

To
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FREEDOM OF
COMMUNICATION

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12 See Baker, *op.cit.*, pp.12–13; S. Ingber, 'The Marketplace of Ideas: A Legitimizing Myth', *Duke Law Journal* (1984), 1, 25; and H. Wellington, 'On Freedom of Expression', *Yale Law Journal* 88 (1979), 1105, 1130–31.

13 *Whitney v California*, 274 US 357, 375 (1927); *Furman v Georgia*, 408 US 238, 467 (1972); *Red Lion Broadcasting Co. v FCC*, 398 US 367, 392 (1969); *New York Times v Sullivan*, 376 US 254, 272, 279 (1964); *Poe v Ullman*, 367 US 497, 514–15 (1961). See *Abrams v United States*, 250 US 616, 630 (1919): 'The ultimate good desired is better reached by free trade in ideas ... the best test of truth is the power of thought to get itself accepted in the competition of the market'.

14 See Lee C. Bollinger, *op.cit.*, 43–75.

15 As in B. Duval, 'Free Communication of Ideas and the Quest for Truth: Towards a Teleological Approach to First Amendment Adjudication', *George Washington Law Review* 41 (1972), 161.

16 Thus, Thomas I. Emerson, 'Toward a General Theory of the First Amendment', *Yale Law Journal* 72 (1963), 877–956, at 881: 'expression is normally seen as doing less injury to other social goals than action. It generally has less immediate consequences, is less irredeemable in its impact.'

17 Baker, *op.cit.*, 57f.

18 Baker, *op.cit.*, 59.

19 See the discussion by Rae Langton in this volume, Chapter 6.

20 Greenawalt, *op.cit.*, 22–3; Baker, *op.cit.*, 37–46.

21 See R. Coase, 'Advertising Free Speech', *Journal of Legal Studies* 6 (1977), 1.

22 This rationale is central in Baker, see *op.cit.*, p.5. Also David Richards, *op.cit.*, *passim*; see also T. Scanlon, 'A Theory of Freedom of Expression', *Philosophy and Public Affairs* 1 (1972), 204.

23 See Baker, *op.cit.*, 53.

24 T. Scanlon, *op.cit.*, 204.

25 See J. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), 105–16; and A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (New York: Harper and Brothers, 1960); also R. Bork, 'Neutral Principles and the First Amendment', *Indiana Law Journal* 47 (1971), 20–35. The basic argument is well set out in James Mill, 'Liberty of the Press', *Encyclopedia Britannica*, 5th edn (1821), 258–72.

26 Vincent Blasi, 'The Checking Value in First Amendment Theory', *American Bar Foundation Research Journal* (1977).

27 J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972).

28 J.J. Rousseau, 'A Discourse on the Origin of Inequality' (1755), in G.D.H. Cole, *The Social Contract and Discourses* (London: Dent, 1963), 143–229.

29 Jurgen Habermas, *The Theory of Communicative Action*, Vol. 1, *Reason and the Realization of Society* (Boston: Beacon Press, 1984); *The Philosophical Discourse of Modernity* (Cambridge: MIT Press, 1987); 'Toward a Communication-Concept of Rational Collective Will-Formation', *Ratio Juris* 2 (1989).

30 Lee Bollinger, *op.cit.*, *passim*. For criticism, see P. Schlag, 'Freedom of Speech as Therapy', *UCLA Law Review* 34 (1986), 265, at 281–2.

31 Joseph Raz, 'Free Expression and Personal Identification', *Oxford Journal of Legal Studies* 11 (1991), 303–24.

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Enfranchising Silence: An Argument for Freedom of Speech

PHILIP PETTIT

There are many arguments in the literature that support freedom of speech and communication.¹ I wish to draw attention in this short piece to one argument that has received little or no attention. I do so, because I think that it has considerable force.

The paper is in three sections. In the first preliminary section I say what I mean by freedom of speech. In the second I show that freedom of speech in this sense facilitates what I describe as the enfranchisement of silence: it means, as I shall put it, that silence itself becomes potentially communicative: it means, not just that speech is free, but that silence itself becomes a form of speech. And then, in the third section, I explain why this enfranchisement of silence, this extension of the range of speech, is a desirable effect: it is associated with a range of important social benefits.

The paper is built, then, around two key ideas. The first is that freedom of speech has a quantitative as well as a qualitative impact; it means, not just that speech has the quality of freedom, but that there is a great quantity of speech about: this, as silence itself becomes a form of speech. The second idea is that this particular increase in the quantity of speech – this transformation of silence into speech – is of importance to social life, being responsible for a number of significant benefits.

While the enfranchisement of silence offers an important argument for the value of the freedom of speech, I should say at the outset that it does not offer an argument for the absolute value of such speech. I am quite ready to believe that freedom of speech in some areas impacts negatively on other equally or more important freedoms: for example, the freedom of pornographers to promulgate a certain image of women – and, worse, to insinuate that this image

is a matter of common belief – may have a very negative effect on a range of women's freedoms, making them highly vulnerable to various forms of interference.² In such instances, there may be a good case for restricting the speech involved or for putting certain forms of regulation in place. I am happy to leave that sort of possibility open.

Freedom of Speech

Freedom of speech, by all accounts, is a species of negative liberty. Such negative freedom or liberty assumes that the bearers of freedom are individual persons; that their freedom is always freedom from the interference of others, however that is understood; and that their freedom is freedom to pursue a limited range of activities such as that of saying what they will, associating with whomever will have them, moving wherever they like, and so on.³

The notion of negative freedom or liberty is ambiguous in an important way. It may be thought to require, even in the ideal, only the absence of interference: only the bare fact of non-interference. Or it may be taken to require security against interference: if you like, robust or resilient non-interference.

To enjoy freedom of speech in the first sense, it would be sufficient just to be in a position where nothing you actually say, nor anything you might subsequently choose to say, attracts the interference of others, attracts attempts at obstruction or penalization or coercion. But you could be in the position of enjoying non-interference in this way just because you are lucky; while you are surrounded by people who could interfere – you are not secure against a change of whim on their part – they are benignly disposed and do not get in your way. Thus the enjoyment of speech in the second sense would require something extra: it would require the existence of a protective field sufficient, at least in the ideal, to guarantee you against possible interference, sufficient to give you security in the possession of the non-interference you enjoy.

The first notion of freedom, as I have argued elsewhere, is Hobbesian in origin and was taken up by the nineteenth-century founders of modern liberalism.⁴ Under this approach, liberty – non-interference – is going to be available even to the solitary individual in the state of nature; indeed, it is going to be available in the fullest measure to that person, since there will be nobody around to get in her way. It will also be available in society, courtesy of the disincentives to interference that the law and other social controls provide. But it will only be available there in imperfect measure, since the law and related controls invariably involve a degree of interference themselves and are generally coercive in character.

The second notion of freedom is associated, not with modern liberal schools of thought, but with the long tradition of republicanism: with the tradition that goes back to Roman sources and that was extremely influential in the development of political thinking from the time of the northern Italian republics in the Quattrocento down to the period of the American war of independence and the French revolution.⁵ In this tradition, the protective field provided by the law and related institutions – or at least provided by them if they genuinely represent the rule of law and not a covert despotism – is essential to freedom, not just in an instrumental way, but as a matter of its constitution. There is no security in non-interference, at least none of the kind that is possibly available to all, except so far as a person is recognized by the law and the supporting culture as subject to protection: someone of such a status that it is common knowledge that others are deterred from interfering, that anyone found attempting interference will be opposed, and that anyone who succeeds in interfering will be required, if convicted, to try to rectify the offence.⁶ Freedom in this sense is not available to the solitary individual in the state of nature. Freedom in this sense is essentially social: it amounts to nothing other than citizenship.

When I write of freedom of speech, I shall always have the republican freedom of speech in mind. I envisage freedom of speech as the power of speaking your mind – perhaps within certain limits – in the knowledge, shared with those about you, that your doing so is effectively protected. Freedom in this sense has a subjective connotation. It means being able to speak without fear of others or without any need to defer to others. It means being able, if you judge it desirable, to be frank.

For such freedom to exist, I should mention that it must be a matter of legal right. But that it is a matter of right need not mean that it is a matter of absolute right, since the freedom involved may be limited to certain domains or may be conditional on certain provisos. This will not be inconsistent with the possibility of frankness, provided that the limits and conditions are clear in advance to speakers, provided speakers do not have to live with uncertainty as to whether their speech may be judged retrospectively to have been in breach of the boundaries involved.⁷

One final comment. Since freedom of speech is often invoked in debates about the media, I should mention that I think this is sometimes misleading. We should distinguish between speech and speech-opportunity. What the media represent are scarce opportunities for a certain sort of speech – that which reaches a large audience. Freedom of speech is certainly relevant to what happens in the media, but a distinct principle is also relevant: one which would require that different interests have equal access to scarce media opportunities in

the case of certain conflicts. Those who invoke freedom of speech in defence of the media often do so – in confusion or malice – as if that principle had no claim whatsoever on our attention. They ignore the fact, for example, that the media are often used to say or to insinuate that something – say, a racist opinion – is a matter of more or less common belief, not just something that the speaker happens to hold. It is crucial that those affected by such claims have the opportunity to challenge them for, as we shall see in the last section, matters of common belief or consensus are deeply involved in the emergence of a community as a body with which individuals can identify.

The Enfranchisement of Silence

Suppose we have a community – say, for purposes of discussion, a small commune – in which freedom of speech within a certain domain is well and truly established. No one is obstructed, penalized or coerced – no one suffers interference – in that domain of speech: no one is exposed to the danger of interference, because a protective field of law and custom guards against interference, and it is common knowledge in the community that this is so. And suppose that the domain of free speech in this sense covers criticism of other individuals for the things they say and do that bear on the public realm. I now want to argue that the realization of such freedom of speech is significant, not just in enabling people to speak their minds on such public matters, but also in enabling them to be significant in their silences.

Imagine that someone performs some public act, some act that is of significance to others, not just to the agent herself. The freedom of speech enjoyed by those who observe her in that performance means that they may be expected to complain or criticize in the event of believing that the action is not for the best. But the freedom of speech also means that if they say nothing, then absent any obvious alternative reason why they should remain quiet in face of such a stimulus (more on this later), they may be presumed by the agent, and by the others involved, not to disapprove of what has been done; they may be presumed, in effect, to approve of the behaviour. And not only that. Since the availability of that presumption is going to be obvious to the silent observers, as well as to those others, they are in a position to know that their silence will be assigned that significance. They are in a position to know that, by remaining silent, they can get the others – the audience of their silence, as we might say – to believe that they approve.

Nor is even that result the end of the matter. It is going to be a datum available to all, as a matter of common belief, that the silent observer knows that, by remaining silent, she gets her audience to

believe that she approves of what she has observed. But then it is going to be a matter of common belief that, by remaining silent, she acquiesces in their believing that: if you like, that she intends them to believe that. Everyone believes that by remaining silent she acquiesces in their believing that she approves; everyone believes that everyone believes that; and so on in one or another version of the usual hierarchy.⁸

The thrust of my remarks will be obvious to those who are familiar with the literature on meaning and communication. The core requirement for meaning or communication, by the sort of theory associated with Paul Grice, is that the following conditions hold, and hold as a matter of common belief: that the speaker intends her audience to form a certain belief (or related state); that she intends that they recognize that intention; and that she intends that their recognition of this intention help to lead them to fulfil it, help to get them to form the relevant belief.⁹

It will be clear, then, that under our account of silence – silence in the presence of freedom of speech – the silent observer gets as close as makes no difference to the position of meaning or communicating by her silence that she approves of what she observes. She may address only a small audience of observers, not the unbounded audience of the mass media. But she speaks in an unambiguous voice to that audience. She acquiesces in their coming to believe, as a result of her silence, that she approves; she acquiesces in their recognizing that she acquiesces in this way; and she acquiesces in the fact of that recognition leading them to form the relevant belief. And this, what is more, as a matter of common belief. I do not want to get caught in the further difficulties of analysing meaning and communication. But however those difficulties are to be resolved, I hope it will be clear that silence in the presence of freedom of speech is itself capable of becoming a form of meaning and communication. Silence is capable of being given a voice. If you prefer, silence is enfranchised.

This result is derived, it should be remembered, only subject to certain conditions: specifically, that the stimulus is a public act that is significant for others; that the subject-matter involved falls in the domain of free speech, and that there is no obvious, independent reason why the person should remain silent under the sort of stimulus provided. Those conditions mean that we cannot give significance to silence on the part of those who may not have noticed the stimulus, for example, or who can be seen to be preoccupied. But still, the conditions are going to be run-of-the-mill in a community where freedom of speech is established. And so we can see that, in such a community, silence is typically going to be significant of approval. Silence is rarely going to be mute: speech, at least in an extended sense, is going to be ubiquitous.

Among the conditions for giving silence the significance of approval is the absence of an obvious, independent reason for the silence. It is worth mentioning, in passing, that the failure of that condition need not mean that the silence has no significance at all but, rather, that it takes on the significance of disapproval. Consider the case where someone is known to disapprove or is silent in a context where there is an expectation that approval will generate praise; the context, for example, of sitting beside someone who has just given a speech and who is being congratulated by everyone else around.¹⁰ Admittedly, such cases may be as common as cases where silence is significant of approval. The important point is not that silence commonly signifies approval under conditions of freedom of speech, though that is how I have chosen to phrase it, but rather what silence commonly signifies under such conditions: silence comes to represent an alternative form of speech.

We can sum up the message of our considerations with the metaphor of a field of force. In a field of force there is no distinction between active and passive influences since everything has a role in the gravitational or electromagnetic whole. Similarly, in the society I have described, there is no real distinction, under exposure to appropriate stimuli, between speech and silence. Each carries a communicative charge; each plays a part in sustaining the effect of the whole. The only way for a speaker to escape from this effect is to remove herself altogether from the field: to go into solitude. No one can be present in the field without making a communicative difference, without revealing her mind to some audience, however restricted.

One caveat, in conclusion. When I speak of silence, I am obviously thinking of silence in the presence of an opportunity to speak. The point is worth mentioning because sometimes the word is used in political debate to mean something else: to mean the silence of those who do not have access to the media and who are silent – media-silent – for lack of that particular sort of speech-opportunity. Politicians who claim to speak for the silent majority are not listening to silence in the sense that I intend here. Rather they are taking advantage of a very privileged speech-opportunity to make a claim about what is being communicated by ordinary people in the opportunities they do have, what is being communicated in forums that lie beyond the reach of the media. It is because of the privilege afforded by the media in this way that it is important, as mentioned at the end of the last section, that different interests should have equal media access.

The Argument

This is enough, I trust, to establish the connection I see between freedom of speech and the enfranchisement of silence. I turn now to why the enfranchisement of silence, and therefore the freedom of speech, are important.

Consider the workplaces in which employees do not have the effective freedom to criticize the doings or sayings, even perhaps the jokes, of the boss. Consider the political party in which members do not have the freedom to raise questions about anything that happens to be in line with received policy or ideology. Or consider the religious congregation where no one dares to make a challenge to the dictates of the minister or priest or guru. In such communities, silence loses its voice and the field of communicative force contracts. Stares go blank instead of sceptical, and communication retreats to the narrow channels of explicit speech. Not only do the silent say nothing, they mean nothing either.

This deadening or muting of silence is probably inherently unattractive to most of us. We are, after all, creatures of logos or reason, creatures of the word. But if we find the scenarios described unattractive, we are bound to recoil even more dramatically from the prospect of muted communities that are not just partial groupings, in the fashion of workplaces of political parties or religious congregations, but total communities; that is, communities like the nation-state from which there is little or no escape.

One of the best examples of a muted community of this type is Mao's China, at least as that appears in a book like Jung Chang's *Wild Swans*.¹¹ She describes a society in which it is common knowledge that no one, at any level of the society or even the party, is in a position to criticize Mao with impunity; a society in which, on the contrary, every word and deed of Mao's is held up as the very essence of wisdom and virtue. In this society, silence means or communicates absolutely nothing; it could be the product of fear or it could be the product of admiration and approval. No one is in a position to know. Silence in such a world does get to be construed, of course, since the authorities will always give it a suitable interpretation: one of dreamy adulation in the faces of the masses – as depicted in the familiar posters – or one of sullen hostility in the expressions of those they condemn. But the construal of the authorities will not be subject to challenge: those whose silence it is will have lost their voices.

There is a great contrast between the situation described here and the imperfect but certainly superior situation in most western democracies. Various authorities in these democracies will also put a construal on the media-silence of the majority, as mentioned earlier, but two things make for an important difference. First, the silence is

just media-silence, and a public figure's claim may be manifestly false when judged against what people are actually saying and not saying in other forums of exchange. And second, the media do not belong exclusively to one group of people – the principle of equal speech-opportunity is at least imperfectly realized – so that what one public figure says may be challenged by another.

I have been looking at Mao's China in the hope that the horror of silence disenfranchised will make salient the appeal of enfranchisement and thereby the appeal of freedom of speech. But it may be useful if I return to a more analytical mode and identify some precise benefits to be associated with the enfranchisement of silence. I will mention three.

The first and most obvious benefit in enfranchising silence is that it enables a person to have a presence – a conversational presence, as it were – in the public life of her society. No one's voice is stilled; no one is ostracized from the life of the community or the polity, if even their silence is rendered significant. No one is reduced to mass status in the manner of Mao's fellow citizens: no one becomes a cipher whose meaning is determined solely by the authorities who construe it. The individual is conversationally empowered in the establishment of freedom of speech. She is not just enabled to speak, she is put in a position where she cannot remain speechless; not, at any rate, to the audience of her immediate peers. This image of the conversationally empowered citizen fits so well with a broad range of political ideals that it should argue eloquently for the value of enfranchising silence.

A second benefit of enfranchising silence is associated with the ideal, not of personal presence, but of interpersonal consensus. An important feature of human exchange, so I will presume, is the ability of people to form consensus on this topic or that, in this or that smaller or larger group. A consensus involves more than the fact of believing the same things. It involves also the common belief that people believe the same things: the common belief – in the usual hierarchy – that they each believe this or that or the other proposition. Wherever there is to be an orthodoxy, or even a more contingent meeting of minds, there has to be a consensus in this sense. But it turns out that consensus is very difficult to attain, at least beyond a small number of people, unless speech is free and silence is enfranchised.

The reason will be more or less obvious. With groups of any large size, not everyone can have their say, and so the evidence of a consensus must rest on the significance of silence in communicating assent or dissent. Was there a consensus in support of Mao during the days of the cultural revolution? There was no possibility of such a consensus appearing because, even if everyone did approve of his

actions, no one could have been in a position to assume that everyone did so: the silence that might have betokened assent to the public praise of Mao under conditions of free speech meant nothing in the circumstances of the time. I fully recognize, of course, that many may have been brainwashed into believing that there was a consensus of support; if the mature Jung Chang is to be believed, then her younger self certainly thought there was. My point is rather that there was no possibility of a proper consensus emerging, no possibility of a consensus that would have been compelling to someone in normal possession of her faculties.

I think that the possibility of such consensus is of the greatest importance in social life. Unless we are each in a position, without fear of delusion, to identify what we all think in a group, and what it is commonly believed that we all think, then none of us is in a position to identify in a significant and sensible way with that group. We are deprived of perhaps our most important connection to the life of the community. The *anomie* of which Durkheim wrote is as nothing compared to the loss of coordinates with which someone has to live in such a situation. Thus I see the connection to consensus as a significant argument for the enfranchisement of silence.

The third and last benefit that I see in the enfranchisement of silence connects with a theme that I have laboured elsewhere.¹² This is that people control one another's behaviour in great part, not by any words of praise and censure and not by any corresponding actions, but by the formation of attitudes of approval and disapproval in circumstances where it is clear what attitudes they form.

It used to be widely said that there is no hope of people's getting themselves out of a collective predicament by means of approving of cooperative behaviour and disapproving of non-cooperative. If they are not motivated to cooperate spontaneously and thereby escape from the predicament, then why should they be motivated to go to the trouble of approving and disapproving in a manner that might lead them out of the predicament? But this line of argument is misconceived. The formation of attitudes of approval and disapproval is not intentional and involves no trouble for the subject: it differs in this respect from overt praise and censure. And so there is nothing in principle confused about suggesting that people may be able to police one another – police one another by means of approval and disapproval – out of collective holes into which their spontaneous behavioural inclinations would lead them.

I have argued that people do indeed exercise this policing role, and to some effect, in a variety of contexts. They do so in ordinary social life, as when they keep to queues, even automobile queues, out of fear of perhaps entirely unexpressed condemnation by others. They do so on committees, for example on juries, when the fear of

looking foolish plays a role in leading each to try to argue persuasively for whatever line she takes. And they do so in more public life when the discipline of the forum – the discipline of showing that you know what an argument is – leads them away from at least the more indefensible extremes. So at least I hold.

If I am right about this, then it is of great importance that social and public life be organized so that there is a free play of attitude, and imputation of attitude, in people's reciprocal control of their behaviour. The last point that I want to make about the enfranchisement of silence is that, if silence is not enfranchised, if silence does not speak unambiguously for the attitude of the subject, then there is no room for the attitudes of that person to exercise a control over the actions of others. There is no room for this because the imputation of attitude breaks down. How am I to know what you think if, in the absence of freedom of speech, I do not know what you are non-coercively disposed to say and not to say?

Consider the effect on the forum of a regime such as Mao's. It is clear that only one factor had any widespread effect on the things that individuals said in the people's courts and at other mass meetings. That factor was the fear of stepping out of line, the fear even of being thought to be less than a zealot. There was no room for the discipline of normal expectations as to what others think to play any role in the control of what was reported and alleged. The outlandish piled on the outlandish as this most basic of human disciplines broke down and, with it, the community's sense of sanity.

Perhaps I have said enough. While we are creatures of the word, most of us spend more time in silence than in speech, even when partaking in conversation. It is vital to a range of social issues that when we lapse into that silence, we are not deprived of our voices. We remain active presences in conversation, active parties to potential consensus and active controllers of the things that others say and do. We lose any hope of such an active role if our speech is not free and our silence not enfranchised. And so the enfranchisement of silence, and the freedom of speech, are of the very greatest political importance.¹³

Notes

1 For a critical overview, see Tom Campbell, 'Rationales for Freedom of Communication' in this volume, Chapter 2.

2 This will be particularly so, given the republican understanding of freedom that I introduce in the first section of the paper.

3 See my 'A Definition of Negative Liberty', *Ratio* 2 (1989), 153–68.

4 See John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of*

Criminal Justice (Oxford: Oxford University Press, 1990) and Philip Pettit, 'Negative Liberty, Liberal and Republican', *European Journal of Philosophy* 1 (1993), 15–38.

5 See Pettit, 'Negative Liberty, Liberal and Republican'.

6 See Philip Pettit and John Braithwaite, 'Not Just Deserts, Even in Sentencing', *Current Issues in Criminal Justice* 4 (1993), 225–39.

7 Freedom of speech, therefore, need not involve the sort of status which Fred Schauer takes the First Amendment in the US Constitution to give it. See his 'Free Speech in a World of Private Power', Chapter 1 of this volume.

8 See David Lewis, *Convention*, (Cambridge, MA: MIT Press 1969), 52–60, on how something like this becomes a matter of common knowledge.

9 See H.P. Grice, 'Meaning', *Philosophical Review* 66 (1957), 377–88. For a recent, sophisticated development in this area see Dan Sperber and Deirdre Wilson, *Relevance: Communication and Cognition* (Oxford: Blackwell, 1986).

10 My thanks to Wojciech Sadurski on this point and for this example.

11 London: Harper Collins, 1991.

12 See Pettit, 'Virtus Normativa' in *Ethics* 100 (1990), 725–55; Philip, *The Common Mind: An Essay on Psychology, Society and Politics* (New York: Oxford University Press, 1993); and Geoffrey Brennan and Philip Pettit, 'Hands Invisible and Intangible', *Synthese* 94 (1993), 191–225.

13 Thanks to Baogang He, Wojciech Sadurski and Michael Smith for very useful comments on an earlier draft.