Anonymity and Authority

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I. INTRODUCTION

Anonymity, like its companions secrecy and privacy, is a mixed blessing. The protection of being anonymous does allow some people to say things they might refrain from saying if their names were attached to their utterances. And insofar as some of the things that such people might say with anonymity but not without would be of genuine value, anonymity will thus sometimes empower people to say things that are worth saying, increasing the overall stock of worthwhile information and opinion. The *Federalist Papers* are a prime example,[1] and so too are the various other anonymous pamphlets and articles and letters that were so important in America's Founding Period. Similarly, the world seems a better place because of the works that have been produced behind the shield of a pseudonym, whether they be the novels of George Eliot or George Sand, or the humor of Mark Twain. And the prevalence of the secret ballot throughout the democratic world embodies the view that public voting, although it may have some communitarian virtues, may also be too often distorted by threats and intimidation.

Yet anonymity has its darker side. It may empower baseless libel[2] or harmful gossip. It allows people, whether in voting or writing, to manifest prejudice and personal grievance and other illegitimate motives without

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[1] As are the *Cato* letters of John Trenchard and Thomas Gordon, anonymous pamphlets and newspaper contributions of the early eighteenth century that were themselves part of the pre-history of the First Amendment itself. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. B. Found Res. J. 521 (1977).

[2] Indeed, libel suits against anonymous internet posters have produced a raft of litigation and academic commentary. *See, e.g.*, In re Subpoena Duces Tecum to AOL, LLC, 550 F. Supp. 2d 606 (E.D. Va. 2008); Highfields Capital Management, LP v. Doe, 385 F. Supp. 2d 969 (N.D. Cal. 2005); Doe v. 2theMart.com, 140 F. Supp. 2d 1088 (W.D. Wash. 2001); Doe v. Cahill, 884 A.2d 451 (Del. 2005); Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1373 (2009).

fear of appropriate social sanctions.[3] And it deprives citizens of information about the identity of speakers or writers that they may often, and often for entirely legitimate reasons, desire to have.

In recent years, of course, the most salient dimension of anonymity is the role that it plays in issues relating to electoral speech and campaign finance (undoubtedly the inspiration for this Symposium). It seems highly important for people–and especially voters and opinion-makers–to know, for example, who is funding what issues and what positions and what candidates, and thus it would be valuable to learn about the extent to which that knowledge is impeded by laws and regulations allowing anonymous individuals and entities to provide substantial and self-interested support for candidates and issues under the cover of specially-created organizations with nice-sounding but vacuous names. But it seems also important to nurture the spirit of the secret ballot and consequently to allow individuals and interested organizations to shield themselves from intimidation and retaliation by expressing and supporting their political preferences without having to reveal their true identities to the public, to the press, and to their political enemies.

We might ask which of these competing considerations is more or most important, but the answer seems rather clearly to be "both." And if we also take into consideration the various other values served on the one hand by anonymity, privacy, and secrecy, and on the other by transparency and disclosure, the answer might well be "all of the above." The spirit of transparency and disclosure is a large part of the spirit of the times,[4] but so too is a spirit of privacy and secrecy.[5] These are real conflicts, and those who think we can simultaneously maximize transparency and privacy are seeking the unattainable. Yet although these and related values are inevitably conflicting, and although managing that conflict is a task of great intellectual and policy importance, my goal in this paper is not to resolve the conflict between these competing values in any or all contexts, or even in the context of anonymity generally, or even in the yet narrower context of anonymity and campaign finance.

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[3] In numerous faculty academic environments, for example, there are frequent discussions about whether votes on tenure or faculty appointments should be secret or open. Openness facilitates discussion and requires people to defend their votes, but may also stifle the embodiment of non-prejudicial but still unpopular views. Anonymity lessens the stifling, but may empower those who have views that are illegal, immoral, or simply indefensible.

[4] For an overview, see Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339; *see also* Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011 (2008); David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2011).

[5] *See* SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 3-14 (1982).

Rather, my more modest aim is simply to suggest that anonymity may be more complex than is often supposed, and that disclosure may at times be less separable from the message than is sometimes believed. Adding this consideration to the arguments for and against anonymity in this or that context will not resolve any of the tensions, but may help analyze them in a somewhat more complete fashion. But prescribing what weight this consideration should have, or assessing just how the balance should be struck, is something that is best left for other people or other occasions.

II. THE DIVERSITY OF ANONYMITY

There is no reason to suppose that all or even most of the interesting questions to be asked about anonymity and disclosure are constitutional questions generally or First Amendment questions specifically. In many and perhaps most contexts, the first question to be asked is one about the desirability or undesirability of some policy, with the constitutional questions arising only if and when the policy decisions raise constitutional issues. Nevertheless, or perhaps because of how the policy questions are often resolved, the First Amendment issues are important, and commonly serve to frame many of the contemporary debates. Yet even when we leave many of the extraordinarily complex policy issues behind and focus more narrowly on the First Amendment, we discover that the free speech issues have arisen and multiple and diverse contexts.

Most immediately, but not the earliest historically, are the issues surrounding electoral and campaign financing. Should individuals should be allowed to make campaign contributions without disclosing their identities? If so, should the same shield be available to corporations and associations? And should the same considerations that apply to contributions also apply to expenditures? Most importantly in this context, if the states or the federal government choose to require disclosure of contributions, or expenditures, or both, would such mandatory disclosure violate the First Amendment?[6]

Although these issues of campaign finance, campaign contributions, and campaign spending dominate First Amendment discussions of

[6] *See* Buckley v. Valeo, 424 U.S. 1, 64 (1976) (collecting cases for the proposition "that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment"); Pollard v. Roberts, 283 F. Supp. 248, 256-57 (E.D. Ark. 1968), *aff'd per curiam*, 393 U.S. 14 (1968).

anonymity today,[7] others have been more prominent in the past. In particular, the membership list cases–*NAACP v. Alabama*,[8] most prominently, and others less well-known[9]–make vivid the value of anonymity. Alabama was, in the 1950s, interested in obtaining the membership lists of the NAACP not because Alabama wished to make NAACP members aware of the social services that Alabama might provide to the membership. Rather, and quite obviously, the membership rolls would have provided a way for officials hostile to the civil rights movement to locate the targets of their hostility, to the disadvantage not only of the targeted individuals, but also to the organizations themselves–organizations created primarily for the purpose of public advocacy. Thus, the potential intimidation was directly in conflict with the unintimidated–"unchilled," in the more familiar language of First Amendment doctrine and theory[10]–exercise of central First Amendment rights.[11]

The basic principle in *NAACP v. Alabama* was reinforced and broadened in a different context two years later, in a 1960 case called *Talley v. California*.[12] *Talley* arose in response to a California law that had imposed upon a group using handbills to urge a boycott a requirement that all handbills be identified with the name of the sponsoring individual or organization. At the time that *Talley* was being considered the Court had yet to decide *New York Times v. Sullivan*,[13] and consequently did not yet fully grasp and develop the doctrinal and analytic tools necessary to recognize that penalties short of absolute prohibition may nonetheless stifle the exercise (for rational actors) of First Amendment rights. Such stifling (or "chilling") would likely reduce the amount of speech actually produced, and reduce the number of people willing to challenge official power, thus going the heart of precisely that activity that the First

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[7] The issue is raised, inter alia, by Doe v. Reed, 130 S. Ct. 2811 (2010); Citizens United v. FEC, 130 S. Ct. 876 (2010); Republican Party v. White, 536 U.S. 765 (2004); McConnell v. FEC, 540 U.S. 93 (2003).

[8] 357 U.S. 449 (1958).

[9] *See* Gibson v. Fla. Legislative Investigative Comm'n, 372 U.S. 539 (1963); Bates v. City of Little Rock, 361 U.S. 516 (1960); Marshall v. Stevens People & Friends for Freedom, 669 F.2d 171 (4th Cir. 1981).

[10] *See, e.g.*, Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685 (1978).

[11] *NAACP v. Alabama* may be largely a creature of the civil rights movements and the Supreme Court's obvious support of it. To the extent that this is so, making broad generalizations to other contexts, at least at the time, is dangerous. Contrast, for example, Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1 (1961) (holding that the registration requirements of the Subversive Activities Control Act were not unconstitutional as repugnant to the First Amendment).

[12] 362 U.S. 60 (1960).

[13] 376 U.S. 254 (1964).

Amendment seeks to foster. But because at the time of *Talley* this approach was still four years in the future, the Court instead, and somewhat awkwardly, treated the case as a total prohibition on the distribution of unsigned handbills. And as a total prohibition, Justice Black for a 6-3 majority reasoned, the case was controlled by *Schneider v. Town of Irvington*,[14] which had invalidated on more traditional public forum grounds a total prohibition on handbilling.

Thirty-five years after *Talley*, the Court reaffirmed the same principle, this time in the case of *McIntyre v. Ohio Elections Commission*.[15] The issue was largely the same as that in *Talley*, although the election context in *McIntyre* makes the case even more relevant to today's controversies than *Talley*. Ohio had prohibited the use in election campaigns of unsigned handbills and related political advertisements, and the Supreme Court, with Justice Stevens writing for the majority, invalidated the law. In support of the Court's conclusion, Justice Stevens recounted numerous instances of important works of literature and politics that had been produced anonymously or under pseudonyms.[16] The *Federalist Papers* are perhaps the most famous of these, and Justice Stevens reminded us not only of this, but also of the works of O. Henry, Mark Twain, George Eliot, and Charles Dickens, all of which had been produced and published without the real names of the real authors having been identified.[17] Thus, to the Court, anonymity had strong historical as well as theoretical credentials, and after *Talley*, *McIntyre*, and *NAACP v. Alabama* thrown in for good measure, and with much of the odor of the McCarthy era well behind us, it seems now plain that the Supreme Court is inclined to perceive clearly the threat to the exercise of free speech rights by enforced disclosure, and to perceive anonymity as a virtue that carries with it few countervailing vices.

III. ON THE VALUE OF IDENTIFICATION

Talley, *McIntyre*, and *NAACP*, as well as other membership list cases, are still very much good law,[18] standing as a valuable embodiment of the

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[14] 308 U.S. 147 (1939).

[15] 514 U.S. 334 (1995).

[16] *Id.* at 341 & n.4.

[17] *Id.*

[18] An interesting and relevant question, and one that has never reached the Supreme Court, is whether a person has a First Amendment right to physically conceal his or her identity while engaging in a public protest. *See, e.g.*, Church of the Am. Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197 (2d Cir. 2004) (addressing, inter alia, whether wearing a mask during protest is protected by a right to

principle that Joan of Arc was the exception and not the rule. Not everyone is willing to be burned at the stake for their principles and their beliefs, and for the rest of us–with at best a normal and not exceptional amount of courage–the fear of various unpleasant consequences is often sufficient to get us to keep our mouths shut and our beliefs to ourselves.[19] And thus it seems clear that a First Amendment in which *Talley* and *McIntyre*, in particular, were decided differently would be a First Amendment less sensitive to the realities of speaker incentives, and more willing to tolerate an environment in which only–or at the very least disproportionately–the bold were full participants in public discourse.[20]

It is a mistake, however, to assume that First Amendment rights come without costs. "There is no such thing as a free speech," Eric Neisser reminded us in a rather different context, some years ago,[21] and the idea has broad application. It reminds us that most protections of speech protect speech that is harmful or at least in some ways and on some occasions disadvantageous. And thus the protection of speech, even when the protection is well-founded, comes with some social cost.[22] Most recently, the decisions in a series of recent Supreme Court free speech cases make vivid the idea that the First Amendment protects speech not because it is harmless, but despite the harms it may cause. In protecting dogfighting and other animal cruelty videos in *United States v. Stevens*;[23] in upholding in *Snyder v. Phelps*[24] the rights of the Fred Phelps and the Westboro Baptist Church to protest the rise of open and accepted homosexuality in the United States and in the military by picketing the funeral of a dead (heterosexual) soldier and thus causing unimaginable grief to his family; and in permitting in *Brown v. Entertainment Merchants Association*[25] the sale and distribution to minors of videos allowing the minors to experience

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anonymous speech); Church of the Am. Knights of the Ku Klux Klan v. City of Erie, 99 F. Supp. 2d 583 (W.D. Pa. 2000) (same).

[19] What I call "the Joan of Arc image" may have dominated the early years of free speech thinking. One of the reasons that William Blackstone and John Milton were so opposed to prior restraint and still so accepting of subsequent punishment may be that many of the conscience-driven speakers they were thinking of were people who would have been necessarily impeded by restraint in advance, but would have been willing to speak, regardless of the consequences, if only the circumstances allowed it. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *151; JOHN MILTON, AREOPAGITICA (1644).

[20] There seems to be a common belief that courage correlates with veracity, but I see no reason to suppose that this common belief is actually sound. The courageous seem to me no more likely to be correct than the timid, and no more likely to make sound arguments than the fearful.

[21] Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L.J. 257, 258 (1985).

[22] *See* Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992).

[23] 130 S. Ct. 1577 (2010).

[24] 131 S. Ct. 1207 (2011).

[25] 131 S. Ct. 2729 (2011).

virtually the "joys" of killing, maiming, and rape, the Court re-established the principle that the existence of harm is not even close to a sufficient condition for regulation.

Much the same view can be applied to the question of anonymous speech, although here the harms–or at least the disadvantages–are not quite as obvious. But understanding those disadvantages takes as its point of significant departure Justice Stevens' acknowledgment in *McIntyre* that there was an "interest in providing voters with additional relevant information"[26] about political debate. But in framing the issue in this way, Justice Stevens seemed to understand the problem in terms of the "curiosity" of listeners and viewers, and indeed he had used exactly that word earlier in the opinion.[27] But when the interest is understood as a "simple interest" in providing additional information,[28] or as only a matter of "curiosity," it is an interest which is destined to come out the loser when pitted against the chilling effect of mandatory disclosure. When the question is intimidation versus curiosity, there can be little doubt that guarding against intimidation will prevail, and little doubt that the losing interest will, as it so often is, be trivialized,[29] as if those who were interested in knowing the actual authors of public speech had interests and preferences most closely analogized to the interest of those who are regular consumers of supermarket tabloids or television shows (or Internet sites) exposing in lurid detail the escapades of entertainers and other celebrities.

Implicit in Justice Stevens' characterization of the issue is the view that the message–whether McIntyre's, Talley's, or James Madison's–is largely and analytically distinct from the identity of the author or communicator of that message. And, to be fair, separating the potentially valuable message from the identity of the (presumed) less valuable identity of the messenger has a distinguished provenance. In formal and informal logic, ad hominem arguments have long been treated with contempt. The value of an argument, the traditional view says, is independent of who is making it. If an argument can genuinely and soundly demonstrate that *X* entails *Y*, then the fact that the argument is offered by a known liar or an otherwise despicable character is irrelevant. And, similarly, the literary examples offered in *McIntyre* support the view that our enjoyment of the humor of

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[26] McIntyre v. Ohio Elections Comm'n, 514 U.S. at 348.

[27] 514 U.S. at 341.

[28] 514 U.S. at 348.

[29] On the trivialization of real harm in the cases previously mentioned, see Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. (forthcoming 2012).

Mark Twain has very little to do with his real identity as Samuel Clemens, and so too with most other works of literature. There have been centuries of debates about whether William Shakespeare really did write Shakespeare's plays, but our enjoyment of them would likely not be much diminished by the discovery that William Shakespeare was the pseudonym for an exalted lord or a convicted felon. Indeed, the arguments in favor of publishing anonymous tracts like the *Federalist Papers*–which, by the way, because of their very anonymity, would not be published today by any mainstream newspaper or magazine–are similarly premised on the idea that both the force of the arguments and their literary and stylistic power exist independently of the actual identities of the actual authors. In many contexts, it is often believed that the soundness of an argument or the truth of a fact is logically distinct from the identity of the individual offering it.

Logically this is perhaps so, but discourse, and not only public political discourse, is not only about logic in the narrowest sense. So perhaps the picture just described is not always, or even often, an accurate one. Numerous modern works in the philosophy and sociology of science, and numerous modern contributions to epistemology, have supported an idea sometimes referred to as "epistemic dependence."[30] That is, the generation of new knowledge is not an individual process. Rather, the growth of knowledge relies persistently on the cooperative activities of multiple participants, all of whom need to have some degree of trust in each other in order for the collective enterprise to function.[31] And thus knowledge advances not by the "Aha!" discoveries of individuals, but instead by the collaborative and interdependent efforts of multiplicities of individuals who, sometimes knowingly and sometimes not, are working together to produce advances that are properly attributed to no one individual.

"Dependence" and "trust" are valuable terms, but it is important to recognize that the basic idea here is one of authority. When scientists and ordinary people reach conclusions about the state of the world, they rely in some significant part on prior conclusions produced by others, and in that sense treat the conclusions of others as authoritative–as being entitled to respect because of their source and not because of their content.[32] I believe, for example, in the truth of global warming, evolution, natural selection,

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[30] John Hardwig, *Epistemic Dependence*, 82 J. PHIL. 335, 335 (1985).

[31] *See* John Hardwig, *The Role of Trust in Knowledge*, 88 J. Phil. 693 (1991).

[32] Much of the philosophical literature is couched in the terminology of "testimony," in the broad sense of relying on the statements of others, as opposed to the somewhat narrower legal meaning. *See* C.A.J. COADY, TESTIMONY: A PHILOSOPHICAL STUDY (1995); Elizabeth Fricker, *The Epistemology of Testimony*, 61 PROC. ARISTOTELIAN. SOC'Y (SUPP.) 57 (1987); Peter Lipton, *The Epistemology of Testimony*, 29 STUD. HIST. & PHIL. SCI. 1 (1998).

the efficacy of chemotherapy, and countless other scientific conclusions, but not because I have ever tested them. And so too with my beliefs in the falsity of astrology, phrenology, and numerology. But the principal reason I hold these beliefs is because people whom I treat as authoritative on such questions claim to have established them. And so too outside of the world of science. I have no personal knowledge that Magellan circumnavigated the world in the sixteenth century or that 1964 presidential aspirant George Romney's parents were American citizens when he was born outside the United States, but I believe these and many other facts largely because of what has been told to me by others, and in part because I have a similar faith in facts that have persisted as a matter of accepted collective knowledge for many years. Maybe my faith is unwarranted, and perhaps I should be more skeptical. But few of us are skeptical about such things, and none of us are that skeptical about everything.

Moreover, much the same applies to arguments as well as to facts. We think of anonymous documents like the *Federalist Papers* as being acceptable examples of anonymity because they are "pure" argument, but they are nothing of the kind. They rely on facts, historical examples, and much else that give them their power, but whether those facts are true is something that was and is taken largely on faith. In addition, we frequently skim the arguments of others, or accept the summaries of such arguments, or engage in various other shortcuts, many of which on many occasions require us to accept or reject propositions based, at least in part, not on our own knowledge, but on a belief in the reliability of the knowledge that has been produced by someone else.

Once we recognize that most of the contributions to public debate that we especially value (as well as those we most abhor) rely on assertions that the reader or listener or viewer is expected to take on faith, we can understand that treating identity as largely a matter of idle or voyeuristic curiosity misconceives the nature of public discussion. If someone says to me that President Obama was born in Kenya or Indonesia and is therefore an ineligible imposter to the presidency, I want to know who said so, not (only) as a matter of curiosity, and not only because I want to learn about who is taking which positions in public debate so that I can learn something about *them*,[33] but because knowing who said something enables me to evaluate the substance of the statement. That is what the claim of

[33] And I certainly do not wish to deny the importance of learning about people and organizations by learning what positions they hold and support.

authority- and trust-dependent knowledge is all about, and it infuses our epistemic existence.

Thus, evaluating a fact or argument offered in public debate is often facilitated by knowing who offered it. And this ought to be well-known in the law. Not only is law itself an authoritative practice,[34] but the law of evidence explicitly recognizes that judges and jurors evaluate the truth or falsity of testimony by what they know about the witness. That is why cross-examination may appropriately probe issues of bias and perceptual accuracy, among others, and why finders of fact are constantly evaluating the credibility of those who offer evidence at trials.

The conclusion to be drawn from all of this should by now be clear. The identity of a speaker, and the signals about reliability that may be provided by knowing the speaker's identity, are part and parcel of the content of what a speaker says and of how listeners evaluate it. In most of the domain of what we know and how we know it, speaker identity and speaker credibility loom large. Conversely, when we are deprived of those facts, we are epistemologically disabled. And we are not epistemologically disabled only because our curiosity about some facts has not been satisfied. We are epistemologically disabled because almost all of what we know depends on what is said to us by others, and almost all of what is said to us by others depends for its value to us on the credibility of those others. If those others are unknown to us, we lose an important tool in deciding, quite simply, what to know, and thus, what we know.

IV. CONCLUSION: THE COSTS OF ANONYMITY

All the above has been devoted to exposing some of the rarely recognized costs of anonymity. To protect the identity of a political speaker, as in *McIntyre*, is to deprive the rational reader of McIntyre's handbills of something that the rational recipient not only would, but *should*, want to know. If, in order to prevent the rational McIntyres of the world–the speakers who are legitimately worried about retaliation or loss of privileges or jobs or social standing or something else because of what they have said–from being chilled in what they say we are compelled to prevent the rational readers of something that they would legitimately like to know in order to assess what they have read or what they have been told, then we can see most clearly that *Talley*, *McIntyre*, and various other

[34] *See* JOSEPH RAZ, THE AUTHORITY OF LAW (1979); Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931 (2008).

anonymous speech cases are protecting speakers at some cost to listeners and at some cost to society.

That these are costs, however, does not mean that they are net costs. As *NAACP v. Alabama*, *Talley*, and *McIntyre* make clear, there are costs of denying the claim to anonymity as well. We do not know whether without anonymity we would have been deprived of the *Federalist Papers* or the humor of Mark Twain or the novels of George Sand or George Eliot, but all of these possibilities are far from remote. So it is a mistake to assume that anonymity is unnecessary for the very values that undergird at least some of the First Amendment, just as it is a mistake to assume, as I have tried to argue here, that it is a mistake to ignore the costs of respecting those values, costs that themselves are part of a First Amendment that recognizes that at least some of the goals of the idea of free speech are epistemic ones.

Thus, I offer no prescriptions here. I certainly do not offer prescriptions on how future anonymity cases, whether dealing with campaign finance or otherwise, ought to be decided, nor on how legislative and administrative bodies, as a matter of policy, ought to make determinations about issues implicating anonymity. There are costs on both sides, just as there are benefits on both sides, and the costs and benefits on both sides are ones that have strong First Amendment implications. It is always easy to assume that restrictions on communication are the product of the overreactions of self-interested or paranoid politicians, but in many areas this is simply not so. Once we see that protecting anonymity comes at a genuine epistemic cost to the kinds of concerns that are themselves components of a robust epistemic conception of the goals of a system of freedom of speech, we can see that the First Amendment stands on both sides of the debate. But how that debate ought to be resolved must wait for another occasion.