ABSTRACT & BIOGRAPHICAL SUMMARIES

INTENTIONLESS FREE SPEECH: ROBOTS & RECEIVERS

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The Conceptual Debate

Two contemporary controversies – the FAA's regulation of newsgathering drones and the FTC's investigation into Google's search engine practices – reveal the fault line between America's traditional free speech law and robotics. Scholars and lawyers have been galvanized by these controversies and others to inquire: Should the constitutional coverage and protection that are given to traditional forms of speech be extended to the algorithmic output of computers and the information processed and transmitted by robots? More specifically, to what extent, if any, should the constitutional conception of speech give coverage to the semi-autonomous creation and delivery of robotic speech (this without regard to subsidiary questions, such as the application of unprotected speech categories or competing state regulatory interests)?

On the one hand, there are the naysayers. They argue trenchantly against constitutional coverage for robotic speech. Their objections fall along a continuum; the most significant of those criticisms are the following:

- Free speech theory and doctrine extend protection exclusively to the *intentional expressions of human beings*. Robots are neither human, nor can they fairly be considered to have intentions.

- Free speech protection is tied to *expressive and evaluative acts*, not performative or functional ones. The products of robotic speech – whether algorithmic indexing and ranking, electronic data gathering and delivery, or anything else – are more "performative" than "propositional," more "functional" than "dialogical," more "observation" than "opinion."

On the other hand, there are the advocates of constitutional coverage for robotic speech. They stress the *human-robotic interface*. In large part, they view robotic speech in relation to the human that empowered it, treating the robot as not much more than the legal agent of the human principal when it is communicating (with either a human being or another robot). For them, the constitutional inquiry must focus on the nexus that robotic output has with human interaction. The more the human interacts in programming the robot and the closer the communication is to something that the human would have created him/herself, the more robotic speech warrants coverage and, perhaps, protection. These advocates stress free speech theory and doctrine that support arguments such as the following ones:

- Robotic speech is typically tied to *human editorial judgment*.

- The constitutional touchstone is a *substantive message that is communicated*. Robotic speech consists of substantive messages that are sendable and receivable, and that can be recognized as communicative speech.

Where Is Meaning to Be Found?

To a large extent, the contentions of the naysayers and the advocates beg an important question: If constitutional coverage is assigned to speech because of what it "means," where is meaning to be found in the speech? In more technical terms, is *the situs of meaning* primarily in: (1) the words, text, or data?; (2) the intentions of the speaker, writer, or programmer who infuses meaning into his or her words, text, or code?; or (3) the reception of the listener or reader who interacts with the words, text, or data, however delivered?

The question of how "meaning" is generated was central to a debate that raged more than three decades ago in the precincts of literary criticism and cultural studies. Key to that debate was the school of reader-response criticism; it held that a literary work is actualized only through a convergence of reader and the text – the reader actively creating the meaning, not by extracting an intended authorial meaning from the text but by experiencing the text. In short, the reader is the situs of meaning because "the place where sense is made or not made is the reader's mind rather than the printed page or the space between the covers of a book." (Fish 1980). This point was illustrated in academic exchanges inspired by the celebrated "wave poem" hypothetical, which we vary for purposes of clarity. A stroller on the beach comes upon what she understands to be a peace symbol squizzled into the sand, this at a time of political unrest. As it turns out, the symbol is no more than the result of the silting of sand by ocean tides. At the moment of interpretation, however, does meaning hinge on whether or not a human or oceanic agent created the symbol?

How, then, does this example drawn from literary criticism apply to our constitutional inquiry? Think of robotic speech as a new and real form of wave speech. In this respect, much the same debate has shifted from the shores of literary criticism to the realm of robotics. Indeed, the same basic arguments characterize the struggle among free speech scholars over the meaning, significance, and constitutional coverage of robotic speech:

- On the one hand, there are those who argue that speaker's intent matters for speech protection, so much so that the non-human and non-intentional speech generated by robots would at best be suspect as a candidate for significant constitutional recognition.

- On the other hand, there are those who devalue speaker's intent as the source of meaning for speech protection and situate meaning in data itself,[†] insofar as it has the potential to inform and to inspire new propositions and opinions. Seen in that light, robotic data is speech and therefore qualifies for constitutional coverage.

Intentionless[‡] Free Speech

What has not yet been fully recognized by even the most speech-protective theorists is the import of the lessons from reader-response criticism and reception theory. That is, if free speech law

[†] In a related regard, the Supreme Court in *Sorrell v. Attorney General of Vermont* (2011) recognized that the sale, transfer, and use of data are more than mere commercial conduct; rather the creation and dissemination of computer-generated information constitute speech under the First Amendment.

[‡] We have taken the liberty of coining this term because it conveys a meaning different than "unintentional."

protects words, text, and data for the meaning that is substantially (if not entirely) constituted in the minds and experiences of the "receiver" (whether a listener, reader, or data user), then most objections to constitutional coverage of robotic speech fall away. It should be immaterial to free speech treatment that a robot is not a human speaker. It should be irrelevant that a robot cannot fairly be characterized as having intentions. It should be beside the point that a robot does not engage in a dialogic exchange to express propositions or opinions. What matters for constitutional purposes is that the receiver experiences robotic speech as meaningful and potentially useful or valuable. In essence, this is the constitutional recognition of intentionless free speech (IFS) at the interface of the robot and receiver.[*]

IFS puts into bold relief what has long been heavily veiled in free speech jurisprudence, if only because of the Enlightenment's preoccupation with dialogic truth-seeking and the modern obsession with human self-expression. Indeed, several significant doctrines in American free speech law that heretofore appeared inexplicable or incongruous become understandable and appropriate in the IFS context. Strange as it may seem, the Supreme Court has given some credence to the IFS premise, more than has heretofore been realized. Consider only a few telling examples:

- Do we protect non-obscene pornographic speech because of the intent of the speaker or the experience of the receiver? The former proposition strikes us as absurd because the pornographer's intent is not a relevant part of the constitutional calculus. Under IFS, however, non-obscene pornography is both constitutionally covered and protected because the receivers find substantial meaning and value (however sexualized) in the eroticized words and pictures.

- Do we protect corporate commercial speech primarily because of the intent of the advertiser or the experience of the receiver? In *44 Liquormart, Inc. v. Rhode Island* (1996), for example, a unanimous Supreme Court appreciated that the non-human, corporate character of an advertiser was of no moment. The constitutional significance of an advertisement or commercial lies entirely in its potential meaning or value to the consumer who experiences it.

- Do we protect the technology of video gaming primarily because of the intent of a programmer or the experience of a receiver? *Brown v. Entertainment Merchants* (2011) struck down a violent video game law aimed at protecting minors. The debate in and resolution of the case – and the focus of free speech value – hinged on the narrative meaning created in the minds of the youthful gamers engaging in computerized entertainment.

[*] Our promotion of IFS as an interpretive theory of First Amendment coverage must be understood as distinct from a substantive theory of a First Amendment right to receive information, which we do not advocate here. The latter stemmed from the Supreme Court's decision in *Martin v. Struthers* (1943) and evolved in an ambivalent fashion largely through legal controversies over public access to information in library settings, see, e.g., *Board of Education v. Pico* (1982) and *U.S. v. American Library Association* (2003). Importantly, the salience of IFS does not turn on the strength of any affirmative First Amendment right of the public to information; as an interpretive theory of constitutional coverage, it is entirely consistent with the text-based proposition that the First Amendment imposes a disability upon Congress, and thus indirectly secures only negative liberties of speech, press, assembly, petition, and religion.

And there is more. In all of this, what seems to be emerging is a jurisprudential understanding, however nascent. By that measure, the receiver's experience of speech may have revealed an essential dimension of the constitutional significance of speech, whether human or not, whether intended or intentionless.

Theory & Practice

Sometimes technology lags behind the conceptual constructs that justify its constitutional status — think of it as a case of theory outpacing practice. In many important respects, that is where we are currently with respect to our conceptions of the law and the existing state of robotic science.

Think of today's technology as 1st Order Robotics. This is the realm in which robots are typically viewed as agents driven by and responsive to the dictates of their principals. That is, the work that robots do and the information they gather and provide are overwhelmingly determined by the parameters set by their programmers. They may appear to make "intelligent" decisions in their highly structured environments, but they are neither autonomous nor operative in unstructured environments.

But what happens if and when that realm expands with dramatic advances in Artificial Intelligence (AI) – progress so great as to push toward "machine-learning" or actually empower what futurists call "truly intelligent" robots? Among other things, this would involve the ability to learn from trial and error or from observing and mimicking humans or other robots, and then to generalize that knowledge so as to apply it to new and different situations. Those developments would usher in 2nd Order Robotics. In that realm, the work of robots and the information they provide could be so potentially vast and undetermined that they might operate in largely unstructured environments and be perceived as having a meaningful degree of autonomy from their makers.

Admittedly, there are already impressive experiments in AI that have generated algorithms enabling computers to create "original" paintings, compose "original" music, and write "original" news stories; and Google and other companies are working assiduously to develop AI to be used in domestic services, such as elder care. However interesting these technological advances, we are truly not yet at the threshold of 2nd Order Robotics – the realm of self-learning, adaptive, and virtually autonomous robots. But technology never ratchets backwards. Driven largely by the passions of scientific investigation and the profits of commercial industry, technology thrusts forward.[†] And in a realm of 2nd Order Robotics, the conceptual and constitutional constructs that we have discussed here would fully align with technology – think of it as a case of practice catching up with theory.

Whether we are still squarely situated in 1st Order Robotics or in the embryonic stages of 2nd Order Robotics, we still face the interpretive moment for First Amendment law when governmental regulation impacts robotic output. After all, questions of constitutionally significant meaning are still paramount, and IFS theory clarifies that such meaning resides in the receiver of information.

[†] See, e.g., Ronald Collins and David Skover, "Commerce and Communication," in *The Death of Discourse* 69-135 (2nd ed., 2005).

We, the recipients of the robot's extraordinary largesse, are those who invest meaning in its data. And it is that investment that matters in evaluating the constitutional import of robotic speech. Thus understood, the richness of the First Amendment stands to be more fully appreciated – for, latent in its text is an important signifier. Technology speaks to us in the most novel of ways, and we the receivers understand that.

Bibliographical Note:

In preparing our abstract, we have already examined a wide swatch of technological, philosophical, and jurisprudential literature relevant to our project – ranging from books such as Ugo Pagallo's *The Laws of Robots* (2013) to Samir Chopra and Laurence F. White's *A Legal Theory for Autonomous Artificial Agents* (2011), and from articles or reports by authors such as Jack Balkin, Jane Bambauer, Stuart Benjamin, Oren Bracha (with Frank Pasquale), James Grimmelmann, Eugene Volokh, and Tim Wu.

Our proposal represents a continuation in our scholarship on technology and its relationship to law. See, e.g., Ronald Collins and David Skover, "Paratexts," 44 *Stanford Law Review* 509 (1992) and Collins and Skover, "Paratexts as Praxis," 37 *Neohelicon* 33 (2010).

BIOGRAPHICAL SUMMARIES

Ronald K.L. Collins is the Harold S. Shefelman Scholar at the University of Washington Law School. Before coming to the Law School, Collins served as a law clerk to Justice Hans A. Linde on the Oregon Supreme Court, a Supreme Court Fellow under Chief Justice Warren Burger, and a scholar at the Washington, D.C. office of the First Amendment Center, where he wrote and lectured on freedom of expression.

Collins has taught constitutional and contract law at Temple Law School, George Washington Law School, Seattle University School of Law, and the University of Washington Law School. He has written constitutional briefs submitted to the Supreme Court and various other federal and state high courts. His journalistic writings on the First Amendment have appeared in *Columbia Journalism Review, New York Times*, *Los Angeles Limes,* and *The Washington Post,* among other publications. He is the book editor of SCOTUSblog. In addition to the books that he co-authored with David Skover, he is the editor of *Oliver Wendell Holmes: A Free Speech Reader* (2010) and co-author with Sam Chaltain of *We Must Not Be Afraid to Be Free* (2011). His last book is *Nuanced Absolutism: Floyd Abrams and the First Amendment* (2013).

David M. Skover is the Fredric C. Tausend Professor of Law at Seattle University School of Law. He teaches, writes, and lectures in the fields of federal constitutional law, federal jurisdiction, mass communications theory, and the First Amendment.

Skover graduated from the Woodrow Wilson School of International and Domestic Affairs at Princeton University. He received his law degree from Yale Law School, where he was an editor of the *Yale Law Journal*. Thereafter, he served as a law clerk for Judge Jon O. Newman of the U.S. Court of Appeals for the Second Circuit. In addition to the books that he co-authored with Ronald Collins, David is the co-author with Pierre Schlag of *Tactics of Legal Reasoning* (1986).

Together, **Collins and Skover** authored *The Death of Discourse* (1996 & 2005), *The Trials of Lenny Bruce: The Fall & Rise of an American Icon* (2002 & 2012), *Mania: The Outraged & Outrageous Lives that Launched a Cultural Revolution* (2013), *On Dissent: Its Meaning in America* (2013), and *When Money Speaks: The McCutcheon Decision, Campaign Finance Laws, and the First Amendment* (2014). They have also authored numerous scholarly articles in various journals including the *Harvard Law Review*, *Stanford Law Review*, *Michigan Law Review*, and the *Supreme Court Review*, among other publications.