mandatory disclosure of the members' identities would expose them to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."⁴⁶ Professor Redish argues that "it may well be appropriate to draw a distinction between expressive and associational anonymity"⁴⁷ for purposes of considering what to protect and what to reject, because expressive anonymity "most

dealing with "an extended thread of discussion" rather than "one-shot messages"); Lidsky & Cotter, *supra* note __, at 1539 ("[A]udiences are likely to discount the value of nonattributed speech, thus mitigating some (but not all) of anonymous speech's potential harm"), 1588 ("Any regulation of anonymous speech should begin with the presumption that information consumers are likely to discount unattributed speech and to use indicia other than author identity to judge its reliability. In other words, regulation of anonymous speech should start with the assumption that the audience itself will be able to dissipate much of the harm of anonymous speech."); Richard M. Cardillo, Note, *I Am Publius, and I Approve This Message: The Baffling and Conflicted State of Anonymous Pamphleteering Post-McConnell*, 80 Notre Dame L. Rev. 1929, 1955 (2005) ("Readers understand that anonymous advocacy may have dubious origins and will accord it an appropriate level of skepticism.").

⁴⁴ Redish, *supra* note __ (manuscript at 7).

⁴⁵ *Id.*

⁴⁶ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958); *see also Bates v. Little Rock*, 361 U.S. 516 (1960); *Shelton v. Tucker*, 364 U.S. 479 (1960).

⁴⁷ Redish, *supra* note __ (manuscript at 19).

proximately causes the First Amendment harms to be avoided by the reduction in political fraud.”⁴⁸ He would continue to protect associational anonymity, while cutting back on the scope of protection for expressive anonymity.

I am less convinced that we can or should disaggregate expressive and associational anonymity. This is so for reasons relating to the efficacy of attribution choices as expressive signals. In order for signaling to be fully effective, it must meet certain preconditions. We have already seen that a standard account of signaling requires that an action must be costly to be a signal. In addition, the signal must be capable of being understood as a signal by the relevant interested parties; and the behavior must be “undertaken for purposes of signaling and not for other purposes.”⁴⁹ In short, for signaling to be effective, it cannot be unduly influenced by exogenous factors. Public or private factors that disrupt a person’s ability to signal, or that add enough “noise” to the signal that they prevent it from being properly understood by its recipients, will undermine the value of a signaling regime.

Pressures on associational anonymity may be one such undercutting force. After all, an important aspect of a person’s “private associational choices” is precisely that it enables her to speak anonymously. Individuals may join expressive associations for a variety of reasons, of course: to enjoy membership goods such as retail discounts, for example, or out of sympathy for that group’s ends. They may also join because they want to take advantage of the greater speech resources possessed by that group rather than engage in individual speech: associational speech has a megaphone effect. But one important reason why people join expressive associations is because they provide a vehicle for anonymous speech. It may well be easier and safer for an individual to speak through the NAACP than to argue for civil rights in his own voice and under his own name, since he may incur significant (and often extralegal) costs for doing so. Of course, these “anonymous” – more properly, pseudonymous and corporate – groups will develop their own reputations, and speech by particular associations may have greater or lesser signaling value and

⁴⁸ *Id.* (manuscript at 34).

⁴⁹ Edward Rock and Michael Wachter, *Meeting by Signals, Playing by Norms: Complementary Accounts of Nonlegal Cooperation in Institutions*, 36 U. Rich. L. Rev. 423, 427 (2002).

may be judged accordingly. The important point, however, is that individuals may well see associations as a means of speaking anonymously.

Forcing the disclosure of membership lists, as various southern states attempted to do with the NAACP, disrupts this signaling system. The goal of these disclosure laws was twofold. They sought to remove the veil of anonymity from individual members, so that they could be subjected to public and private harassment for the speech undertaken on their behalf by the association. They also sought to drive away members who had been attracted to the NAACP and other groups precisely because of their anonymity, and thus to weaken these groups' ability to survive. Anonymity-stripping, in this context, thus risked diminishing the overall level of discourse on important public issues altogether. Moreover, these laws disrupted the signaling value of anonymous *and* attributed speech, by using exogenous factors to affect individual choices about how – and how *visibly* – to speak.

This suggests that, *pace* Professor Redish, it may be impossible to disaggregate expressive and associational anonymity. The two are not so easily treated as separate matters. Rather, associational anonymity is one of the means of preserving the conditions under which attributional choices about speech, including the decision to be more or less anonymous, can have a signaling value. To be sure, the two categories of anonymous speech are not necessarily related in every case: an individual may choose between attributed or anonymous speech without considering associational anonymity as a third option, or she may join an association for reasons having nothing to do with either speech or anonymity. Still, the argument I have offered suggests that associational and expressive anonymity are more closely linked than Professor Redish suggests, and that we protect associational anonymity in part because it helps preserve the signaling value of expressive anonymity.

Indeed, this point leads to a broader one. A *variety* of First Amendment doctrinal rules – including associational anonymity, but also including the doctrines prohibiting content regulation and the “heckler’s veto,” to take two examples – can be viewed as safeguarding the signaling value of attributional choices in speech. Of course, the First Amendment *protects* some forms of retaliation against speakers. One may vocally

disagree with a speaker, for instance; indeed, under defamation law as it has been modified by the First Amendment, one may often do so vituperatively. But, by curtailing some of what it considers illegitimate methods of public or private retaliation against particular speech acts, the law preserves the signaling value of particular attributional choices by speakers, including whether to speak openly, anonymously, or pseudonymously, by ensuring that those choices are not *too* costly.⁵⁰ The protection of associational anonymity is thus only one method among many by which First Amendment law helps speech maintain its signaling value. Expressive anonymity, viewed as a form of speech, is thus part of a continuum of protected choices (including attributional choices) about the nature and intensity of one's speech; and protecting expressive anonymity is one of the many means of making speech possible at all, both as a matter of signaling and more generally.

IV. CODA: THE TENSION BETWEEN ANONYMITY JURISPRUDENCE AND CAMPAIGN FINANCE JURISPRUDENCE

The foregoing discussion raises one last question. If, as I have argued, attributional choices with respect to speech, including the choice to speak anonymously, have an important signaling value that in turn helps recipients of such communications to decide how much weight to give to various speech acts, then what should we make of the courts' treatment of campaign finance laws under the First Amendment?

A number of writers have already waded into these waters, noting a seeming contradiction between the Supreme Court's strong defense of anonymity in cases like *McIntyre* and its far gentler treatment of mandatory disclosure laws in the campaign finance context.⁵¹ An expanded treatment of this

⁵⁰ For a hint of arguments along these lines, see Posner, *supra* note ___, at 221.

⁵¹ See, e.g., Lidsky & Cotter, *supra* note ___, at 1547-55; Cardillo, *supra* note ___; see also Robert F. Bauer, *Not Just a Private Matter: The Purposes of Disclosure in an Expanded Regulatory System*, 6 Election L.J. 38 (2007); William McGeeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. Pa. J. Const. L. 1 (2003); Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. Rev. 265 (2000).

question is well beyond the scope of this paper. But the tension is worth noting just the same.

To be sure, even when reviewing campaign finance laws the courts have been at least somewhat protective of attribution choices, including the choice of anonymity. Thus, in upholding laws requiring the disclosure of the identity of donors to minor parties and independent candidates in *Buckley v. Valeo*,⁵² the Supreme Court held that those requirements could be overcome by the showing of “a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties.”⁵³ Moreover, the disclosure laws may have stronger justification in the campaign finance context than in the general context of anonymous political speech.⁵⁴ So it may be possible to reconcile the two very different treatments of anonymity in the courts’ First Amendment jurisprudence.

Still, even if that reconciliation is possible, it does not mean there is no tension between the two lines of cases.⁵⁵ When combined with this paper’s arguments in favor of the signaling value of anonymity and other attributional choices, this tension suggests that the Supreme Court ought to reconsider this famously tangled area. Perhaps the cleanest remedy would be to reconsider the starting point for the campaign finance regulation cases: the idea that money is speech. Perhaps the Court needs to more fully acknowledge the value of anonymity, even within the campaign finance context, while mustering stronger arguments for overcoming anonymity in this context. Perhaps the Court need to focus more expressly on the question of when and whether campaign contributions, as opposed to other forms of political expression, actually have a public signaling function. Or perhaps, as many have urged, the Court should consider abandoning its (relatively) permissive approach to disclosure laws in the campaign finance regulation context altogether.

⁵² 424 U.S. 1 (1976).

⁵³ *Id.* at 74; see also *Brown v. Socialist Workers ’74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982) (finding that this standard had been met in that case).

⁵⁴ For such arguments, see, e.g., Lidsky & Cotter, *supra* note __, at 1552-54.

⁵⁵ See *id.* at 1555 (“Even if *McConnell* [*v. Federal Elections Commission*, 540 U.S. 93 (2002)] and *McIntyre* are technically distinguishable, they have a deep theoretical inconsistency. The *McConnell* Court’s assumptions about both the value of anonymous speech and the ability of the audience to properly interpret it differed markedly from the assumptions in *McIntyre*.”).

CONCLUSION

My criticisms notwithstanding, Professor Redish is to be commended for bringing fresh thinking to the question of anonymous political speech and unsettling some of our easy assumptions in this area. He makes clear that his primary goal is to “raise awareness about this troubling dilemma of First Amendment theory,”⁵⁶ not to settle the matter; his article provides an excellent starting point for such a discussion. Still, a genuinely productive conversation about the role of expressive anonymity within the First Amendment will have to account for a few more factors than Professor Redish has yet adduced. In particular, it will have to account for wide variety of attributional choices that fall under the general rubric of “anonymity. More importantly, it will have to account for the signaling-based possibility that, far from being a “sub-category of the constitutional guarantee of silence,”⁵⁷ anonymity, in all its many forms, is actually a highly expressive and nuanced kind of speech. In my view, these considerations weigh rather heavily against Professor Redish’s proposal for the prohibition of protection for certain kinds of anonymous political speech, as interesting as it may be.

⁵⁶ Redish, *supra* note __ (manuscript at 8).

⁵⁷ *Id.* (manuscript at 1).