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# Compelled Speech

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## Articles

### COMPELLED SPEECH

*Larry Alexander\**

At Christmas, I, a lapsed Jew, attended mass with my wife, a devout Catholic, as I usually do. And, as usual, I stood when the congregation stood but did not kneel when the congregation knelt. When the congregation recited the Nicene Creed, I remained silent. But when Christmas carols were sung, I sang along.

Why did I sing the carols, which proclaim the divinity of Jesus, but not recite the Nicene Creed? After all, both contain propositions I do not believe to be true. My only answer is that it seemed wrong to recite the Creed (and to genuflect) but not to sing the carols.

What does this autobiographical revelation have to do with compelled speech, which, after all, is the title of this essay? I was not compelled by anyone to recite, kneel, or sing (or not to do so). If I had been, that would have been a different matter altogether.

Well, yes it would have been. And I am indeed interested in speech compelled by the government. However, as I hope to show, figuring out just when governmentally compelled speech is problematic requires understanding how those compelled to speak are harmed by being so compelled. And that turns out not to be such an easy task.

I am going to come back to the Nicene Creed, Christmas carols, and like matters by a rather circuitous route. I shall first

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\* Warren Distinguished Professor, University of San Diego School of Law. Thanks to Elaine Alexander, Mitch Berman, Connie Rosati, Fred Schauer, and Steve Smith, all of whom evinced interest in my topic and offered profitable advice about things to consider, and each of whom had a somewhat different take on the problem of compelled speech.

look at the array of Supreme Court cases that the Court refers to as compelled speech cases. My purpose is to distinguish among them and to separate most from the few that are my concern. I shall then focus on these latter cases and ask if the government acts involved should be regarded as constitutionally problematic, and, if so, why. That question will lead me to examine the possible harms an individual might arguably suffer as a result of being compelled to utter propositions in which she does not believe. And that examination will lead me back to the quotidian examples with which I began.

My conclusion will be anticlimactic, I fear. The harm in compelled speech remains elusive, at least for me. My hope is that some reader more insightful than I will pick up the ball and figure out just where the harm lies. My suspicion, however, is that it will not be easy going.

## I. DISTINGUISHING AMONG COMPELLED SPEECH CASES

As a matter of Supreme Court constitutional doctrine, there are probably four distinct lines of cases that in some sense deal with “compelled speech.” First, there is the *Barnette/Wooley* line, which includes only the two cases to which the name refers.<sup>1</sup> That is the line that interests me and to which I shall return.

Second, there is the *Abood* line, in which I include *Abood*,<sup>2</sup> *Keller*,<sup>3</sup> *Glickman*,<sup>4</sup> *Southworth*,<sup>5</sup> *United Foods*,<sup>6</sup> and *Johannis*.<sup>7</sup> These cases are more accurately called “compelled support” cases because they involve compelling some to pay for speech of others with which the former disagree. The harm of compelled support is quite different from whatever harm is involved in the *Barnette/Wooley* line. The *Abood* line should really be thought

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1. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977).

2. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

3. *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990).

4. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 1145 (1997).

5. *Board of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000).

6. *United States v. United Foods, Inc.*, 533 U.S. 405 (2001).

7. *Johannis v. Livestock Marketing Assoc.*, 125 S. Ct. 2055 (2005). For other recent commentary on this line of cases, see Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087 (2005); Robert Post, *Compelled Subsidization of Speech: Johannis v. Livestock Marketing Association*, 2005 SUP. CT. REV. 195; Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555 (2006).

of as cases dealing with the fair distribution of the burden of financing speech in circumstances in which some who are forced to finance it disagree with its content or its necessity. Essentially, these are cases about arbitrary taxation where the taxes are going to pay for speech.

Take *Abood*. The question there was whether people forced by law to join a union could be compelled to pay union dues to finance union political speech with which they disagreed. The Court held that although those compelled to join could be further compelled to pay dues to finance collective bargaining activity—from which they derived a benefit, however unwanted—they could not be compelled to finance union political speech. (*Keller* held the same in the context of compelled membership—with compelled dues—in a state bar association; *Southworth* held differently with respect to mandatory student fees used to finance campus speakers; and *Glickman* and *United Foods* came out both ways with respect to compelled financing of promotions of commodities.)

In two of the three cases in which the Court found the compelled support violative of the First Amendment—*Abood* and *Keller*—any benefit that the speech provided the compelled payors derived from the speech's providing a benefit to the general public and not from its providing a more specific, tangible benefit to compelled payors. Or at least there was no more reason for the compelled payors to finance this speech than there was for others to do so. In *Abood*, union members who dissented from the union's political views were arbitrarily taxed to support those views. They were arbitrarily taxed because there was no more reason to have *them* finance the speech than to have, say, owners of diners, Red Sox fans, or neighbors of the union officers support it. The same holds true for *Keller* and possibly for *United Foods*, though the latter is a much less clear example.

The third line of compelled speech cases is the *Tornillo* line.<sup>8</sup> That line also arguably includes *Pacific Gas and Electric*,<sup>9</sup> although *Pacific Gas and Electric* could be looked at as an arbitrary taxation case. (The tax was de minimis, however.) The Court in *Tornillo* seemed to be worried about whether a right of reply requirement would deter the speech that would trigger that right. If when you attack someone, you are forced to give him a

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8. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

9. *Pacific Gas & Elec. Co. (PG&E) v. Public Utils. Comm'n*, 475 U.S. 1 (1986).

right to reply on your letterhead, you might refrain from attacking him. That was the Court's primary worry in *Tornillo*.

Finally, there is the *Roberts/Hurley/Dale* line of cases involving compelled association, or the "association as speech" cases.<sup>10</sup> The claim in those cases was that the membership criteria of groups were expressive of ideas, and that compelling change in those criteria altered the messages the groups wished to communicate. Now a lot has been and could be said about this line of cases. I, for one, think that although a group may wish to send a message through its membership criteria, and although nondiscrimination laws and the like *do* alter such messages, there should be no *First Amendment* objection to outlawing certain membership criteria so long as government's purpose is not itself message related.<sup>11</sup> I may mean to send a "message" by using a sound truck in a residential neighborhood at night to communicate my ideas, or by communicating them through graffiti on others' buildings. My media may be integral parts of my messages. Nevertheless, I have no credible First Amendment objection to laws preventing my use of these media, however message-related they are.<sup>12</sup> The *Roberts/Hurley/Dale* cases should have been conceptualized by the Court as straightforward freedom of association cases rather than as free speech cases.<sup>13</sup>

In any event, this line of cases does not raise the "compelled speech" problem that interests me here. Rather, it is only the *Barnette/Wooley* line that does so.

## II. EXPLAINING BARNETTE AND WOOLEY

In *Barnette*, West Virginia required schoolchildren to recite the Pledge of Allegiance even if they (or their parents) objected

10. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

11. See LARRY ALEXANDER, *IS THERE A RIGHT OF FREEDOM OF EXPRESSION?* 115–18 (2005). I do *not* mean to suggest, however, that there is no right to freedom of association, or that there is no such right in the Constitution. I am merely denying that such a right is derivable from our right to freedom of expression. On this point, I am in disagreement with not only the Supreme Court in cases such as *Dale*, but also such academic commentators as Seana Shiffrin. See Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839 (2005). Shiffrin makes a convincing case for the importance of freedom of association to idea formation and testing. See *id.* at 868–75. Nonetheless, I do not believe that importance is sufficient to establish that freedom of association is entailed by freedom of speech.

12. See ALEXANDER, *supra* note 11, ch. 2.

13. See *id.* at 115–18.

to the Pledge's content. In *Wooley*, New Hampshire forbade taping over the state's "Live Free or Die" motto, even if the vehicle owner disagreed with the sentiments expressed. In both cases the Court found a First Amendment violation premised on the existence of compelled speech. But just how did compelling speech in such ways run afoul of constitutional values?

#### A. INTERFERENCE WITH AUTONOMY

The West Virginia and New Hampshire laws surely limited the autonomy of the complaining parties. However, this by itself cannot explain the outcomes. Laws generally limit autonomy, at least in the sense that they prevent people from doing what they would otherwise choose to do. In *Wooley*, moreover, the law imposed only a negative duty ("do not obscure the motto on the license plates"), although that negative duty was conjoined with an affirmative one to which no one objected ("carry the New Hampshire license plate on your New Hampshire vehicle").

*Barnette*, on the other hand, did involve an affirmative duty to act. However, schoolchildren are subject to all sorts of affirmative duties of this sort ("go to school," "turn in your homework," and so forth). Indeed, we permit government to impose affirmative duties on adults, such as duties to serve on juries or in the military, or duties to report accidents. Moreover, some of the affirmative duties we permit government to impose on adults are duties to speak—most importantly, to testify at trials or other official proceedings. Although the duty to testify is limited by certain privileges, there is no privilege against testifying on the general ground of "autonomy."

#### B. GOVERNMENTAL INCULCATION OF VALUES

Another possible objection to the laws in *Barnette* and *Wooley* is that the states' purpose in those cases was the inculcation of certain beliefs/values, and that purpose is a constitutionally illegitimate one. Forcing schoolchildren to recite the Pledge or drivers to carry the motto on their license plates is an illegitimate attempt to alter what the complainants think.

Now, there are a number of objections to this account of *Barnette*/*Wooley*. First, the Court in these cases never repudiated inculcation of beliefs/values, even through coercive measures, as

a legitimate state goal; moreover, in other cases the Court has affirmed the goal's legitimacy.<sup>14</sup>

Second, *Wooley* seems particularly difficult to explain as a case of coercive inculcation of beliefs/values. Whether or not the motto was visible or taped over, it would be largely invisible to the vehicle's driver and passengers. Other vehicles' license plates would be much more effective for that purpose than the plates of Maynard's own vehicle, in which case the demand should have been to eliminate the motto from all license plates.

Third, my interest here is in the harm suffered by the individual compelled to utter in some fashion a proposition that he does not wish to affirm. If the state has a legitimate interest in belief/value inculcation, is there a harm caused by compelled speech apart from its role in belief/value inculcation that should invalidate the state's acts? On the other hand, even if the state has *no* legitimate interest in belief/value inculcation, is there a harm from compelled speech when the government is *not* trying to inculcate beliefs/values thereby? (Suppose, for example, that government compels students to sing certain lyrics in music class, or to recite certain lines in drama class,<sup>15</sup> solely because those lyrics and lines help further dramatic or musical instructional goals, and not because the government wishes to inculcate what those lyrics or lines affirm: May it do so despite students' objections to being compelled to express those sentiments?)

### C. DECEPTION OF THE AUDIENCE

Perhaps government is attempting to deceive or will have the effect of deceiving the public regarding what various people believe. That would surely count heavily against coercing speech. Abner Greene, in his excellent short essay on the Pledge, thought deception to be one of the chief concerns about coerced speech.<sup>16</sup>

On the other hand, Greene argued, and I agree, that no reasonable observer in *Barnette* would conclude that the coerced schoolchildren believed in the Pledge. No reasonable believer in *Wooley* would believe that any given owner of a New Hampshire

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14. See, e.g., Board of Educ., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853 (1982).

15. See, e.g., Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004) (stating that a drama student may be required on pedagogical grounds to recite lines to which she objects as a condition of receiving class credit).

16. Abner S. Greene, *The Pledge of Allegiance Problem*, 64 *FORDHAM L. REV.* 451, 474-75 (1995).

vehicle supported the state's motto either.<sup>17</sup> Reasonable observers would understand that the recitation of the Pledge and the displaying of the motto on the license plates were coerced. I surely don't attribute to the soldier who salutes her commanding officer any attitude of actual respect for that officer. (What I do believe is that the government is, by requiring the salute, attempting to teach the soldier that she *should* respect her commanding officer, and that the government is probably quite successful in that endeavor. This belief in turns leads me to believe that it is quite likely the soldier does have the attitude the salute is supposed to denote, *though her particular act of saluting itself is not evidence of that attitude.*)

### III. HARMS TO THE INDIVIDUAL

Here I want to ask whether, apart from the legitimacy of government's purposes in coercing speech, there are harms to the coerced individual from being forced to affirm a proposition he does not believe. If I, for example, were compelled to recite the Nicene Creed, what harms—other than a limitation of my autonomy, as with compelled testimony—would I suffer? Here are some possibilities.

#### A. PRESENTING A FALSE FRONT

This is related to the deception argument, except the focus is now on the individual whose "affirmation" is deceiving others and the harm that individual suffers in the process. For many (most?) people do not want to be misperceived by others, at least with respect to their core beliefs. They want others to know what they stand for, apart from any concern with harms others might suffer as a result of misunderstanding what the speaker believes.

All that is true but insufficient. As previously pointed out, in many of the core examples it is unlikely that anyone will misunderstand the speaker's true mind. The coerced schoolchildren could explain to their classmates their true beliefs, and their being coerced fully explains to others their reciting the Pledge. And surely no one ever attributes a license plate motto to the vehicle's owner.

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17. *Id.* at 482–83.

Moreover, if asked why I do not recite the Nicene Creed, the answer would not be because I do not wish to mislead others in the congregation about my true beliefs. Nor would a concern with false fronts explain why I feel quite comfortable singing the carols, or why I would not hesitate to play any part in Jesus Christ Superstar (if only I could sing). The harm of maintaining a false front does not do the work required here.<sup>18</sup>

#### B. UNDERMINING ONE'S OWN BELIEFS

*Saying* what you do not believe is certainly not the same as *believing* what you do not believe, a self-contradiction. Moreover, although one can be coerced to say things, one cannot be coerced to believe them. Still, saying what you don't believe with sufficient repetition, whether doing so due to legal, social, or psychological pressure or for some other reason, might cause one's beliefs to change to become more congruent with what one verbally affirms. I'll just gesture towards the explanatory mechanisms: cognitive dissonance, the Emperor's New Clothes effect, subliminal influence.

The danger is not that one's beliefs will change but rather that they will change for reasons other than rational reconsideration. The mechanism is just adverted to cause beliefs to change by bypassing the ordinary filters of evidence and rational analysis upon which one wants one's beliefs to be based.

Now there is something to this basis for objecting to affirming what one does not believe and therefore to allowing government to coerce speech. Indeed, I think many of the parents of my Jewish friends who objected to having their children sing Christmas carols (or having their children in nursery school sing "Jesus Loves Me," the first song I remember learning in my nursery school) did so on the ground that singing carols and such might subtly cause their children to hold Christian beliefs.

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18. David Velleman has written a provocative essay in which he connects shame with the inability to control our self-presentation, which inability casts doubt on our status as an agent. J. David Velleman, *The Genesis of Shame*, 30 PHIL. & PUB. AFF. 27 (2001). (I thank Connie Rosati for this reference.) According to Velleman, public nakedness exposes one's inability to conceal sexual arousal, which is why violations of privacy regarding the body are frequently shame-inducing.

Is it similarly shameful to have one's expressions coerced? Is one's status as an autonomous agent undermined if one capitulates to the coercion of expression? My own sense is that it is not. One should be no more ashamed of uttering sounds or making marks on paper in response to coercion than one should be ashamed at refraining from jaywalking, filling out tax returns, or testifying at trials.

Still, this account of the harm of affirming what one does not believe seems inadequate. It does not explain why *I* resist reciting the Nicene Creed and at the same time sing carols. I do not fear having my rational thought processes violated by reciting the Creed; nor do I believe my singing carols has affected any of my beliefs. Moreover, I believe that were I compelled to recite the Creed weekly, I still would not fear the undermining of my beliefs and rational thought processes. I would probably just recite it mindlessly; or adopt jesuitical “mental reservations” and silently insert a “not” into the propositions I rejected; or think of myself as speaking a made-up language that attaches quite different meanings to the sounds. Fear of coming to believe what I reject fails to capture the phenomenology of my resistance to the Creed. Nor do I think it was the central worry in *Barnette* and *Wooley*.

Seana Shiffrin correctly points out that as rational agents, we have an interest in seeing that what we believe reflects the evidence we possess and warranted inferences from that evidence.<sup>19</sup> When the government tries to circumvent our rational thought processes in getting us to believe what it wishes, it offends this interest. And compelling us to say certain things is objectionable because it is a way of altering our beliefs by bypassing the modes of persuasion that engage our processes of rational belief formation.<sup>20</sup>

Surely, however, this is overstated. First, government “compels” schoolchildren to believe certain things without attempting to “persuade” them. Much of what is taught in schools—grammar, arithmetic, spelling, world capitals, and so on down a long list—is not taught through persuasion. Rather, it is presented as true, and students must acknowledge it as true, at least for purposes of passing courses and receiving good grades. Much has to be taken on others’ say so, even for the most rational of agents. And many of the things government tells us—for example, that the bridge has been undermined by flooding and is dangerous to drive over—it expects us (rightly) to believe or at least to act as though we believe. Even more is that the case for schoolchildren.

Shiffrin understands this but thinks compelling people to utter what they do not believe is a more pernicious form of belief inculcation than having them listen to or read the propositions

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19. Shiffrin, *supra* note 11, at 856.

20. *Id.* at 856–62.

government wishes them to believe.<sup>21</sup> In part, she believes that this is because, as a compelled listener, one is more detached from the proposition than one is as a compelled speaker.<sup>22</sup> Perhaps what one could conclude is that when government compels adults actively to assert propositions in which they do not believe, (1) government trenches on autonomy to a greater extent than it would were people merely subjected to government speech, and if government's purpose is to cause those compelled to speak to come to believe what they are compelled to assert, then either (2) government will be ineffective, making the infringement of autonomy pointless, or (3) government will be effective, but only through bypassing the compelled adults' rational capacities, which is objectionable.

This account would explain only why we should object (as adults) to belief inculcation through compelled recitations. It would not explain objections to compelled speech for other purposes. Leaving aside the purpose to deceive the audience, which is objectionable in its own right but is inapplicable where the compulsion is obvious, why would government compel speech if not to inculcate belief in the speaker? I have already mentioned some possible purposes. A university voice teacher may believe that certain lyrics are best for voice training. Or a drama teacher may believe certain plays and parts therein are best for dramatic training. Or there may be aesthetic reasons for requiring certain recitations. Admittedly, conceivable reasons for compelled speech run out rather quickly. Still, there are reasons other than belief inculcation.

Moreover, many people feel harmed by being forced to assert propositions that they do not believe even if they do not fear coming to believe those propositions and would not otherwise object, at least not nearly so much, to being compelled to speak. (They would not object nearly so much to being compelled to say something they *did* believe, to sing a song they found pleasant, or to recite a nursery rhyme.) Sir Thomas More objected to affirming Henry's legitimacy as head of the English church, not because he feared that he would come to believe it, and not because of the effort required to make the affirmation, but for

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21. *Id.* at 861.

22. *Id.* at 861–62. See also Vincent Blasi & Seana Shiffrin, *The Story of West Virginia v. Barnette: The Pledge of Allegiance and Freedom of Thought in CONSTITUTIONAL LAW STORIES* 433, 461–63 (Michael C. Dorf ed., 2004) (arguing that “performative dissonance” may cause compelled speakers to come to believe what they are compelled to say).

some other reason, some harm that he would suffer. So we must press on to see if we can discern what that harm might be.

### C. DIVINE RETRIBUTION

At least with respect to religious expression, affirming what one does not believe may seem to some to be blasphemy meriting divine punishment. (In fact, I know many people do think this.) And this might be what motivates the claim of harm in *Barnette* and *Wooley*.

Now I cannot here get into theological beliefs in any depth. I can, however, express puzzlement over the claim that God would be angry with those who—whether to avoid legal punishment, social sanctions, or awkward social situations (such as calling attention to oneself disruptively)—mouth the sounds which in a certain language make words that express propositions that they do not believe. If, under various pressures, people make such affirmations with the mental reservations required by what they actually believe, why should God be angry? After all, we are assuming that no one is deceived to his detriment, and the speaker is not by speaking undermining his actual beliefs.

In any event, fear of divine retribution is not *my* reason for refusing to recite the creed. I do not believe the God of Abraham, Isaac, and Jacob would smite me down if for various reasons I recited it, nor do I fear his wrath over my singing carols. And unless I can distinguish between the Creed and the carols, I cannot see why He would distinguish the two.

### D. NORMS

Suppose one said that the reason the Creed and the carols seem different to you, Alexander, is that there is a norm against reciting creeds in which one does not believe, but no norm against affirming propositions in, say, songs and plays.

The problem with this “norm” explanation is this: Either the norm rests upon some policy, or it does not. If it does, then what is that policy? We looked at deception, undermining rational belief, and avoiding divine punishment, and none of them appears straightforwardly capable of providing the policy grounds for the suggested norm.

On the other hand, suppose the norm rests on nothing deeper. It is just how we do things around here. My response is that I see no evidence that there *is* such a norm. Those who be-

lieve that I shouldn't sing carols obviously do not recognize a norm that distinguishes creeds from carols. Moreover, the norm explanation does not square with my phenomenology when I consider whether to recite, kneel, or sing. My decisions are not influenced by any generally accepted social norms of which I am aware.

But suppose there is such a norm, even if we cannot provide it with a convincing policy basis. One may sing Christmas carols without believing in the propositions asserted, but one transgresses a social norm if one recites the Nicene Creed in a church service without believing it.<sup>23</sup>

For this explanation to do the work required to solve the compelled speech puzzle, however, the norm involved would have to hold, not only when, uncoerced, I choose to recite the Creed, but also when the government compels me to do so. The social norm, in other words, would have to prescribe martyrdom in such a case. Unless, however, there is a convincing argument for why such a social norm should be recognized and internalized—an argument that cites to harms from reciting the Creed under compulsion that are greater than the harms of martyrdom—I find the social norm explanation incapable of the heavy lifting required.<sup>24</sup>

#### E. PERSONAL INTEGRITY

It might be contended that were I to recite the Creed, I would undermine my personal integrity. It is surely plausible (is it not?) that nothing is more essentially “me” than my beliefs. Because I do not believe in the Creed, affirming it represents a loss of personal integrity.

To the extent this argument is not merely a rehash of the prior ones, I find it mysterious. One can accept the premise that one “is” one's beliefs without concluding that affirming propositions in which one does not believe undermines personal integ-

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23. Mitch Berman suggests this possibility.

24. Fred Schauer suggests that perhaps power relations might be relevant here—that a Jew at a Catholic service in the United States might feel differently from a Catholic at an American Bar Mitzvah, and that as a Jew of Romanian Jewish descent, he was much more willing to recite the liturgy in a Jewish service in Romania, with its tiny remnant of a once large Jewish population, than he would be in a service in the United States. He also suggests that being compelled either to utter prayers in which one does not believe or publicly decline to do so is objectionally manipulative, presumably because it forecloses the option of hiding one's views. Yet that assumes what is in issue, namely, that uttering what one does not believe is harmful to the utterer. Email correspondence with author, June 6, 2006.

riety. Remember that, by hypothesis, the affirmation leaves one's beliefs fully intact. They are not altered in any way thereby. Indeed, calling what is at issue an "affirmation" is an equivocation. One is "affirming" what one does not believe by making sounds that in the language of some audience conventionally express the speaker's declaration that he believes certain things to be true or right. But making such sounds in no way touches the speaker's actual beliefs. He is not in his mind "affirming" what he does not believe. Nor could he. He is like the corporate customer service representative who tells you, according to the script mandated by corporate management, that X corporation "wishes you a good day," or the small child who says "thank you" when he is commanded by his father to thank Aunt Harriet for the wonderful fountain pen.<sup>25</sup>

#### F. PERFORMATIVES

It has been suggested to me that perhaps things like reciting the Creed are performatives, ways of doing things with words, like saying "I do" at a wedding ceremony or "I promise" to a business partner. Viewed in that way, reciting a religious creed in which one does not believe—as, famously, Sir Thomas More refused to do (though he did not urge his family to refuse)—is more akin to "spitting on the cross" or some other blasphemous *act* than it is to a mere assertion.<sup>26</sup>

The problem with this explanation is that the preconditions for, say, my recitation's of the Creed being a performative do not seem to be present. After all, if one were to say "I do" in a play or sing it in a duet, no one would think that a marriage had occurred. An intention to marry by the speaker is not required: One can marry by saying "I do" even if one does not intend to do so, so long as one understands that one is in a wedding, and that saying "I do" at the appropriate moment seals the deal. The same with an "I promise" said in the appropriate setting. But one *does* have to understand that one is participating in a wed-

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25. Nor does one's expressing propositions in which one does not believe undermine one's sincerity or one's character as sincere if the expression of those propositions occurs in situations where no one is deceived about one's actual beliefs or about why one is expressing those propositions. Shiffrin thinks sincerity *is* at stake, see Shiffrin, *supra* note 11, at 862–63, but I think that what she really objects to is the cheapening of sincere utterances by the proliferation of compelled ones.

26. I owe this suggestion and example to my colleague Steve Smith, who has also touched on the mystery of compelled speech in his wonderful essay on Sir Thomas More. See Steven D. Smith, *Interrogating Thomas More: The Conundrums of Conscience*, 1 U. ST. THOMAS L.J. 580 (2003).

ding ceremony or that one is contracting a deal. And participating in a real wedding ceremony is different from “playing one on TV,” for example. The same holds for contracting. Moreover, one requirement of participating in a wedding ceremony, promising, and the like is that one’s participating be done voluntarily. I cannot here unpack what pressures do and do not defeat voluntariness. Suffice it to say that uttering “I promise” with a gun at your head is not a binding promise—which is why it is impossible to receive a binding promise from someone you have wrongfully threatened. And the same goes for “shotgun weddings.” (A “marriage” that was actually performed under threat of death would surely fail to be a marriage, despite the popular notion that “shotgun weddings” were a regular occurrence in an earlier era.) I conclude, at least tentatively, that my reciting the Creed in church—unless I am on the podium going through an initiation rite, and doing so voluntarily—is not a performative.<sup>27</sup> And it surely would not be if it were coerced by the government.

The force of the performative account of why one might object, say, to a nonbeliever’s reciting the Nicene Creed, even when no one is deceived about his actual beliefs, stems, I suspect, from an almost magical potency that people sometimes ascribe to the shapes or sounds that constitute words. Young children who speak English have a difficult time understanding how a Spaniard’s calling their pet dog a “perro,” or their pet cat a “gato,” can be other than a mistake. A dog just is a dog and not a perro. It takes a while for children to comprehend the idea that the shapes and sounds of languages are conventional rather than Platonic. As adults, however, we do not entirely let go of childish ways. Although we realize that languages are conventional, and that speakers can assert what they do not believe, we are still tempted to say of one who recites a creed that he “affirmed” the creed, even when we know that he does not believe it and that he knows we know it. He after all made the sounds of affirmation, or so we are tempted to think. But if we are so tempted,

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27. Steve Smith, on the other hand, finds the performative account explanatory of my discomfort at reciting the Creed. He points out, quite correctly, that I would not object to reciting the Creed if I were cast in the role of a priest in a play, or if a dying relative were to ask me to read it to her because she has forgotten it. My objection to reciting in church, he concludes, must be because I regard the recitation in that context as a performative, the conditions for which are met.

Steve may be right, but I remain skeptical. The case seems unlike, say, an unbeliever’s taking Communion, which the Church does regard as a performative. Were I to take Communion, I could not justify my act on the ground that I just viewed it as sating my desire for a wafer.

that demonstrates, I believe, that we have not entirely relinquished the Platonic view.

#### IV. IMPLICATIONS

I am left where I began, puzzled about my own behavior and that of many others I know. Why do we do what we do? What harms do we think we are avoiding by refusing to say certain things? What harms do we think we are courting when we *do* say them or sing them?

This leaves me with the following constitutional problem. Suppose a governmental body were to issue a decree, backed by a threat of punishment, that everyone recite a particular creed. There are several reasons why government might be acting wrongly in doing so, and some of those reasons might be of constitutional significance. But one candidate reason—that people who are coerced to say things that they do not believe are harmed by saying those things—remains undemonstrated, despite the prevalence of the belief that they *are* harmed. And if we cannot show that people are harmed when they are compelled to say what they do not believe, *that* cannot be the reason compelled speech is wrong.