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Introduction: Situating Speech and Silence

Austin Sarat

The First Amendment's protection of free speech is surely one of America's greatest legal, political, and cultural achievements. As Robert Tsai observes, "Many people believe in the promise of the First Amendment before they set eyes on the actual text. Even if they do not know the precise wording of the instrument, they consider the cluster of rights guaranteed by it to be a badge of citizenship. As more Americans came to accept the virtues of expressive liberty during the twentieth century, the First Amendment became synonymous with social progress."[1] In addition, it has long been recognized that free speech is a crucial tool of self-governance in a democratic society.[2] Justice Louis Brandeis famously noted, in his concurring opinion in the 1927 case of *Whitney v. California*, that "[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[3] Moreover, dozens, if not hundreds, of books have been written in praise of free speech and in an effort to understand and assess the Supreme Court's First Amendment jurisprudence.

[1] Robert Tsai, *Eloquence & Reason: Creating a First Amendment Culture* (New Haven: Yale University Press, 2008), ix.

[2] Thomas I. Emmerson, *The System of Freedom of Expression* (New York: Vintage Books, 1971). Also Cass Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press, 1995). Sunstein claims that the key rationale for free expression is what he calls "government by discussion."

[3] *Whitney v. California*, 274 U.S. 357 (1927). Also Bradley Bobertz, "The Brandeis Gambit: The Making of America's 'First Freedom' 1909–1931," 40 *William and Mary Law Review* (1999), and Vincent Blasi, "The First Amendment and the Ideal of Civil Courage: The Brandeis Opinion in *Whitney v. California*," 29 *William and Mary Law Review* (1988): 653.

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Beyond our shores, free expression has often been trumpeted as a distinctively American virtue, one that plays an important part in a broader agenda of democratization around the world.[4] In 1947, speaking before a joint session of Congress, President Harry Truman hailed America's commitment to free speech. He described a world divided between nations that were committed to "free institutions" and "freedom of speech" and those that rely on "terror and oppression." "The free people of the world look to us," Truman went on, "for support in maintaining their freedoms."[5]

More recently, in his second inaugural address, President George W. Bush echoed Truman when he said, "There is only one force of history that can break the reign of hatred and resentment, and expose the pretensions of tyrants, and reward the hopes of the decent and tolerant, and that is the force of human freedom. We are led, by events and common sense, to one conclusion: The survival of liberty in our land increasingly depends on the success of liberty in other lands. The best hope for peace in our world is the expansion of freedom in all the world."[6]

Yet freedom and free speech have not always been treated with such reverence. Indeed traditionally, speech has often been the object of suspicion. Here speech is renamed "rhetoric." In a critical tradition dating back at least as far as Plato's *Gorgias*, empty or manipulative speech is condemned as that which "gives [rise to] belief without knowledge."[7] Rhetoric, Socrates contends in the *Gorgias*, is "pandering and base claptrap . . . ."[8] "[T]he orator," Socrates says, "does not teach juries and other bodies about right and wrong – he merely persuades them."[9] Philosophical speech, in contrast, "aims at the edification of the souls of the citizens and is always striving to say what is best, whether it is welcome or unwelcome to the ears of the audience."[10]

[4] Michael Doyle, "Kant, Liberal Legacies, and Foreign Affairs," 12 *Philosophy and Public Affairs* (1983), 205. Also Ivo Daalder and James Lindsay, "America Unbound: the Bush Revolution in Foreign Policy," 21 *Brookings Review* (2003).

[5] Harry Truman, "Special Message to Congress on Greece and Turkey: The Truman Doctrine," March 12, 1947. Found at http://www.presidency.ucsb.edu/ws/index.php?pid=12846.

[6] George W. Bush, "Second Inaugural Address," January 20, 2005. Found at http://www.bartleby.com/124/pres67.html.

[7] Plato, *Gorgias*, ed. and trans. Walter Hamilton. (London: Penguin Books, 1960).

[8] *Id.* 32.

[9] *Id.*

[10] *Id.* 110.

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In the United States, the Platonic distinction between rhetorical and philosophical speech is generally elided in favor of an embrace of a so-called "marketplace of ideas."[11] As Justice Oliver Wendell Holmes put it,

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . . that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[12]

Yet in some instances the American legal tradition also protects our "right to remain silent," thus imagining that freedom means freedom to choose what to say to whom and when to say it. This portrait of the choosing subject, knowing when, how, and why to speak or remain silent has recently been subject to critical examination by scholars who bring literary theory or psycholanalysis to bear on the subject.[13]

In both the scholarly assessment of, and public praise for, free speech, in the Platonic suspicion of rhetoric or the Enlightenment ideal of a "market place of ideas," in the volitional imagining of the individual freely choosing when to speak and when to remain silent or in its critique, much is taken for granted – for example, that we know what speech entails, that speech is generally to be preferred to silence, that silence itself is merely an absence of speech, and so forth.[14] *Speech and Silence in American Law* engages those taken-for-granteds and subjects them to critical scrutiny.

Rather than abstract philosophical discussion or yet another analysis of legal doctrine, this book seeks to situate speech and silence, locating them in particular circumstances and contexts, asking how context matters in

[11] See Oliver Wendell Holmes's dissenting opinion in *Abrams v. United States*, 250 U.S. 616 (1919).
[12] *Id.*
[13] Peter Brooks, *Troubling Confessions: Speaking Guilt in Law and Literature* (Chicago: University of Chicago Press, 2001).
[14] Marianne Constable, *Just Silences: The Limits and Possibilities of Modern Law* (Princeton: Princeton University Press, 2005).

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facilitating speech or demanding silence. To understand speech and silence we must inquire into their social life and examine the occasions and practices that call them forth and give them meaning. As anyone who has ever undertaken it knows, free speech is by no means "free," that is, free of costs.[15] As Stanley Fish notes,

> The idea is that free expression, the ability to open up your mouth and deliver an opinion in a seminar-like atmosphere, is the typical situation and any constraint on free expression is therefore a deviation from that typical or normative situation. I begin by saying that this is empirically false, that the prototypical academic situation in which you utter sentences only to solicit sentences in return with no thought of actions being taken, is in fact anomalous. It is something that occurs only in the academy and for a very small number of people. Therefore, a theory of free speech which takes such weightless situations as being the centre of the subject seems to me to go wrong from the first. I begin from the opposite direction. I believe the situation of constraint is the normative one and that the distinctions which are to be made are between differing situations of constraint; rather than a distinction between constraint on the one hand and a condition of no constraint on the other.[16]

Because, as political theorist George Kateb recognizes, the only speech that needs defending is speech that is "worthless" and/or "harmful"; speaking one's mind can be a very hard thing to do.[17] John Stuart Mill rightly observed that speaking against the grain requires courage.[18] Similarly, remaining silent when speech is demanded also takes courage.

But perhaps the context for speech and silence and their social life go beyond such personal virtues. We know that not all speakers are equally able to get themselves heard, that without a commitment to equal freedom

[15] Stanley Fish, *There's No Such Thing as Free Speech . . . and It's a Good Thing too* (New York: Oxford University Press, 1994).

[16] Peter Lowe and Annemarie Jonson, "'There is no such thing as free speech': an interview with Stanley Fish," *Australian Humanities Review* (February, 1998). Found at http://www.australianhumanitiesreview.org/archive/Issue-February-1998/fish.html.

[17] George Kateb, "The Freedom of Worthless and Harmful Speech" in *Liberalism without Illusions: Essays on Liberal Theory and the Political Vision of Judith N. Shklar* ed. Bernard Yack (Chicago: University of Chicago Press, 1989). Also Steven Shiffrin, *Dissent, Injustice, and the Meanings of America*(Princeton: Princeton University Press, 2000).

[18] Joseph Hamburger, *John Stuart Mill on Liberty and Control* (Princeton: Princeton University Press, 2001), 92.

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some voices will be heard and others drowned out.[19] Similarly, when speech in public is demanded, the burdens of speaking may be too great. Yet, as a couple of the authors whose work is collected here point out, anonymity may liberate speakers but also encourage speech that is fraudulent or worse.

To make progress in our understanding of speech and silence we must ask: Who is authorized to speak? And what are the conditions that should be attached to the speaking subject? Are there occasions that call for speech and others that demand silence? What is the relationship between the speech act and the speaker?

The chapters in this book engage with these questions, deepening, in this engagement, our knowledge of the situation of speech and some of the crucial dilemmas attached to it, helping readers to understand what compels speakers and what problems accompany speech without a known speaker, allowing us to assess how silence speaks and how speech renders the silent more knowable. Thus *Speech and Silence in American Law* begins with a chapter of reflections on the nature of language and the things that words alone can do. The second chapter situates the dilemma of speech and silence in the moments when public officials decide among what Albert O. Hirschman labeled “exit, voice, and loyalty.”[20] The next two chapters take up the particular problem of anonymous speech, a subject of great importance that has received all too little scholarly attention. The book concludes with a pressing contemporary problem, namely, the problem of when, if at all, it is permissible to compel the body to speak.

Speech and Silence in American Law is the product of an integrated series of symposia at the University of Alabama School of Law. These symposia bring leading scholars into colloquy with faculty at the law school on subjects at the cutting edge of interdisciplinary inquiry in law. One of the products of that colloquy is the commentary provided after each chapter.

Marianne Constable begins our inquiry by describing Obama’s swearing-in ceremony, in which Justice Roberts misspoke the oath, causing Obama to have to be sworn in a second time. She writes, “Lawyers outside as well as inside the White House, recognize that for a particular sort of utterance – such as an oath or an agreement – to do what it does, certain accepted

[19] Owen Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Boulder, Colo.; Westview Press, 1996).
[20] Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge: Harvard University Press, 1970).

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conventional procedures that include the uttering of certain words must be met; the procedures must be carried out by the appropriate persons, correctly and completely, in the appropriate circumstances . . .” Constable uses the Obama episode as a starting point to explore this relationship between words and bonds, laws and speech.

At the end of the first lecture of *How to Do Things with Words*, J. L. Austin writes that “accuracy and morality alike are on the side of the plain saying that ‘our word is our bond’.” Constable suggests that “Austin’s point . . . is to argue against the view that the truth or falsity of the correspondence between a speaker’s words and so-called inward acts or intentions alone is key to understanding the sense we make of promises . . . A promise – however sincere or deceitful – has been made – one says accurately, according to Austin – when an utterance fulfills certain external – conventional – requirements; and morality, again according to Austin, calls for that promise to be kept.”

Austin contrasts his view to Hippolytus’ utterance, in Euripides’ play by that name, that “My tongue swore, but my mind did not.” But in actuality, Constable writes, at the end of this play Hippolytus *does* keep his promise. “The *keeping* of his promise turns out to be problematic though, in terms of both accuracy and morality. As such, the *Hippolytus* reveals a difficulty with the relation between promising and the keeping of the promise (which in Austin’s terms would constitute the subsequent conduct required for the illocutionary act of promising to have been successful).” To expand on this point, Constable writes, “The play is full of performative speech acts: oaths, promises, declarations, accusations, supplications, wishes, curses, rebuttals, proclamations, and so forth. The speech acts of gods are effective . . . The speech acts of humans by contrast continually go wrong.”

This, she contends, is because human speech is susceptible to difficulties such as being misheard, misunderstood, concealed, and speaking rashly or in excess, haste, anger, pride, or weakness. Constable notes, “Indeed, in the *Hippolytus*, human speech is so problematic that accuracy and morality – or at least our human conceptions of justice – seem to be on the side of Hippolytus’ breaking his word or his oath to be silent.” Thus for Hippolytus, both speech and silence are problematic.

The accuracy and morality that Austin invokes, Constable suggests, epitomize approaches to truth and goodness that are not necessarily on the side of promise keeping nor on the side of law as we know it. Neither the

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bond that is a sworn promise nor the bond that is speech can be grasped in Austin's terms; the binding of "our word" is not limited to what is accurate and moral.

Constable develops the implications for law of understanding the speaking of words as an event, not necessarily accurate or moral, which binds us to a world that is itself governed neither by accuracy nor by morality. In trying to master events of speech – and in occasionally acknowledging its inability to do so – our law shows its own indebtedness to a law – neither accurate nor moral – greater than itself. Modern contract law confirms this view that "human speech acts are problematic happenings that bind mortals in a world that is neither moral nor accurate . . . To protect agreements, contract law seeks to ensure that accepted conventions – of speech acts of offer and acceptance for instance – are followed. To assess unfairness, contract law looks to the entirety of the circumstances in which an agreement was made or to what Austin would call the 'total speech situation.'" Either of these aspects of contract law may be upheld or rejected.

Contract law, Constable notes, "diverges from morality insofar as morality requires the keeping of promises." Where an enforceable agreement is broken, law remedies the breach by imposing damages. Also, enforceable agreements can become unenforceable in time, suggesting (like Hippolytus) that "speech acts and their effects may escape mortal speakers' intentions and desires. So too, it shows that human law does not seamlessly rectify speech acts gone astray." Nor can it, argues Constable, for, "Legal speech itself is not so much 'false' or 'inaccurate' or 'incorrect' as seemingly 'inappropriate' outside its convention-ridden institutional context and 'infelicitous' when it goes wrong within it (though it may of course also be mistaken and misunderstood)." Thus not only does contract law articulate conventions for particular types of speech acts, it does not (like speech itself) always follow the laws of morality.

Constable's final section asks, "if neither accuracy, morality nor law side plainly with the keeping of promises, in what sense is our word our bond?" She explores this question using United States law, because it is "our" law and because it epitomizes "positive law." She suggests that, "As positive law has become law *tout court*, positive law's own human and procedural standards of 'fairness' and 'legitimacy' have taken the place of justice." In her view, "At stake in the law's treatment of speech today then is the possibility that something – a law of speech perhaps (or perhaps not 'law' or 'thing' at

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all) – lies at least in part beyond the reach of the long arm of (the empirical realities of) positive law. And . . . the positive law in which we are all implicated may even acknowledge this to be so."

Moreover, our law recognizes the "act-like" quality of speech. For example the illocutionary *Miranda* warning, which "alerts the accused of a danger: that utterances made in the extraordinary conditions of the in-custody interrogatory phase of the legal process may have a different import or force or effect than when ordinarily said . . . The *Miranda* holding thus acknowledges a possible limit to the justice of the actual system: the speech acts of the accused may go wrong in ways the system cannot control or rectify. The law warns the accused, acknowledges its own limitations, and invites the accused to respond." Even silence constitutes a response in this instance.

This example "suggest[s] ways that our human – positive – law is susceptible to infelicities and incapacities of speech, whose claims it cannot escape. Contrast this to its encounter with the demands of morality, which it cannot meet." Taking the argument even further, Constable writes, "Insofar as positive law occasionally acknowledges its inability to do justice to the speech of others, it cedes some of its jurisdiction (as jurisdiction or the saying of law) . . . It shows itself dependent on and indebted to speech and the silences out of which speech comes. It shows itself beholden to something 'greater than' or 'beyond' itself." Constable concludes that "our often garrulous and sometimes successful, sometimes unhappy, law is beholden to, is indebted to, not morality or divinity, but to speech and silences out of which law – as speech act – comes."

Constable's interest in using speech and silence to illuminate the limits of positive law reappears in Louis Michael Seidman's account of the dilemma of former U.S. Secretary of State Colin Powell. The dilemma that Seidman describes is another variation of Hirschman's "Exit, Voice, and Loyalty," namely, when it is appropriate for public officials to resign in protest over a policy with which they profoundly disagree and when should they remain silent. To illustrate this dilemma, Seidman focuses on Powell's option to resign rather than make a case to the United Nations Security Council for the invasion of Iraq. Seidman's purpose is to "show that the resignation decision is hard and that words like 'duty,' 'ethics of public service,' and 'sound public policy' do not capture all the difficulty. Instead, the best defense of public resignation conceptualizes it as a radically free

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act – a rebellion against normal constraints, including the constraints of duty and ethics."

Seidman lays out eight alternatives to resignation. Speaking about Powell he says "1. He could have remained in office and simply gone along with government policy on Iraq without voicing doubts or dissent." "5. He could have employed the threat to resign as a tactic without making good on the threat." "7. He could have resigned from office and publically offered innocuous reasons for doing so, but let it be known informally that the real reasons were opposition to Bush administration policy," and so forth.

In order to decide which of these alternatives one might employ, Seidman describes what he labels a "consequentialist position." For example, "officials who resign in protest, but fail to make their protest public (Option 6) combine the worst of both worlds. On the one hand, the resignation removes them from positions of power where they might continue to do some good. On the other, it does little or nothing to advance the goals that motivated it." The threat of resignation (Option 5) is often as, or more, effective than resignation itself, though such a threat can easily lose its credibility. Staying in office and withholding moral censure may also "combine the worst of both worlds."

With respect to Powell, Seidman writes that resignation was not obviously the right answer, for until the history of the Bush administration is written "we will not know what good Powell was able to accomplish in other areas of foreign policy during his remaining tenure." Even if resignation were always an effective strategy, he writes, " . . . there is no reason to think that the people who resign are systematically more likely to be right than the people who formulate the policy that motivates the resignation." Seidman concludes that "there will often be strong consequentialist reasons to resist the temptation to resign."

Seidman takes up "non-consequentialist" perspectives, for, "Paradoxically, much of the intstrumental good achieved by resignation stems from the appearance that the person leaving office is not acting instrumentally." He claims, "there is indeed a nonconsequentialist argument for resignation, but . . . people who make the argument frequently underestimated the force of the argument on their side." Resignation may be widely regarded as a deeply principled act for two reasons: "First, resignation in protest is often a courageous decision that may do serious damage to the resigning official's political career . . . Second, resignation in protest demonstrates personal integrity."

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Yet both of these reasons, Seidman argues, may be faulty when examined more closely. He writes, " . . . if not always wrong, a public resignation is always at least morally problematic. It is, after all, a feature of the obligation of loyalty that takes hold at precisely the time when there are strong prudential or moral reasons for desertion." As Seidman sees it, "Perhaps Powell performed categorically prohibited acts, but it is also possible, at least some times [sic], for a public official to remain in office and get her hands very dirty indeed while nonetheless steering clear of that kind of wrongdoing that cannot be justified even when necessary to achieve a greater good."

In the final part of his chapter, Seidman explores "the stance that the legal system does and should take with regard to resignation decisions. As a descriptive matter . . . the most salient feature of the law of resignation is how sparse it is. Resignation from high office is an almost completely law-free zone. As a normative matter . . . the absence of legal constraint supports the conception of resignation as radical break that I favor." Legal rules governing speech and silence by public officials reflect, rather than resolve, the moral ambiguity of that choice. On the one hand, First Amendment doctrine regarding speech by people in office strongly encourages external speech and discourages internal protest. Federal and state "whisleblower statutes" also provide protection for officials playing an external game. On the other hand, the courts have upheld statutes that prohibit "leaks" by government officials and subpoenas directed against reporters and others to uncover the source of leaks. They have also enforced contracts entered into by government officials that subject their post-service statements to prior restraints.

Given unresolvable conflicts about how officials should choose between speech and silence, Seidman concludes that it is a mistake to try to align our legal and moral principles. The law, he says, should discourage dissident speech by public officials, but we should nonetheless praise officials who, in the teeth of the law, refuse to remain silent. As for Powell's choice to remain silent about his doubts concerning the Iraq war, "We might think of it," Seidman observes, "as a truly free choice – free not just in the sense that he would not have been punished whatever he did, but also in the sense that it was unconstrained by the usual instrumental and non-instrumental considerations that 'force' one judgment or the other. It is just because he had a free choice in this sense that he is ultimately responsible for the decision that he made."

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