

### Abstract

Free speech is sometimes conceptualized as unhindered speech, sometimes as protected speech. On the first view, the protection of the law is just one of many possible means for removing hindrances to speech; on the second it is essential. Free speech is better conceptualized in the second way, albeit the first has become more popular in jurisprudence and politics. In [that second](#) conception, you cannot enjoy free speech by the gift or tolerance or indifference of others: to enjoy it is to have the robustly entrenched rights of a free speaker. That ideal fits better with traditional assumptions and has more compelling credentials. Let the right to speak be legally protected and speakers gain a publicly marked status as persons with opinions of their own; silence becomes enfranchised, so that someone's saying nothing can say a lot; and people cannot easily duck responsibility for what they choose to say or not to say. [To illustrate them with a case study, these are benefits that argue, in the context of a suitable culture, for the importance of academic freedom.](#)

### Keywords

free speech<sub>2</sub>; protection<sub>2</sub>; academic freedom<sub>2</sub>; non-interference<sub>2</sub>; non-domination

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## Two Concepts of Free Speech

Philip Pettit

### 10. Introduction

Philosophical and jurisprudential discussions of free speech tend to say little on how to conceptualize the phenomenon they target. They all agree, of course, that free speech exists only to the extent that there is considerable latitude in speakers' choices about what to say. And they debate in detail about the precise extent of the required latitude. But they say little or nothing on what it is about choices in that range of speech that makes them free.

This is a serious lacuna in the literature, because there are two distinct grounds on which speech in the relevant range might be taken to be free. The first is that people are unhindered in how they exercise their speech options within that range. The second is that they are protected in the exercise of those options: in particular, that they are protected by public law or by the public rules of a corporate body like a university, which has its own domain and government. This paper looks at why it is important to distinguish the two versions of the free speech ideal and at the case for taking the ideal in the richer version, i.e. as protected speech.

The paper is in six-eight sections. In the first Section 2 I draw the distinction between the two conceptions of free speech. In the second Section 3 I look at why the distinction is significant. And in the third Section 4 I argue for why it makes good sense to equate the ideal of free speech with protected speech rather than with unhindered speech. In the following two sections Sections 5 and 6 I set aside the issue as to which of the ideals better answers to the notion of freedom and examine-look more directly at the respective benefits—and costs—of

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protected versus unhindered speech, [arguing that there are](#). [I look in the fourth Section 5 at the benefits of unhindered speech and in the fifth Section 6, which is relatively longer, section I go through](#) three important benefits that [only](#) protected speech [in particular](#) would yield. [Then S](#) [The final section 7 looks turns](#), in the spirit of a case study, [to at](#) the sort of protection of speech associated with academic freedom; it argues that while academic freedom is special—it is not just free speech in an academic context ([Scott 2017](#))—the protection it requires is justified by the same three benefits. [Section 8 summarizes and concludes the discussion.](#)<sup>1</sup>

The ~~defense of the~~ ideal of free, protected speech, as distinct from the ideal of free, unhindered speech, is of [sufficient](#) practical and public importance [to merit the attention that I give it here](#). But [the issue it raises](#)<sup>#</sup> should be distinguished from ~~two-three separate~~ related issues that are of [similar-comparable](#) importance; [for want of space, these receive little more than a mention in what follows](#).

One [issue](#) bears on the range of speech choices in which the ideal selected applies: the range, in effect, where the benefits outweigh the costs. While assuming that the range should be extensive under each ideal—the benefits I associate with protection, [as we shall see, help to support-argue for](#) an extensive range—I do not [directly](#) address the question of exactly how far it should extend.

~~The other issue I ignore bears on how far people should enjoy access to opportunities for speech—these may be restricted by various gendered or racist norms—and to speech~~

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<sup>1</sup> [In preparing this paper I benefitted greatly from the comments of a referee on an earlier draft, from suggestions offered by Jennifer Lackey, from written comments from Robert Goodin and Clarissa Piterman-Gross, and from discussion of the main ideas at two events in March 2017, one at Australian National University, Canberra, and the other at Yonsei University, Seoul.](#)

platforms like the podium at an organized event, the public newspaper, and the television interview. While this issue is also of great importance, I do not address it here. A second issue is linked in particular with social media. While the internet has made it possible for just about anyone to broadcast just about any message, it allows messages to be so unsourced, so undisciplined and so numerous that most of them remain incontestable. The question then is how far free speech loses its value in the absence of contestability and what measures can be taken to remedy the problem. This may be the most pressing free-speech issue in many societies today but, apart from a brief mention in Section 3, I say little about it here.

The final issue I set aside bears on how far people should enjoy access to opportunities for speech—opportunities that may be restricted, for example, by various gendered or racist norms—and to special platforms for speech like the podium at an organized event, the public newspaper, and the television interview. While this issue of access is also of great importance, I hardly address it here.

## **21. The Basic Distinction**

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### **2.1 Unhindered speech**

Unhindered speech, as the phrase suggests, is speech that you can conduct without facing hindrance from other individuals or from any officials, whether they be officials of the state or officials in a corporate body that has its own internal government and regulations. Speech can be hindered in any of a number of ways. Covertly or overtly, others may remove your option of saying what you want to say. Covertly or overtly, they may impose a penalty on your saying it: that is, replace the option by a penalized alternative. Or finally—and necessarily, of course in a covert way—they may deceive you about the chance or need to say

it, thereby misrepresenting the option. In short, the hindrance of others in the domain of speech, as in any other domain, may involve removing, replacing, or misrepresenting the options before you.

Even with these clarifications in place, however, there are two different ways in which the requirements of unhindered speech may be understood. You may be taken to enjoy free speech in this sense just so long as you are allowed to say what you actually want to say on a given occasion. Thomas Hobbes (1994, ch. 21.2) would presumably take this to be enough for unhindered speech, as he says that someone is free—and presumably, therefore, free in speech—when “he is not hindered to do what he has a will to”: that is, that is, not hindered to do what he actually wishes to do.

This reading of what it is to enjoy unhindered speech would equate it with enjoying preference-satisfaction in the realm of speech. It puts a premium on being able to speak as you actually wish to speak, without requiring that you would also have been able to act as you wish according to your wishes, even had you wished-wanted to say something else or wanted indeed to stay silent. Think of the different expressive options you face in such a situation for saying things, which may be taken to include the option of remaining silent, as doors between which you have to choose. On Hobbes’s view, you enjoy freedom of speech insofar as the door you push on—the option you actually prefer—is open to you. It does not require that any of the other doors are open, just the one you choose.

Isaiah Berlin offers an alternative vision of what unhindered speech requires, defending precisely the sort of open-doors picture that Hobbes rejects.<sup>2</sup> According to this account you

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<sup>2</sup> Berlin makes the mistake, however, of not recognizing Hobbes as an antagonist; see (Pettit (-2011)).

Among contemporary thinkers, it is probably only those who confuse freedom in a given sphere with preference-satisfaction who, wittingly or unwittingly, follow Hobbes.

enjoy free speech on a given occasion just to the extent that all the relevant options or doors, and not just the one you prefer, are open to you. You may choose to speak out in a particular way and find, happily, that that door is open; no one tries to ~~shut you up~~[stop you](#). But it also has to be the case, on this account of unhindered speech, that if you had chosen to say something else instead, or chosen not to speak at all, then that door would also have been open. ““The extent of a man’s negative freedom is, as it were, a function of what doors, and how many are open to him; upon what prospects they are open; and how open they are””  
(Berlin 1969, [p. xlvi](#)).

Berlin’s conception of unhindered action or speech is clearly superior to that of Hobbes. For as he points out, you could give yourself Hobbesian freedom of speech, even when you are blocked from saying what you want to say, by getting yourself to change what you want to say: by adapting your preferences. And that does seem downright absurd; it falls far short of our intuitive sense of what the ideal of freedom should ensure. He underlines this normative absurdity quite nicely when he notes: ““to teach a man that, if he cannot get what he wants, he must learn to want only what he can get may contribute to his happiness or his security; but it will not increase his civil or political freedom”” (Berlin 1969, [p. xxxix](#)).

The Hobbesian conception of free speech requires the absence of frustration: you get to say what you actually prefer to say in the context of certain options. The Berlinian requires the absence of interference, as we might put it: you get to say whatever you might want to say, regardless of the option you prefer. Freedom in the sense of non-interference is a more demanding ideal of free speech than freedom in the sense of non-frustration, and from now on we can identify it with the ideal of unhindered speech. But, even interpreted in this way, the ideal of unhindered speech is itself less demanding than the ideal of protected speech.

## [2.2 Protected speech](#)

Taking unhindered speech in Berlin's sense, then, what distinguishes it from protected speech? Not much stands between them on a common but inadequate account of protection. On that account, the point of protection is to make it more likely that you will enjoy unhindered speech; to increase the expectation or probability of unhindered speech. The difference between unhindered and protected speech on this approach would simply be the difference between actual unhindered-speech and expected unhindered-speech. The same ideal would be at issue in each case but would be presented from different perspectives: in the first case, it would be cast *ex post* as a goal attained, in the second it would be cast *ex ante* as a goal to pursue.

But the point of protection is not just to probabilify in this way. After all, I might make your enjoyment of free speech more probable by bribing others to let you have your say and that would scarcely be a way of protecting you. What protective measures aim to achieve is not primarily to make your enjoyment of unhindered speech as likely as possible—after all, the bribery arrangement might actually do better on that front—but to put burdens in the way of others interfering with you: to render their interference not so much less likely as less accessible (Pettit 2008).

What form should those protective burdens take? Typically, they involve preventive obstacles that remove the option of interference altogether or, more plausibly, ~~that~~ penalties that put difficulties or costs, actual or threatened, in the way of interference. In other words, they put in place measures of interference that counter the interference they are designed to block. Paying would-be interferers for not interfering would not interfere with them in this sense. It would put an extra alternative on their menu of options, allowing them not just the option of refraining from interference but the enhanced option of refraining and claiming the payment as reward. That would certainly make non-interference more attractive for them but

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it would leave the interference option intact; it would put nothing in the way of their taking it instead.

Protected speech appears as a distinct ideal from unhindered speech as soon as we recognize that the point of protection is not to make interference less attractive and less probable but to interfere with the very possibility of interference: to remove that option altogether or to replace it by a penalized alternative. Protecting you means erecting obstacles to the interference of other people in any scenarios, however improbable, where they might choose to try ~~to~~ interfere. And that is quite distinct from trying to make their interference less probable. Doing that would not necessarily mean arranging things so that would-be interferers are obstructed—that may not be the best means of reducing the probability of interference—but arranging things so that others are less likely to interfere. It would mean giving them something more attractive to do, such as refraining from interference and then claiming payment as a reward.

The protection of freedom of speech is always going to raise an issue, of course, as to who is in charge of the protective apparatus. I shall assume here that when protection is necessary—when there is no natural obstacle or hurdle stopping some from interfering with others—it is provided by law, with the support of social norms, and that that law is subject to democratic, constitutional control, not exposed to an unconstrained will on the part of those in power. In particular, I shall assume that the legal protection is not provided at the whim of a benevolent autocrat or elite body. If it were provided on such a discretionary basis then it would not be fully protective: it would protect you from others in the society, but only at the

cost of leaving you unprotected against the even greater danger that such an authority would represent.<sup>3</sup>

Legal protection relies inevitably on putting penalties rather than obstacles in the way of those who would hinder speech: this, for example, by imposing criminal sanctions on offenders or by allowing victims to invoke tort remedies against offenders. But how severe must the penalties facing others be in order to provide you with the requisite protection? The only plausible response is that they must be severe enough to enable people-you to say their your bit on any topic—and, figuratively, to look others in the eye as they-you do so—without the power of interference on the part of others being sufficient giving you good reason, by local criteria, to give them reason for fear or deference (Petit 2012, 2014).<sup>4</sup>

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### 2.3 Comparing unhindered and protected speech

As mentioned at the end of the first section beginning, the ideal of free speech in either of the versions just distinguished is taken to involve the same, presumptively broad range of speech options. The unhindered-speech ideal takes this range of speech to qualify as free in virtue of being unhindered, the protected-speech ideal takes it to qualify as free in virtue of being protected. Consistently with that being so, the range of speech that people enjoy may be at once unhindered and protected, in which case the difference between the ideals bears only on what grounds or justifies the freedom of speech that people are said to enjoy.

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<sup>3</sup> The law may also serve to protect those affected by speech, of course, as in laws against hate speech or laws of defamation. If free speech were the only relevant value, which it certainly is not, then it would argue against such laws under either interpretation of the ideal.

<sup>4</sup> By this criterion, even the excessively timid who shrink from saying their bit may enjoy freedom of speech: they may not have any reason, by local criteria, for fear or deference.

For reasons of convenience, the alternatives in the comparisons that follow are, on the one side, a suitable range of unhindered but unprotected speech and, on the other, that same range of unhindered speech, where it is now also protected. Thus, I shall ignore the case where people's speech is protected but, because the protection works badly or counterproductively, is not fully unhindered: say, a scenario where people suffer a number of assaults on their protected speech, whether or not the offenders are always penalized and the victims vindicated. The line taken in the paper can be extended to that scenario but how it is extended will depend upon a number of other variables of conceptualization.<sup>5</sup>

## **3.2. The Significance of the Distinction**

These comments may suggest that the distinction between unhindered and protected speech is a subtle conceptual divide: the sort of stuff that may interest philosophers but hardly policy-makers. That suggestion, however, is misleading. The distinction drawn has deep-running practical implications, which bear on the social meaning of free speech and on the political appeal of protecting and regulating it. Conceived as unhindered, free speech is a socially undemanding and a politically problematic ideal. Conceived as protected, it contrasts on both counts: socially, it imposes demanding requirements; politically, it constitutes a plausible goal.

### ***3.1 Free speech and social life***

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<sup>5</sup> It will depend, in particular, on whether we think that the vindication of status that you enjoy when an offender is apprehended and penalized entitles us to say that in a sense your freedom as a speaker has been preserved.

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Unhindered speech is socially less demanding than protected speech because you can enjoy it just by virtue of others not actually interfering and not being likely to interfere. It does not matter that they have a power of interference against which you are not protected. So long as they do not actually impose on you, and are unlikely to do so, you have all the freedom of speech you could wish for. You may be a member of the beta class in a society where anyone in the alpha class can shut you up; you have no protection against them. But if those in the alpha class are indulgent towards you, letting you say what you wish, that means that you have the fullest form of freedom in this sense.

If free speech means protected speech, however, then that is not so. For, to stick with the scenario just introduced, the alphas who refrain from interfering with you or other beta speakers still retain the power of interference; it is not as if they renounce or destroy that capacity. And so, you as a beta are not protected against them. You could enjoy free speech in the richer, protected sense, only to the extent that interference by any alpha was not so much unlikely as inaccessible. Alphas would have to face serious obstacles if they tried to interfere, finding that the option of interference was blocked entirely or burdened by various difficulties or costs.<sup>6</sup>

### [3.2](#) *Free speech and political action*

Unhindered speech is not only socially less demanding than protected speech; it is also politically more problematic. This is because any form of regulation, whether by officials of the state or of a subsidiary institution like a university, will be hostile as such to the ideal of unhindered speech: it will itself constitute a hindrance. A regulation against hate speech may

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<sup>6</sup> Thus, by this account, it would not be enough, contrary to [Niko Kolodny's \(2014, p. 295\) claim](#), that the alphas be “[“resolutely disposed”](#) not to interfere with the speech options of the betas.

do better overall by unhindered speech: it may prevent more interference than it perpetrates. But still, it will be hostile in itself to the ideal. While it may promise a number of steps forward in promoting free speech—this will always be a matter of relative probability—it will take one certain and decisive step backwards: it will itself impose on the freedom of certain speakers.

The crucial observation here, central to the tradition of classical liberalism, is in the words of Jeremy Bentham (1843, p. 503) that “all coercive laws . . . are, as far as they go, abrogative of liberty”: that is, liberty conceived as the absence of interference. The observation explains the sense in which the ideal of free, unhindered speech is politically dubious. It means that the onus is on regulators to argue that although their initiatives certainly reduce some free speech, those measures promise to do better by free speech in the longer term. The default option is no-regulation, then. Regulation will be triggered only in response to positive evidence that it may be necessary for achieving the maximum level of free speech.

The ideal of free speech as protected speech is not politically problematic in the same way. On the contrary, it is an ideal that is entirely plausible, even inescapable, as a goal of law and regulation. It is only by dint of law and regulation—and supportive social norms—that speech gets to be protected, and gets to count as free. Assuming that the regime treats people as equals, as a public system will presumably be required to do, it will explicitly or implicitly protect all and only those speech options that each can exercise and enjoy at the same time as others. They are all and only those speech options, as we may say, that are co-exercisable and co-enjoyable (Pettit 2012, pp. 92–107).

The regulations designed to identify and protect co-exercisable, co-enjoyable speech options—the basic liberties of speech—may take any of a variety of forms. They will include regulations like Robert’s rules of order that prevent people speaking at will in a public

gathering—and so avoid cacophony—but allow them to speak according to a certain schedule (Hart 1973). They will also include regulations that restrict speech options, criminalizing various forms of speech: for example, dangerous speech such as mischievously shouting “Fire!” in a crowded theater; speech that invades the privacy of others, as that is culturally understood; and the sort of hate speech that would threaten public order and undermine the peace that speech requires. And they may also include regulations that allow tort remedies against speech that would expose someone to an unjustified loss of reputation and standing. Such regulations are designed to identify speech options that can be protected for all at once, enabling each to exercise their options at the same time as others and to enjoy that exercise, regardless of how many others take up those options at the same time.

Although details of interpretation may be controversial, the regulations illustrated so far are all broadly plausible. But the requirement that the liberties of speech established in a society ought to include only speech options that are co-exercisable and co-enjoyable may argue for other, more surprising regulations.

Thus, to take a salient example, the requirement would argue, in my view, against allowing the sort of anonymous commercial and political speech that currently dominates social media. In order for each to enjoy the exercise of free speech by others, they must be able to hold those others to account, testing them for how far their speech represents the unified, fact-responsive viewpoint of a responsible speaker. But anonymity of the kind that currently prevails on social media makes speech entirely uncheckable and unaccountable. Denying hearers the ability to distinguish between responsible speech and fake speech, it threatens to reduce speech on the social media to the role of a manipulative instrument designed to get in under the radar of interrogation and elicit purely emotive responses.

The protection given to speech by the law may be provided in a number of ways. It may take the form of constitutional protection, as in the jurisdiction associated with the First

Amendment of the United States. It may criminalize certain hindrances to speech. It may make measures of tort law available against purported hindrances, allowing plaintiffs to appeal to the courts. Or it may take a local form, as under the regulations of a particular institution like a university.

Thus, on the equation of free speech with protected speech, public law is essential for identifying the speech options to be protected and for providing the protection itself; the law that plays this role may be common across a society or may apply only within a certain institutional context. And that means that ~~that~~ suitable laws do not constitute an invasion of free speech from without—even an invasion that is benign overall—as the alternative approach assumes. It means that law is part of what creates free speech: part of the infrastructure necessary for people to share in enjoyment of that ideal.

If law is part of the infrastructure of free speech, of course, then the default position of those who embrace free speech cannot be no-regulation. Rather it must be a commitment to identifying regulations that can provide the best infrastructure possible for free speech, protecting as many co-exercisable, co-enjoyable speech options as possible, establishing them as basic liberties of speech, and protecting those liberties in a suitably effective manner. What exact options should be protected as liberties, and in what measure they should be protected, is something for each legal system to determine, taking account of contextual and cultural considerations.

Even Isaiah Berlin (1969, p.1x) acknowledges the constructive role of the law on this front when he says that “the area of men’s free action” often has to be “artificially carved out” by law. While the idea may not appeal to those who insist on seeing free speech as unhindered speech, it also has the stamp of authority. John Locke (1960, II.57), the great apostle of tolerance, argued in this vein that “where there is no law, there is no freedom”: that it is the law that defines the range of relevant choices, including the choices you or I have

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to speak our mind, and that then gives them the protection required for freedom. And in taking this line, Locke was supported by legal and political authorities in the following century, prior to the rise of the classical liberal view that Bentham helped to shape. Thus, in his canonical commentary on [English](#) law in the 1760s, Sir William Blackstone (1978, p. 126) made a point that would have been endorsed on all sides: “laws, when prudently framed, are by no means subversive but rather introductive of liberty; for (as Mr Locke has well observed) where there is no law there is no freedom.”

## 43. The Attractions of Equating Free Speech with Protected Speech

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That it is socially more demanding, and more hospitable to the role of political regulation, may already make the ~~conception equation~~ of free speech ~~with~~ protected speech more appealing than the alternative. But there are three other considerations too that should incline us in that direction. The first is normative, the second sociological, and the third historical.

### 4.1 *The normative consideration*

The normative consideration takes us back to Berlin’s argument that there is something absurd—something normatively absurd—about conceiving of freedom of speech as an ideal you could enjoy by getting yourself to want to say only those things that others allow you to say. For just as that result seems absurd, so it seems absurd to think that you could get to enjoy freedom of speech by making yourself charming enough to induce those with a power of interference to permit you to say what you like in the relevant range of speech options.

We might admit that despite being a beta you can manage on a particular occasion, thanks to your efforts at cajoling and seducing the alphas, to have your say. But we could

hardly hold ~~that~~ in such a case that you enjoy freedom of speech as a normatively important type of freedom. You may be clever enough or charming enough to be generally able to keep the alphas sweet and to get them to indulge your desire to say what you think. But this is hardly a capacity that we could represent as an important form of freedom.

The open-doors image of freedom that Berlin embraces, and the unhindered-speech ideal that it supports, might suggest that you have a freedom worth celebrating. But the fact that all of your speech options are open doors does not rule out the presence of doorkeepers with the power, should they wish, to deny you passage. And so, you could enjoy the highest level of freedom in this sense, yet be required to live on your wit and your wiles, striving to keep the doorkeepers sweet and indulgent.

It should be clear that unhindered speech may not amount to much of an ideal, if it materializes on this sort of basis. You may manage to speak or not to speak, according to your will, in the scenario envisaged. But you will depend on the goodwill of the doorkeepers in order to enjoy that latitude of choice. And so, it will be their will, not yours, that is ultimately in charge.

#### 4.2 *The sociological consideration*

The second, sociological reason for preferring to equate free speech with protected speech is that not only does the equation give us a normatively more attractive ideal, it also fits better with our everyday preconceptions of what freedom of speech requires.

In order to enjoy what we generally think of as free speech, it is not intuitively sufficient just to get away with saying whatever you like, perhaps because of good luck or native cunning. You might get away with saying whatever you like in a totalitarian society, because of being clever about keeping your head down and ducking the law. But that would scarcely mean, in our ordinary usage, that you enjoyed freedom of speech there.

Berlin himself shows that he might be sympathetic to this observation. He remarks at one point that if I am to be free in any sphere there must be “a room within which I am legally accountable to no one for my movements” (Berlin 1969, p. 155). If I were legally accountable to someone for what I said, or if I were accountable in any similar way, then this strongly suggests that I would not count as enjoying freedom of speech. If free speech has to be speech for which I am accountable to myself alone, and this by virtue of the law, then it surely has to mean protected speech, not just speech that I am lucky enough or cunning enough to be able to get away with.

### *4.3 The historical consideration*

The third, historical reason for equating free speech with protected rather than just unhindered speech is that this fits better with the history of ideas about freedom. In particular, it fits better with the way of thinking that shaped the American revolution in 1775, informed the arguments for the 1787 Constitution, and led shortly afterwards to the inclusion of a Bill of Rights that ~~broke new ground in prohibiting~~ restricted the power of the legislature from passing to pass any law that would abridge freedom of speech.

Down to about the end of the eighteenth century, it was customary to think that in order to be free in a given type of choice—say, in the exercise of speech—it had to be the case that you are able to choose as you will between the relevant options, regardless both of what you want to do and of what any other might want you to do. This conception was distinct from the classical liberal view of freedom as the absence of interference, which was later introduced by Jeremy Bentham (Pettit 1997, ch. 1; Skinner 1998). It required an absence of a power of discretionary interference on the part of others—this, to be achieved by legal protection—not just the absence of that interference itself. On this older approach, you are not free in any type of choice—you do not enjoy the status of freedom in its exercise—to the extent that you are

subject to a master, even a gentle master. However indulgently the master behaves, your subjection means that you depend on the goodwill of another, in effect their permission, for being able to choose as you wish; you cannot choose as you wish regardless of how that other wishes you to choose.

This way of thinking about freedom, standard at the time of the American founding, is associated with the long republican tradition that goes back to classical Rome, in which freedom is hailed as the paramount ideal in social life and is contrasted with any subjection to the will of another (Petit 1997, 2014; Skinner 1998; Petit 2014). The slave who congratulates himself on how free his good fortune or sharp wit enable him to be is a figure of fun in Roman comedies (Skinner 1998, pp. 40–41). He may think himself free but by Roman lights he is manifestly and ludicrously mistaken: no one is free if they have a master, even a very un-intrusive master.

This Roman theme remained alive in the later republican tradition that took the Roman republic, suitably idealized, as a model for the polity. In the words of Algernon Sidney (1990, p. 441), a seventeenth-century republican thinker, “he is a slave who serves the best and gentlest man in the world, as well as he who serves the worst.” The theme recurs over the following century, especially among the American revolutionaries and their supporters. Thus the English clergyman and mathematician, Richard Price (1991, pp. 77–78), could claim without fear of contradiction that those who live under the power of masters “cannot be denominated free, however equitably and kindly they may be treated.” Going even further, indeed, he could argue that in repealing the Stamp Act without renouncing the power to impose it, the Westminster Parliament cast itself as a master, albeit a kindly master, and saw the American colonists as its subjects. Commenting on Extending the claim that gentle mastery is still mastery, and still inimical to freedom, he says: “This is strictly true of communities as well as of individuals.”

We saw earlier that there are two versions of the ideal of freedom associated respectively with Hobbes and Berlin: freedom as non-frustration and freedom as non-interference. The republican tradition hails yet a third ideal, freedom as non-domination: a freedom that requires that no one be in the position of a master or *dominus* in determining what you choose. Applied to a particular set of options, non-frustration requires the absence of hindrance with your actually preferred option; non-interference requires the absence of hindrance with your preferred option, regardless of which option you prefer to have; and non-domination requires the absence of hindrance with your preferred option, regardless of which option you prefer to have and regardless also of whether others are happy for you to enjoy that power of choice.

## **54. The Benefits of Unhindered Speech, Protected or Not**

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### *5.1 Beyond the linkage with freedom*

It is one thing to argue, however, that the best interpretation of free speech is as protected speech: that it makes free speech into a socially more demanding, politically less problematic ideal, as we argued in Section 32; and that there are normative, sociological, and historical reasons, as we saw in Section 43, for interpreting the ideal that way. It is another thing to argue that, quite independently of its linkage with the notion of freedom, there is more to be said in favor of the ideal of protected speech than in favor of unhindered speech.

I maintain that protected speech promises many more benefits than unhindered speech and does so without incurring heavy costs in addition. The benefits conferred by protection often escape notice, however, because many standard arguments for free speech cite the interests served by unhindered speech—their good, functional effects (Kern 2016)—and the

balance of such good effects over bad. Those arguments abstract from the issue as to whether the unhindered speech is at the same time protected, or even unhindered because of being protected. These functional effects are worth documenting before we turn, in [the next section 6](#), to the argument for protecting speech.

## [5.2](#) *Functional effects*

The functional effects of unhindered speech all involve the interests people are said to have in speaking openly, whether in private or in public, and in hearing what others openly say; and this, regardless of whether the speech occurs under a protective shield or not. Assuming that the benefits outweigh the costs, the effects argue that there should be free speech in one or the other version but say nothing on which version is the more appealing ideal.

~~There are two sorts of functional effects~~ [come in two varieties](#), one ~~of which is~~ causal ~~in character~~, the other constitutive. Many of the standard arguments for free speech cite causal effects, as in [John Stuart Mill's \(2001\)](#) argument in *On Liberty* that free speech is likely to have the good effect of facilitating access to the truth. Other causal effects that are routinely invoked are the results of speech in communicating the ideas of speakers, in establishing productive relationships among speakers and hearers, in giving hearers would-be information on how things are in the world, in enabling interlocutors or bystanders to know where they stand with speakers, and the like.

Other standard arguments for free speech invoke functional effects that are constitutive in character. Constitutive effects consist in things that people bring about but not as a result of a causal, [temporally demanding](#) process. They might be illustrated by the effect of resting that you bring about by lying down, or the effect of keeping a promise that you bring about by returning the book you borrowed; in each example, the effect materializes simultaneously with the grounding action, not as the output of a causal process that takes time to evolve. In

the case of free speech, the presumptively good, constitutive effects that are often cited in the literature include those whereby speakers achieve a desirable form of self-expression, speak for themselves as autonomous subjects, or just enter conversation and exchange with others.

It is a striking feature of all these effects, causal and constitutive, that they materialize as a result of the unhindered speech acts performed by speakers, regardless of whether those acts are protected. And the same is true of many of the bad effects of speech that are recognized as considerations that may argue for restrictions: for example, effects like those mentioned earlier on the maintenance of public order, on the privacy that people can enjoy, and on people's ability to maintain their reputation and standing. Like their positive counterparts, these effects are of a sort that will emanate from unhindered speech, independently of whether or not that speech is protected.

### *5.3 The role of functional effects*

Why does the literature concentrate so much on the functional effects of unhindered speech, ignoring the difference made by protection? The answer, no doubt, is that while these effects are irrelevant-orthogonal to the question-addressed-concern of-in this paper, they are-certainly-relevant-to-bear directly on an issue we put aside. That is the question about what exactly is the range of speech options that should be taken as basic liberties in a society.

Functional effects make a presumptive case for when unhindered speech is beneficial overall, and for when the costs are prohibitive: when they argue for restrictions on free speech, whether in the name of public order or personal privacy or social reputation. The effects cannot decide the case finally, of course, if there are other considerations to be taken into account. And, as the next section argues, there are other considerations to be reckoned with, all of them associated with the balance of benefits that protection promises.

~~We saw earlier that there should be regulations against anonymity of the kind that makes speech uncheckable, since speech may not otherwise generate its standard benefits. It is worth remarking that if anonymity were in place, then that would undermine many of the benefits associated with unhindered speech. It is hard to see why speech might have the effect of facilitating the search for truth, for example, or of enabling people to express themselves, if it materialized under a veil of anonymity. This suggests that while the benefits associated with unhindered speech may not strictly depend on that speech being protected, they do depend on a sort of transparency that may require regulatory support in the case of social media.~~

## 65. The Benefits of Protected Speech

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### 6.1 *Looking for the benefits of protection as such*

What are the benefits that the protection of speech is liable to bring on stream? We may assume in approaching this question that when speech is protected as well as unhindered, it is not because of the protection that hindrance is absent. On balance, this assumption makes the task of arguing for the merits of protection more rather than less difficult, since it forces us to put aside any instrumental benefits protection may have in inhibiting offences against free speech. The assumption is that speech might be unhindered in the presence of protection for reasons that would continue to obtain in the absence of protection: say, because of a virtuous disposition on people's part, in particular on the part of the more powerful, not to interfere with the speech options of others. On this picture, the protection does not play an active role in inhibiting interference; at most, it provides a back-up inhibitor that would only come into play if people's virtue or goodwill faltered.

Even under this assumption, there are strong grounds for preferring to have the relevant range of speech protected rather than just relishing the fact that it is unhindered. Protecting speech, whether in society as a whole or within a particular organization like a university, will require the community to bear the costs associated with establishing, promulgating, and administering a suitable regime of law. And, while those costs go beyond the costs of unhindered speech, they are unlikely to weigh heavily against the benefits provided by an effective regime of protection.

There are three major benefits associated with the protection of speech, and with its protection only. The first is that if you are protected under public law in speaking your mind within the broad limits imposed, then you enjoy an important sort of status in relation to others. The second is that if you are protected in this way, then the fact that you say nothing in a given conversation can communicate a determinate message as eloquently as speech; silence is enfranchised. And the third is that if you are protected appropriately, then what you say or fail to say becomes properly attributable to you; other things being equal, you have to assume responsibility for the message you convey. I describe these in turn as the status benefit, the enfranchising benefit, and the responsibility benefit.<sup>7</sup>

## [6.2](#) *The status benefit*

The fact that you are protected in how you exercise a certain range of speech choices means that you can speak as you wish in a robust manner, not just contingently on the more

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<sup>7</sup> The first of these benefits is the most generally recognized, although not always linked with protection [against hindrance](#) as distinct from just the absence of hindrance. It is cited in discussions of the role of free speech in democracy and in narrower discussions that cite the interest of speakers in the status and autonomy associated with free speech.

powerful remaining good-willed and allowing you to do so. You can say what you like robustly over variations in what you think, in how those others think, and in how as a consequence they react to the position you adopt. Moreover, the fact that you are protected in this way on the basis of public law, as we have been assuming, means that it is going to be a matter of common awareness in the community that you enjoy this independence in relation to others. Everyone is going to be aware of the independence you enjoy, aware that everyone is aware of it, aware that everyone is aware that everyone is aware, and so on (Lewis 1969). And the fact that you are marked out as independent in this way—independent in a manner that makes you the equal of others—has the symbolic effect of communicating that you are subject to no one else in how you choose to speak: your voice is your own.

These effects mean that you enjoy an important status in a double sense of that term. You enjoy an objective status in the sense that not only do you escape interference in whatever you actually say, you are such that you would be likely to have escaped it if you had chosen to say something else or if others were more hostile than they actually are to the attitudes you display; you are at least approximately proof against ~~any other turning hostile~~the potential hostility of others. But not only do you enjoy that status as a matter of objective fact, you also enjoy it as a matter that is registered in common awareness and treated as symbolic of your protected standing. You are put in a position where, absent undue timidity, you can look others in the eye without fear or deference; you are no one's lackey or pawn.

Public law may not be enough on its own to confer this status. But it is likely to achieve that effect if it is rooted in the norms that are supported attitudinally in your community. Suitable norms are likely to reinforce laws if the regularities that the laws prescribe represent patterns of behavior such that each can expect others to approve of their complying and/or to disapprove of their not complying. Ideally, they are norms that are collectively beneficial—

they enable each to speak their mind—and that do indeed attract the approval of all.

Assuming the expectation of approval for conformity to the regularities, the natural desire to attract the approval of others will give each a motive for compliance, even when penalties of law are avoidable (Brennan and Pettit 2004). And this sort of support seems to be generally available for law, at least when it does not offend people's natural sentiments (Tyler 1990).

The status benefit may be the main good that the protection of a suitable broad range of speech is likely to achieve. It is bound to be of relevance both within society generally, marking the legal right of each to have their say, and within particular institutions like a university or church or party or corporation. By virtue of enjoying this protection people are enabled to claim equal respect with others—equal respect, although not perhaps equal esteem—for what they say. They do not have to tread carefully for fear of saying the wrong thing and triggering the wrath of colleagues or administrators. They can walk tall and speak forthrightly.

### *6.3 The enfranchising benefit*

The second benefit of having your speech protected is that it enables you to communicate your attitudes even when, as in most cases, you do not say anything. The benefit is that it enfranchises silence (Pettit 1994).<sup>8</sup> Speaking your mind on certain matters is often likely to elicit the dislike and disapproval of others, in particular officials in the society at large or in your institutional environment. It is likely to test the virtue and goodwill that we are assuming for purposes of argument. Even if others are virtuous and not disposed to turn hostile, we may not be sure that you are confident of this. And so, were you not manifestly

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<sup>8</sup> For a debate on the range of circumstances where this effect is likely to materialize, see (Langton (2007) and (Pettit (-2007)).

protected against their hostility, we might not be sure of what is communicated by your silence on one or another topic. It might be in that scenario that you do not speak out because of being happy with things. Or it might be that you are inhibited from saying your piece.

This problem can only be rectified insofar as there is such protection for speech, grounded in public laws and norms, that the presumption when you do not speak out on some relevant matter is that you are happy with the way things are; you are happy with the situation that the authorities defend, for example, or with the proposals that they put forward. If there were no protection, so that speaking out was liable to seem hazardous—and this, even under our assumption of virtue—then your silence might betoken a fear of reprisal rather than a willingness to accept what is defended or proposed.

Absent protection, as this shows, you can be rendered mute in a metaphorical as well as a literal sense. You can be in a position where your silence says nothing and, worse still, can be interpreted in whatever fashion the powerful wish to construe it. You are a passive canvas onto which they can project the attitudes that it suits them to assume and that it is in their interest to advertise for the benefit of third parties. You can resist this usurpation of your standpoint, this silencing of your judgment, only by sticking your neck out and putting yourself at risk. You can intrude yourself into the conversation, as it were, only insofar as you are willing to be heroic.

For dramatic examples of this muting effect, think of a society like North Korea today, or China in the time of Mao, or Germany in the Nazi era. Most people do not get to count in any way under such a regime because they dare not speak and their silence can be interpreted by the prevailing authorities as expressive of acquiescence or even, as suggested in official propaganda, indicative of adulation.

Is the enfranchising effect likely to prove intuitively too much? Is it likely to argue against plausible restrictions on hate speech, for example, or bigoted speech? It will not do

this in circumstances where such speech is common, harmful, and dangerous for public order. But it does raise a question about how far such restrictions should run. If people do not speak as bigots just because of the presence of restrictions, for example, it is not going to be clear who are the bigoted and how numerous they are; even the silence of the unbigoted can always be put down to fear of the law. If people do not speak as bigots in the absence of such restrictions, then they thereby communicate their tolerance. And assuming that the many do this, the tolerance they communicate can eclipse the intolerance displayed by the bigoted few.<sup>9</sup>

**Commented [DS7]:** AQ: I found the conclusion of note 9 a little hard to square away. Is fear of restrictions or a restrictive law likely in a society where even bigoted speech is protected?

#### *6.4 The responsibility benefit*

Apart from providing an independent status for speakers, and apart from enabling people to convey their attitudes even when they remain silent, the public protection of speech has a related, third benefit. It ensures that the things that people say and do not say are properly attributable to them. Those utterances convey attitudes in such a manner that speakers can be assumed to hold genuinely by them and can be held responsible for how far the attitudes

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<sup>9</sup> It is worth noting that fear of a restrictive law might not only make the presence of tolerance hard to discern in others; it might even make it unlikely to materialize, crowding out the spontaneous sentiments of tolerance. There is an extended literature on the effect of monetary rewards, for example, in crowding out more virtuous motives: in leading people to become dependent on such rewards for behaving in a way that they would otherwise have adopted out of spontaneous virtue (Frey and Jegen 2001; Atiq 2014). As the desire for such rewards might supplant spontaneous virtue, so the fear of restrictions might ~~have the effect of reducing the sort of tolerance that silence would communicate in a society where even bigoted speech is protected~~do so as well, displacing natural tolerance in favor of a resentful compliance with the law.

count with others as reasonable or unreasonable. If you speak for or against some arrangement, for example, or if you are silent in a situation where you are free to speak, then you will thereby convey your presumptive attitude. And, insofar as we assume that you are protectively insulated against external pressures, we can hold you to account for the attitude you convey; we can force you, as we will be forced ourselves, to face the challenge of defending your values and your views.

Despite the protection provided for you by law and norm, of course, you may actually be led by external pressures to advertise a particular vision; you may be influenced unduly by the desire to please someone in authority or to put yourself on the side of the majority. But given a suitable regime of protection, we can blame you for succumbing in that way to such pressures, playing up to the powers or the fashions that be. Suitable measures create an environment where, in the absence of an unusual capacity to deceive, you cannot expect to gain general acceptance and esteem if you warp the attitudes you stand by to the contours of power and popularity. You have to be your own man or woman. You have to speak for yourself.

It is plausibly a good in itself that people should be fit to be held responsible for the views they represent. But this good brings an added benefit in its train. Once it is a matter of common awareness that people are fit to be held responsible for the attitudes they communicate, we may expect them to use that speech well: to use it responsibly, in the common sense of that phrase.

Suppose common standards are established in the society for the attitudes it is reasonable or unreasonable to hold or convey. Insofar as everyone is taken to be responsible for the attitudes they communicate, they are going to be exposed to the assessment of their fellows and to the discipline imposed by the desire to stand well in their opinion and, above all, to

avoid condemnation and shame. They will operate under a discipline imposed by the economy of esteem (Brennan and Pettit 2004).

This economy will not work for good in the presence of widespread bias or bigotry, of course, or within an asocial ghetto like the community of thieves. But in more common, less noxious environments, and certainly in an environment where our assumption of virtue applies, it can impose a useful discipline on how people exercise the opportunities given them by the protection of speech, guarding against the wayward abuse of those opportunities.

“The law of opinion,” as John Locke (1975, bk 2, ch. 28.11) calls it in his *Essay Concerning Human Understanding*, operates among people to that sort of effect when by “approbation and dislike they establish amongst themselves what they call virtue and vice.”

## 76. A Case Study: Academic Freedom

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Just to illustrate the benefits we have been rehearsing, consider the case of the teaching or research institution, where a regime of academic freedom has been established. Such a regime may be defended on a variety of grounds but, whatever the rationale adopted, it is bound to ensure protection for various forms of speech (Moody-Adams 2015). Specifically, it will give protection to teachers and researchers—and, in a lesser measure, to students—against intrusions by political authorities in the expression of opinion on matters relevant to their disciplines of inquiry. The authorities against which protection is provided are officials of the state or of the local institution.

The protection that academics have traditionally enjoyed in liberal democracies extends to any issues in the domains addressed by their disciplines. Subject to standard financial constraints, it enables researchers to pursue whatever questions they wish within their domain of expertise, protecting them against local and political authorities, and by implication against

those who might seek to pressure those authorities to constrain them. In the same way, the protection enables teachers to determine the content of the courses that they are assigned to teach. And it also extends to students, giving them certain rights in choosing their research focus or in selecting their preferred courses.

This protection often has quite striking effects. Thus, whatever the discomfort created, whatever the offence given, it enables researchers, teachers, and students ~~to take a mix of salient examples~~, to speak out against intelligent design in biology, against Holocaust denial in history, against the special status of human beings in ethics, or indeed against political correctness in politics. And it even enables them not to give any time or attention to contrary views.

Why give the members of academic institutions this degree of protection? Why offer a sort of protection, for example, that would normally be unavailable to the members of a commercial corporation, even one involved in research?

Three background assumptions play an important role in explaining why special protection makes sense in the academic case. The first is that allowing the truth to emerge in academic contexts is a social good, indeed one of the main goods that justify academic institutions. The second is that academic disciplines represent the best means available for interrogating the truth on relevant issues. And the third is that professionalization guards against abuse, exposing individuals within those disciplines to a particularly effective economy of esteem. It ensures that those who do not conform to disciplinary standards in their claims, or in the considerations they invoke in support of those claims, are unlikely to be taken seriously and may even be exposed to censure and shame.

The role of the economy of esteem helps to counter the concern that if academics are given protection against political control, they may abuse the opportunities afforded to them thereby. And, with that concern sidelined, the three benefits of protecting speech in general

make a strong case for protecting the speech of academics within their sphere of expertise. That protection ensures that academics have a secure status as inquirers among inquirers; it means that their silence on certain topics, whether in the classroom or more generally, can convey an unambiguous message; and it implies that they have to assume personal responsibility for the things they choose to say or not to say and, more generally, for the views they choose to defend or to ignore. This last effect is what ensures, of course, that the economy of esteem can operate amongst them.

Should we be worried if in a given institution, or perhaps across the range of institutions in a country, certain doctrines do not get any hearing: if, to go back to our examples, there are defenders of the special status of human beings or of political correctness, but none of intelligent design or of Holocaust denial? This should not be a concern, when the standards of relevant disciplines, and the norms of the corresponding professions, argue against such theories: when, in effect, the limitation in the views defended stems from the operation of a suitable economy of esteem. Such an economy will tend to inhibit only the expression of views that are likely to be indefensible.

All of that said, of course, it remains possible that an indefensible orthodoxy may get established within a discipline, unduly inhibiting the consideration of rival opinions. But that possibility scarcely argues that academics should not be protected in the way they are: that managers should be empowered, for example, to require them to give an airing to views they do not actually hold or that others should be employed, in addition or in their place, to represent such views. Any managerial imposition of that kind would block the three benefits that protection ensures. It would deny academics their status as independent inquirers; it would deprive their silence of communicative power; and it would mean that they could not be held responsible for the views they present.

The best safeguard against the danger of an inappropriate orthodoxy gaining a hold on a discipline is, in the end, the very regime of protection under which that danger arises. Suppose that academics enjoy protection, are taken to be responsible for the attitudes they communicate, and operate therefore within the economy of esteem. If there is a set of views that are actually defensible by disciplinary standards, and that are currently neglected or sidelined, then the economy of esteem will itself provide an incentive for exploring them. The outliers who do this, and are led in consequence to challenge the orthodoxy, may suffer a degree of neglect or mockery in the short term. But if the challenge is successful, then they will stand to earn the long-term reward of high esteem and celebrity status. Fame can be the spur to their efforts and can provide a guard against the formation of unjustified orthodoxies.

## **87. Conclusion**

There is a clear distinction between the view that what makes speech free is its being unhindered and the view that what makes it free is its being suitably protected. That distinction marks a divide between a socially undemanding, politically problematic ideal and an ideal that is socially demanding and politically plausible. A variety of considerations, normative, sociological, and historical, argue for equating free speech with protected speech and accepting these implications.

Standard arguments for free speech usually concentrate on the overall benefits of unhindered speech but there are three important benefits that argue in particular for the value of protected speech. Public protection across a broad range of speech options is required for giving people the status of free speakers, for enabling them to communicate by their silence as well as by what they say, and for requiring them to assume personal responsibility for the attitudes they champion, recognizing that they are answerable to others for how they choose

to exercise the options that are made available to them. Those benefits are nicely illustrated in the case of academic freedom considered in [the final sSection 7](#).

Assuming that it covers a suitably wide range of options, free, protected speech is bound to be a challenge for any community. It means that those in charge in the polity, or in any particular organization, are going to be exposed to complaints that they would rather not have to hear and negotiate. And it means that many who live in exposure to the freely expressed attitudes of others, particularly in this or that minority, will often find themselves outside their comfort zones, forced to say where they stand in response to others. I myself think that these implications are ones we should welcome, not necessarily lament. But even if we do lament the costs they impose, we should be able to see reason why the costs are bearable. They are the price we pay for enjoying the status of free speakers, who are able to communicate with others by what we do not say as well as by what we do, and who can force one another to take full, bracing responsibility for the attitudes we adopt and advertise. <sup>10</sup>

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<sup>10</sup> In preparing this paper I benefitted greatly from the comments of a referee on an earlier draft, from suggestions offered by Jennifer Lackey, from written comments from Robert Goodin and Clarissa Piterman Gross, and from discussion of the main ideas at two events in March 2017, one at Australian National University, Canberra, and the other at Yonsei University, Seoul.

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