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SILENCE AND THE WORD

PAUL CAMPOS*

Professor Post has identified and described an essential tension at the heart of so-called "collectivist" accounts of free speech.¹ Certainly from the orthodox (i.e., libertarian) perspective of modern First Amendment doctrine, there is little to be said in favor of the enthusiasm for bureaucratic correctitude displayed by Professors Fiss, Sunstein, et. al. I share Professor Post's skepticism regarding the virtues of "managed deliberation," and have little to add to his exemplary critique.

I would, however, like to say a few words about a metaphor. This particular metaphor is central to not only many of the papers which have been given at this conference, but to the bulk of modern free speech theory: I refer to Holmes's "marketplace of ideas." The marketplace of ideas has become more than a mere figure of speech—it is now, one might say, the *constitutive* metaphor that organizes an entire cognitive field in certain predictable ways. Thus, Professor Post's essay divides First Amendment discourse into varieties of laissez faire individualism that celebrate the autonomy of atomistic choice, inevitably colliding with managerial modes of bureaucratic rationality that mimic the planned structure of the modern welfare state.

Now as has been noted many times, implicit in the classical economic theory of the market is the idea that everything worth acquiring can be bought. I believe a parallel fiction burdens our marketplace of ideas: the (usually unstated and therefore all the more powerful) assumption that everything worth knowing can be said.

I can best illustrate this claim by pointing to certain ways of speaking, and of keeping silent, that contest the omnisignificant pretensions of discursive rationalism. The languages of art, philosophy, and religion often remind us that the deepest meanings must ineluctably seep into the fields of silence at the limits of human discourse. Consider the beginning of *King Lear*. Maddened by his monstrous appetite for verbal displays of unlimited devotion,

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1. Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993).

Lear offers up his kingdom to his daughters, if only they will oblige him:

Which of you shall we say doth love us most?
That we our largest bounty may extend
Where nature doth with merit challenge.²

His eldest daughters, Goneril and Regan, are only too happy to comply, declaring that they love him "more than words can wield the matter," before proceeding to lavish him with a verbal flood of fulsome flattery. Cordelia, the youngest daughter, is horrified by this spectacle, and refuses to play her scripted role in this particular piece of "managed deliberation." She knows that "my love's more richer than my tongue," and so when her father demands "what can you say to draw a third/ More opulent than your sisters? Speak," she replies

Nothing, my lord.
Nothing?
Nothing.

Lear is thunderstruck. "Nothing can come of nothing. Speak again." Cordelia answers, "Unhappy that I am, I cannot heave my heart into my mouth. I love your majesty according to my bond; nor more nor less."³

Something of Cordelia's resistance to the seductions of language can be found in this passage from the Taoist philosopher Chuang Tzu:

Duke Huan of Ch'i was reading a book at the upper end of the hall; the wheelwright was making a wheel at the lower end. Putting aside his mallet and chisel he called to the Duke and asked him what book he was reading. 'One that records the words of the Sages,' answered the Duke. 'Are those Sages alive?' asked the wheelwright. 'Oh no,' said the Duke, 'they are dead.' 'In that case,' said the wheelwright, 'what you are reading can be nothing but the lees and scum of bygone men.' 'How dare you, a wheelwright, find fault with the book I am reading. If you can explain your statement, I will let it pass. If not, you shall die.' 'Speaking as a wheelwright,' he replied, 'I look at the matter in this way; when I am making a wheel, if my stroke is too slow, then it bites deep but is not steady; if my stroke is too fast, then it is steady, but it does not go deep.

2. WILLIAM SHAKESPEARE, *THE TRAGEDY OF KING LEAR*, act 1, sc. 1 (Russell Fraser ed., Signet Classics 1963).

3. *Id.*

The right pace, neither slow nor fast, cannot get into the hand unless it comes from the heart. It is a thing that cannot be put into words [rules]; there is an art in it that I cannot explain to my son. That is why it is impossible for me to let him take over my work, and here I am at the age of seventy still making wheels. In my opinion it must have been the same with the men of old. All that was worth handing on, died with them; the rest, they put in their books. That is why I said that what you were reading was the lees and scum of bygone men.⁴

Both the limitations of language and the sacred qualities of silence were well understood by the Midrashim, the Jewish sages who forbade anyone from speaking the Shem Hamephorash, that is, the Secret Name of the God they would only call Adonai—Lord. For them, to even presume to call the Lord by his true name signified a grave impiety. As Borges puts it

[e]ven in the human languages there is no proposition that does not imply the entire universe; to say *the tiger* is to say the tigers that begot it, the deer and turtles devoured by it, the grass on which the deer fed, the earth that was mother to the grass, the heaven that gave birth to the earth . . . in the language of a god every word would enunciate that infinite concatenation of facts, and not in an implicit but in an explicit manner, and not progressively but instantaneously. . . . A god . . . ought to utter only a single word and in that word absolute fullness. No word uttered by him can be inferior to the universe or less than the sum total of time. Shadows or simulacra of that single word equivalent to a language and to all a language can embrace are the poor and ambitious human words, *all, world, universe*.⁵

To deny the reality of the unnameable involves a kind of linguistic hubris. The marketplace of ideas commodifies, or, if you will, profanes the inexpressible richness of experience by reducing our communicative gestures to an impoverished series of tradeable propositions which are assumed to capture all we know, and all we need to know.

It is this language, the language of hypertrophied utilitarianism, of bureaucratic rationality, which gives mechanical life to the formulaic doctrines that monopolize the marketplace of free speech jurisprudence. Indeed, the metaphor becomes the message, and our speech about speech begins to resemble those stylized notations

4. MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS, AND OTHER ESSAYS* 9 n.2 (1962) (quoting Chuang Tzu).

5. JORGE LUIS BORGES, *The God's Script, in LABYRINTHS; SELECTED STORIES AND OTHER WRITINGS* 169, 171 (Donald A. Yates & James E. Irby eds., 1964).

that cryptically encode reams of financial information: Benthemite figurations of meaning, thin, lifeless, unreal.

And yet one can still find traces of resistance to the hyper-rationality of contemporary legal discourse in the most unlikely venues. Consider two Supreme Court opinions, each of which, not coincidentally, still elicit widespread cries of outrage from legal scholars: Justice Blackmun's opinion for the Court in *Flood v. Kuhn*, and Chief Justice Rehnquist's dissent in *Texas v. Johnson*.

In *Flood v. Kuhn*,⁶ the Court refused to overrule a half-century old case that had granted major league baseball an exemption from the antitrust laws. The contested precedent was based on a discarded interpretation of the Commerce Clause, and all nine justices agreed that if they were to visit the matter de novo, baseball would not be granted such an exemption. The formal legal argument in Justice Blackmun's opinion involves a rather dry discussion of how much force should be granted to stare decisis in questions of federal statutory interpretation.

Yet the first part of the opinion is something else altogether: a florid encomium to baseball's history which climaxes in a kind of incantation, made up of the names of ninety-three famous and not so famous figures from the game's fabulous past, beginning with Ty Cobb, Babe Ruth, Tris Speaker, Walter Johnson and Henry Chadwick, and ending with Carl Hubbell, Old Hoss Radbourne, Moe Berg, Rabbit Maranville, Jimmie Foxx and Lefty Grove.⁷

This list is reminiscent of nothing so much as that portion of the canon of the Catholic mass in which the priest intones the names of thirty-seven saints, anointing the congregation in a voluptuous wave of nostalgic remembrance. And when we study the subtext of *Flood*, a similar rhetorical function for Justice Blackmun's strange chant begins to reveal itself. *Flood* upholds baseball's antitrust exemption because of a 'recognition and an acceptance of baseball's unique characteristics and needs. . . . If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court.'⁸

Justice Blackmun's list, then, like Cordelia's silence, signals the evocation of an organic ordering of social life that is not amenable to rational analysis. Cordelia can only point to that

6. 407 U.S. 258 (1972).

7. *Id.* at 262-63.

8. *Id.* at 284.

inchoate bond between father and daughter that Lear, in his feverish lust for the clarity of language, insists must be made verbally explicit. Similarly, Justice Blackmun attempts to evoke the mysterious, inexplicable hold that baseball has on the core of American culture through a kind of prelapsarian naming of names that will both provide the uninitiated with insight into the special nature of baseball history, and represent a transrational justification for his—in the best sense—deeply conservative impulse not to tamper with the traditional social order of the game.

Chief Justice Rehnquist's dissent in *Texas v. Johnson*,⁹ the flag burning case, bears an uncanny structural resemblance to *Flood*. The first part of the opinion is a retrospective paen to the American flag, celebrating its role over the course of two centuries of American history. The central element of the dissent's language is supplied not by traditional legal rhetoric, but rather by poetry: the Chief Justice quotes stanzas of Emerson's "Concord Hymn," of the Star Spangled Banner, of various patriotic songs, and all of John Greenleaf Whittier's "Barbara Frietchie."

The dissent attempts to evoke in the reader a visceral, rather than an intellectualized, understanding of its claim that

[t]he flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have

. . . .
 . . . [t]he government has not "established" this feeling; 200 years of history have done that.¹⁰

Whatever views one may hold regarding the First Amendment, this is surely a more accurate rendering of the American flag's cultural significance than that found amid the bloodless rationalizations of Justice Brennan's opinion for the Court.

Why then do legal scholars routinely emit hoots of derision when confronting Blackmun's and Rehnquist's idiosyncratic and intriguing texts?¹¹ I would suggest that the answer has something to do with the sociology of knowledge. Professor Fish reminds us that the world of actual speech does not usually function like a

9. 491 U.S. 397 (1989).

10. *Id.* at 429, 434.

11. A textbook example of this tendency is found in Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124 (1992). For a full scale critique of this type of legal scholarship, see Paul Campos, *Advocacy and Scholarship*, 81 CAL. L. REV. 216 (1993).

philosophy seminar;¹² while Professor Post emphasizes how impoverished Meiklejohn's model of political life as a well-run town meeting really is.¹³ These are helpful reminders of how academics, perhaps especially legal academics, systematically overvalue hyper-rational, tightly structured forms of public deliberation, in much the same way that football coaches overvalue the ability to bench press 470 pounds. This, after all, is what we are good at doing, and at teaching others to do.

Naturally enough, it disturbs us to consider the possibility that the logic of collective identity depends more on the public's irrational attachment to a piece of cloth, or the name of a half-forgotten ball player, than on all the arguments in all the law review articles entombed within the sepulchral silence of our libraries.

What is essential, perhaps, is not that everyone shall speak, but that everything worth knowing shall *not* be said. Poets, priests, philosophers, and sometimes even judges understand this. We who are professionally obliged to forget it, and to intermittently mistake the cramped and tumultuous marketplace of ideas for the great globe itself of earthly knowledge would do well to remember that, in the words of that most poetic of philosophers, Ludwig Wittgenstein,

[D]oubt can exist only where a question exists, a question only where an answer exists, and an answer only where something *can be said*.

. . . .

. . . There are, indeed, things that cannot be put into words. They *make themselves manifest*. They are what is mystical.¹⁴

12. Stanley Fish, *Fraught With Death: Skepticism, Progressivism, and the First Amendment*, 64 U. COLO. L. REV. 1061, 1062 (1993).

13. Post, *supra* note 1, at 1112.

14. LUDWIG WITTEGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 149-51 (D.F. Pears & B.F. McGuinness trans., 2d ed. 1971).