MEANING IN LAW

A Theory of Speech

Charles W. Collier

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(Based on the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.)

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Preface

The announcement for the latest edition of a leading text on freedom of expression states that it "proceeds from the assumption that the variety of First Amendment values can best be studied . . . as they emerge from concrete cases rather than from an abstract characterization and classification." I think not. Nothing intelligible is likely to "emerge," unannounced, from the study of concrete legal cases.

Lawyers (and law professors) spend a lot of time debating whether, for example, a given law is "content-based" or "content-neutral" and whether legislative action is (or is not) "related to the suppression of free expression." I understand the need for these more or less inconclusive arguments. They respond to preestablished categories in legal doctrine, which in turn pose questions that need to be answered one way or another for a case to be decided. Good lawyers are adept at formulating arguments on both sides of these questions (which is why I call their arguments "more or less inconclusive").

Consider, for example, a city's ban on nude scenes in drive-in movies that could be seen from a highway. The city argued that its ordinance (1) protected people from movies that might offend them, (2) protected children from nudity,

and (3) ensured that passing motorists would not be distracted. The debate then turned on (1) whether passersby could simply "avert their eyes"; (2) whether minors need to be protected from all nudity, "irrespective of context or pervasiveness"; and (3) whether soap operas or violence would be any less distracting to passing motorists. To which the Supreme Court added helpfully: "Such cases demand delicate balancing."

I think little is to be gained by pursuing this form of argumentation, and indeed the opportunity to approach the subject of speech from a more fundamental perspective is likely to be lost. Thus, I propose to disregard the "fundamentals" of legal doctrine (at least for a while) and to approach the subject with as few legal preconceptions as possible.

But I will not be sailing trackless seas. Arguments drawn from those disciplines one would most naturally consult in the study of speech (linguistic theory and the philosophy of language) will serve as important points of reference throughout. And when I do turn to concrete legal cases, my focus on "symbolic speech" will keep the definitional question ("What is speech?") at the forefront.

There is a certain schizophrenia involved in writing about speech from the perspective of linguistic theory or the philosophy of language, because "speech" is not the term (or the concept) that would be used in those disciplines. Instead, it is the term chosen by the framers of the Constitution's First Amendment, when they declared that "Congress shall make no law . . . abridging the freedom of speech." They did not choose to protect "language" or "expression" or "communication" or "symbolism," even though these are typically the uses to which speech is put. In a sense, "speech" in the legal context is whatever courts say it is; but I do not think that is a very important sense. In fact, it is very important *not* to think this way, because then all

the natural, logical associations that might inform a general theory of speech are hostage to the peculiarities of legal doctrine. So while I shall pursue those natural, logical associations as far as possible, the tension inherent in the philosophical analysis of an irreducibly legal concept cannot ultimately be resolved.

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Introduction

What do flag burning, cross burning, draft-card burning, nude dancing, wearing black armbands, and sleeping in public parks have in common? For one thing, they have all been considered "speech," for purposes of the First Amendment, by the U.S. Supreme Court.

Of course, none of the above activities is speech in any normal sense. They are what constitutional lawyers term "symbolic speech." More than two centuries of adjudication have extended recognition and protection to symbolic expression in a bewildering array of circumstances the Founding Fathers clearly never envisioned. Recent decades have seen a veritable explosion in types of protected symbolic speech but without a theoretical framework for such a development. It is nothing short of remarkable that, amidst this proliferation of contradictory and confusing legal decision making, neither courts nor commentators have seen fit to develop a general legal theory of "speech," language, or expression. This book addresses these issues and provides such a theory.

A FEEBLE PHILOSOPHY

Legal opinions rarely provide much of a theoretical framework for the decisions they justify, and in this respect constitutional, First Amendment decisions are no different from those in other areas of law. There are two main reasons why law's attempts at philosophizing must necessarily remain feeble at best.

First, legal decisions are made in the context of individual cases and on the basis of specific facts. *Ex facto jus oritur* (law arises out of facts). If the Hippocratic oath in medicine means "do no harm" to the patient, the analogous injunction in law is "do justice in the individual case." Another traditional legal maxim warns that "hard cases make bad law"—certainly a curious state of affairs from the viewpoint of systematic philosophy. If legal opinions were supposed to develop general theoretical frameworks, then hard cases would provide illustrative limiting examples marking the boundaries of legal doctrine. Instead, they seem rather to muddy and obscure those boundaries.

The second reason law cannot be philosophy relates to its structure of authority. Both the doctrine of precedent and the structure of appellate review ensure that lower-court judges trying to "do justice in the individual case" will proceed on the basis of higher courts' "institutional authority" and not on their own intellectual authority. Theoretical correctness and rational consistency have never been the coin of the realm in law. As Justice Jackson once remarked of the U.S. Supreme Court, "We are not final because we are infallible, but we are infallible only because we are final." Such a situation would never be tolerated in philosophy, where one is free to correct thinkers from Plato to Wittgenstein if their arguments are deficient.

Law is not philosophy; it is not supposed to be. There might possibly be some advantages in being governed by

"a bevy of Platonic guardians," but we have not chosen to find out. Nonetheless, in First Amendment law at least, an underlying theory of decision making seems called for by the fact that so much turns on what counts as "speech." If there is to be a definition, then there should be a theory; and "speech," in its common acceptation, has always been too broad and universal a concept to be reduced to a mere legal term of art. Indeed, rather than restrict protected speech within narrow parameters, the clear judicial tendency has been to expand the notion broadly into areas of "symbolic speech" that would hardly have occurred to the framers of the Constitution.

So, how should one take account of these developments? Two main avenues suggest themselves. First is the method of *reconstruction,* that is, the attempt to derive a coherent, underlying theory of speech from the scattered, unsystematic pronouncements of individual jurists and legal commentators. Second is the method of *construction,* by which a theoretical framework for the legal doctrine of speech would be articulated anew on first principles developed in nonlegal disciplines. Each approach will be considered in turn.

RECONSTRUCTION

The implied theory of speech that can be reconstructed from scattered judicial opinions and legal commentary is necessarily only rudimentary and limited. Nevertheless, it provides a starting point. The basic problem is this: All speech (not just symbolic speech) involves some form of conduct as well. If the definition of speech were not further restricted or limited, courts would face claims that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

To head off such claims—which could involve all forms of criminal behavior—courts have insisted on the following three limiting principles.

First, "conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" The requirement of "communication"—however ill defined—may be regarded as basic. And communication entails at the very least a speaker and an audience. In an early case involving students' refusal to salute the American flag, the Supreme Court noted that "[s]ymbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." In that case, the Court concluded (in effect) that *not* saluting the flag was a form of speech. Likewise, in a case involving the state motto "Live Free or Die" on automobile license plates, the Court extended First Amendment protection to someone who (in violation of state law) merely covered up that motto. Although these decisions seem intuitively correct, surely more of a theory is needed to explain how *not* doing or expressing something can be "speech."

Second, for communication to count as speech, there must be "[a]n intent to convey a particularized message." This requirement was first enunciated and deemed satisfied in a case involving a peace symbol taped to an American flag. Nevertheless, in the leading flag-burning case, dissenting Justices argued that "[f]ar from being a case of 'one picture being worth a thousand words,' flag burning is the equivalent of an inarticulate grunt or roar that . . . is most likely to be indulged in not to express any particular idea, but to antagonize others." The contours of this requirement thus remain essentially contested.

Third, for the communication of a message to receive First Amendment protection, "the likelihood [must be] great that the message would be understood by those who viewed it." In the case of the peace symbol taped to the flag, the Court explained that "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." That case arose at a time of great national antiwar protests, so "it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it." On the other hand, in the case of sleeping in public parks, dissenters in the lower court denied that "sleeping is or can ever be speech for First Amendment purposes"—presumably no matter what the context. And in any event, courts have not explained why the audience should get to determine what counts as speech.

So much for the main principles implied in the legal discussion of symbolic speech. Such speech must amount to communication (in a sense yet to be defined), the speaker must intend to convey a specific message, and the audience must be able to understand it. These rudiments of a doctrine of speech seem reasonable enough as far as they go; but obviously they do not go very far. And it is not even clear why these particular principles should be the starting points for a definition of speech. To proceed beyond the stage of vague intuitions and everyday associations, it is necessary to go beyond the legal sources.

CONSTRUCTION

The method of construction addresses conceptual problems *de novo,* using the best and most appropriate analytical tools available, regardless of where they originate. Considering the

limitations of the legal discussion of "speech" outlined above, why would anyone accept such limitations?

As noted already, the lack of a coherent legal theory has not prevented or even slowed down the proliferation of judicially recognized forms of symbolic speech. Indeed, the cases far outstrip the theory. In construing "speech" so broadly, the case law positively cries out for interdisciplinary support. Rather than depend on vague, intuitive, unrefined notions of *speech, communication, symbolism,* and *meaning,* it only makes sense to take advantage of long-standing discussions in other disciplines that systematically address these issues.

A proper theoretical treatment would also restore symbolic speech to its rightful place as the definitional key to First Amendment decision making. Ironically, it is the least central contexts of First Amendment law that provide the most important delineations of its coverage. Within a proper theoretical framework, illustrative limiting cases should serve to demarcate the outer boundaries of the legal doctrine of speech. But in the nude dancing case, for example, the Court was seemingly dismissive of this definitional value, noting only that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."

The task of construction involves the use of relevant nonlegal disciplines, which in this case means seeking the conceptual basis of First Amendment law in linguistic theory and the philosophy of language. Chapter 1 begins with the philosophical theory of meaning and then shows how that theory needs to be broadened. Chapters 2 and 3 pursue the main conceptual stages in the expression of meaning: from symbols, through signs, to words. Chapter 4 pauses for a look back and a look forward, with special reference to the

problem of drawing constitutional boundaries around "speech" in the case law of prior restraints, obscenity, and defamation. Chapter 5 returns to the analysis of symbolic speech in law, considered as a special case of the philosophical analysis of meaningful conduct. Finally, Chapter 6 applies the fruits of this analysis to the constitutional case law of symbolic speech.

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Stylistic conventions: Words to which attention is being drawn and words used in an unusual sense or context are placed within quotation marks (sometimes known as "scare quotes"); words used as objects of linguistic study or as terms to be defined are *italicized*.

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CHAPTER 1

Meanings

I.

Current philosophical discussions of meaning have been heavily influenced, informed, and inspired by ordinary linguistic usage. A number of important philosophical distinctions have been derived from various senses of the verb *to mean* and the different—even contradictory—ways it may be used. For example:

> [1] Those spots didn't mean anything to me, but to the doctor they meant measles.[1]

The spots cannot be viewed in any sense as "speaking," they have no intended audience, and there is no message that could be put in quotation marks (e.g., "You've got measles"); yet the word *mean* is used in a perfectly proper and ordinary way. I shall refer to this as *natural meaning*.