# Abstract of "On Communication"

Everybody knows that communication is important, but nobody knows how to define it. The best scholars refer to it. Free Speech law protects it. But no one—no scholar or judge—has successfully captured it. Few have even tried.

"On Communication" is the first article to define "communication" under the law. In it, I explain why some activities (music, abstract painting, and parading) are considered communicative under the First Amendment, and others (sex, drugs, and subliminal advertising) are not. I argue that the existing theories of communication—that communicative behaviors are expressive or convey ideas—fail to explain what is going on in free speech cases. Instead, I will argue, communication hinges on the free will of the communicant. By this I mean that communication occurs when Person A tries to convey a thought to person B, and Person B can freely choose whether to accept that thought. An act is communicative, in other words, if the important change that A wants to make in B's mind occurs only if B wills it to, as happens during an argument.

Reconceptualizing communication in this way—as behaviors meant to change minds through the free will of the listener—would solve deep and persistent First Amendment problems. It would explain which behaviors are communicative and therefore possibly covered by the First Amendment. Adopting the free-will theory would clarify the analysis in historically muddled areas, such as the First Amendment treatment of nude dancing. But it would also shed light on the law governing new forms of behavior, such as publication of computer programming code.

More broadly, the free-will theory of communication can point us in new directions. We are used to thinking of communication in ways that don't describe it, and these errors may keep us from recognizing new forms of communication as they develop. Applying the free-will theory of communication, I will argue, will prepare us for technological changes that will make our old metaphors for communication obsolete.

# On Communication

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Everybody knows that communication is important, but nobody knows how to define it. The best scholars refer to it.[1] Free Speech law protects it.[2] Smart people tell us that the Internet should be structured to promote it.[3] But no one—no scholar or judge—has successfully captured it. Few have even tried.

The following acts are communicative enough to be covered by the First Amendment:[4] playing music,[5] painting abstract figures,[6] marching in a Hibernian Pride

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[1] Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV., 1277, 1304 (2005) ("Under nearly every theory of free speech, the right to free speech is at its core the right to *communicate*—to persuade and to inform people through the content of one's message."); Frederick Schauer, *The Boundaries of the First Amendment: a Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004) ("even the briefest glimpse at the vast universe of widely accepted content-based restrictions on *communication* reveals that the speech with which the First Amendment deals is the exception and the speech that may routinely be regulated is the rule."); Robert C. Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2355 (2000) ("It seems that what is amiss with First Amendment doctrine is not so much the absence of common ground about how *communication* within our society ought constitutionally to be ordered, as it is our inability to formulate clear explanations and coherent rules capable of elucidating and charting the contours of this ground."); Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 ARIZ. L. REV. 439, 450 (1995) ("the Court has held that cheap and convenient modes of *communication* may not be eliminated wholesale") (emphasis added in every quotation).

[2] *See* U. S. v. O'Brien, 391 U.S. 367, 382 (1968) (holding that a law punishing the destruction of draft cards was constitutional because it condemned the act's "noncommunicative" impact).

[3] *See generally* YOCHAI BENKLER, PROPERTY, COMMONS, AND THE FIRST AMENDMENT: TOWARDS A CORE COMMON INFRASTRUCTURE (White Paper for the Brennan Center for Justice) (2001), http://www.benkler.org/WhitePaper.pdf.

[4] Throughout this article, for ease of reference, I will use the term "First Amendment" to refer only to the Free Speech Clause.

[5] Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment.").

[6] Hurley v. Irish Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995).

parade,[7] watching and showing movies,[8] dancing in the nude and watching nude dancing (barely),[9] picketing (sometimes),[10] posting computer source code,[11] and burning a flag or draft card.[12]

Compare these communicative acts to a list of *non*communicative acts: violence,[13] drug use,[14] subliminal advertising,[15] refusing to allow military recruiters on campus in protest of a government policy,[16] and sex.[17]

What's the difference between the first list and the second? Nobody knows. There are a few *proposed* distinctions, but none bear any scrutiny, and few have been seriously championed. The law nominally protects acts that are "expressive," but that word is never defined. When it is defined, it does not capture what it seeks to—any reasonable definition of "expressive" would include sex and violence, which are deeply expressive but not covered by the First Amendment. The same is true of other phrases used to describe First Amendment coverage, such as "the First Amendment protects the

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[7] *Id.* at 570.
[8] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-503.
[9] City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000).
[10] Thornhill v. Alabama, 310 U.S. 88, 105 (1940); *but see* Int'l Bhd. of Elec. Workers v. Labor Bd., 341 U.S. 694, 705 (1951).
[11] Universal City Studios, Inc. v. Corley, 273 F.3d 429, 448 (2d Cir. 2001).
[12] Texas v. Johnson, 491 U.S. 397, 402 (1989); U. S. v. O'Brien, 391 U.S. 367, 382 (1968).
[13] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence").
[14] Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872, 882. (holding that religious, ceremonial use of peyote was "unconnected with any communicative activity").
[15] Vance v. Judas Priest, No. 86-5844 and 86-3939, 1990 WL 130920, *4 (Nev. Dist. Ct. 1990) ("subliminal stimuli do not constitute speech"); *but cf.* Zamora v. Columbia Broad. Sys., 480 F. Supp. 199, 206 (D.C. Fla. 1979) (holding that First Amendment barred plaintiff's claim that viewing violent television caused him to commit violence).
[16] Forum for Academic and Institutional Rights, Inc. v. Rumsfeld, 126 S. Ct. 1297, 1311 (2006).
[17] James Allon Garland, *Breaking the Enigma Code: Why the Law Has Failed to Recognize Sex as Expressive Conduct Under the First Amendment, and Why Sex Between Men Proves That It Should*, 12 LAW & SEXUALITY 159, 196 (2003) ("no court has ever recognized sex as a form of expressive conduct"); *but cf.* Lawrence v. Texas, 539 U.S. 558, 567 (2003) (describing sex as "expression" that is protected under the 14th Amendment right to liberty).

communication of ideas." We aren't really sure what "ideas" are, but—whatever they are—music and nude dancing don't convey them.

Some scholars argue that communicative acts are directed at the mind and not the body,[18] but psychotropic drug use and subliminal advertising are directed at the mind and still not protected from regulation. Other scholars argue that philosophers like Wittgenstein and Austin can show us which acts are communicative. But no scholar has explained how the work of these philosophers, who expanded the common understanding of language, can be used to identify activities that are *not* communicative. And while other scholars assert that communicative acts are those that serve First Amendment values, there is no agreement as to which First Amendment value is paramount. Nor has anyone explained how any *one* value could be used to distinguish between communication and noncommunication, when noncommunicative acts would also further that value.

In short, we got nothing.

This article fills the gap, providing the first viable legal definition of "communication." Instead of worrying about "expression" or "ideas" or "mind" or "values," I will argue, we should be asking about free will. In determining what communication is, we are engaging our intuitions about free will. More specifically, we are engaging our intuitions about *freely willed mental responses*. By this I mean that communication occurs when Person A tries to convey a thought—some idea or feeling—to person B, and Person B can freely *choose* whether to accept that thought. An act is

[18] Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971, 983 (1995).

communicative, in other words, if the important change that A wants to make in B's mind occurs only when B wills it to.

In this article I will develop and defend this theory—the "free will" theory of communication. In section I, I will articulate a "coarse" definition of communication—one that weeds out all the easy cases—and then argue that the coarse definition is overinclusive. I will then argue that the free-will theory defines communication more accurately than the four existing theories: 1) that communication is behavior that conveys "ideas"; 2) that communication is behavior that primarily impacts the mind; 3) that communication can be understood in reference to linguistic philosophy; and 4) that communication is behavior that conveys thoughts and causes limited harm.

In section II, I will discuss the free-will theory of communication in the context of First Amendment law and theory. I will argue that theorists who attempt to derive a theory of communication by looking only at First Amendment "values"—meaning justifications for free speech—will inevitably fail, but that the free-will theory is nonetheless consistent with a multiple-values approach. Then I will argue that current speech/conduct law is incoherent and that the free-will theory could clarify it, and that in particular it could solve problems by refining content-neutrality analysis. I will then apply my theory to two sets of Free Speech cases: the nude dancing cases, and cases governing the publication of computer-programming code.

In section III, I will very briefly explore the broader implications of the free-will theory, arguing that it can help us learn when to treat virtual worlds as real, reimagine the relationship between communication and the body, and prepare us for new technologies that we will not know how to classify under existing free speech theory.

Let's get started, then.

## I. EXPLORATION—WHAT DOES IT MEAN TO COMMUNICATE?

### a. The Coarse Definition of Communication Is Inadequate.

I am going to argue here that the existing definitions of communication don't work, by which I mean that they don't predict what either the cases or intuition say communication is. But first I want to suss out a broad definition of communication, one that will weed out behavior that is undisputedly not communicative.

Communication is made up of things like talking and writing and painting and making movies and so forth. We can note, as a start, that all these things are meant to convey a state of mind from one person to another—an idea or feeling or emotion or some such. To this we can add that the act must be reasonably recognizable as intended to convey thoughts. If, for instance, Fred drops a bowling ball off his roof to protest a treaty, he has not communicated disapproval even if he really means to. Communication, in other words, requires use of conventional means to convey a state of mind.

We can say, then, that communicative acts are 1) intended to convey mental states and 2) done in ways that are reasonably understood to be for that purpose. I'll call this definition—acts meant to convey thoughts done through means reasonably recognizable as serving that end—the "coarse" definition of communication, because, as I will argue, it is useful but overinclusive. Let me also note that some scholars define communication (or its equivalent) in almost exactly this way,[19] presumably reasoning that this is as precise a definition as we can get.

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[19] *See, e.g.*, David McGowan, *From Social Friction to Social Meaning: What Expressive Uses of Code Tell Us About Free Speech*, 64 OHIO ST. L.J. 1515, 1524-25 (2003).

To try the coarse definition out, let's apply it to the following test cases:

1. A doctor prescribes Prozac for a patient.

2. Person A takes a hit of ecstasy. A tries to explain to B what taking the drug feels like. Finding that words are insufficient, A gives B some of the drug.

3. A nude erotic dancer dances on stage in front of a customer.

4. An erotic dancer gives a customer a lap-dance without touching him.

5. The same as 4, except that dancer rubs the customer while dancing.

6. Subliminal advertising, *e.g.*, a movie theater splices a single frame advertising popcorn into a film, which succeeds in raising popcorn sales even though viewers don't know that they have seen the frame.

7. A sadist uses torture techniques that cause no lasting physical harm—e.g., waterboarding and "cold cell"—on a willing masochist as part of a role-playing fantasy.

These examples, I will argue, show the limits of the coarse definition, because under that definition they all should be considered communication, but aren't.[20]

Consider the first example, of a doctor prescribing Prozac. Intuitively, this doesn't *seem* like communication. Indeed, no one has argued that the right to make, prescribe, or take drugs is protected by the Free Speech clause. Still, the coarse definition of communication is any act that 1) is primarily intended to convey states of mind; and 2) does so in ways that are conventionally for that purpose. And the very point of Prozac is to alter thoughts; it made Eli Lilly a lot of money doing that. Put another way, Prozac is like a novel: it wants to change your mind. So making and taking Prozac should be communication, but they're not.

[20] With the exception of nude dancing.

Of course, one might say that Prozac isn't speech because it can cause harm. But speech can cause harm—consider those famous Skokie Nazis, whose right to march was covered by the First Amendment.[21] They could have caused a lot of harm—fear and anger and so forth. So harm by itself can't be the answer. Still, it might be that Prozac potentially causes more harm. But saying this misses the fact that Prozac seems *categorically* different than Nazi parades—not subject to the same speech/harm balancing test, for instance. It is extremely unlikely, for example, that psychotropic drug use would be deemed speech even if the drug undisputedly caused *no* harm. Drug-taking is noncommunicative, in other words, regardless of the harm it causes.[22]

Another possible objection to the Prozac example is that even though the folks at Eli Lilly *intend* to change people's minds—and do so in a way that is recognized for that purpose—they are not conveying a mental state that they themselves are experiencing.[23] In other words, you might say that someone communicates when she has a thought and tries to pass the *same* thought to another person. But people convey states of mind they don't experience all the time—when they lie, for instance. And although lying may not be protected communication, it does seem like a *kind* of communication. One can also imagine hypotheticals in which someone conveyed a thought without knowing what it was. If, for instance, a poet created a computer program that randomly wrote poetry, and it happened to produce a poem that was critical of the government, nothing in First Amendment law suggests that the government could suppress it because the poet wasn't really thinking about the content of the poem.

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[21] Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43, 44 (1977).
[22] Still, this is one possible definition of communication that we should consider going forward: acts are communicative when they convey thoughts and don't cause too much harm.
[23] Well, most of them aren't, but some may be—it's a stressful world.

Here let me add that this requirement—of an identity between the mental state of the speaker and the thought potentially conveyed to a listener—seems to be what the word "expression" is getting at. Literally, "expression" denotes getting something out, and in the First Amendment context the thing expressed must be the mental state of the communicator. But to be communicative an act doesn't need to express a state of mind that the actor is truly experiencing. Consider a nude dancer. Her Free Speech rights don't disappear if she is thinking about the drive home while dancing. This means, then, that the word "expression" is inappropriate, because it connotes a requirement—that the speaker must think or feel what she is communicating—that doesn't really exist.[24]

In any case, the second example addresses this problem directly; the drug user gives Ecstasy to her friend so that the friend can experience the same state of mind as the user. This use of drugs, then, is "expressive." But few would call it communicative, and no judge would classify it as speech.

Examples three, four and five all involve erotic dancing: one from a distance, one up close without touching, and one up close with touching. All these acts are meant to change minds—to cause arousal, which is a mental phenomenon. But only the first act—nude dancing—is covered by the First Amendment, and then only barely.[25] But the purpose and content of erotic dancing and erotic rubbing are the same: to arouse. It therefore seems that they should all be treated the same. Of course, erotic rubbing might be more likely to lead to actual prostitution or other undesirable outcomes, but that is

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[24] And while there probably is a requirement that the speaker *intend* to invoke a mental state in others, intending to make someone feel a certain way and feeling that way yourself are two different things. Certainly one can imagine a pole dancer who intended to arouse her customers without herself feeling aroused.

[25] *See* City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000); *see also supra* note 17.

because it is a very *effective* form of communication, not because it isn't meant to convey a mental state.[26]

Example 6 involves subliminal advertising in a movie theater. Assume for the sake of the hypo that subliminal advertising works (it may not).[27] Under the coarse definition, this ad must be speech. "I want popcorn," is, after all, a state of mind. In fact, subliminal advertising conveys "I want popcorn"—an idea—through language. Conveying an idea through language is the *paradigmatic* instance of communication in typical First Amendment discourse. Subliminal advertising therefore seems like it should be communication. But it is generally not covered by the First Amendment.[28]

The final example—a sadomasochistic mock "torture" session, should also be communicative under the coarse definition. Pain, after all, is a mental state. The torturer in this hypo is therefore conveying a mental state, and doing so without causing physical harm or using physical coercion. And yet it would seem a category mistake to call this act "communicative." One doesn't "communicate" physical pain in the ordinary sense of the word "communicate." Nor is there any reason to think that this act would be covered by the First Amendment.

All of these acts, then, should be communicative under the coarse definition of communication. But none except nude dancing is covered by the First Amendment, and none except nude dancing intuitively seems like communication.

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[26] One could also distinguish rubbing by saying it is a *bodily* act. But rubbing doesn't change or damage the body, the way that sex might (e.g., through HIV transmission). So when we say that rubbing is a bodily act, what we mean is not that it changes the body but that it conveys thoughts through touch, which is a different sense than sight. But it would make no sense to distinguish communication by the particular *sense* that receives the communication. *See infra* part III. Certainly, we wouldn't say that reading Braille is not communicative because it involves touch and not sight.

[27] *See* Nicole Grattan Pearson, Note, *Subliminal Speech: Is It Worthy of First Amendment Protection?*, 4 S. CAL. INTERDISC. L.J. 775, 778-93 (1995).

[28] *See supra* note __.

My thesis—the free-will theory of communication—explains why. These acts are not communicative, I will argue, because they are intended to convey mental states *regardless of the recipient's will*. When someone takes Prozac or Ecstasy, her ability to experience the mental state the drug is supposed to produce does not turn on an act of will. We would not say to a friend, "this drug will get you high if you really think about it." Similarly, subliminal advertising is thought to persuade a person whether they want it to or not. And erotic rubbing is treated differently than erotic viewing because, of the two, rubbing is harder to experience without becoming aroused.

To the coarse definition, then, I am adding a new piece, one that has never been articulated before. The coarse definition says that communicative acts are primarily intended to convey a state of mind and are reasonably recognizable as serving that purpose. But this is not enough. The important and desired change of mind must be effectuated through the listener's will.

**b. The Free-Will Theory Elaborated.**

In the previous section, we saw that the coarse definition of communication and the concept of expression failed to explain why some acts—those that changed minds in ways the listener couldn't reject—weren't communicative. This suggested an additional requirement: that the thought conveyed be effectuated only through the will of the listener.

We are now in a position to elaborate a little bit on this proposal. First, let me say that although this concept of freely willed responses may seem obscure, it isn't. This appeal to freely willed mental responses is most evident in argument, which is core First-Amendment activity. When someone is arguing, her goal is not just to have her voice

heard. Her goal, instead, is to *convince* someone—to change the listener's mind. But the listener can only be convinced through her own free will. My thesis is that we should treat *this* quality (of working through the free-will of the listener) to be the sine qua non of communication, whether linguistic or not.

Second, let me clarify that the phrase "freely willed mental response" refers—as the use of the word "mental" indicates—to acts that the listener can control her response to solely through mental effort. In other words, these are acts whose most important effects can be resisted even when they are physically completed. For instance, one can hear an argument and choose whether to agree with it, or watch a play and choose not to be moved by it. Psychotropic drugs, on the other hand are *not* communicative, because people who take drugs can't choose whether to be affected by them, although one could freely choose not to take drugs.[29]

Third, I have described communicative acts as those whose most "important" effects are effectuated only through the freely willed mental responses of others. Every act has multiple effects, both physical and mental, and the communication analysis focuses on the most significant one. Persuading someone, for instance, has physical effects—moving some air molecules around—and multiple mental effects, such as

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[29] My justification for this distinction is primarily descriptive. Communication doesn't encompass acts—think of drug use and sex—whose most important effects can't be willfully avoided by those who engage in them. But the distinction holds up normatively as well. The First Amendment doesn't create a simple right to individual communicative autonomy—to say only what you want to say, and hear only what you want to hear. In some cases it enables others to impinge on communicative autonomy by granting them the right to make people hear things they don't want to, as when unpopular speakers are granted the right to hold forth in a public place. *See* Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43, 44 (1977). Obviously, such a grant could never be extended to acts whose most important effects, when completed, overran the listener's will. There is no First Amendment right to touch someone sexually against their will—even when such touching is in the public sphere (e.g., on a street corner). Nor should there be a right to broadcast subliminal messages at someone to make them join a certain political party, even though such an act would involve no *physical* coercion whatsoever.

putting the sound of the argument in the listener's head and invoking comprehension in the listener. The first effect—hearing a speaker's words—is unwilled. The second—comprehension—is probably unwilled too, in that the normal listener experiences it whether she wants to or not. It is the next potential effect—agreement—that is only effectuated through the will of the listener, and this effect is the focus of the analysis, and the one that I call "important."

It follows that a lot turns on this word "important,"[30] a term that is as yet undefined and perhaps indefinable. This term denotes a pragmatic analysis that cannot be reduced to a simple formula. That notwithstanding, in most cases, the most important effect—the one that is the subject if the analysis—is easily identified. The aim of argument is to persuade; the aim of music is to make the listener feel a certain way; the aim of erotic dancing is to arouse.

One can imagine more complicated scenarios, but few that would cause problems in practice. If I decided to convince a friend to support gun safety laws by shooting him in the neck with a BB gun, I would be inducing pain—an unwilled mental state—with the aim of producing agreement, which is a willed one. But if I argued that my act was protected by the First Amendment because inducing pain was only a means to convince my (by now former) friend, I would lose, and no one would find my argument plausible. Pain is an important effect—one that we care about a great deal—and is therefore the focus of the analysis even when it is used to convince somebody. In most cases, then, the importance requirement will be uncontroverted.

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[30] The word "important," is I think, the right one, not because it perfectly predicts precisely which thought is at issue but because it is expansive enough to encompass all the relevant factors. Indeed, any more technical term would suggest a precision that the analysis itself lacks.

### c. Analysis of Existing Theories.

So far, I have articulated the coarse definition of communication (acts reasonably intended to convey thought through conventional means); argued that the coarse definition is broadly correct but overinclusive and therefore inadequate (because it would encompass, among other things, sex, drugs, and subliminal advocacy); and proposed a new element to the coarse definition—namely, that communicative behaviors are those whose most important effects are reasonably intended to be brought about through freely willed mental responses of the action's object (meaning the communicant).

In this section, I will test this new definition against existing theories of communication, and hopefully show that the free-will theory of communication more accurately describes communication—that is, that it better aligns with what First Amendment cases and common intuition dictate. Let me note that as I proceed, I will refer to First Amendment doctrine, but I will hold off on fully reconciling my theory with the First Amendment until I have finished making my case for communication in the abstract, because I fear that prematurely descending into Free Speech law will only lead us down dark paths from whence we will be unable to retrace our steps. So I will wait for that.[31]

As to the other theories of communication, there are, I will argue, four, although this number is somewhat arbitrary. Indeed, the literature presents an enormous amount of language about communication—and its fellow travelers "expression" and "protected

[31] *See infra* part II.

speech"—but few coherent theories. (There are, of course, some exceptions to this.)[32] By this I mean that, surveying the literature, one is likely to find phrases like "the First Amendment protects the communication of ideas," or "the First Amendment protects expression" without any examination of what "ideas" and "expression" are.[33] To some degree, then, I am only identifying strains of rhetoric, but these strains do cohere into arguments that are worth considering.

The first such argument is that communication is the conveyance of "ideas." The second is that communication is behavior that goes to the mind and not the body. The third is that communication can be understood in reference to linguistic philosophy, and in particular the philosophy of J.L. Austin. The fourth—as I noted earlier—is that communication is behavior that conveys states of mind and doesn't cause too much harm.

All of these theories, I will argue, are terribly wrong.

### 1. Communication Is Not Just the Conveyance of Ideas.

Frequently, behavior is said to be covered by the First Amendment if it conveys "ideas" or "information." This theory, which I will call "ideaism," does not withstand much scrutiny. It is, perhaps, a sufficient refutation of this theory to note that nobody who uses it will define "ideas" and "information." But it is worth thinking about these terms; doing so will focus the inquiry and provide a vocabulary for the debate.[34]

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[32] *See*, *e.g.*, Miller v. Civil City of South Bend, 904 F.2d 1081, 1093 (7th Cir. 1990) (Posner, J. concurring), *rev'd sub nom*. Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (articulating Posner's theory of "expressive" behavior).

[33] *See*, *e.g.*, First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 802 (1978) (Frankfurter, J. concurring). ("The First Amendment was meant to guarantee freedom to express and communicate ideas.").

[34] Before considering ideaism, though, let me note that I will not look at the word "symbolic," which, although it shows up often in the First Amendment context, is far too squirrelly to use productively. Think about two uses for the word. The first is the sense in which words and letters could be called "symbols," in the way that the written phrase "stop the war" is communication effectuated through symbols. The second

Turning to "information," and "ideas," then, we can say that the first term—"information"—is used to refer to things like sentences, mathematical formulas, musical scores, computer code, and DNA strings. But it is not used to refer to things like the sound of music, or the way a picture looks. "Idea," on the other hand, refers to mostly the same things—sentences, formulas, scores, etc.—with the added requirement that "idea" usually connotes a mental phenomenon. Thus the ordinary sense of the phrase "he had a good idea," with the "idea" denoting a mental state.[35]

The simple argument against ideaism (and informationism), then, is that it fails to predict what is actually covered by the First Amendment. An ideaist view of the First Amendment would exclude covered activities like music and nonsymbolic art. Dance performances,[36] abstract art,[37] instrumental music,[38] and narrative[39] are covered by the

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is the way that a physical item serves as a representative for something else, as when the draft card O'Brien burned was "symbolic" of the war. *See* U. S. v. O'Brien, 391 U.S. 367, 376 (1968). Without thinking too much about the tougher questions—(what is a symbol? what is the relationship between language and the world?)—it should be clear that the word "symbol" means different things in these two cases. But no one who uses the word "symbol" in First Amendment cases will explain in what meaningful sense these two uses are alike. Using "symbol," is thus not a way to explain how covered acts are alike, but instead a way of *avoiding* explaining how they are alike.

[35] Let me offer definitions of these terms, noting first that while these definitions are probably generally inadequate—they fail to capture every usage, and are not informed by extralegal literature—they will at least let you know what I'm talking about. We can think of "information," then, as 1) a series of elements drawn from a limited set of elements; that is 2) useful because it is arranged in a particular way. A sentence is a sequence of marks drawn from a limited set of elements (the alphabet). These elements are useful when arranged in the proper sequence, but not otherwise. If I were to rearrange the letters in a sentence, I might have nonsense. The same is true of any of the examples in our list of things "information" refers to: programming code, DNA, mathematical formulas and so on.

An "idea," in contrast, is a thought expressed in an information system. In other words, ideas are arrangements of elements that people *can think in*, and that have meaning in a particular information system. Most ideas, obviously, are in language, but people can think in other information systems as well (mathematical formulas, musical notation, etc.). Notice then, that not all information systems are idea systems. DNA, for instance, is an information system—limited elements usefully arranged—but not an idea system. (Very few folks walk down the street thinking "AGCT GCAT," although you can encode language as DNA and vice versa.) But because language is the paradigm example of communication, and because information systems tend to resemble each other, there may be a tendency to think of all uses of information as communicative. In fact, as I will argue, this confusion is influencing the programming code cases. *See infra* part II.e.2.

[36] *See* City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000).

[37] Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995).

First Amendment, but don't convey ideas.[40] And if "idea" is read to convey these things, then the term just means "mental state," and ideaism merely recapitulates the coarse definition of communication. If instrumental music conveys ideas, then more or less everything must. It is true that music has a formal vocabulary (song form, for instance). But so do most human activities, like manufacturing automobiles, for example. If one can talk about the debt that Schoenberg owes Beethoven, one can also talk about the debt the 2005 Mustang owes to the Mach 1. Building a car still isn't speech.

Ideaists might argue that the Amendment's protection of music, paintings, art and dance is a mistake, or a *de minimis* exception. Most don't, however, and as a doctrinal matter it seems unthinkable that these protections could be rolled back and silly to argue that so broad and meaningful a swath of human behavior is *de minimus*. "A rule cannot be laid down that would excommunicate the paintings of Degas."[41]

Ideaism thus improperly excludes large swathes of nonlinguistic behavior from communication. But even if the Free Speech clause protected only language, ideaism would still be wrong. Language itself obviously conveys more than ideas. Consider how much of language does not survive translation; how much is conveyed through timing or tone of voice (as when flirting, or telling a joke). Imagine a law providing that the text of rousing political speeches could be reproduced, but that video and audio tapes of the speeches were illegal. Transcripts of Martin Luther King Jr.'s speeches would be in legal

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[38] *Id.*
[39] Which need not necessarily be linguistic.
[40] Judge Posner has made this point eloquently. *See* Miller v. Civil City of South Bend, 904 F.2d 1081, 1093 (7th Cir. 1990) (Posner, J. concurring), *rev'd sub nom*. Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). ("Even if 'thought,' 'concept,' 'idea,' and 'opinion' are broadly defined, these are not what most music conveys; and even if music is regarded as a language, it is not a language for encoding ideas and opinions.").
[41] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 252 (1903).

circulation, but not recordings. Wouldn't such a law offend the First Amendment, even though it was idea-neutral? How, then, could we say that the First Amendment covered only "ideas" or "information"?

### 2. Communication Is Not Behavior that Goes to the Mind.

Some First Amendment scholars have argued that speech is behavior that goes to the mind while conduct is behavior that changes the physical realm, i.e. goes to the "body."[42] I will call this view mentalism. Although mentalism misses the mark, it does so in ways that are more interesting than ideaism.

Here let me define terms. "Mind" means everything a person experiences in his or her head—pain, for instance, or love, or thoughts about the quadratic formula. The physical realm—the "body" in the literature—is everything that is physically out there: cheese and Yugos and the Indian Ocean and so on.

A trivial objection to mentalism is that every communicative act uses the body. Books are made of paper, conversation of breath, and so forth. Indeed, any communication causes physical responses in the communicants—reading a book causes eyeballs to move and synapses to fire. So when the mentalist says communication "goes to the mind," what she means, then, is that the physical consequences of communication are *incidental* to the mental changes. What matters first about a book is that it can change your mind, not that it causes paper cuts. A sword is primarily important for its value in causing cuts, so using a sword isn't a speech act.

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[42] *See* Sullivan, *supra* note __ at 442 ("The distinction between mind and body, speech and conduct, expression and action, holds that speech is privileged above conduct; government may regulate the clash of bodies but not the stirring of hearts and minds.").

But not all behaviors intended to change people's minds are communicative. As per our previous examples, erotic rubbing, drugs, and subliminal advertising are all both mind-altering and noncommunicative. And here you might say that in these acts, the mental change is incidental to the physical change. But the physical change caused by rubbing or swallowing a pill is no more incidental than that caused by reading. And subliminal advertising causes exactly the same physical changes as normal advertising, but is not communicative.

These examples get to the problem with the mentalist view. There are many behaviors that are intended to create a mental phenomenon in others that are not speech because the response they provoke is *beyond the communicant's control*. Prozac changes the mind without the participation of the person who takes it. The same is true of subliminal advertising. To be communicative an act must effectuate not just any mental changes, but *freely willed* mental changes. This explains why language is the paradigm of communication. Mental responses to language are rarely constrained. If A tries to persuade B—or comfort her, or woo her, or what have you—she need not feel as A wants. She will be persuaded or comforted or wooed as she pleases. Her mental response will be freely willed. But linguistic activity—indeed, any formal aspect—is only *correlated* with this quality of producing free responses, not synonymous with it.

Language that does not produce free mental responses is therefore not communicative. We can test this hypothesis with a simple thought experiment. Imagine a man who, using spells, could always convince listeners of what he wanted to. Let's call him "The Sorcerer." Through television appearances, The Sorcerer forces the American people to appoint him King, scrap our constitutional democracy, and cancel all the good

TV shows.[43] He obviously threatens all of the classical First Amendment values: deliberative democracy, individual autonomy, the marketplace of ideas, etc. Eventually some soldiers with earplugs detain him and gag him. He then argues (via text messaging, I guess) that preventing him from using his spells violates his First Amendment rights.

So would you, dear reader, go to court to defend his right to cast spells? If you were an ideaist or mentalist, you would have to, because he has done nothing but change people's *minds* by conveying *ideas*. If you think he should stay gagged, then you must reject these theories.

The point of this silly hypothetical[44] is that it is people's capacity to *respond freely* that is the sine qua non of communication. This quality of free response is not epiphenomenal; it is the thing itself. In truth, it is the other qualities usually thought to mark communication—the use of ideas or reason or information or appeals to the mind or whatever—that are epiphenomenal. If we remove the reliance on the listener's will, then the act is not communicative, no matter what else is true about it.[45]

### 3. Communication Does Not Consist of Illocutionary Acts.

Beyond mentalism, a significant strain in First Amendment scholarship tries to solve speech/conduct problems by referencing extra-legal theory, most often linguistic philosophy. The most invoked names are Austin and Wittgenstein.

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[43] *See, e.g.*, *'Veronica Mars' Cancelled*, WORLD ENTER. NEWS NETWORK LTD., May 18, 2007, at http://www.hollywood.com/news/Veronica_Mars_Cancelled/3697259 (last visited July 21, 2007).

[44] Not that silly, though—subliminal speech is a minor, real life instantiation of the sorcerer hypothetical. So is (language-based) brainwashing.

[45] My sense is that this is what people are getting at when they refer to the mind/body distinction. But if so, they are using the word "mind" in a way that it's never been used before.

Reading these two philosophers, one can see why Free Speech scholars like them so much. Legal scholars are generally—and rightly—dissatisfied with the existing theories of First Amendment coverage. They therefore tend to argue that courts are overly formalistic in making speech/conduct decisions, meaning that they look too heavily at the form of the activity and not its purpose or the context in which it is used.[46] These scholars push two related themes: anti-formalism and contextualism. Anti-formalism proposes that in identifying communication, current doctrine unduly emphasizes form over function. Contextualism proposes that the law should focus on the circumstances surrounding the putatively protected behavior to see if it is communicative.

Austin and Wittgenstein fit in perfectly with the agenda of anti-formalist scholars. Both philosophers worked to show that language didn't work in just one way, that it could work in different ways and have different effects in different contexts.[47] And here the problem shows itself already. Taking it as true that language does different things depending on the context in which it used, how can one use this datum to fashion a rule that defines communication? Knowing that there is no unitary theory of language—that it does different things in different contexts—can only tell you how *not* to define communication. Of course, it is true that we can only tell whether an act is communicative by looking at its use in context. But in that context, what the hell are we looking for?

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[46] *See* McGowan, *supra* note __, at 1525-26; Lee Tien, *Publishing Software as Speech Act*, 15 BERK. TECH. L.J. 629, 633-34 (2000).

[47] Of course this summary is grossly reductionist. I am speaking of Wittgenstein's later writing, which is relied on by the legal scholars I am arguing against. In the Philosophical Investigations, for instance Wittgenstein's rejection of a unitary theory of language is clear. *See, e.g.*, LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, §§ 1, 11-15, 23-27, 107, 108, 304 (3rd ed. 1958; ROBERT J. FOGELIN, WITTGENSTEIN 107-143 (2d ed. 1987). Austin's work focuses on the effect that context can have on the nature of speech act performed. *See generally* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (2d ed. 1955).

Legal scholars who cite linguistic philosophers therefore inevitably end up doing little more than restating the coarse definition of communication.[48] Granted, there is some utility to this, insofar as it beats back more formal conceptions (like ideaism). But, as we have already seen, the coarse definition is inadequate.

To make this point, let me demonstrate how using Austin's work to define communication produces the wrong result. I choose Austin both because he is a wonderful writer and also because he is a favorite of First Amendment scholars.[49] Making this demonstration requires using Austin's vocabulary, one that is alien to legal discourse. But it is worth learning these terms, if only to see how little they add to the communication debate.

Austin articulated three classifications of speech acts: the 1) locutionary, 2) illocutionary; and 3) perlocutionary.[50] These categories capture different ways in which a single speech act can work.

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[48] Here is McGowan, for example, in a passage in which he cites, among others, Austin, Post, Wittgenstein and Searle:

> Expression is produced through social understandings speakers and listeners bring to bear on conduct they recognize as expressive. . . . . For expression to work, both speakers and listeners must understand the practices and conventions they employ as expressive. A person walking to work is not speaking, but a parade marcher is. . . . The context in which expression occurs is an unspoken element of the dialogue between speakers and listeners. (Internal citations omitted.).

McGowan, *supra* note __, at 1524-25. In other words, acts are expressive when, taken in context, people know they are expressive.

[49] Austin is famous for arguing that language can not only describes things, but actually *do* things. *See* AUSTIN, *supra* note __, at 94. For example, when the Queen swings a bottle of champagne at a boat and says "I christen this boat the 'Bad Koala,'" she is not describing a christening, but performing one. *Id*. at 5. Appropriately enough, Austin called these verbal acts "performatives." Some First Amendment scholars, most eloquently Kent Greenawalt, have used this distinction to map out First Amendment coverage in ways that, while interesting, won't help us define communication. *See generally* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989). Greenawalt argued that a category of linguistic behavior that he calls "situation altering utterances" are not covered by the First Amendment. *Id.* at 239.

[50] *See, e.g.*, Fadi Hanna, Article, *Gay Self-Identification and the Right to Political Legibility*, 2006 WIS. L. REV. 75, 79-84 (2006) (arguing that coming out of the closet effectuates all three of Austin's speech acts); B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 512 (2005); Heidi M. Hurd, *Expressing Doubts About Expressivism*, 2005 U. CHI.

The three acts are defined as follows:

1. The "locutionary" act conveys "sense and reference."[51]

2. "Illocutionary" speech acts are "utterances which have a certain (conventional) force."[52]

3. A "perlocutionary" act is a speech act that achieves something.[53]

To illustrate these terms, let me give an example. Imagine that I was considering walking into a bar, and my friend Veronica persuaded me not to. Later, I relate this conversation to a different person, my other friend Logan. If I said "Veronica *said* 'don't go into the bar,'" I would be describing the locutionary act, the simple meaning of what was said. If I said, "Veronica *urged* me not to go into the bar," I would be describing the illocutionary act, the type of speech act that was performed when context is taken into account. If I said, "Veronica *persuaded* me not to go into the bar," I would be describing the perlocutionary act—the act that was achieved.[54]

In other words, "saying" is a locutionary act, "urging" an illocutionary one, and "persuading" a perlocutionary one. Because these terms describe different ways of looking at a single speech event, the same locutionary act can, depending on circumstances, have different illocutionary effects. (This is only a fancy way of saying that words with the same sense and reference can be used to do different things.). If, for instance, I said, "don't shoot me!" to someone who was shooting at me, I would be *pleading*. If I said "don't shoot me" while rehearsing a play, I would be *rehearsing a*

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LEGAL F. 405, 419 (2005). And these are only a few of the many articles that reference Austin's speech-act theory.

[51] AUSTIN, *supra* note __, at 109.

[52] *Id.* at 109. If this definition seems obtuse to you, don't worry. It seems obtuse to me, too, as it did to Austin. *See id.* at 99 ("I am not suggesting that it is a clearly defined class, by any means."). And if *he* has trouble defining the illocutionary, what hope is there for judges?

[53] *Id.* at 109.

[54] *See id.*

*play*. In both cases, the locutionary act—the referential sense of the words—is the same. And if I didn't get shot, the physical effects would be the same as well. But the illocutionary acts would be different: pleading for one's life is not the same as rehearsing a play.

Focusing on the illocutionary act thus promotes anti-formalism and contextualism, directing the analysis toward speech's meaning in a particular context. This has led some scholars to argue that the communication analysis should focus on illocutionary impact. Witness Lee Tien:[55]

> For First Amendment purposes, the relevant intent is the speaker's intent that the hearer understand the act as a speech act—particularly as an illocutionary act. But the Supreme Court thinks of meaning mainly as propositional content. Without illocutionary force, a speech act is either propositional or perlocutionary, and the speaker can only have propositional or perlocutionary intent.[56]

Tien also suggests that communication should be understood as successful completion of the illocutionary act.[57] But this method will never do to define communication. In practice, it would mean that, when faced with a speech/conduct question, a court would ask whether the speaker did something that is conventionally done with words. If A brandished a knife at B, for instance, then the court would ask "was A *threatening* B?" Because "threatening" is an illocutionary act—something that can be done with words—the brandishing would be communicative. But brandishing a knife is normally an assault, which isn't covered by the First Amendment. Under Tien's

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[55] I should note that Tien focuses more on Searle's work than Austin's. *See* Tien, *supra* note __, at 639-43. Searle's philosophy, as described by Tien, is amenable to the same criticisms as Austin's.

[56] *Id.* at 652 (2000).

[57] Tien's proposed test is this: "First, the speaker must intend that the hearer grasp illocutionary intent. Second, the meaning that matters is utterance meaning. Third, the actor must intend that the hearer grasp the illocutionary force through the hearer's knowledge of the conventions that govern meaning and intent, which requires an internal connection between the two." *See* Tien, *supra* note, __ at 650.

theory, it should be. Or at least we can say that Tien's theory does nothing to explain *why* assault wouldn't be covered.

Nor is Tien's theory merely overinclusive. It is also underinclusive because it assumes that all nonlinguistic communication has an illocutionary effect—a conventional force—that maps onto language. But not all nonlinguistic communication aspires to work as language does. What is the illocutionary force of a concerto? It has none. A concerto doesn't want to be a play; it's just a different way of conveying feelings. In other words, trying to define communication by focusing on the illocutionary force of nonlinguistic communication doesn't explain why nonlinguistic behavior is communicative when it works *differently* than language, which it sometimes surely does.

#### 4. Communication Does Not Consist of Behaviors that Convey Thoughts and Cause More Good than Harm.

One conceivable definition of communication is that it is made up of behaviors that fit the coarse definition—behaviors that convey thoughts in recognized ways—but is limited by an anti-harm principle, or some form of pragmatic cost/benefit analysis. Under this theory, behaviors like assault and sex and drug use are distinguishable from speech only because they are more likely to cause harm; or, in Posner's formulation, they are regulable because the harm prevented by regulation outweighs the value of the speech thereby suppressed.[58]

I agree with Posner that cost/benefit analysis does influence—and in some ways should influence—analysis of whether a particular speech act is protected by the First

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[58] *See generally* Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1 (1986). Posner does not like the term "cost/benefit" balancing and prefers to call his view "pragmatic adjudication," although he concedes that it involves balancing. *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 738-40 (2002) (hereinafter "Pragmatism").

Amendment. In the famous example, censoring disclosure of troop movements is permissible during war.[59]

Taking this is as true, one still can't capture the First Amendment by saying that it protects "expressive"[60] behavior that is pragmatically useful. First, as I've noted, the category of "expressive" behavior doesn't get at what we want, because it implies an identity between the mental state of the actor and the thought conveyed to the listener, which the law doesn't require.[61] But even substituting the coarse definition of communication—acts that convey thought in ways reasonably meant to do so—the "pragmatic" view still doesn't fully describe the law. This is because, as I noted briefly earlier, there are many behaviors that both fall under the coarse definition of communication and are pragmatically useful but still aren't protected by the First Amendment. To revisit the earlier list, subliminal speech, drug use, and erotic touching are all coarsely communicative, and yet not covered by the First Amendment.[62] And here Posner might say that these acts aren't pragmatically useful—that on balance they cause more harm than good. But this misses the fact that there doesn't seem to be any balancing going on in these cases. Indeed, we can hypothesize facts under which these acts are unquestionably net beneficial, but intuition still balks at the idea of protecting them under the First Amendment. Even if there were a uniformly safe drug that conveyed a wonderful state of mind—a sugar pill that induced visions of cuddly ponies—nothing in our history or law suggests that taking the pill would be deemed a speech act. Nor, I suspect, would a movie theater have a constitutional right to subliminally order

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[59] *See* Near v. Minnesota, 283 U.S. 697, 716 (1931).
[60] *See, e.g.*, Posner, *Pragmatism*, *supra* note, __ at 745.
[61] *See supra* part I.a.
[62] *Id.*

people to call their grandmothers if they have a chance, despite the utility of such an order.

This is not to say that a pragmatic approach cannot inform the law. It is only to say that an approach that failed to recognize the difference between giving someone an opportunity to choose a state of mind and forcing her to feel it won't fully capture the law.

## II. APPLICATION: THE FREE-WILL THEORY OF COMMUNICATION AND THE FIRST AMENDMENT.

I have, so far, argued for a new definition of communication—what I call the "free-will" theory of communication—whose central tenet is that communicative acts are intended to invoke freely willed mental responses. And although I have relied on First Amendment law in this analysis, I have not yet attempted to fully integrate it with the existing doctrine and scholarship, which I will do now.

First, some clarifications. Before continuing, I need to distinguish between "coverage" and "protection" in the First Amendment context.[63] An act is "covered" by the First Amendment when attempts to regulate it invoke constitutional scrutiny. An act is "protected" by the First Amendment when it is unconstitutional to regulate that act. Thus an act may be covered by the First Amendment and still not protected. In this article, I am primarily interested in coverage, in discovering when the First Amendment is interested in a particular behavior, not whether it ultimately protects that behavior.[64]

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[63] Frederick Schauer made this distinction first. *See* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 267 (1981).

[64] There is, of course, no hard and fast doctrinal line between protection and coverage—the courts sometimes blur the two. But they are conceptually distinct. The protection determination is a matter of balancing, while the coverage determination is categorical. Under the protection analysis, the government can regulate a behavior if it has a good enough reason, or doesn't incidentally suppress too much speech.

I should add that a theory of communication is not by itself sufficient to define First Amendment coverage. As Robert Post[65] and Frederick Schauer[66] have noted, there are many communicative acts that aren't covered. Product warnings, contracts, professional advice—to name just a few uncovered speech acts—don't invoke the First Amendment.[67] Post argues that to be covered an act must not only facilitate communication but also further First Amendment values.[68] I find this argument convincing, although my larger thesis does not hinge on it—it is enough to know that not all communicative acts are covered.

Nonetheless, as I will argue, all covered acts must at least facilitate communication. I will explore these themes further in the next section, which addresses First Amendment values.

**a. The Free-Will Theory and First Amendment Values**

There are a lot of First Amendment articles—an awful lot, actually—about values, with "values" meaning, roughly, justifications. Many are looking for the paramount value, the *real* reason for the First Amendment. But considering the diverse practices covered by the First Amendment—arguing, writing, marching, singing, erotic dancing, etc.—and the number of ends they can be put to, identifying a single reason to protect speech seems unlikely. Nor is it clear *why* speech should be protected for only

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This review is taken without the court's usual deference to legislative findings. But the legislature can regulate uncovered activities without needing to survive balancing; it need demonstrate only a rational reason, and its conclusions are reviewed with deference.

[65] Robert Post, *Encryption Source Code and the First Amendment*, 15 BERKELEY TECH. L.J. 713, 715 (2000).

[66] *See generally* Schauer, *supra* note __.

[67] Post, *supra* note __, at 715.

[68] *See* Post, *supra* note __, at 715-17.

one reason.[69] With other laws, it is not unusual to say that the law has been passed for several reasons; doing so doesn't make the law unenforceably indeterminate. Nonetheless, values-based discourse dominates First Amendment theory, and I need to locate my theory within that discourse.

Let us consider, then, how the free-will theory of communication fits in with the values scholarship. "Values," as I noted, refers to reasons to have the First Amendment. In other words, the values debate describes the ultimate *ends* to which the amendment should be put. "Communication," on the other hand, describes a set of means—different ways of doing things. Some scholars have argued that the means must be defined in terms of the ends—to say, in other words, that the First Amendment protects all behaviors that serve First Amendment values.

I think that this approach is incorrect. Let me make an analogy to show why. Let's consider a law that protects another set of practices—say, a law forbidding the legislature to abridge "transportation." Like speech, transportation is made up of a bunch of practices: driving and flying and train travel and so on. There could be several reasons for the transportation law. Protecting transportation promotes individual autonomy, but also economic productivity. It is also necessary for democracy, insofar as people can't get together without it. When applying this law, judges would want to keep these reasons in mind. The law would only cover behaviors that furthered these values; driving friends to work would be protected, but not deliberately running over your enemies. Behaviors would thus be covered when they were *both* considered transportation *and* served the values behind the law.

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[69] Many others have made this point. *See, e.g.*, GREENAWALT, *supra* note __, at 9-34.

What focusing on values can't do, in this hypothetical, is *define transportation*. First, this is because there are many different "transportation values." But even if any single value were used, the definition wouldn't fit, because other means would serve that end. Cars promote economic production, but so do computers and many other things.

Just as "transportation" cannot be defined solely by looking at values, neither can speech. If the First Amendment covered all behaviors that furthered any particular value—liberty, deliberative democracy, truth seeking—it would be a very different law. Democracy requires free speech, but it also requires a right to assembly, a right to liberty of movement and so forth. Free speech is good for truth seeking, but so is deep-sea exploration. The latter just isn't speech.

To sum up: acts are covered by the First Amendment when they both facilitate communication and serve First Amendment values. There is no single First Amendment value, however, and hence it is impossible to define communication as all acts that further a particular value. Moreover, even if there were a *single* First Amendment value, defining communication in terms of that value would not produce a descriptive account.

This is not to diminish the work of authors who advocate for a conception of the First Amendment predicated on a single value. These pieces amount to normative arguments in favor of different visions of the amendment. But whatever the merits of these alternate conceptions, for our purposes it is enough to see that any scholar whose work focuses solely on values will inevitably end up either altering the contours of communication or arguing that the communication requirement should be discarded altogether.

Consider, in this light, the work of C.E. Baker. Baker is one of the most insightful advocates of a single-value view of the First Amendment. He champions the liberty/autonomy value, arguing that speech "should receive constitutional protection . . . because and to the extent that it is a manifestation of individual autonomy."[70] Moreover, because "nothing in the notion of liberty or autonomy distinguishes speech from other meaningful behavior," he concludes that all behavior—communicative or not—should be covered.[71] Baker further argues that nonlinguistic conduct should be protected if it "furthers key first amendment values" and if it "promote[s] first amendment values in a relevantly similar way" to speech.[72] This leads him to argue that sex, for instance, should be covered.[73]

Baker's broader justification of this view turns on his theory of liberty, which is ingenious.[74] But it does not describe First Amendment case law, and does not purport to. It is, instead, a normative argument in favor of a libertarian constitutional order.[75] Baker's values-only interpretation of the First Amendment cannot account for what is, only what might be.

David Strauss's work is also relevant here. Strauss has argued for what he calls the "persuasion principle," the theory that "the government may not suppress speech on

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[70] *See* Baker, *Harm, Liberty and Free Speech*, 70 S. CAL. L. REV. 979, 981 (1997).
[71] *Id.* at 982.
[72] *See* Baker, *Scope of the First Amendment Value of Speech*, 25 U.C.L.A. L. REV. 964, 1006 (1978).
[73] *See* Baker, *supra* note __, at 983 n.12.
[74] Baker distinguishes between "allocation rules"—those that allocate a choice to one person or another and therefore do not formally restrict liberty—and "general prohibitions," which prevent everyone from making a given choice and therefore restrict aggregate formal liberty. *Id.* at 997-1008. Baker argues that only general prohibitions trigger liberty-based constitutional concerns. *See id.*
[75] *Id.* at 1013 ("The strong presumptive principle against violations of formal liberty and the particular categorizations devised here to implement that principle can, I think, only be justified as an intellectual (and potentially political) strategy to get at the best substantive results.").

the ground that it is too persuasive."[76] Like me, then, Strauss argues that protected behavior can be identified by the way it affects the listener. But Strauss goes on to argue that the persuasion principle is justified by the autonomy value, applying a Kantian definition of autonomy.[77] In order to be consistent with his autonomy justification, Strauss limits the application of his principle to behaviors that appeal to "reason."[78] Even if we accept "reason" as a meaningful, justiciable category, such a principle necessarily includes not only most nonlinguistic communication but also much protected speech. (If "Fuck the Draft"[79] appeals to "reason," then that category has very porous boundaries.). Thus, as Strauss admits, his principle cannot explain First Amendment coverage, but only provide a compelling rationale for protecting behavior in a limited set of cases.[80]

Scholars who focus on values alone thus cannot define communication. But even if communication is not defined by any particular First Amendment value, looking at those values collectively can help describe the requirements for communication. To return to the transportation analogy, it has to be true that acts that are deemed "transportation" serve at least *one* of the relevant transportation values. The same is true of communicative acts: they must serve at least *one* First Amendment value.

Testing the free-will theory of communication against this criterion, we see that under the free-will theory, all communicative acts would serve classical First Amendment values. Described broadly, the classical First Amendment values are deliberative

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[76] David Strauss, *Persuasion, Autonomy and Freedom of Expression*, 91 COLUM. L. REV. 334, 334 (1991).
[77] *Id*. at 354-55.
[78] *Id*. at 335.
[79] *See* Cohen v. California, 403 U.S. 15, 16 (1971).
[80] Strauss, *supra* note __, at 357 n.64 ("My concern here is not to describe exhaustively what the first amendment protects, but to examine the extent to which the persuasion principle should be accepted as a reason to forbid restrictions on speech.").

democracy, truth seeking, and liberty/autonomy maximization.[81] Looking at these collectively, communicative acts, under the free-will theory, would not *uniquely* serve any one value, but all communicative acts would further at least one value.

Consider, for instance, the deliberative democracy rationale. There would be no deliberative democracy if people could not disagree with arguments presented to them. The truth-seeking rationale—the marketplace-of-ideas theory—would likewise be frustrated if listeners were constrained to agree with what they heard. Obviously, a true marketplace of ideas requires that the consumers of ideas be able to reject them.

Under the free-will theory, liberty is also increased by communicative acts. This would not be the case under the coarse definition of liberty, which would include acts that convey thoughts that the communicant can't resist. In those cases, the speaker has the liberty to do what she wants, but the listener loses the ability to respond as she wants. But liberty is maximized when the speaker's right to convey consensual thoughts is protected, because the speaker has the freedom to speak, and the listener has the freedom to disagree, or not feel as the communication is intended to make her feel. Communication, as I define it, thus enhances liberty by definition. The speaker presents the listener with a state of mind, and the listener is free to reject it.[82]

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[81] *See* 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2:3 (treating "three classic free speech theories—'marketplace of ideas,' 'human dignity and self-fulfillment,' and 'democratic self- governance'").

[82] Of course this is only necessarily true proximately—arguing for fascism might reduce aggregate liberty—but the analysis has to be at the proximate level if communication is to be identified.

The free-will theory is thus consistent with a multiple-values based view of the First Amendment; each classical value is furthered by communicative behavior, but not all behaviors that further any one value are communicative.[83]

### b. Description of Speech/Conduct Law

Here, for the first time, I will discuss speech/conduct law, the set of cases most relevant to communication. As I have noted, knowing what "communication" is doesn't answer any doctrinal questions by itself. Part of the reason that the simple problem of defining communication has never been undertaken before is that it is woven into difficult doctrinal questions in ways that are hard to untangle. So, before describing the cases, let me tease out a few threads.

I have previously distinguished questions of "coverage" and "protection." "Covered" acts invoke the First Amendment (or should, at least), while "protected" acts are protected from regulation. The government can regulate protected acts, but only with really good reason, and only after showing that the costs outweigh the benefits—a showing in which it bears the burden of proof.[84] Doctrinally, this balancing function is effectuated through the tiered constitutional scrutiny system.[85] The "interest" and "tailoring" requirements force the government to show that the good the challenged law

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[83] My description of the First Amendment values is necessarily abbreviated. In part this is because volumes have been written about each theory, and I simply cannot address them in any way that is responsive to the scholarship. But it is also because the case for the free-will theory stems (I hope) mostly from its descriptive accuracy, and not from any value-based description.

[84] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 442 (1996).

[85] *See, e.g.*, Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2664 (2007). ("Under strict scrutiny, the Government must prove that [the law] furthers a compelling interest and is narrowly tailored to achieve that interest.").

does outweighs its ancillary costs.[86] These requirements may vary with the type of speech at issue.[87]

Coverage is more complicated. The First Amendment is interested in behavior when it facilitates communication and does something else. Post has construed this "something else" as serving First Amendment values.[88] However this additional requirement is characterized, we can conceive of it related to the justifications for free speech. It is not enough to speak—one must speak in ways that the First Amendment cares about.

Stepping back, then, it seems that First Amendment analysis should require three different tests: one that describes communication, one that indicates what sort of communication serves First Amendment values, and a third that indicates when the government can regulate covered speech.[89]

Of course, actual free speech law looks very little like what I'm describing. But it is useful to isolate these questions so we can see how they are incorporated into the various doctrinal tests. Doctrinally, defining communication is most relevant to "speech/conduct" law. At the heart of this set of cases is a single question—namely, when does nonlinguistic behavior trigger First Amendment scrutiny?

There is no simple answer. The cases refer to nonlinguistic communication as, variously, "expressive conduct,"[90] or "symbolic expression,"[91] or "symbolic conduct,"[92]

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[86] *See id*.
[87] As happens with, for example, commercial speech. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York , 447 U.S. 557, 564 (1980).
[88] *See* Post, *supra* note __, at 715-17.
[89] It might also be true that, as Post suggests, the balancing tests for covered speech might differ according to the kind of speech protected. *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1275-77 (1995).
[90] City of Erie v. Pap's A.M. 529 U.S. 277, 289 (2000).

or "combined" speech and conduct.[93] Optimally, these terms would have distinct meanings, and the Supreme Court, operating under an announced rule, would slot behavior into one or the other category. But the terms are used without any particular justification or pattern, and there is no reason to pretend that they collectively form a coherent body of law.

Instead, the Court does one of three things when forced to decide whether nonlinguistic behavior is communicative. It either: 1) applies the *O'Brien* mixed-speech-and-conduct test;[94] 2) assesses whether the behavior is covered under the "message" test established in *Spence v. Washington*;[95] or 3) fashions an ad-hoc test based on conclusory use of the word "expressive."

The first move—relying on the *O'Brien* test—is quite common. The *O'Brien* test combines a content-neutrality test (in its third "unrelated to the suppression of free expression" prong) and a scrutiny standard (in its fourth prong.). The content-neutrality prong goes to coverage and the scrutiny prong to protection. But, to return to our earlier taxonomy, the *O'Brien* test contains no test for communication. Rather, an act is deemed communicative by virtue of being slotted in the "combined" speech and conduct category.

This would be fine, if there were some principled reason behind it. But no one has any idea when behavior falls into the combined speech and conduct category, or why.

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[91] Virginia v. Black, 538 U.S. 343, 360 (2003).
[92] *Id.* at 360 n.2.
[93] U. S. v. O'Brien, 391 U.S. 367, 376 (1968).
[94] *Id.* at 377 (famously holding that behavior is protected if "it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").
[95] 418 U.S. 405, 411 (1974)

Combined how, one wants to know? In a certain ratio of speech to conduct? But what would that ratio be, and how can courts measure it? Indeed, the idea of "combined speech and conduct" was picked apart long ago.[96]

If not subjected to *O'Brien* scrutiny, nonlinguistic putative communication can—at the justices' unguided discretion—be assessed under the test announced in *Spence v. Washington*. *Spence*, an early flag-desecration case, holds that nonlinguistic behavior brings the First Amendment into play when "an intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[97]

The *Spence* test is thus a pure communication test, one that restates the coarse definition of communication while adding the requirement that the mental state conveyed must be a "particularized message." Problematically, it's hard to figure out what a "particularized message" is. My best gloss is that it means that the act must be reducible to language. But if that is what is meant by "particularized message," the Spence test is subject to the same criticisms that ideaism is.[98]

When not applying *Spence* or *O'Brien*, the Court engages in ad-hoc test making. This technique is on display in *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld (FAIR)*, the Court's most recent speech/conduct decision.[99] *FAIR* addressed the constitutionality of the Solomon Amendment, a law that cut federal funding to law schools that forced the armed forces to recruit off campus in order to protest the

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[96] *See, e.g.*, John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1494-96 (1975).
[97] Spence, 418 U.S. at 411.
[98] *See supra* part I.c.1.
[99] 126 S. Ct. 1297 (2006).

military's policies towards homosexuals.[100] The Court concluded that the schools' exclusion of military recruiters was not "inherently expressive" and therefore not covered by the Free Speech Clause.[101]

In making this determination, the Court did not cite *Spence*.[102] Instead it came up with a new test, holding that nonlinguistic behavior was protected if it was "inherently expressive,"[103] like flag burning.[104] Behavior is inherently expressive, the Court concluded, if people could grasp its message without relying on explanatory language.[105] In practice, schools that defied the Solomon Amendment forced military recruiters to work outside the law school, but allowed them to recruit on the attached undergraduate campus.[106] The Court concluded that a viewer wouldn't know that this exclusion from the law-school campus was in protest of the military's policies without some accompanying verbal explanation.[107] Instead, the viewer might think that the law school was just short on rooms.[108] This need for outside explanation contrasts with flag burning, whose communicative force, presumably, is conveyed without accompanying language.[109]

Although the *FAIR* test is new, the Court made no real attempt to reconcile it with existing doctrine. Nor did it consider the test's ramifications, or give guidance as to the scope of its application. Even taken on its own terms, the *FAIR* test seems ill conceived.

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[100] *Id.* at 1302.
[101] *Id.* at 1310.
[102] *Id.*
[103] *Id.*
[104] *Id.*, citing Texas v. Johnson, 491 U.S. 397, 406 (1989) (a flag-burning case).
[105] *Id.* at 1310-11.
[106] *Id.* at 1311.
[107] *Id.*
[108] *Id.*
[109] The Court, providing an alternative rationale, also concluded that the regulation survived *O'Brien* scrutiny. *See id.*

There are many communicative acts—modern dance, picketing—whose purpose would be unclear without some linguistic explanation. Indeed, one could make the point about flag burning. One proper method for disposing of a flag is burning;[110] communication outside the burning itself is therefore necessary to help the viewer determine whether a flag is burned for disposal or protest. The *FAIR* test thus fails to define communication on its own terms. But even if the test made sense in context, it is not part of any real effort by the Court to develop a consistent, workable jurisprudence for determining whether nonlinguistic behavior is covered by the First Amendment. The Court seems to have abandoned the effort, if it ever made one. When confronted with the same question, the Court might apply the *FAIR* test, or *O'Brien*, or *Spence*; or it might do something new all over again.

The law, in sum, is a mess.

**c. The Free-Will Theory and Content-Neutrality Analysis.**

To review, we are trying to locate the role of a communication standard in actual First Amendment law. So far, I have argued that for an act to invoke the First Amendment it must at least facilitate communication. This suggests one obvious way that a communication standard is relevant to coverage: the communication standard is necessary to determine whether an act is communicative in the first place. And if, as I argue, communicative acts are those that are intended to invoke freely willed responses, then the standard will be most relevant when there is a disagreement over whether observing a behavior changes the viewer in spite of herself. So, for example, the long-

[110] AMERICAN LEGION, CEREMONY FOR THE DISPOSAL OF UNSERVICEABLE FLAGS, http://www.legion.org/?section=americanism&subsection=flag_unserviceable&content=flag_ceremony (last visited July 21, 2007).

running disagreement over whether nude dancing is "expressive" reflects disagreement as to whether one can watch nude dancers and choose not to be aroused.[111]

But there is another way in which a communication standard is relevant to First Amendment law: a communication standard is necessary for a principled application of a content-neutrality test. Content neutrality is the view that First-Amendment coverage depends, in some way, on the government's orientation toward the content of the communication it seeks to suppress—that is, whether the law is in some sense *directed* towards suppressing that content. In truth, this theory has many names and variations (*e.g.*, purposivism),[112] but these distinctions—while important—are beyond the scope of this paper.

But if content-neutrality analysis means sniffing out government hostility towards content, we need to know what it means to be hostile to content. And here it must mean hostile to *communicative effects* of an act. Because, whatever "content" is,[113] it would not do for the State to avoid First Amendment scrutiny by arguing that it is not hostile to the form of the communication, but the changes it makes in the world. Imagine, for instance, that the government wanted to suppress pro-union speech. Could it then escape constitutional scrutiny by arguing that, while it liked the word "union" (the content) in

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[111] *See infra* part II.e.1.

[112] *See, e.g.*, Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001) (arguing for an analysis focused on government purpose); *see also* Kagan, *supra* note __, at 415, arguing that the analysis should focus on motive ("First Amendment law is best understood and most readily explained as a kind of motive-hunting").

[113] "Content" is one of those words that everyone uses but no one wants to thinks about. As best I can capture it, "content" is roughly synonymous with "information"—referring to meaningful phrases in information systems. But it is also sometimes used to describe acts in which no ideas are conveyed, such as nude dancing. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 581 (1991) (Souter, J., concurring) ("such is the expressive content of the dances described in the record"). Presumably in these contexts it refers to the sensory experience of the communicative act—the way that an erotic dance looks, or the way that objectionable music sounds.

and of itself, it wanted to keep people from joining unions (the effects), and therefore was acting in a content-neutral way? Such a reading runs contrary to modern First Amendment law.

Moreover, if the First Amendment protects communication then it must protect behaviors that are to be regulated for their communicative impact. Content-neutrality, in other words, indicates neutrality towards the communicative effects of speech.[114]

If content-neutrality means neutrality towards communicative effects, one needs a theory of communication in order to identify those effects. Until now we have lacked such a theory. The result, inevitably, is confusion, as courts are unable to articulate what consequences of regulated speech a law may legitimately target. In the Supreme Court, this uncertainty has manifested itself, among other places, in the "secondary effects" doctrine, which prohibits regulations aimed at speech's "primary" effects[115] but not regulations aimed at its "secondary effects."[116] The Court has never articulated which effects are "secondary," however, and the term itself is ambiguous.[117]

Post has aptly described this problem:

> The challenge, then, is to specify the kinds of causal relationships between speech and its impacts that the secondary effects doctrine should target. . . . Should a law that prohibits pornographic movies because they allegedly increase the rate of crimes against women be deemed content-based or content-neutral? What of a law that suppresses violence in the media because of an asserted connection to violent crimes? Or a law regulating corporate speech during elections in order to avert voter alienation?[118]

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[114] *See* Volokh, *supra* note _, at 1347.
[115] Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85, 94 (1977).
[116] City of Erie v. Pap's A.M., 529 U.S. 277, 296 (2000).
[117] "Secondary," could mean "causally remote," for instance.
[118] Post, *supra* note __, at 1267.

The free-will theory answers these questions. If communication changes people's minds only when they will it to, communicative effects are those brought about—both remotely and proximately—through freely willed responses. A law that targeted pornography to prevent violence against women, for instance, would be regulable if the average consumer of pornography became more inclined to violence despite himself—if the change was forced rather than willed (assuming that it happens at all). A theory of communication is thus a necessary element to a content-neutrality test; the free-will theory supplies that element.[119]

**d. Identifying Freely Willed Responses.**

I have so far argued that communication is a diverse set of practices with no particular form; that other theories misclassify communication by identifying it with characteristics that are only correlated with it; that the free-will theory best describes the outcomes of First Amendment cases; that it is normatively consistent with the multiple-values view of the First Amendment; that it can determine which acts are communicative and therefore help articulate First Amendment coverage; and that it identifies communicative effects and is therefore necessary for a principled application of a content-neutrality test.

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[119] Posner has effectively argued that instead of focusing on government purpose or motive, the analysis should be consequentialist, weighing the speech suppressed by a regulation against the harm prevented. *See* Posner, *Pragmatism*, *supra* note __, at 738-39. I cannot fully address Posner's argument here, but it's worth thinking about. In any event, even under Posner's consequentialist view a theory of communication is necessary. If the effects of speech are to be weighed, speech must be identified, and it cannot be identified without some theory delineating what distinguishes it from all other behavior.

Before applying the free-will theory, then, I need only argue that it will work in practice—that is, that asking whether behaviors invoke freely willed responses would be a good way of settling doctrinal controversies in the real world.

The practical defense of the theory, then, is not that it will provide determinate answers to every question, but that it will make us argue about the right things. This can help, first, by getting us out of the trap of talking about "ideas" and "symbols" and so forth. Trashing bad theory, in other words, is useful in its own right.[120] Even if the free-will theory of communication became a fig leaf for the exercise of bare intuition, relying on bare intuition would be preferable to referencing misguided rhetoric—rhetoric that someone might actually take seriously.

Beyond clearing out the cobwebs, applying the free will standard could also usefully guide us toward relevant factual evidence. Identifying freely willed states of mind—by which I mean states of mind for which a person can rightfully be held accountable[121]—is central to criminal and tort law, and finds expression in the insanity defense, compulsion, entrapment and volition.[122] There is thus a working body of law

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[120] *See generally* Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).

[121] Here let me explain what I mean by "free will." I write as a pragmatist. The pragmatist views the task of finding the foundation of human knowledge to be either "impossible or uninteresting, and in either case not worth doing." Posner, *supra* note __, at 738. Pragmatists thus believe that a proposition should be tested "not by its correspondence with 'reality' but by the consequences of believing or disbelieving it." *Id.*

From this perspective, one can be both a determinist—that is, think that the laws of nature leave no room for human agency—and believe that people can be held morally accountable for their choices. We are better off judging others than not judging others; therefore we should judge. If we are to judge we must identify those acts for which people are morally accountable. We call those acts that people can be judged on "freely willed." My incorporation of the phrase "free will" thus does not reflect a studied evaluation of the term in light of its philosophical usage—an evaluation I am neither equipped nor inclined to make. It only recognizes that we have developed a law that gives special protection to behaviors intended to convey thoughts to others when—and only when—we decide that the recipient could be judged for her response. I call these responses "freely willed."

[122] *See* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 643-49 (1981) (arguing that these doctrines embed deterministic reasoning in our criminal-law discourse, which is nominally predicated on the presumption of the actor's free will).

centered around the same question I am proposing we ask. Determining whether a strip club patron could resist arousal, for instance, is no different than asking if an allegedly insane criminal defendant could have resisted the compulsion to commit crime.[123] Indeed, it's the *same* question, only moved to a new context.

Criminal and tort law thus provide a working template for application of the free-will theory of communication.[124] In criminal and tort cases, psychological and neurological evidence is relevant to the question of whether an act—and the state of mind that accompanied it—were voluntary. The same evidence can guide factual inquiry about whether an act is communicative. Indeed, the outcomes are congruous. Music is communication—and drugs are not—for the same reason that it is easier to prove a lack of culpable mens rea from a defendant's use of a legal psychotropic drug than it is to prove that a heavy metal song compelled someone to commit suicide.[125]

Of course, aligning the communication analysis with the free-will/determinism debate in criminal law doesn't solve all our problems. It only leads to a new set of problems. The role of determinism in the law is highly controverted, as it must be.[126] The role of psychological, sociological, and neurological evidence to show that a person

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[123] *See* MODEL PENAL CODE § 4.01 (providing that a defendant cannot be criminally liable when he lacks the "substantial capacity . . . to conform his conduct to the requirements of law"). Some version of this rule is in effect in roughly one third of the states. *See* Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 53 (2006).

[124] Although, to be sure, there is an ongoing debate as to whether these doctrines should be understood as expressions of determinism. *See* Kelman, *supra* note __, at 643-49; *see generally* Michele Cotton, *A Foolish Consistency: Keeping Determinism out of the Criminal Law*, 15 B.U. PUB. INT. L.J. 1 (2005).

[125] *See* Waller v. Osbourne, 763 F. Supp. 1144, 1151 (M.D. Ga. 1991) (finding a failure to state a claim when plaintiff's theory was that Ozzie Osbourne's music made plaintiff's son kill himself); *see also* McGowan, *supra* note __, at 1599 n.86 (collecting cases in which courts rejected the argument that music or other performances were incitement unprotected by the First Amendment).

[126] *See supra* note 123.

couldn't have avoided a certain mental state is similarly controverted.[127] The free-will theory of communication thus transports a familiar set of unanswerable questions—what it means to choose, and what science can tell us about whether a choice was free—into the First Amendment context. But if, as I have argued, we call acts "communicative" when they invoke freely willed responses, then these are precisely the unanswerable questions we should be debating.

Here one might object that the introduction of scientific evidence would disfigure the law by proving that acts now deemed communicative do not invoke freely willed responses. But this is to misread the nature of the free-will standard. Like some of the most enduring legal standards—e.g., the reasonableness standard—the free-will standard combines both a factual and normative question. It has to be that way. Whatever evidence comes from neuroscience, there is no part of the brain labeled "free will." The role of scientific evidence in the free-will determination is thus not to overwhelm the normative question but merely to articulate its contours. If, for instance, psychological data showed that instrumental music affected the brain like drugs do, we might just as well deem drug use communicative as exclude music from the protection of the First Amendment.[128]

More broadly, the free-will theory can reveal the communication analysis as a site where freedom is negotiated—to show that the debate over whether an act is "speech or conduct" is not one about the *form* of an activity, or even communicative *convention*, but

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[127] *See generally* Redding, *supra* note __; Christopher Slobogin, *Psychiatric Evidence in Criminal Trials: To Junk or Not to Junk?*, 40 WM. & MARY L. REV. 1 (1998).

[128] One might say that music is protected because it usually complements language, and that rule making tends to be categorical and that instrumental music is only protected by dint of its association with vocal music. This is undoubtedly true to some degree. But even so, there must be *some* principle determining what is communicative other than "association with language." People talk during violence, but violence is never communication.

rather about how much freedom we grant ourselves. To call an act communicative, in other words, is to acknowledge the listener as a moral agent; to say otherwise is to deny her that agency.

Consider, for example, the famous Meese Committee. In the eighties, President Reagan appointed the Meese Committee to examine the impact of pornography on American Culture and suggest new laws for the treatment of obscenity. While doing its research, the Committee watched a lot of pornography.[129] The fact that the Committee watched so much pornography, one might argue, proves that pornography doesn't turn people into criminals—after all, no one on the Committee was later arrested.

If the rationale for limiting pornography were harm prevention, this criticism would fall short—it might be true that pornography affects different people in different ways. But the real issue is one of free will. If the Committee were to suggest treating pornography as conduct—as something that changed people in spite of themselves, so that pornographers were in some part responsible for the harm viewers caused—they would be granting others less moral agency than they granted themselves. "We can see this stuff and choose not to be changed; normal viewers cannot." That this premise is offensive to a rights-based system of law seems obvious.

### e. Application: Nude Dancing and Publishing Code

Having argued that the free-will theory can improve doctrine, I am going to give two examples: the nude-dancing cases and cases governing whether publication of computer source code is protected speech. In both sets of cases, I will argue, the law or

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[129] *See* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, FINAL REPORT at 5 ("We could not have responsibly conducted our inquiry without spending a considerable period of time examining the materials that constitute the subject of this entire endeavor").

scholarship is confused because authors have been writing without a theory of communication.

### 1. Nude Dancing

The two most recent cases governing the power of a state to directly regulate erotic dancing are *Barnes v. Glen Theatre, Inc.*,[130] and *City of Erie v. Pap's A.M.*[131] In *Barnes*, the owners of a nightclub wanted to present totally nude dancing, but Indiana law required dancers to wear G-strings and pasties.[132] The challenged law did not just prohibit nude dancing, but all public nudity.[133] The Court held that the law was constitutional, with Chief Justice Rehnquist announcing the judgment as part of a three-justice plurality.[134]

This opinion makes some mysterious moves. It concludes, for instance, that nude dancing is expressive conduct within "the outer perimeters" of the First Amendment, but "only marginally so."[135] The opinion does not explain why.[136] It also applies the *O'Brien* test without any justification, except a brief comment explaining that the *O'Brien* test resembles the time, place or manner test—a test that is itself inapplicable to Indiana's general prohibition on nudity.[137]

The Rehnquist plurality held that the law was constitutional under the *O'Brien* test because it was unrelated to the suppression of free expression and instead furthered a

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[130] 501 U.S. 560 (1991).
[131] 529 U.S. 277 (2000).
[132] *See* Barnes, 501 U.S. at 563.
[133] *Id.* at 566.
[134] *See Id.* at 571.
[135] *See* Barnes, 501 U.S. at 566.
[136] *Id.*
[137] *Id.*

"substantial government interest in protecting order and morality."[138] Justice Souter concurred, but wrote separately to indicate that he thought the government interest in this case was in curtailing the "secondary effects" of nude dancing, such as prostitution and sexual assault.[139] Justice Scalia also concurred separately, concluding that the statute was not directed at the expressive content of nude dancing but at the immorality of nudity and therefore did not invoke the First Amendment.[140] In dissent, Justices White, Blackmun, Marshall and Stevens argued that nude dancing was pure expressive conduct and could not be regulated without a compelling interest.[141]

*Pap's A.M.* was decided nine years later and addressed a statute that also imposed a general ban on nudity.[142] A majority of the Court again concluded that nude dancing was only barely covered, holding that it falls "only within the outer ambit of the First Amendment."[143] This time, a five-justice plurality also concluded that the ban should be analyzed under the *O'Brien* test.[144] O'Connor, joined by three other justices, announced the judgment in an opinion holding that the law was constitutional as applied.[145] Here, instead of finding that the ban passed the *O'Brien* test because the government had a substantial government interest in promoting morality, the plurality concluded that the government had a substantial interest in regulating secondary effects.[146] The dissent, written by Stevens and joined by Ginsberg, argued that nude dancing was expressive

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[138] *Id.* at 569.
[139] *Id.* at 582.
[140] *Id.* at 575-580.
[141] *Id.* at 596.
[142] Pap's A.M., 529 U.S. 277 at 283.
[143] *Id.* at 289.
[144] *Id.* at 296.
[145] *Id.*
[146] *Id.*

conduct[147] and that the law itself was directed at the expressive content of nude dancing.[148]

We can take two points from these cases: 1) while most justices conclude that nude dancing is just barely covered by the First Amendment, some justices think that it is not covered at all; and 2) a ruling plurality agrees that the legality of the statute depends on what the government's interest is, but there is disagreement as to what constitutes a legitimate interest.

The debate thus turns on whether 1) nude dancing is communication and 2) the alleged secondary effects the government seeks to regulate are communicative. The first question is controverted, I think, because it reflects disagreement as to whether a patron could watch an erotic dance and *choose not to be aroused*. Consider a spectrum of hypotheticals covering the same sex act. The first is a dispassionate written description using clinical language; the second is a written description that is meant to arouse; the third is a film of the act; the fourth is a simulation of the act performed by a nude dancer on stage; the fifth is the act itself. Now consider the law. Doctrinally, doing it in the flesh is conduct,[149] while seeing it in a movie or reading a book about it is speech (so long as the book or movie isn't obscene). Live dancing, as we know, is the liminal case. All of these behaviors, however, have the same *content*. The law is not distinguishing between them because of the value of the messages they send. The difference is the degree to which the communicant can resist arousal.

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[147] *Id.* at 326.
[148] *Id.* at 331.
[149] *See* Garland, *supra* note __, at 196.

As to whether arousal is a freely willed mental response to nude dancing, I believe that it is. Erotic nudity is simply too pervasive in society—from classical painting to high art films[150]—to permit the conclusion that the harmful mental changes it wreaks can't be resisted. This permissiveness towards eroticism in other contexts demonstrates a belief in the moral agency of its viewers that would be abridged if erotic dancing in strip clubs were forbidden solely because it lacked the trappings of art.

If nude dancing's exile to the First Amendment's hinterlands is explained by uncertainty over whether arousal is freely willed, the state's right to regulate nude dancing turns on application of the "secondary effects" doctrine. The alleged secondary effects are violence, public intoxication and prostitution.[151] Under the free-will theory, the analysis is properly construed as one of identifying communicative effects. That is, if nude dancing invokes arousal, does arousal lead to increased violence, public intoxication, and prostitution?

Scholars like Amy Adler have argued that it does not. Adler points out that the relevant law forbids nude dancing, but not *near-nude* dancing: wearing a G-string and pasties is acceptable.[152] Therefore, she argues, the state must prove that nude dancing would cause prostitution, violence and drug use while near-nude dancing would not—in other words, that two stars and a strip of cloth can stop crime.[153]

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[150] *See* Miller v. Civil City of South Bend, 904 F.2d 1081, 1089-94 (7th Cir. 1990) (Posner, J. concurring), *rev'd sub nom*. Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)
[151] Pap's A.M., 529 U.S. 277 at 297.
[152] *See* Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1129 (2005).
[153] *See id.*

In Adler's characterization, the state's position is not just wrong, but pathological, demonstrating a fear of female genitalia.[154] But the state's case isn't crazy, and it doesn't turn on proving that looking at genitals makes people go bad. Instead, it turns on proving that there is more crime in all-nude clubs than near-nude clubs. This might be true for reasons other than the corrosive effects of genitals. The two types of clubs might attract different patrons and employees, and therefore have different cultures. Or the visual reminder of the law, and the accompanying threat of inspection, might alter behavior in larger ways.[155]

But even if the state's position can be construed as a matter of influencing "culture," and not as an uninterrupted causal connection between seeing genitals and crime, that does not mean that the state has proved that secondary effects are noncommunicative. It is hard—perhaps conceptually impossible—to disassociate a culture from the communication it fosters. If the government could censor communication because it contributed to a culture that was more amenable to crime, than a fair amount of protected speech—curse words[156] and general statements of disrespect to authority[157]—would fall outside of the First Amendment's reach. However tenuous the link, the "secondary effects" argument turns on the way that nude dancing *changes people's minds*. This makes the secondary effects communicative. Under this standard, *Pap's A.M.* was wrongly decided.

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[154] In part this is just a Sorites problem. All distinctions look silly at the limit. If it's absurd to say that G-strings will stop crime, it's equally absurd to say that evidence in a crime is fresh the day before the statute of limitations runs out but stale the day after. The limitations period just represents society's best attempt to balance the contravening interests at stake, as does the G-string requirement to those who defend it.
[155] Or not—I don't know. I don't spend a lot of time in strip clubs.
[156] *See* Cohen v. California, 403 U.S. 15, 20 (1971).
[157] *See id.*

### 2. Code Cases

In the last decade, a series of cases have analyzed whether computer programming code is covered by the First Amendment. These cases arise in two contexts. The first line of cases stems from the government's attempts to regulate, for national security reasons, the export of encryption technology that could be used to communicate secret messages. The second arises from movie studios' attempts to use intellectual property laws to enjoin publication of a program that allowed digital copying of DVDs. Both cases show how the lack of any real definition of communication has led the law astray.[158]

#### i. Encryption-Export Regulation Cases

The lead case in the national security line is *Bernstein v. U.S. Dept. of Justice*.[159] Bernstein, a PhD. candidate, wrote a program called "Snuffle 5.0" using C, a source-code programming language.[160] Snuffle 5.0 was an encryption program that could convert a comprehensible written message—like a sonnet or a football score—into an incomprehensible "cipher text." The program could also be used by someone with a "key"—a large number—to de-encrypt the cipher text back into comprehensible text.[161]

In explaining source code, the Ninth Circuit wrote that:

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[158] Before getting to the cases, let me point out a complication that is particular to code: code facilitates communication both as a tool and a medium of contact. By medium of contact I mean the thing that the reader experiences through the senses. Code is a medium of contact when a computer programmer (or someone else) reads or hears it. But it is a tool when it is used to make something—an image or song or so forth—that is seen or heard. Code, of course, can be either. But in these cases I am analyzing code as a medium of contact; the importance of code as a tool will have to wait for another time.

[159] 176 F.3d 1132 (9th Cir. 1999) (Bernstein IV), *reh'g en banc granted and opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999).

[160] Bernstein v. U.S. Dept. of State, 922 F. Supp. 1426, 1429 (N.D. Cal. 1996) (hereinafter Bernstein I).

[161] Bernstein IV, 176 F.3d at 1137.

> "Source code" . . . refers to the text of a program written in a "high-level" programming language, such as "PASCAL" or "C." The distinguishing feature of source code is that it is meant to be read and understood by humans and that it can be used to express an idea or a method. A computer . . . can make no direct use of source code until it has been translated ("compiled") into a "low-level" or "machine" language, resulting in computer-executable "object code." . . . . Because source code is destined for the maw[162] of an automated, ruthlessly literal translator—the compiler—a programmer must follow stringent grammatical, syntactical, formatting, and punctuation conventions. As a result, only those trained in programming can easily understand source code.[163]

In addition to the Snuffle 5.0 encryption program, Bernstein also wrote a paper explaining his encryption method.[164] Later he wrote a set of instructions in English explaining how to program a computer to encrypt and decrypt data using the techniques in Snuffle, "essentially translating verbatim his Source Code into prose form."[165] Bernstein wanted to publish these materials—the paper, the source code program, and the prose "instructions"—for academic discussion. The government, however, requires that some encryption technologies must be licensed before disclosure to a foreign person, and Bernstein was worried that his materials would require a license.[166]

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[162] Isn't this an awesomely weird metaphor? My compiler eats code!

[163] Bernstein IV, 176 F.3d 1132 at1140. Here is an excerpt from Snuffle 5.0:

```
        for (; ;)
(
uch = gtchr( );
if (!(n & 31))
(
for (i = 0; i64; i//)
l[ ctr[i] ] = k[i] + h[n - 64 + i]
Hash512 (wm, wl, level, 8).
```

*Id.* at 1140 n.11.

[164] *Id.* at 1136.

[165] *Id.*

[166] Bernstein I, 922 F. Supp. at 1430.

Bernstein applied for this license.[167] After some back and forth, the State Department concluded that Snuffle was a munition under the International Traffic in Arms Regulations Act, and that Bernstein would need a license to "export" the source code and the instructions, but not the paper.[168]

Bernstein sued, arguing that the export restrictions violated the Free Speech Clause. The district court found that the restrictions were unconstitutional, reasoning that the posting of source code was pure speech.[169] The district court's influential explanation is worth quoting at length:

> Bernstein's encryption system is written, albeit in computer language rather than in English. . . . It would be convoluted indeed to characterize Snuffle as conduct in order to determine how expressive it is when, at least formally, it appears to be speech. . . . Language is by definition speech, and the regulation of any language is the regulation of speech. Whether source code and object code are functional is immaterial to the analysis at this stage. . . . Thus, even if Snuffle source code, which is easily compiled into object code for the computer to read and easily used for encryption, is essentially functional, that does not remove it from the realm of speech. Instructions, do-it-yourself manuals, recipes, even technical information about hydrogen bomb construction are often purely functional; they are also speech.[170]

### ii. DeCSS Cases.

The DeCSS cases stem from what was, in retrospect, a sad attempt by a consortium of businesses to prevent unlicensed copying of commercial DVDs. This consortium—which included movie studios and DVD player manufacturers[171]—

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[167] Bernstein IV, 176 F.3d at 1136.
[168] *Id.* at n.2.
[169] Bernstein I, 922 F. Supp. at 1436. Because the parties had argued for the less restrictive *O'Brien* standard, the court applied that test without considering other options.
[170] *Id.* at 1437.
[171] Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 309 (S.D.N.Y. 2000).

developed an encryption algorithm called CSS.[172] As part of a comprehensive licensing scheme, the consortium encrypted all DVDs and installed CSS on licensed DVD players, so that only licensed players could play encrypted DVDs. Jon Johansen—a fifteen year old Norwegian boy—and two of his anonymous Internet buddies then broke CSS by reverse engineering it.[173] They then created DeCSS, a program that decrypted CSS-protected DVDs, enabling users to copy and play those DVDs.[174] Johansen posted an executable version of DeCSS in object code[175] form on his web site for anyone to download and use.

DeCSS was soon all over the Web.[176] Movie studios began writing cease-and-desist letters to the operators of websites that made DeCSS available for download.[177] One such person was Eric Corley, who wrote a magazine for computer hackers and oversaw an online version of the magazine.[178] Corley posted both source and object code versions of DeCSS on his website. Universal Studios sued to enjoin Corley (and the corporation he ran) from making DeCSS available for download from his website and also from linking to other websites that did.[179]

The law that Universal relied on—the Digital Millennium Copyright Act (DMCA)—is controversial in its own right.[180] The DMCA, among other things, forbids

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[172] *Id.*
[173] *Id.* at 311.
[174] *Id.*
[175] Object code is the pure binary code read by a computer. Universal City Studios, Inc. v. Corley, 273 F.3d 429, 438 (2d Cir. 2001).
[176] *Id.* at 439.
[177] *Id.*
[178] *Id.*
[179] *Id.* at 441.
[180] This DMCA has been broadly attacked by intellectual property scholars. *See, e.g.*, Jacqueline D. Lipton, *Solving the Digital Piracy Puzzle: Disaggregating Fair Use from the DMCA's Anti-Device Provisions*, 19 HARV. J.L. & TECH. 111 (2005); Yijun Tian, *Problems of Anti-Circumvention Rules in the DMCA and More Heterogeneous Solutions*, 15 FORDHAM INTELL. PROP. MEDIA AND ENT. L.J. 749 (2005); Thomas A.

"trafficking" in any technology "primarily designed . . . for the purpose of circumventing a technological measure that effectively controls access" to digital copyrighted material.[181] In response, Corley argued that DeCSS was pure expression and that the injunction therefore violated the Free Speech Clause.[182]

Ultimately, the Second Circuit concluded that "computer code conveying information is 'speech' within the meaning of the First Amendment."[183] The court reasoned that:

> Instructions such as computer code, which are intended to be executable by a computer, will often convey information capable of comprehension and assessment by a human being. . . . Moreover, programmers communicating ideas to one another almost inevitably communicate in code, much as musicians use notes. Limiting First Amendment protection of programmers to descriptions of computer code (but not the code itself) would impede discourse among computer scholars, just as limiting protection for musicians to descriptions of musical scores (but not sequences of notes) would impede their exchange of ideas and expression.[184]

### iii. How to Determine Whether Code Is Communicative.

The code cases demonstrate the problems that arise when First Amendment analysis is done without a definition of communication. The existence of misleading theories—ideaism and symbolism in particular—leads courts to think that noncommunicative acts are communicative merely because they resemble speech: "Language is by definition speech, and the regulation of any language is the regulation of

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Mitchell, *Copyright, Congress & Constitutionality: How the Digital Millennium Copyright Act Goes Too Far*, 79 NOTRE DAME L. REV., 2115 (2004); David Nimmer, *Back From the Future: A Proleptic Review of the Digital Millennium Copyright Act*, 16 BERKELEY TECH. L.J. 855, 867 (2001). I find these attacks convincing, although I'm not knowledgeable in the field.

[181] 17 U.S.C. § 1201(a)(2).

[182] Universal City Studios, Inc. v. Corley, 273 F.3d 429, 451 (2d Cir. 2001).

[183] *Id.* at 449-50.

[184] *Id.* at 448.

speech. . . . Instructions, do-it-yourself manuals, recipes, even technical information about hydrogen bomb construction are often purely functional; they are also speech."[185]

Using symbols is not speech, however—only using symbols to convey thoughts that people *could freely resist* is speech. But computers have no free will; they can't disagree with code. The analogy with "instructions" is thus dead wrong. Instructions are orders that the reader could choose to resist. Code, on the other hand, is a way of making a machine run.

If code is not communicative in the first instance, it still might be protected if it is used in a communicative way. And here, again, the lack of a definition of communication has led the analysis astray. Consider the prevailing (with some exceptions, of course)[186] scholarly consensus, which is that the DeCSS cases were wrongly decided. This argument—made most eloquently by David McGowan—holds that courts have been slow to recognize new conventions of expression and have unduly emphasized code's "functional" nature.[187] McGowan argues that courts tend to miss the expressive intent of posting code among communities interested in programming.[188] He also argues that, to the extent expressive publication of source code is regulated because it can facilitate unlawful behavior, it should be covered under incitement law, which requires a likelihood that an act will cause harm if it is to be regulated.[189]

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[185] *Id.* at 1437.
[186] *See*, *e.g.*, Dan L. Burk, *Patenting Speech*, 79 TEX. L. REV. 99 (2000).
[187] *See* McGowan, *supra* note __, at 1572; *See also* Lora Saltarelli, note, *The Digital Millennium Copyright Act and the Functionality Fallacy*, 77 NOTRE DAME L. REV. 1647(2002).
[188] McGowan, *supra* note __, at 1573.
[189] *Id.* at 1588-94; *see also Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (finding advocacy regulable when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

This story is wrong; posting code is not like incitement, even though both acts require an intervening act to cause harm. This is because code can cause noncommunicative harm, while incitement cannot. To be more precise, harm can ensue from posting code even if the mental change the publisher of code hopes to bring about does not occur. Taking Johansen at his word, he meant to initiate a conversation on decryption technique by posting DeCSS. But the most important effect of DeCSS—video copying—would occur even if no one understood the techniques it demonstrated.

Indeed, it could happen if *nobody's* mind was changed by the posting of DeCSS. DeCSS enabled people who already wanted to copy DVDs to do so. Posting code, in this respect, is like leaving a loaded gun out on a window sill. If someone picks up the gun and shoots a puppy, the liability of the gun owner is not assessed under incitement law. This is true even if the gun owner left the gun out for communicative purposes—to show off the stock, or protest anti-gun laws. That code has *some* communicative effects does not make it communicative when its most important effect is *non*communicative.

Of course, this does not mean that code should never be covered. It just means that less code should be covered than the common story proposes. Here we can contrast *Bernstein* and *Corley*. Bernstein was a mathematician who wanted to make a point about encryption theory.[190] To make this point, he used code, a medium that was uniquely suited to his project.[191] His program never functioned, because creating a functioning

[190] 176 F.3d 1132, 1136 (9th Cir. 1999) (Bernstein IV), *reh'g en banc granted and opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999).
[191] *Id.* at 1140-41.

program was incidental to his goal.[192] It was therefore primarily important because of what it communicated, not what it did.

Johansen, on the other hand, wrote a working program. Other people reposted it, both to make it available for other users and in protest of the law forbidding it.[193] When Corley later reposted DeCSS he argued that he did so to communicate the ideas it contained. But DeCSS was not *primarily* important to anyone—to Corley, Johansen or the government—for the mental responses people had after reading it. It was important because it enabled copying of protected DVDs.[194]

## III. IMPLICATIONS

So far, I have argued that communicative behaviors are those that are primarily important because they invoke freely willed mental responses. Most of my time has been spent disputing earlier theories of communication and addressing specific doctrinal controversies. In this section, I will briefly consider a few broad implications of my theory.

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[192] *Id.* at 1141 n.14.

[193] Committing an unlawful act in order to protest the law making it unlawful cannot, as a matter of course, be a speech act, or every law would be fairly easily circumvented. O'Brien wasn't protesting the law against destroying draft cards; he was protesting the war.

[194] At the trial court, Corley argued that he posted DeCSS because he was covering an important story, and testified that writing the story without posting DeCSS would be like "printing a story about a picture and not printing the picture," an argument that McGowan finds persuasive. David McGowan, *From Social Friction to Social Meaning: What Expressive Uses of Code Tell Us About Free Speech*, 64 Ohio St. L.J. 1515, 1572 (2003) (citing Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 346 (S.D.N.Y. 2000), aff'd, Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001) (No. 00-Civ-0277 (LAK)), available at http://www.2600.com/dvd/docs/2000/0725-trans.txt (last visited Oct. 9, 2003)). But this assumes away the argument, because a picture is communicative and code generally is not. If an unusual gun were used in a famous murder, many people would surely like to own a copy. But if a manufacturer sold working replicas (or, as Corley did, gave them away), the government shouldn't have to survive strict—or even *O'Brien* level—scrutiny to apply ordinary gun laws to the sale.

Let me start by revisiting an earlier point. We saw, in our discussion of mentalism, that while scholars said that communication went to the "mind" and not the "body," the real operative distinction was between behaviors that conveyed thoughts that were forced on a person and behaviors that conveyed thoughts they could choose.[195]

This suggests a new way of ordering the world. Instead of splitting the world between mind and body—between what we *experience*, and what *is*—we might split it between acts that force experiences on us, and those that allow us to choose experiences. Applying this distinction will allow us to understand new ways of being. We tend, for instance, to think of "virtual" worlds as incorporeal—that is, of being more mind than body. But worlds are virtual in light of the meaning attached to them, not by dint of their physical presence. If an online world became so important that its inhabitants were moved by occurrences there to the same degree that real-world inhabitants were—if they could not choose whether to be moved by changes there—then we should not think of it as a virtual space, but a real one. Indeed, the world is full of information technologies—things that are important for their mental effects, not their physical ones—that we nonetheless would never describe as "communicative" or "virtual." Paper money, after all, is an information technology—a way of keeping track of people's beliefs—but money is still real.

Thinking about communication, in other words, can allow us to see the world in new ways. Symbolic acts—like taking someone's money—are more like violence because of the coercion they effect. And nonsymbolic acts—like consensual sex—are in some sense more like language, because of the lack of coercion. The free-will theory of

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[195] *See supra* part II.b.

communication allows us to see past these categories—mind and body, signifier and signified—that are thought to define communication and consider whether we want to live in the kind of libertarian world that Baker proposes.[196]

The free-will theory can also help us rethink the way our bodies relate to the world. Our sense of the "normal" body deeply informs the scope of communication. The law, for instance, treats communication as a visual and aural phenomenon. Of the five senses, vision and hearing are the only ones that are normally thought of as conduits for communication. (By "conduit" I mean the sense through which the communicant receives the communication.)[197] Of the communicative phenomena we have been discussing—reading, talking, nude dancing, music—all are experienced visually, aurally, or both.[198] (They can be experienced through other senses as well, but those other inputs are not considered communicative.). The line between speech and conduct tracks the difference between sensory inputs. Eroticism conveyed through touch is considered conduct; when conveyed through sight it is expression. There is, in fact, no activity that is primarily experienced through taste or smell that is considered speech. The only tactile experience that qualifies is Braille.[199] Even this fact is telling; presumably, Braille is speech because it is linguistic and thus a close analogue of written communication.

But language, of course, is not only the only way to communicate. If Braille is covered because it is an analogue of aural and visual language, then other analogues of

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[196] *See supra* part II.b.

[197] A particular communicative act can engage different senses on the part of the speaker and the listener. Someone marching in a protest experiences tactile (as well as visual and aural) input, but a spectator experiences only visual and aural input. Of course, the spectator has tactile input—she feels the ground beneath her feet—but this sense isn't a medium for communication.

[198] This distinction might be another usage for the terms "mind" and "body." My sense is that activities that cause tactile, olfactory and taste-based input are labeled "bodily" phenomena.

[199] *See* Am. Council of the Blind v. Boorstin, 644 F. Supp. 811, 815 (D. D.C. 1986) (holding that the Braille editions of Playboy magazine are covered under the First Amendment).

visual and aural forms of communication should be covered as well. For those who can hear, music is an aural experience. But for the deaf, it is touch-based, experienced through vibrations.[200] If aurally experienced music is communication, then tactilely experienced music could be as well. The freedom granted the hearing should run also to the deaf.

If, in other words, we believe that communication is seen or heard, we may miss that it can be felt. Indeed, even framing the question this way—"what is the deaf version of music?" is discriminatory; it might just as well be reversed. There may be forms of communication in the deaf community that could alert the law to unrecognized communication in hearing life—new freedoms, if we could see them.

We will also, I think, soon need a theory of communication because technology will change so much that we won't be able to rely on the old categories even by way of analogy. It is now possible to interact in immersive simulated environments, to touch each other (and have "sex"!)[201] remotely, to bypass sensory input by stimulating the brain directly, and to transmit brain impulses directly to bionic limbs.[202] How long, then, before technology enables one person to convey brain impulses directly to another, without mediation of the senses? And what would we say of this—that it went to the "mind" and not the "body"? That it conveyed "ideas"? But saying those things would prove nothing at all.

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[200] *See* Corey Kilgannon, *Hip-Hop Reverberates In a Silent World*, N.Y. TIMES, March 29, 2007, at B1.
[201] *See* Xeni Jardin, High-Speed Love Connection, WIRED, June 24, 2004, available at http://www.wired.com/gaming/gamingreviews/news/2004/06/63963 (last checked on August 6, 2007).
[202] *See, e.g.*, Charlotte Hunt-Grubbe, *The Blade Runner Generation*, TIMES ONLINE, July 22, 2007, at http://www.timesonline.co.uk/tol/life_and_style/health/article2079637.ece (last checked on August 6, 2007).

The old metaphors break down. The world will change rapidly, and we will change too, in ways that we will never recognize, ways that will recreate us and make us recreate what it means to read and write and speak and think. Against all this we can only hope to see truly—that is, to never mistake the name for its bearer, the blueprint for its architecture, or the map for its dark territory.