Robotic Speakers and Human Listeners

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In their forthcoming book, Ron Collins and David Skover propose that we do—and should—protect speech not so much because of its value to speakers but instead because of its affirmative value to listeners. Defining and describing that value very broadly as "utility," they then conclude that robotic speech deserves the First Amendment's coverage, and often its protection, precisely because of its great utility to listeners:

> It should be immaterial to free speech treatment that a robot is not a human speaker. It should be irrelevant that a robot cannot fairly be characterized as having intentions. It should be beside the point that a robot does not engage in a dialogic exchange to express propositions or opinions. For constitutional purposes, what really matters is that the receiver experiences robotic speech as meaningful and potentially useful or valuable.[1]

In earlier work (first with Toni Massaro[2] and then with Toni and Margot Kaminski[3]), my co-authors and I similarly concluded that little in First Amendment law poses a barrier to First Amendment coverage of robotic speech. Although this conclusion feels counterintuitive to many, it stems much more from the contemporary state of First Amendment law than from the nature of robots or artificial intelligence (AI) themselves.[4]

Indeed, most "positive" free speech theories value, and thus urge the protection of, expression because it provides certain affirmative benefits

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1. RONALD COLLINS & DAVID SKOVER, ROBOTICA: SPEECH RIGHTS & ARTIFICIAL INTELLIGENCE 42 (Cambridge Univ. Press 2018).

2. Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1169, 1193 (2016).

3. Toni M. Massaro, Helen Norton & Margot E. Kaminski, *Siri-ously 2.0: What Artificial Intelligence Reveals About the First Amendment*, 101 MINN. L. REV. 2481, 2523 (2017).

4. *See id.* at 2512 (explaining that "the Court's contemporary free speech theory and doctrine already make it difficult to articulate convincing limiting principles").

to *listeners*: expression can facilitate listeners' democratic self-governance, it can enlighten them through exposure to a marketplace of ideas and knowledge, and it can inform their choices and thus enable the exercise of their individual autonomy.[5] Even "negative" free speech theory, which emphasizes the dangers of the government's control of expression rather than the affirmative value of that speech in its own right, seeks primarily to protect *listeners* from the government.[6] In short, both positive and negative free speech theories (as well as the Supreme Court's contemporary First Amendment doctrine that draws upon them) protect "listeners' interests in free speech outputs—rather than speakers' humanness or humanity—in ways that make it exceedingly difficult to place AI speakers beyond the First Amendment's reach."[7]

So, if we assume that the First Amendment is largely, if not entirely, about serving listeners' interests in speech—in other words, that it's listeners all the way down—what would a listener-centered approach to robotic speech require? To be sure, robotic speech can offer great value to human listeners.[8] But here I want to briefly discuss the complicated and sometimes even dark side of robotic speech from a listener-centered perspective.

More specifically, cheap and plentiful speech—and robotic speech is increasingly an important source of cheap and plentiful speech[9]—is of great utility to many listeners. But there is a dark side too, as cheap and plentiful speech sometimes poses new dangers to certain listeners and to the public more broadly.

Rick Hasen, for example, observes that "[c]heap speech has dramatically lowered costs for those who want to draw on people's fears and rile them up for violent purposes."[10] Julie Cohen uses the term "infoglut" to describe this era of cheap and plentiful speech fueled by

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5. *See* Massaro & Norton, *supra* note 2, at 1175–82. Note that one strand of "positive" free speech theory—that which values speech for its ability to further *speakers'* autonomous expression—provides the exception to the rule that otherwise emphasizes listeners' interests. Even so, we predicted that the growing prevalence and value of AI speech would place increasing pressure on this theory to define and refine its understanding of the speakers entitled to First Amendment protection. *See id.* at 1180–82.

6. *See* Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 17 (2009) (emphasizing the dangers created by the government's efforts to control information rather than any affirmative benefits of expression for its own sake); Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445, 451 (2012) (explaining that a negative theory of the First Amendment is rooted in governmental distrust).

7. Massaro, Norton & Kaminski, *supra* note 3, at 2483.

8. *See* Massaro & Norton, *supra* note 2, at 1170–72 (describing some of the benefits of robotic speech to human listeners).

9. *See* Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 206–07 (2017).

10. *Id.*

technology, along with its attendant and often unanticipated dysfunctions: "Information abundance also enables new types of power asymmetries that revolve around differential access to data and to the ability to capture, store, and process it on a massive scale."[11] And as Tim Wu explains:

> It is no longer speech itself that is scarce, but the attention of listeners. Emerging threats to public discourse take advantage of this change. . . . The low costs of speaking have, paradoxically, made it easier to weaponize speech as a tool of speech control. The unfortunate truth is that cheap speech may be used to attack, harass, and silence as much as it is used to illuminate or debate.[12]

Cheap speech, the democratization of information, and infoglut: these and other terms all describe abundant speech of the sort that robots and other technological developments increasingly make possible. While such inexpensive and plentiful speech may seem to maximize listener utility, the concerns expressed by Cohen, Hasen, and Wu (among others) show how more speech is not always better for listeners. Indeed, sometimes speakers "weaponize" cheap speech to threaten listeners—for example, by exploiting information and power advantages that increase their capacity to deceive, manipulate, and coerce their listeners.

Speakers' motives for exploiting listeners are many and complicated: for example, speakers may seek to entertain themselves (and others), to make money, or to influence political outcomes.[13] Consider, for example, the evidence that Russian bots targeted the American electorate as part of a campaign to manipulate the 2016 elections:

> Bots can serve many purposes, some beneficent and others nefarious . . . . Of greatest relevance here, bots can spread information or misinformation, and can cause topics to "trend" online through the automated promotion of hashtags, stories, and the like. During the 2016 campaign, the prevalence of bots in spreading propaganda and fake news appears to have reached new heights.[14]

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11. Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQ. L. 369, 384 (2016) ("Under conditions of infoglut, the problem is not scarcity but rather the need for new ways of cutting through the clutter, and the re-siting of power within platforms, databases, and algorithms means that meaning is easily manipulated.").

12. TIM WU, KNIGHT FIRST AMENDMENT INST., IS THE FIRST AMENDMENT OBSOLETE? 2–3 (2017), https://knightcolumbia.org/sites/default/files/content/Emerging%20Threats%20Tim%20Wu%20Is%20the%20First%20Amendment%20Obsolete.pdf [https://perma.cc/D3W3-22HM].

13. *See* Helen Norton, *(At Least) Thirteen Ways of Looking at Election Lies*, 71 OKLA. L. REV. (forthcoming 2018) (identifying a wide range of motives underlying certain speakers' lies to their listeners).

14. Nathaniel Persily, *Can Democracy Survive the Internet?*, J. DEMOCRACY, Apr. 2017, at 63, 70, https://www.journalofdemocracy.org/sites/default/files/07_28.2_Persily%20%28web%29.pdf [https://perma.cc/7PJ8-85YR].

Tim Wu points to China to further illustrate how speakers can exploit cheap and abundant speech, or "infoglut," to threaten listeners' interests: "What [researchers] have discovered is a regime less intent on stamping out forbidden content, but instead focused on distraction, cheerleading, and preventing meaningful collective action."[15]

Furthermore, sometimes listeners themselves are a threat to other listeners. Indeed, listeners' interests—both short- and long-term—often conflict. Trolling provides an illustration. As Whitney Phillips explains, "[T]rolling can be nasty, outrageous business. That is, in fact, the entire exercise: to disrupt and upset as many people as possible, using whatever linguistic or behavioral tools are available."[16] Although the trolls' targets find this speech of no value and often of great harm, some number of the trolls' listeners include other members of the trolling community who consider trolling to be enjoyable precisely because others find it so unpleasant. As I have written elsewhere: "[T]hat the nasty and pernicious features of certain speech can strip it of utility for some listeners is precisely why other listeners enjoy it . . . . Those who are quick to see utility in contested speech may well be those least likely to experience, and thus see, its harm."[17] Relatedly, different listeners experience hate speech in different ways and thus disagree about its value. Even though hate speech is of no utility to its targets, some bystanders apparently enjoy it. Indeed, many listeners enjoy hateful, false, and outrageous speech when it speaks to and confirms their pre-existing preferences, fears, and grievances.[18]

So far, I have discussed the dark side of robotic speech for its human listeners. I next consider what it would mean to take listeners' interests seriously in the context of robotic and other technologically cheap and plentiful speech.

Contemporary First Amendment theory and doctrine make clear that we sometimes privilege listeners' First Amendment interests by protecting speech, and sometimes by regulating it.[19] At times, for example, the government imposes duties of honesty, accuracy, or disclosure upon

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15. WU, *supra* note 12, at 10.

16. WHITNEY PHILLIPS, THIS IS WHY WE CAN'T HAVE NICE THINGS: MAPPING THE RELATIONSHIP BETWEEN ONLINE TROLLING AND MAINSTREAM CULTURE 2 (2016).

17. Helen Norton, *What's Old Is New Again (and Vice Versa)*, *in* RONALD COLLINS & DAVID SKOVER, ROBOTICA: SPEECH RIGHTS & ARTIFICIAL INTELLIGENCE 100, 107 (Cambridge Univ. Press 2018); *see also id.* ("[S]ome listeners (as well as speakers) see other listeners simply as means to their own ends of utility and [] assessments of utility (and harm) can be shaped by the powerful to the detriment of those less powerful.").

18. *See* PHILLIPS, *supra* note 16, at 10 (describing how trolls enjoy watching each other "ruin[] complete strangers' days").

19. *See* Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 52–60 (2016) (discussing listener-centered speech environments).

certain speakers to protect listeners' informational and autonomy interests. Recall, for instance, the commercial speech context, where listeners' interests as consumers in receiving truthful and non-misleading information about legal commercial transactions justify both the protection and regulation of commercial expression to serve those interests.[20] Consider too the professional speech setting, in which governments sometimes protect listeners' interests by prohibiting professionals' inaccurate or otherwise harmful speech to their clients and patients, and by requiring certain truthful disclosures.[21]

We can similarly understand the First Amendment to protect robotic speech that is of value to its listeners, while permitting the government to regulate robotic speech to protect listeners from coercion, deception, and discrimination. In short, First Amendment doctrine retains a human focus when it attends both to the value and the dangers of robotic speech to its human listeners.[22]

Of course, hard questions remain in determining exactly when and how to regulate robotic speech to protect listeners' interests—questions we will be grappling with for years to come.[23] And, to be sure, sometimes the answer may not be legal regulation, as we may instead choose to rely on markets, norms, or architecture to protect listeners' interests.[24]

But to close with one specific doctrinal proposal, I suggest that we understand the First Amendment to permit the government to privilege listeners' interests by requiring the truthful disclosure of expression's robotic origin.[25] Expression's source is extremely valuable information

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20. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562–64 (1980) (explaining that commercial speech that is false, misleading, or related to illegal activity can be prohibited outright consistent with the First Amendment because it is of no value to listeners, while governmental restrictions on all other commercial speech are subject to intermediate scrutiny because they regulate speech that is of value to listeners).

21. *See* PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 248–50 (2013) (describing the regulation of professional and fiduciary speech to protect vulnerable listeners).

22. *See* Massaro, Norton & Kaminski, *supra* note 3, at 2523.

23. *See id.* at 2506–23.

24. *See* Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662–64 (1998) (describing how law, social norms, markets, and architecture can all regulate human behavior in different ways); *see also* Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435, 1468–84 (2011) (considering approaches to online hate speech that rely on markets, norms, and architecture).

25. *See* WU, *supra* note 12, at 4, 9 ("[G]iven that many of the new speech control techniques target listener attention, it may be worth reassessing how the First Amendment handles efforts to promote healthy speech environments and protect listener interests . . . . [N]o one quite anticipated that speech itself might become a censorial weapon, or that scarcity of attention would become such a target of flooding and similar tactics."); Hasen, *supra* note 9, at 23 ("But there is a danger that counterspeech will not be enough to deal with the flood of bot-driven fake news making it harder for voters with civic competence to separate truth from fiction and make informed voting and policy choices. For this reason, the First Amendment should not be interpreted to bar the government from

upon which listeners often rely to gauge a message's quality and credibility.[26] Claims to anonymity or pseudonymity (i.e., speakers' efforts to conceal and sometimes even lie about their expression's actual source) generally serve speakers' interests at the expense of their listeners.[27] In short, the more information about the source of a message, the better for listeners. Indeed, because the source of speech is so valuable to listeners, the Supreme Court has repeatedly upheld compelled disclosures—that is, laws that require campaign contributors and speakers to disclose their identities to the public—in the campaign speech context where it is otherwise so loath to permit regulation.[28]

As many of the speakers in this Symposium emphasized, robots are disruptive in many ways, for good and for ill.[29] More specifically, the cheap and plentiful speech that robots help make possible can disrupt democratic institutions (again, for both good and for ill) and will likely disrupt First Amendment doctrine as well.[30] Just as criminal and tort law will respond to the new ways in which robots cause harm, so too will First Amendment doctrine respond to the new challenges generated by robotic speech. Recall that the First Amendment doctrine of the early twenty-first century is almost unrecognizable from the First Amendment doctrine of the early (and even the late):[31] change will come, even if we are not yet sure what form it will take.

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enacting carefully drawn laws which would require social media and search companies such as Facebook and Google to provide certain information to let consumers judge the veracity of posted materials.").

26. *See* Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 592–97 (2008) (describing how individuals use the source of speech as a heuristic for its credibility or lack thereof).

27. Helen Norton, *Secrets, Lies, and Disclosure*, 27 J.L. & POL. 641, 644 (2012) ("[S]ome political speakers seek to shape their listeners' voting behavior by denying those listeners information about the source of the message or of the candidate's (or cause's) financial support—information that is not only indisputably true but also of great interest and value to listeners."). I acknowledge a few exceptions, for example: listeners' interests are served by anonymity for speakers who reasonably fear retaliation for whistle-blowing or other speech about government and other misconduct that is of great value to listeners. *See id.* at 642–43.

28. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 371 (2010) ("[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.").

29. Annette Clark, Dean, Seattle University School of Law, Opening Remarks at the Seattle University Law Review Symposium: Singularity: AI and the Law (Feb. 17, 2018).

30. *See* Massaro, Norton & Kaminski, *supra* note 3, at 2506–23 (describing doctrinal and policy challenges, which include determining when robots can sue or be sued and distinguishing robotic conduct from speech for First Amendment purposes).

31. *See, e.g.*, GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 533 (2004) (describing substantial changes in First Amendment doctrine over time).

And perhaps the challenges of robotic speech will inspire and enable a return to a truly listener-centered approach to some of these challenges in other, more traditional settings. As many thoughtful commentators have observed, although the commercial speech doctrine originally sought to privilege listeners' interests as consumers, commercial and other speakers now increasingly exploit that doctrine to attack regulations intended to protect listeners from speakers who enjoy advantages of power and information over them.[32] Examples include powerful speakers' challenges to privacy laws that constrain commercial entities' use of information for marketing purposes and challenges to laws that require corporate and commercial actors to make certain truthful disclosures.[33] As my co-authors and I earlier suggested, "[t]he prospect of free speech rights for strong AI speakers might encourage useful clarification of the roles of human listeners and of speech harms in U.S. free speech theory and doctrine today."[34]

32. *E.g.*, Alan B. Morrison, *No Regrets (Almost): After Virginia Board of Pharmacy*, 25 WM. & MARY BILL RTS. J. 949, 952–53 (2017) ("I had hoped that, as the commercial speech doctrine developed, the utility of the information to the consumer would be part of the balance, instead of simply asking whether the challenged statements were truthful."); Tamara Piety, "*A Necessary Cost of Freedom"? The Incoherence of* Sorrell v. IMS, 64 ALA. L. REV. 1, 5 (2012) ("*Sorrell* completes what has been a decades-long process of turning the rationale for commercial speech doctrine upside down by putting the speaker, rather than the public interest, at the center of the analysis. It completes what I call has been a 'bait-and-switch' whereby the protection for commercial speech was offered under one justification, but once it was granted, has morphed into something completely different.").

33. *See* Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1395–96 (2017) (asserting that the contemporary Court's approach to free speech problems has included a significant and potentially damaging change in its concept of "listeners") ("In the republican tradition, listeners are a stand-in for the public, whose interest in free expression is to achieve collective self-determination and self-government . . . . Leaving this tradition behind, the Court's new approach narrowly conceived of listeners as individual consumers or voters whose interest in free expression is to make informed choices in the market for goods or candidates . . . . [L]isteners' rights are subordinated to corporate speech rights. It is deeply ambiguous whether the Court's deregulatory holdings actually benefit listeners, though corporate interests are always served.").

34. Massaro, Norton & Kaminski, *supra* note 3, at 2523; *see also id.* at 2514 (predicting that these challenges "may inspire more careful reflection about how to define and mitigate the harmful effects of covered speech, while preserving its manifold benefits").