RESPONSE

AUTONOMY AND DISCIPLINARITY: CAN PSEUDOPROFESSIONAL SPEAKERS SELECT THEIR OWN CONSTITUTIONAL CATEGORIZATION?[†]

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Claudia Haupt's timely and important article, *Pseudoprofessional Advice*,[1] addresses the thorny question of how law should treat the speech of licensed professionals that conflicts with the relevant profession's standards but is given outside the context of a traditional professional relationship. Such speech has the potential to inflict great harm, as she illustrates by referencing medical professionals who, in recent years, publicly gave COVID-19-related advice that, if followed, could lead to greater illness or death.

Haupt's article, which builds on her substantial body of insightful work on professional speech,[2] situates itself at the troubling intersection of at least three contested issues in free speech doctrine. First is the relevance of speaker *autonomy*—the constitutional relevance of individual choice.[3] Second is the First Amendment's treatment of disciplinary expertise and *knowledge*—a category of speech that is undoubtedly important but hard to square with other values like autonomy or the marketplace of ideas.[4] Third is the First Amendment's responsiveness to *harm*—an issue that has not received scholarly

[†] An invited response to Claudia E. Haupt, *Pseudoprofessional Advice*, 103 B.U. L. REV. 775 (2023).

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[1] *See generally* Claudia E. Haupt, *Pseudoprofessional Advice*, 103 B.U. L. REV. 775 (2023).

[2] *See generally* Claudia E. Haupt & Wendy E. Parmet, *Lethal Lies: Government Speech, Distorted Science, and the First Amendment*, 2022 U. ILL. L. REV. 1809; Claudia E. Haupt, *The Limits of Professional Speech*, 128 YALE L.J.F. 185 (2018); Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238 (2016).

[3] *See* C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 6-7 (1976) (arguing First Amendment protects speaker's self-realization); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFS. 204, 216 (1972).

[4] *See* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 27 (2012); Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445, 472-73 (2012); *see also* Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 465-69 (2019).

attention commensurate with its importance and complexity.[5] It would be surprising if the overlap of these three difficult issues lent itself to clear normative and doctrinal takeaways, and it is a considerable virtue of Haupt's project that she does not offer (to repurpose her central example of bad medical advice) a simple and inadequate prescription. Rather, she concludes that the normative stakes of pseudoprofessional advice present a serious challenge to the doctrinal distinction between professional speech and public discourse, and that regulatory interventions can sometimes be justified to prevent harm.

Haupt's primary concerns are thus the constitutional categories and how we know which one—professional speech, public discourse, or some mix thereof—is applicable. This short Response explores the additional question of *who* selects which category is applicable. That question, too, involves the intersection of autonomy and disciplinarity—namely, to what degree can a speaker choose (or even influence) the constitutional categorization of her speech as professional, in public discourse, or something else entirely?

This turns out to be a thorny matter of interpretive authority distinct from complying—or judging compliance—with primary rules of conduct. That is, a speaker might have near-total control over whether she is liable for knowingly giving bad medical advice; she can simply not give it. But it does not follow that she has final say over whether her speech is judged by professional standards; the boundaries of that legal category are tied to underlying social roles over which no individual has control. So what is a disgruntled professional speaker to do? Conceptually speaking, her choices involve considerations of exit, voice, and loyalty.[6]

Doctrinally speaking, the challenge begins with the First Amendment's rightful recognition that although speaker autonomy and disciplinary knowledge are both important values, they are simply incompatible in some fundamental ways. The very nature of a discipline, after all, is to impose limits on individual expression. Within the context of a professional relationship—between a doctor and a patient, say—a licensed professional can be held liable for speech that runs counter to the accepted norms of her discipline, regardless of whether she earnestly believes the speech to be true or valuable. Importantly, the propriety of these limitations is premised on the status of the speaker as a professional. This is a bit of an oddity for the First Amendment, which in most contexts is (proudly) insensitive to speaker identity. A nondoctor can give terrible medical advice and not be held liable on the same basis.[7]

But a professional is *not* subject to those professional standards in all contexts—her identity does not follow her everywhere. When speaking in public

[5] As Haupt rightly notes, there are some notable exceptions. *See generally* Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953 (2016); Leslie Kendrick, *Must Free Speech Be Harmful?*, 2020 U. CHI. LEGAL F. 105; Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81.

[6] *See infra* notes 13-16 and accompanying text.

[7] Depending on the circumstances, one might face tort liability, or liability for practicing without a license, but not the same kind (or likely degree) of liability as a doctor would face.

discourse, a doctor is treated like any other speaker; her statements are "transmuted" into statements of opinion to which liability cannot attach.[8] Haupt highlights the enormous "gulf" between these two outcomes and suggests that pseudoprofessional speech sits uncomfortably between them.[9] And because the enormous power imbalance between professionals and others is incompatible with the equality on which public discourse depends, there is a strong argument for treating such speech—even if delivered outside a traditional professional-client nexus—as subject to disciplinary regulation.

It is worth emphasizing this point about inequality because an animating concern in Haupt's work is the concrete harm that pseudoprofessional speech can inflict. She is undoubtedly correct that people who follow quack medical advice are putting their health and perhaps their very lives in danger—which, in turn, raises the stakes for regulation. But is the presence—or even likelihood—of such harms *necessary* to support regulation of pseudoprofessional speech?

To the contrary, pseudoprofessional speech can be regulated precisely and solely based on its deviation from professional standards, regardless of any resulting individualized or social harm.[10] This would be in accord with the law's treatment of professional practice without a license, which effectively presents the converse problem from the one that Haupt investigates. Her concern is, essentially, how to treat (purported) *non*professional practice *with* a license, rather than how to treat (purported) professional practice *without* a license. The law is very familiar with the latter set of cases, and such speakers can, of course, be subject to liability. What matters for present purposes is that their liability does not depend on proof of harm. That is, it is no defense for a person practicing law without a license to say that her legal advice was sound and consistent with relevant professional standards, or that it helped her purported client, or that it was ignored.

A symmetric principle could apply to the pseudoprofessional speech cases. Lack of individualized harm should be no defense, even if the presence of such harm might, of course, be relevant, including for purposes of evaluating damages. A doctor who falls into Haupt's category—one who is subject to regulation because she is not quite in public discourse—should be subject to regulation even if she is ignored, or even if her advice turns out incidentally to have helped some people.

Regardless of the standard for liability, and whether it requires individualized harm, it is important to note *who* decides which set of standards applies: in this context, the rules of professional speech or those of public discourse. Again, this kind of classification-selection can be separated from judging compliance with

[8] *See* POST, *supra* note 4, at 44.

[9] Haupt, *supra* note 1, at 778 (highlighting "still undertheorized gulf between the treatment of expert speech in the professional-client or doctor-patient relationship . . . on the one hand and expert speech in public discourse on the other").

[10] There might, of course, be some threshold of individualized harm necessary to show standing or justiciability. My focus here, like Haupt's, is solely on the First Amendment standards.

the *primary* rules of conduct. Whether I form a corporation or a sole proprietorship is relevant but not dispositive of whether I am liable for my business's malfeasance. Likewise, whether my terrible medical advice is classified as professional speech or public discourse is significant but not dispositive of whether I am liable in tort. The question of classification is effectively one about which primary rules apply—those of professional speech or public discourse, for example—not whether they have been violated. At risk of overcomplicating what is hopefully an intuitive point, this is essentially a matter of what Wesley Newcomb Hohfeld would call a "power": the ability to alter legal relationships (including the "rights" and "duties" that are often central to primary rules).[11]

One obvious answer is that a judge, professional association, or other legal decisionmaker has the ultimate authority to determine what is, in effect, a legal question. However important speaker autonomy might be in the construction and application of free speech rules, a speaker cannot simply classify her own speech into a preferred doctrinal category simply by declaring, "This speech is not obscene," or "This is a public forum." Similarly, the classification of professional speech in particular cannot entirely be left to the speaker, as it is predicated on social roles. I cannot declare myself to be a doctor (at least not without facing the prospect of liability for practicing without a license), nor is it simple for me, if I am a doctor, to declare a particular speech as *not* professional. In the context of litigation, I can argue for whatever classification I favor, but ultimately the applicability of the legal category—like whether a particular speech act falls within the "nexus" of a professional relationship[12]—is largely up to the rule-applier.

And yet, even if not dispositive, the speaker's choices and actions are certainly relevant to the choice of constitutional category. Just as a person can choose to conform her actions to a primary rule, so too might she conform her actions so as to *select* the primary rule by choosing a particular classification. This is true not only in the obvious sense—that she provides the factual basis for an adjudicator's post hoc determination (i.e., "What you said was professional speech")—but also because the speaker can intentionally shape that classification ex ante. In a sense, this is straightforward and familiar. Law regularly provides ways for people to opt into a given legal regime. Whether my company is treated as a sole proprietorship, corporation, or partnership is a function of my own choices and actions.

As with primary rules (i.e., not committing a tort), it might not always be clear ex ante whether one's actions are sufficient to trigger the applicability of a constitutional categorization. Sometimes the costs of doing so are high—like establishing legal residence or citizenship, which trigger new primary legal

[11] *See* Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 986-87.

[12] *See* Lowe v. SEC, 472 U.S. 181, 232 (1985) (White, J., concurring).

rights and duties—and other times less so—like choosing to speak in the first place and thus stepping into the First Amendment's domain.

In the context of professional speech, a person wishing to avoid being subject to the disciplinary standards of a profession—perhaps because she rejects the knowledge associated with it—can choose not to join it in the first place, or to leave the profession altogether. And although "exit" options come in many forms and raise some practical and theoretical difficulties, in such cases the speaker's autonomous choice is likely determinative of her constitutional classification. In that sense, speaker autonomy is consistent with professional discipline and knowledge production.

Speaker autonomy only goes so far. In the specific context that interests Haupt, the most difficult questions likely arise when a person, *already* a professional, engages in speech arguably outside of her professional role—when, for example, a doctor goes on television to advocate quack COVID-19 cures. Such a person of course wants to avoid the kind of regulation for which Haupt advocates (i.e., being subject to the standards of the profession with which she disagrees). But she also—earnestly, we can stipulate—believes that the professional standards are wrong. What are her options?

In *Exit, Voice, and Loyalty*, Albert Hirschman noted two main ways in which a dissatisfied member of an organization can respond to such a situation—abandon it (exit) or attempt to change it (voice).[13] Shareholders who sell stock in a corporation out of dissatisfaction, consumers who abandon a product, and employees who quit a company are all exercising exit. Shareholders who raise objections at an annual meeting, consumers who complain about the product, and employees who unionize are all exercising voice. In Hirschman's words, "Exit and voice, that is, market and non-market forces, that is, economic and political mechanisms, have been introduced as two principal actors of strictly equal rank and importance."[14]

Both options may be available to the professional who disagrees with her profession's disciplinary standards. The person who quits being a doctor because she cannot, in good conscience, advocate for COVID-19 vaccines has chosen a permanent exit. The person who appends a disclaimer to her speech has, effectively, attempted a temporary one.[15] But (attempted) exits from the realm of professional speech need not always be explicitly labeled as such. A doctor appearing on a television show has selected a very different social—and thus legal—context of communication than a one-on-one meeting with a patient in her office. In effect, she might have attempted an exit from professional speech, if not the profession as a whole.

The other option is voice: to speak up within the organization in an effort to change the relevant standards. Every well-functioning profession does or should

[13] ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 3-5 (1970).

[14] *Id.* at 19.

[15] *See* Haupt, *supra* note 1, at 814-15.

have channels for such change. For the disgruntled doctor, this would mean directing speech at fellow members of the profession rather than patients or the public at large.

The interplay between exit, voice, and loyalty might be a fruitful angle with which to investigate questions (and persons) at the margins of professional speech. If voice is seen to be a cheap and effective option for dissatisfied members, then exit is comparatively less likely. A professional association whose members perceive it to be open and responsive might, therefore, have a greater proportion of internal, discipline-challenging debate—through professional journals, annual meetings, or whatever channels available—than exit into public discourse.

The converse is also true: low exit costs will decrease the likelihood of voice. A shareholder who does not like the direction of a publicly traded company can simply sell her stock on the open market rather than complain at the annual meeting. For the same underlying reason, the easier it is to exit a profession, the less likely a professional is to challenge those standards internally. It would follow that when professional membership loses value—perhaps because potential clients, patients, and others no longer value the disciplinary knowledge that the profession represents—exit becomes cheaper, and voice less likely.[16] Disgruntled professionals in those circumstances have less incentive to use voice to try and change disciplinary standards. They would instead exit into public discourse.

Understanding these incentives will require more scholarship, like Haupt's, engaging both doctrines simultaneously seriously with the internal dynamics of professional organizations.

[16] *See, e.g.*, TOM NICHOLS, THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS 2-3 (2017).