

# THE BOUNDS OF OPEN INQUIRY

## Permissible University Responses to Blameworthy Student Speech

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INTRODUCTION

The particular focus of this article stems from the general interest two of us have in the nature and value of individual liberty.<sup>1</sup> It is by virtue of that general interest that we have more particular interests in people’s freedom of expression and the freedoms people have to respond to others’ expressions. And precisely because universities have traditionally constituted arenas in which people are encouraged to pit their ideas against one another, we take the issues of proper student speech, and of university administrations’ responses to student speech when it is improper, to be a fruitful venue in which to explore these interests of ours in personal liberty. The questions we explore are: when are students wrongful in their speech, and when should students who are wrongful in their speech be accorded “rights to do wrong,” by being left at liberty to say things they ought not to say?

We begin by noting the narrowness of our project. First, for purposes of this inquiry, we have put to one side any concerns with *state* regulation of speech. Our focus in this piece will be on the morality of private individuals’ and private institutions’ reactions to blameworthy speech. We accordingly limit our discussions to the issues faced by private universities rather than public ones (which are, after all, state actors). Second, we also put aside concerns about the *legality* of speech, particularly as that legality is governed under the detailed doctrines of First Amendment law in the United States. Our focus will rather be on the morality of

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1. This piece thus harmonizes with a forthcoming book on which the two of us are working. See Heidi M. Hurd & Michael S. Moore, *Liberty in Law and Morals* (unpublished manuscript) (on file with authors).

speech and the reactions to speech when that speech is morally wrongful, not on what the law either does or should provide on these topics. Third, while universities embody and serve multiple “constituencies”—students, faculty, staff, alumni, members of the public, and scholars and researchers within the global community who work to advance the cutting edge of knowledge—we have concerned ourselves solely with blameworthy *student* speech and the legitimate responses to it by university administrators. This allows us to disentangle the values uniquely implicated by campus speech from concerns about values related to other features of the academy, such as academic freedom, tenure, and the due process constraints that attend academic employment contracts, all of which give other protections to faculty speech. This also allows us to disentangle the thorny question of when universities themselves should speak out on matters of public moment and who it is that should speak for such organizations.

On this narrowly tailored topic (of proper university responses to wrongful student speech), we take up three questions. First, what is the moral latitude that individuals have to speak in ways that are, in one manner or another, blameworthy? Second, what is the moral latitude that audience members have to refuse to enable, interfere with, prevent, or punish blameworthy speech by others? Third, do the moral rights, duties, and permissions that determine the legitimacy of individual reactions to blameworthy speech also dictate the responses that are legitimately available to administrators of private universities?

We approach these issues via the following organization. In Part I, we take stock of the moral machinery that is available to understand the claims that can be made by speakers and audience members concerning contested speech. We begin by charting the moral categories by which actions can be evaluated—actions that include, but are by no means limited to, speech acts. This allows us to isolate four distinct kinds of morally blameworthy actions and, thus, to chart four distinct grounds on which any kinds of action (including speech acts) might be condemned. We then distinguish three general categories of reactions that individuals might legitimately have to wrongful behavior by others. As we shall make clear, a full appreciation of the morality of these responses requires recognition of two asymmetries in morality: first, the difference between the stringency of our negative duties to refrain from enabling wrongful acts and the typically lesser stringency of our positive duties to prevent or punish those same wrongful acts by others; and second, the greater latitude we have to prevent wrongful actions before-the-fact than to punish them after-the-fact.

In the remaining parts of the paper—Parts II, III, and IV—we turn from the general moral building blocks with which to assess all actions that occupy us in Part I to the specific moral concerns that pertain to acts of *speech*. In Part II, we first ask what makes speech in some sense special (if it is special), and we then flesh out in detail the four senses in which this allegedly special activity can nonetheless be morally blameworthy when performed with certain content or when done in certain circumstances. In Part III, we discuss the ways in which we morally can and should react to blameworthy speech by others. The three modes

of response to the four modes of blameworthy speech by others (that is, the payoff of the preliminary survey in Part I) provide the matrix with which we organize this discussion. In Part IV, we arrive at the topic that motivates this paper and the symposium for which it was originally written; here, we ask how ought university administrators react to blameworthy speech by students? As we shall argue, the morality of personal interactions explored in the previous section informs the morality of the responses available to those who administer private universities. But whether and how that morality changes when one moves from private individuals to university administrators depends upon the nature and role of the kinds of institutions that universities are supposed to be. In Part IV, we initially lay out four models of higher education and then proceed to examine the ways in which those models would influence administrators who are called upon to calibrate their responses to the different ways in which students' speech may be blameworthy.

We approach our conclusions in Part IV about free speech in university settings with a good deal of tentativeness, caution, and humility. We aim in this paper more to organize how the discussion of these issues should proceed than to convince readers of the correctness of our own resolutions of these issues. We would regard our efforts as a success if discussions about campus speech could be fruitfully recast according to the terms we advance, even if those discussions were to resolve the issues at hand differently than would we.<sup>2</sup>

## I. MORAL MACHINERY OF USE IN EVALUATING ACTIONS GENERALLY

There are five distinctions of some salience in morality that we generally rely on to organize our discussion of the morality of free speech. In this Part we treat each of these distinctions seriatim in what follows.

### A. *Two Kinds of Permissions in the Hurd/Moore Logic of Rights*

We begin with what it means to have a moral right. To say that an individual has a right to do some particular action is not merely to say that it is right that the person does that action. To possess a moral right to do an action is one way (amongst others) of making that action the right thing to do. But possessing a moral right is a more discriminating notion than the idea of an action being the right thing to do.

In clarifying what it means to say that X has a right to do an action such as uttering "A," we first need to attend to Bentham's old distinction between two kinds of rights: active rights by rights-holders to do things and passive rights by

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2. Even when limited to guiding discussion, our aims here are modest. We are most interested in guiding after-the-fact judgments as to the morality of speech and of reactions to speech when it is wrongful; such guides to after-the-fact judgment may or may not provide reliable guides to before-the-fact decision-making by either student speakers or university administrators. Right-making characteristics for good decisions are not always the best decision-procedures even though those decisions are right because of such right-making characteristics. See, e.g., Joseph C. Hutcheson Jr., *Judgment Intuitive The Function of the Hunch in Judicial Decision*, 14 CORNELL L. Q. 274, 274–88 (1929).

rights-holders to have things done for them by others.<sup>3</sup> One's right to enter onto a certain piece of land is an active right that one holds against other people; one's right that another refrain from entering onto one's own land is a passive right that one holds against any putative trespasser(s). A right to say something (or otherwise to express oneself) is an active right to do something, not a passive right to have someone else do something to or for one. Further, an active right is no mere naked liberty (or what Wesley Hohfeld called a "privilege"), that is, an absence of an obligation not to speak, the correlative of which is merely the absence of any (passive) right on the part of others that one not speak.<sup>4</sup> While there may be occasions on which people enjoy mere liberties to speak,<sup>5</sup> in most instances of moral significance, people claim a robust right of expression. In technical terms of our own coinage, they claim a "protected" (or "strong") permission to speak,<sup>6</sup> the correlative of which is an obligation on the part of others not to do some indefinite range of actions that would prevent or otherwise interfere with that person's speech.

There are two ways in which X may have an active right to speak: X may be morally obligated to speak (and therefore, according to standard deontic logic, X has a permission to speak, which, by virtue of its being a protected permission, means that X has a right to speak); or, while it is not the case that X is obligated to speak, nonetheless X has a permission either to speak or not to speak which, again, by virtue of being protected, means that X has a right to speak. In either case, X's moral license to say A is protected by correlative duties of non-interference on the part of others, which is what marks X's permission as a "strong" or "protected" one—namely, as a robust moral right to say A and not a mere privilege.

It is extremely common for a speaker to have a right to say what that speaker ought not to say. But how can this be? How can it be wrong for X to do A if X has the right to do it? And conversely, how can X have a right to do A if A is the wrong thing for X to do? One does not want to make this question seem too easy by misconstruing its true challenge. Specifically, the question does not trade on the familiar distinction between *general* and *concrete* rights. It is unproblematic for X to have a general right to speak—often called "the right of free speech"—but not to have the concrete right to say A on a given occasion. A general right of free speech does not mean that one always gets to say whatever one wants whenever one wants to say it. General rights translate merely into *prima facie* concrete rights, and *prima facie* rights can be overcome by other considerations that make it wrong to do what one *prima facie* had a right to do.

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3. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 57–58 (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1970) (1789).

4. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied to Legal Reasoning*, 23 YALE L.J. 16, 16–59 (1913).

5. See *infra* Part II, Section (A)(3).

6. Heidi M. Hurd & Michael S. Moore, *The Hohfeldian Analysis of Rights*, 63 AM. J. JURIS. 295, 295–354 (2018).

The true query here is how there could ever be a “right to do wrong”—that is, a concrete right to do here and now an act that is wrong. Can we make sense of saying both that X may have the concrete right to say A here and now and that it would be wrongful of X to exercise that right? Such a claim would appear to violate standard deontic logic: If acts are wrongful only when they violate duties, then if it was wrongful of X to say A, X had a duty not to say it. By standard deontic logic since Aristotle, if X had a duty not to say A, then it necessarily was not the case that X had a permission to say A.<sup>7</sup> If X had no permission to say A, X had no right to say A (because rights are a species of permissions thought to be “protected”).

There are two non-exclusive means by which to avoid this contradiction, but it requires two more moral distinctions to see them. The first is to think that some impermissible acts nevertheless enjoy immunities from others’ interference: they are wrongs that one has a *de facto* “right” to do (the scare quotes because one has a “right” only in the sense that others are morally prohibited from interfering with, preventing, or punishing those actions). The second is to think that some acts that are (strongly) permissible are nevertheless blameworthy because they reflect aretaic vices rather than virtues and thus offend against aretaic (but not deontic) morality. We consider each in turn.

### *B. Two Kinds of Obligations in the Hurd/Moore Logic of Rights*

When one person, “X,” is obligated to another person, “Y,” not to do some action A, there are implications for others besides X. For example, Y is standardly said to necessarily have a (passive) right that Y not do A.<sup>8</sup> More relevantly, it also implies that X has an obligation to Y that she does, that Y is not under an obligation not to prevent X from doing A if he so chooses.<sup>9</sup> Moreover, usually, it is not only Y that is permitted to prevent X from doing A, but others too have such a permission; this reflects the view that wrongdoing is the business of all of us, that it is not usually wrong to prevent wrongs by others. Yet not all obligations carry this last implication.

Consider what is fairly construed to have been Justice Sandra Day O’Conner’s view of abortion: it is immoral (O’Conner seemingly thought) for a woman to abort her fetus, yet it would be more wrong for others to prevent her from aborting her fetus (because the choice was hers to make). We call this the two-level analysis of the right to do wrong. First level: X is obligated not to do A and thus has no permission to do A, making it wrongful to do A. Second level: It would nevertheless be wrong for others to interfere with, prevent, or punish X’s doing A because the consequences of such responses would be more severe than those of

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7. Even the most “minimalist” of modern deontic logics obey this Aristotelean minimum. *See id.* at 309–11; *see also* Heidi M. Hurd & Michael S. Moore, *Replying to Halpin and Kramer: Agreements, Disagreements, and No-Agreements*, 64 AM. J. JURIS. 259, 259–74 (2019).

8. Hohfeld, *supra* note 4, at 16–59.

9. Hurd & Moore, *supra* note 6, at 334–35, 343.



X doing A without intervention or reprisal. Inasmuch as others have correlative duties of non-interference in such a circumstance, X has a “right” to do A, although it is a right in scare quotes only because X, in fact, has no permission to do A.<sup>10</sup> What X really has is an *immunity* from others’ adverse responses to A’s wrongdoing. An immunity effectively accords an actor a “right to do wrong” without contradiction. Let us call these special kinds of obligations “duties coupled with an immunity.” These give us our first sense of a right to do some blameworthy action.

### C. Distinguishing Deontic Wrongfulness from Aretaic Blameworthiness

Now consider the role that can be played by an overlay of aretaic judgments on the deontic judgments we have been considering hitherto. It is common in ethics to distinguish *deontic* moral failures from *aretaic* moral failures.<sup>11</sup> Deontic obligations concern acts or omissions that are required at razor points in time, and deontic moral failures constitute prohibited acts or omissions. Aretaic obligations concern character traits that we are obligated to cultivate or suppress over our lifetimes—dispositions to believe, feel, and act that are enduring aspects of our personalities. Aretaic moral failures do not breach deontic obligations and so are not (deontically speaking) wrongdoings. Rather, they are actions that expose character weaknesses and reveal unworthy dispositional traits that a person of good character would work to eradicate or suppress.

Aretaic moral failures can show themselves in three ways.<sup>12</sup> First, they may define the class of *suberogatory* acts or omissions. Suberogatory acts are acts that reveal vices, such as cowardice, selfishness, jealousy, avarice, sloth, and the like. It may be suberogatory for X to say A (even though it is not deontically wrongful for X to say A because, for example, A is true), for by saying A, X may reveal a streak of cruelty, pettiness, or vindictiveness that is aretaically blameworthy. Second, aretaic moral failures may take the form of acts or omissions that fail to be *supererogatory*. Supererogatory acts are acts that are praiseworthy because they go beyond the call of (deontic) duty in ways that reveal admirably virtuous dispositions. It might be supererogatory of X to say A when it would be helpful to others but very costly to X. Still, while X may have no deontic obligation to say A, given its personal costliness, X might be judged guilty of an aretaic failure, for

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10. It is because there is no permission to do A that there is no violation of standard deontic logic to say that there is an obligation not to do A. This does not quite get us out of the words with regard to our own logic of correlatives, however, for it is a theorem of our system that if X has a duty to Y not to say A, then it cannot be the case that Y has a duty to X not to prevent X from saying A. See Hurd & Moore, *supra* note 6, at 343–44. Yet, the non-prevention of wrongful speech by X seems to be precisely the duty Y is said to have under our two-level analysis of the right to be wrong. Our solution to this last conundrum is to distinguish the duties Y has to the speaker, X, from the duties Y has to others; it is only to others that Y has the duty of non-prevention, not to X, the wrongful speaker. See *id.*

11. For a further exploration of this distinction, see Heidi M. Hurd, *Duties Beyond the Call of Duty*, 6 ANN. REV. L. & ETHICS 3, 3–40 (1998); Michael S. Moore, *Liberty and Supererogation*, 6 ANN. REV. L. & ETHICS 111, 111–44 (1998).

12. Moore, *supra* note 11.



A shirked the opportunity to be a moral hero when heroism was important. Let us call this sort of aretaic failure a “failure of supererogation.” Finally, sometimes people confront dilemmas in which the only choices available are aretaically loaded. Whatever they choose to do, they will either supererogate or suberogate. The sister who is asked to save her brother’s life by donating a kidney will be praised for her virtuous sacrifice if she agrees to the donation and blamed for selfish callousness if she refuses to save his life at a modest risk to her own. Aretaically commendable actions in these circumstances are (unfortunately) dubbed in the literature “quasi-supererogatory” actions, and failures to choose such actions impugn an actor’s virtue twice over: they are both failures of supererogation and are suberogatory.

The introduction of aretaic blameworthiness gives us our second sense of there being a right to do blameworthy actions: an act can without contradiction be both deontically permissible (i.e., not wrongful) to perform) and yet be aretaically blameworthy.

#### *D. Implications of These Three Moral Distinctions for Types of Morally Blameworthy Actions*

Before turning to the fourth and fifth pieces of basic moral machinery that will help analyze the morality of responses to contested speech acts, it may do well to summarize what we have done so far by isolating the possible moral status of any given speech act in terms of the distinctions drawn above. We would do this visually by use of a flow chart with nodes of two-valued decisions,<sup>13</sup> but we can do so didactically by ordering five questions to be asked and answered about any action:

- a. Ask which deontic category the speaker’s act of saying A should be placed in. There are four possibilities:
  1. *Duty not to speak*: X may be obligated not to say A (and therefore, necessarily, X has no right to say A, and it would be wrong for X to say A).
  2. *Naked liberty to speak*: X may have no obligation either to say A or not to say A (so it is not wrong for X to say A), and yet X has no right to say A, only a naked liberty (Hohfeldian privilege) to say A. Thus, others have no correlative obligations of non-interference with X’s saying of A.
  3. *Right to speak not based on duty to speak*: X may have no obligation either to say A or not to say A (so it is not wrong to say A), and X has the right either to say A or to remain silent.
  4. *Duty to speak as the basis for the right to speak*: X may have an obligation to say A, and therefore, X has the right to say A. It is right that X says A (but X does not have the right to remain silent).

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13. We lay out the six nodes of such a chart in the Appendix.

- b. Ask seriatim with respect to each of these four deontic categories whether there is a duty on the part of others not to interfere with X's saying A. Standardly (by the Hurd/Moore logic of correlatives<sup>14</sup>) there is such a duty of non-interference by others in 3 and 4, not in 1 and 2.
- c. Ask whether wrongful speech by X that falls into Category 1 is nevertheless protected by an immunity against others' interference so as to count as an instance in which X has a "right to do wrong" that is born of the impermissibility of others' adverse responses.
- d. Ask whether there is some form of aretaic failure with respect to each of these four deontic possibilities. It may be plausible to assume that when people abide by their Category 1 and 4 duties and remain silent or speak as they are obligated to, they cannot be judged guilty of any aretaic failures. But when morality leaves speakers with discretion, as in Category 2 and 3 cases, both speech acts and their omission (silence) can reveal aretaic failures and can, therefore, come in for aretaic blame.
- e. When Category 2 or 3 speech or silence invites aretaic blame, ask what kind of an aretaic failure it reflects (that is, ask whether it was suberogatory, an absence of the supererogatory, or both (i.e., "quasi-supererogatory")).

If we pursue these questions, we arrive at a useful taxonomy to organize four categories of speech that are (prima facie) blameworthy.

Category 1. *Deontically wrongful speech*: Where there is an obligation not to speak (and thus no protected permission or naked liberty to speak), and in breach of this obligation, the speaker speaks.

Category 2. *Deontically wrongful speech protected by an immunity against others' reprisal*: Where there is an obligation as in Category 1 above, and in breach of such obligation, the speaker speaks. Yet, the speaker has an immunity against others interfering with, preventing, or punishing that speech.

Category 3. *Deontically right-protected speech that is aretaically blameworthy*: Where there is a right to speak (a protected permission), but it would be suberogatory (or perhaps simply a failure to be supererogatory) to exercise that right.

Category 4. *Privileged speech that is aretaically blameworthy*: Where there is a naked liberty to speak (a Hohfeldian privilege), but it would be suberogatory (or perhaps simply a failure to be supererogatory) to act on that liberty.

Notice that all of these categories can be duplicated for purposes of organizing categories of silence that are, in some sense, wrongful. One who remains silent when there is a deontic duty to speak is guilty of a deontically wrongful omission. One might, however, be immunized from others' efforts to get one to break one's

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14. Hurd & Moore, *supra* note 6, at 295–354.

silence so that one's refusal to speak counts as deontically wrongful silence that is nevertheless protected by an immunity. When one enjoys either a right to remain silent or a naked liberty to do so, one may nevertheless be aretaically blamed for exercising that right or indulging that liberty, for one's refusal to speak may reveal cowardice, selfishness, bigotry, or some other vicious attribute of character. Inasmuch as our interest is largely in determining legitimate responses to contentious speech acts, we will not complicate our discussion by constantly reminding readers that silence is as susceptible to moral scrutiny as speech.

Having cleared up the various ways in which speech can be "in some sense" wrongful, we shall henceforth reserve the term "wrongful" for instances in which speakers violate deontic duties (categories 1 and 2 above), and we shall use the more generic term "blameworthy" to refer to speech that is either wrongful in that manner, or that offends against our aretaic sensibilities, despite being deontically permitted.

*E. Two More Moral Distinctions and Their Implications for Types of Permissible Responses to the Wrongful Actions by Others*

Finally, before we turn in Part II to cashing out the ways in which speech can be sorted into the above four categories, it is helpful to close with two more distinctions in morality that will prove useful to later illuminating permissible modes of responding to these four kinds of wrongful speech. The first of these is the significant difference we take there to be between acts and omissions, and specifically between the stringency of our negative duties concerning actions we are prohibited from doing, on the one hand, and the stringency of our positive duties concerning actions we ought not omit to do (i.e., that we ought to do), on the other. Second, we also take there to be a morally significant distinction between acts that prevent wrongs before they happen and those that sanction wrongs after they have occurred. Let us explain.

It is a commonly discussed feature of morality that it is much worse to do an act that causes a bad state of affairs than to omit to do an act that would have prevented the occurrence of that same bad state of affairs.<sup>15</sup> The wrong is thought to be greater because the negative duty that is violated by an action is more stringent than the positive duty of prevention that is violated by an omission. It thus requires greater justification to do a *prima facie* suspect action—such as preventing or sanctioning another's speech—than to justify omitting actions that, if done, would have enabled another to do something, such as speak on a given occasion. It accordingly makes sense to treat separate justifications for not providing opportunities for wrongful speech from justifications for

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15. MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 34-78 (2009).

actions that prevent or sanction speech.<sup>16</sup> It is significantly easier to justify not enabling wrongful speech than to justify actively preventing it from taking place or punishing it after it has taken place. We will accordingly treat these easier issues of justification separately as we chart when we may permissibly interfere with the wrongful speech of others.

It is also commonly believed—correctly, we think—that one can do more to prevent a wrongful action than to punish it after the fact. That is why we are justified in using deadly force in response to someone who threatens us with rape or kidnapping,<sup>17</sup> even though the death penalty is plausibly regarded as an unjustified, excessive, punitive response to these crimes after they have occurred. Even a retributivist like Kant should agree with this distinction. Suppose there is one dollar left in the Königsberg city budget for the year and that this dollar could be used in only one of two ways: either to punish the last murderer in the way that she deserves or to prevent another murder from happening. We would hope that even retributivists (for whom punishment of the guilty is an intrinsic good) would value the prevention of a new murder to the punishment of an already completed one.<sup>18</sup> Given this greater ease of justifying before-the-fact preventions vis-à-vis after-the-fact sanctions, we further separate these two modes of actively responding to the wrongful speech of others in the discussion that follows.

In light of these two moral distinctions, we thus can anticipate three possible modes of reacting to or interfering with another's undesirable speech: first, by omitting to enable the speech; second, by outright preventing the speech or by interfering with it so as to make it less effective (for example, by means that prevent audience uptake); and third, sanctioning the speech after-the-fact through means that impose set-backs to the interests of the speaker (for example, by countervailing expressions of disapprobation, social shunning, or penalties such as fines, suspensions, and loss of employment).

With our preliminary distinctions completed, we are in a position to turn to our substantive moral discussion of wrongful speech (Part II), permissible responses to wrongful speech in one-on-one personal settings (Part III), and permissible responses to wrongful speech in university settings (Part IV). From what has just been completed, we will thus discuss these issues in terms of the three possible responses to each of the four kinds of wrongful speech we have just finished taxonomizing.

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16. This asymmetry between acts and omissions in terms of the differential moral stringency in the duties attached to each also makes some difference to the wrongfulness of speech taxonomized earlier. If we were dealing with silences as well as speech acts, we would have to take this point into consideration there as well. But since we put aside dealing with wrongful silences, we can ignore this in that context.

17. MODEL PENAL CODE § 3.04.

18. For a retributivist defense of this priority, see Michael S. Moore, *Responses to Six Interlocutors of Mechanical Choices*, J. CONTEMP. LEGAL ISSUES (forthcoming 2024).

## II. THE RIGHTS AND WRONGS OF SPEECH

We now turn from morality generally to the morality of expressing oneself. More particularly, we inquire, first, as to the nature of the right of free speech (both the general right to free speech and the derivative, concrete right to say A here and now), and second, as to how and when speech can be deontically wrongful or aretaically blameworthy. We begin with the contours of our right to free speech.

### A. *What is Speech, and Why is it Valuable?*

First off, what is speech? In this paper, we will ignore any distinction between oral and written forms of expression (and indeed between these and other forms or mediums of expression). For our present purposes, we will classify all of them as “speech.” Speech acts are actions, just as running, hitting, and spitting are actions.<sup>19</sup> Like these latter kinds of actions, speech acts are not mental acts like thinking or imagining ideas but are physical acts using the human body as their means.<sup>20</sup> Expressing oneself—“speaking” in the generic sense—is an intentionally complex kind of physical action, that is, one that must be done in execution of a certain intention, namely, an intention to put into words a thought, whether that be in oral, signed, or written form.<sup>21</sup> Usually, this is done to communicate a thought to others, but it is not essential to speech that it be done with the purpose of achieving uptake by others.

This last point demonstrates that one must narrow what speech is if one is to find plausible content to a *right* of free speech. For soliloquies like those of Tom Hanks with his soccer ball, “Wilson,” in the film, “Cast Away,”<sup>22</sup> are plainly speech; yet equally plainly, such non-communicative speech is not plausibly thought to be morally important. Speech that is morally significant is communicative in nature. A right to speak is thus a right to communicate with others through speech. This is not to say that the right to speak is the right to succeed in communication. When speech is communicative in its intent, the communication need not be successful (securing Austinian uptake in the intended audience) for it to be morally significant. But for communicative speech to be meaningful, there must be at least the possibility of securing Austinian uptake by its intended audience.<sup>23</sup>

There is something of an orthodoxy in contemporary political theory that “speech is special.” Mill, after all, devoted a separate chapter to free speech in his

19. A well-known slogan of J. L. Austin: “To say something is to do something.” J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 94 (J.O. Urmson ed., 1962).

20. Although there are mental actions (such as actively trying to remember something), the actions of interest to deontic morality involve the movement of the human body. See MICHAEL S. MOORE, *ACT AND CRIME: THE IMPLICATIONS OF THE PHILOSOPHY OF ACTION FOR THE CRIMINAL LAW* (Oxford Univ. Press ed. 2010).

21. Some kinds of acts can only be done intentionally or with a certain intention, such as fishing, telephoning, or speaking. See *id.*

22. *CAST AWAY* (20th Century Studios 2000).

23. See AUSTIN, *supra* note 19.

famous book *On Liberty*,<sup>24</sup> and generations of American lawyers have been steeped in the U.S. Constitution's First Amendment protections of free speech. This orthodoxy commonly prompts those who are naïve to think that one can do no wrong if all one does is throw words rather than rocks at another. Speech, in this naïve view, is everywhere and always immune both to moral blame and to state sanction.

This naïve version of the “speech is special” thesis often has its roots in a more plausible thesis—namely, the thesis that we each enjoy an absolute liberty of conscience, in the sense that we are each free to think what we please, to occupy our minds with whatever thoughts, imaginings, feelings, moods, fantasies, or judgments that we wish, without either morality or law having anything to say about it. So long as such thinking does not “break the skin” and become physical action—even the minimal physical action involved in speech—many share the view that what occupies our own minds is entirely and exclusively our business. Thought, by itself, is beyond moral evaluation and certainly beyond the jurisdiction of legal or social institutions to regulate or sanction.

This presupposition that “freedom of conscience” is absolute is neither naïve nor silly (even though such supposition should be qualified so that our “dark and muddy thoughts”<sup>25</sup> remain eligible for aretaic if not deontic condemnation). What is both naïve and silly is to think that an absolute freedom of thought grounds an equally absolute freedom of expression of thought. One need only reflect on speech that causes serious injury to others for no good reason. Why on Earth would morality refuse to prohibit one means amongst many by which we can harm one another? Speech acts are, after all, a species of actions, and like all other kinds of actions, these too can seriously harm and wrong others.

It would be less naïve to amend the orthodoxy to recognize only a *presumption* (perhaps an especially stringent presumption but still only a presumption) in favor of the liberty of speech acts; this could be a presumption of liberty that is stronger than the usual presumption of liberty that attaches to all kinds of action generally.<sup>26</sup> But is this more sophisticated, less absolutist version of the “speech is special” thesis true? Most act types are not the subject of general rights even when cast as especially forceful presumptions: we do not plausibly possess such a right to run, a right to chew gum, or a right to swim. These act types are only protected by the general presumption that exists in favor of liberty of action, a presumption that applies to all act types.

Three leading justifications of the “speech is special” thesis are that: (1) expression is essential to thought, and thinking without fear of interference or restraint

24. JOHN STUART MILL, *ON LIBERTY* 86–120 (David Bromwich & George Kateb eds., 2003) (1859).

25. HOYT AXTON, *Flash of Fire, on FEARLESS* (UMG Recordings 1976). The context of Hoyt Axton's phrase is: “I thought you were a friend of mine, I thought you were my buddy. But I found out a short while ago your thoughts are dark and muddy. You scare me half to death, my friend, with the things you say and do. So, I'm goin' to heaven in a flash of fire, with or without you.” *Id.*

26. On the general presumption of liberty, see JOEL FEINBERG, *SOCIAL PHILOSOPHY* (1973); *see also* Michael S. Moore, *Liberty and the Constitution*, 21 *LEGAL THEORY* 156, 156–241 (2015).

is essential to personal identity; (2) speech cannot seriously harm others and so regulating it would violate the harm principle that precludes interferences with liberty absent proof that its exercise will harm others (“Sticks and stones can break your bones, but words can never hurt you.”); and (3) communication with others is essential to the goods of sociality and to useful and meaningful projects that require co-operative efforts. Yet surely these considerations, if true, only strengthen somewhat any presumption in favor of the freedom to speak vis-a-vis the background presumption in favor of liberty, generally. They do not give rise to any categorically different right of free speech (as there is plausibly for a categorically different right of free thought); at most, they justify a somewhat more stringent presumption (when compared to other act types) in favor of there being a right to communicate with others through oral, signed, or written expression.

### *B. Four Categories of Blameworthy Speech*

Our main quarry, however, is not the right of free speech but rather the wrongness of certain speech, even in the face of there being any such general right. Here, we return to the four categories of wrongful acts that we isolated at the close of Part I. In this section, we shall ask into the bases upon which speech may be judged (1) impermissible, (2) impermissible but immunized, (3) permissible but suberogatory, and (4) the object of a liberty, rather than an obligation or permission. Once we understand the ways in which speech may be blameworthy, we will be in a position to judge the justifiability of responses to such speech.

#### 1. Speech Acts that are Impermissible

It seems clear that we are sometimes, and perhaps often, obligated to hold our tongues. Absent one having a justification, the obligation in these instances is a strong one: we do not have a Hohfeldian liberty to speak; we do not have a right to speak that is being abused in a manner that makes our speech (merely) suberogatory; and we have no immunity from others’ interference with or prevention of our speech. In what follows, we cannot hope to provide an exhaustive list of factors that make speech wrongful in this strong sense; but we can certainly advance plausible bases for thinking that certain sorts of speech acts constitute *prima facie* breaches of core moral duties that invite legitimate avoidance, prevention, or punishment by others in the absence of justification.<sup>27</sup>

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27. Of course, as is always the case, speakers may be able to raise justifications for employing speech that is *prima facie* wrongful—in any of the senses outlined in the previous section. Our goal in this section is to articulate the ways in which speech may be *prima facie* impermissible, such that a speaker will need a justification in order to make others’ avoidance, prevention, or punishment itself unjustified. In the interests of avoiding repetition, we will not continue to remind readers that our analysis of the categories of blameworthy speech leaves open the possibility that speech which is *prima facie* eligible for inclusion in a given category may be justified, and thus all-things-considered neither wrongful nor blameworthy.



*a. Intrinsically Wrongful Speech*

First, some forms of speech may be intrinsically wrongful, even if not harmful.<sup>28</sup> Racial, sexist, homophobic, ethnic, religious, and gender identity slurs appear eligible for inclusion in this category because even if they do not impose psychic injury upon or incite aggression against any member of the immediate audience, they reinforce bigoted stereotypes that unjustly diminish the standing of individuals within the community and degrade egalitarian commitments essential to maintaining a healthy democracy under the rule of law. The same is true of speech acts that rise to the level of constituting harassment in a workplace (sexual or otherwise), for even if the target of such harassment is not personally pained or intimidated by it, discriminatory speech acts nevertheless constitute gross violations of the rights of that individual, and of all those who are similarly denigrated. Other insults may be similarly intrinsically wrongful. Just as one is unjustly deprived of liberty by the locking of a door even if one has no desire to leave the room, so too are people wronged by denigrating speech acts that diminish their standing on morally irrelevant grounds, even if they personally find them more amusing than upsetting. Finally, one might think there is a catch-all category of speech acts that are intrinsically wrongful despite there being none who could lay claim to personal insult or injury of any sort. Consider blasphemy, or creating images of the prophet Muhammad, or defaming a dead person, or simply gratuitously cursing in a manner that causes offense, but no cognizable harm.

*b. Speech Made Wrongful by its Harmfulness*

Second, some forms of speech may violate obligations to others when and because they are harmful. Insults and harassment of the sort referenced above might be doubly objectionable, for they might both be intrinsically wrongful and wrongful because they are injurious. Few believe, however, that harm, as such, demarcates the line between permissible and impermissible speech. Surely, people do not lose the right to speak simply because their speech will cause others irritation, psychic disquiet, hurt feelings, or other states of mild psychic distress. So, how much harm, or what type, is required for harmful speech to become impermissible?

i. *Speech that Threatens or Incites Physical Harms*: One category of harmful speech that is uncontroversially recognized as both morally and legally impermissible concerns speech that threatens or incites behavior that is physically harmful to persons or property. One can put speech acts analogous to Oliver Wendell Holmes' example of gratuitously yelling "Fire!" in a crowded theater

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28. To be clear, that something is intrinsically wrongful does not mean it is categorically forbidden. *But see* MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 157–58 (1997). It is thus possible for a speech act to be intrinsically wrongful and still be justified as a means of, say, defending oneself against a greater wrong or as the lesser of two evils. The caveat in the previous footnote still holds: intrinsically wrongful speech is still only *prima facie* wrongful and can be exempted from the category of speech that is all-things-considered impermissible by the presence of a justification.

in this category.<sup>29</sup> This category can also include threats, words of intimidation, criminal solicitation, hate speech that tends to incite violence, and speech acts that serve to aid and abet another's criminal offenses.

ii. Speech that Manifests a Purpose to Cause Serious Emotional Distress: It is simply false that "sticks and stones can break one's bones, but names can never hurt one." When people intentionally "hit with words" in lieu of sticks, we might plausibly think of their wrongs as analogous to physical batteries. They are slaps as sure as slaps are slaps. We rightly blame those who use words to cause serious psychic injuries in the same way we blame those who purposefully make physical contact with others in ways that the law takes to be harmful or offensive. The law of torts, of course, recognizes a cause of action for the intentional infliction of emotional distress precisely because the kind of anguish that results from deliberate cruelty is uniquely traumatizing and, for that reason, morally special. As another famous saying of Justice Holmes has it, even a dog knows the difference between being kicked and being tripped over.<sup>30</sup> When people kick with words rather than tripping over their tongues in ways that harm others unintentionally, their words tend to inflict a particularly acute kind of psychic injury—one that we think is eligible for inclusion in the category of speech that is *prima facie* impermissible.<sup>31</sup>

iii. Speech that is False: A third, much more interesting kind of speech that is arguably *prima facie* prohibited is false speech. Not all speech, of course, possesses propositional content, and thus, not all speech has a truth value. Speech that lacks truth value may be impermissible for one of the reasons just canvassed (namely, it may constitute a breach of duty because it incites wrongdoing by others or because it culpably causes emotional distress). Speech that has propositional content, however, may be impermissible simply because it is false.<sup>32</sup> Indeed, the line between true and false speech might well be congruent with the line between speech that is permissible but suberogatory (the true) and speech that is flatly prohibited (the false). One might think, for example, that one is obligated not to utter falsehoods, and that if one does so purposefully, knowingly, or recklessly, one can be appropriately blamed for culpable wrongdoing. And one

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29. *Schenck v. United States*, 249 U.S. 47 (1919).

30. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (1881).

31. To belabor the point one more time, speech may be deliberately hurtful and still justified. Suppose a madman tells me that the only way I can save my kidnapped child is to inflict severe pain on a friend of the sort that can only be achieved through speech that reveals a desire to cut them to the core. In that case, I may be justified in mustering the most hateful speech imaginable and delivering it with as much sadistic vigor as I can manage.

32. In the next segment *infra* Part II, Section (2)(e), we shall take up the question of the status of speech that may or may not be false—that is, speech about which there is reasonable disagreement concerning its truth value. This segment concerns speech that is provably false; speech about which there can be no reasonable disagreement amongst people of goodwill. We appreciate how notoriously mushy the notions of reasonable agreement and disagreement are, but we shall leave for another day any effort to cash them out. For our purposes, it is enough that, however cashed out, they will work to delineate morally relevant and distinct categories of speech.

might think, conversely, that one has a right to say true things, even as it may be suberogatory to do so in certain circumstances.

Two questions immediately arise: Is all false speech at least *prima facie* wrongful, such that, if it is also culpable and unjustified, it is blameworthy? And can truth, by itself, provide a moral defense against the claim that a given speech act constitutes a violation of a moral obligation?

The law certainly relies on the true-false distinction when defining causes of action for defamation, false advertising, deception, fraud, and so forth. But speech is not legally actionable when and because it is false; it must be injurious to legally protected interests (reputational, economic, etc.). Is the requirement that false speech also be harmful unique to legally-recognized wrongs, or does morality also give a pass to those who utter falsehoods that do no tangible harm?

There are at least three reasons for thinking that morality takes all false speech to be *prima facie* wrongful. First, linguistic communication is one of the great achievements of the human species, for it provides a masterful means of solving coordination problems with others and thereby unlocks spheres of liberty, exchange, innovation, experimentation, collaboration, intimacy, and friendship that would be unavailable without it. Inasmuch as effective communication fundamentally presupposes an ethic of truth-telling, falsehoods threaten to undermine a fundamental pillar of social interaction and cooperation. Absent a justification, it would seem that one who utters a falsehood does so impermissibly and is eligible for blame if such a breach is committed culpably.<sup>33</sup>

Second, inasmuch as falsehoods are epistemically misleading, they interfere with others' ability to form true beliefs. Such interferences constitute epistemic harms that might themselves be of moral concern, quite apart from their larger impact on the practice of using language for purposes of social coordination. If the ability to employ the impressive capacities of reason available to humans in the service of knowledge is itself a good, and if that ability requires humans to gather and analyze facts and to draw both empirical and normative conclusions from them, then falsehoods threaten that fundamental human good. Put succinctly, if knowledge is good, falsehoods are at least *prima facie* bad.

Third, people commonly rely upon others' claims to accomplish the epistemic tasks that allow them to achieve their goals that require social coordination or the knowledge of others. When they do, falsehoods undercut that reliance. If thwarting another's reliance is, by itself, *prima facie* wrong, then absent a justification, one is plausibly prohibited from speaking falsely when another relies or might rely upon one's claims being true.

Despite the obvious values served by recognition of a moral obligation to speak truly, an avalanche of objections and queries would need to be met in order to sustain the claim that all or most false claims are morally impermissible. One

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33. The conditional qualification (about culpability) is important to see the plausibility of the assertion in the text that uttering a falsehood is wrong. A lie, for example, is the telling of a falsehood knowing it to be false; surely it is plausible that lying is *prima facie* blamable.

objection might stem from the fact that we often employ speech, the semantic meaning of which is false, in order to convey a message that is true—say, when we employ similes, metaphors, sarcasm, and self-deprecating humor in ways that are designed to convey messages oblique to, and often the inverse of, their linguistic meaning. We say such things as “he’s a bear in the morning,” “she spends her life dancing on pink clouds,” and “I’m not awake today.” When the predictable happens, or someone does something foolish, we say, “What a surprise!” or “Well done!” Of course, the fact that we often turn the semantic meanings of statements on their heads to punctuate ideas or achieve comedic effects is no embarrassment to an effort to defend the view that false speech is impermissible because the utterance meaning of such speech acts provides their propositional content. The prohibition against speaking falsely would plausibly take as its object a speaker’s utterance meaning, not the semantic meaning of the words and phrases employed. So, if a man is dispositionally surly in the morning, the statement that he is “a bear” is true. If a woman has led a lucky life free of hardship and loss, the statement that she has been “dancing on pink clouds” is accurate. And if the utterance meaning of “What a surprise!” well-captures the easy predictability of harm that has materialized, none would think to charge the speaker with a falsehood.

Far more problematic are instances in which people tell beneficial lies. A symptom of the variability in the potential beneficial nature of some lies is the fact that categories of lies are standardly accorded colors. A “blue lie,” for example, is a lie told by a police officer as a means of avoiding the use of force. (“Come with me: your wife is waiting for you at the precinct.”) A “white lie” is a lie told for another’s benefit, typically as a means of making them feel good, putting them at ease, or sparing them unnecessary with grief or aggravation. (“Your new haircut is very flattering.” “Everyone in the office likes you.”) A “black lie,” of course, is a falsehood communicated for private gain, typically as a means of obtaining an unearned advantage or avoiding a deserved penalty. A “grey lie” has attributes of both a white lie and a black one in that it partly aids another and partly aids the speaker. (Think of someone who lies for a friend with the expectation that the friend will reciprocate.) A “red lie” is a lie specifically motivated to harm another (to exact revenge, for example), even at the expense of harm to the speaker.

Many may be willing to concede that black, grey, and red lies are *prima facie* impermissible. Many will think that blue lies are fully justified by a balance of evils that weights the preservation of another’s bodily integrity more heavily than the truth. But many will insist that those who altruistically tell white lies to spare others’ feelings and preserve others’ harmless illusions do nothing impermissible; and indeed, many will find it plausible to think that numerous white lies are obligatory. They will insist that many truths are painful and people are obligated to keep them secret when no good can be expected to come of them. What benefit comes from telling a child she was conceived as a result of a rape? Or telling a friend about her husband’s infidelity many years ago? Or giving others brutally

true assessments of their appearance, intelligence, talents, or what others say about them behind their backs? Is there not a moral lesson to be taken from the old adage that “if you can’t say something nice, don’t say anything at all”?

We are inclined to resist the thesis that truth-telling can ever be a breach of an obligation absent, of course, consensual or contractual arrangements that give rise to affirmative obligations to keep secrets, such as those that pertain in instances in which non-disclosure agreements have been struck or those that attend certain sorts of employment (think about the obligations of secrecy owed by those in the intelligence services or by those whose professional roles entail relationships of confidence with clients, patients or penitents, such as lawyers, psychiatrists, psychologists, and priests). It follows from this that we must reject the view that telling falsehoods can sometimes be obligatory. In our view, morality thus provides the foundation for the absolute defense of truth that defamation law recognizes. No doubt, however, telling others painful truths from which they derive no benefit may be, and probably typically is, suberogatory—that is, an abuse of the right to speak—but we are inclined to think that no one can be wronged by the truth, even as they may be harmed by it. No autonomous adult is entitled to believe false things or to have other such adults do so (we might leave children with fairies and Santa Claus). No one has a right to others’ use of lies to protect their illusions. Hence, no instance of truth-telling can count as a rights violation (again, absent a contractual arrangement that makes it one), inversely, no instance of lying can count as obligatory. To think otherwise suggests either that one takes the balance of consequences to determine the rightness of speech acts (so as to judge the permissibility of truth-telling by whether it will produce a net gain or loss of good consequences) or one subscribes to a version of ethical hedonism that suggests that being connected to Robert Nozick’s pleasurable experience machine is morally superior to living a less pleasurable, but fully authentic life.<sup>34</sup> Inasmuch as we do not subscribe either to moral consequentialism or ethical hedonism, we will refuse the invitation to construe harmful truths as moral wrongs and harmless or helpful lies as moral duties.

The final category of speech acts that might be thought to cause trouble for the view that the line between truth and falsity provides the principal line between permissible and prohibited speech is the category of opinion statements. Sometimes, opinions appear to be mere emotings that lack propositional content altogether, thus resisting the notion that they can be true or false. Someone who describes another as a “jackass” effectively says nothing more than “ugh,” and thus says nothing capable of truth or falsity. Opinion statements that are of this sort typically fall in the above category of verbal slaps (and to the extent that they are slaps, they can be thought to be impermissible in the manner described in Part II, Section (1)(b)(ii) above). Consider, for example, the sign posted at the front of a small Baptist church in Charlotte, NC, a number of years ago that read:

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34. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 246 (1974); ROBERT NOZICK, *THE EXAMINED LIFE* 104 (1989).

“The Koran needs to be flushed.”<sup>35</sup> The utterance meaning of this sign surely converted it into a verbal slap valued not for any empirical accuracy but for the injury it was intended to cause Muslims and the righteousness it was intended to stir within congregation members.

Many opinions, however, explicitly or implicitly convey claims about the world that appear to have truth value.<sup>36</sup> One might think that inasmuch as all opinion statements implicitly, if not explicitly, describe a speaker’s phenomenology, they are made true or false by the degree to which they indeed accurately reflect the speaker’s beliefs. When someone says, “I think she’s very bright,” one might think that this is true or false depending on whether the speaker indeed believes that the person described is very intelligent. In other words, its truth or falsity is determined by the actual content of the speaker’s beliefs and not by the subject’s cognitive capacities. Inasmuch as most opinion statements indeed express the beliefs of their speakers, one might thus think that they are largely immune to falsification. But of course, when people offer up their opinions, they typically seek to do more than convince others of the fact that they possess the beliefs they express. They rather seek to persuade others to join them in holding those beliefs, and as such, they appear to invite an inquiry into the truth of their expressed convictions. When Robert F. Kennedy Jr. claimed that COVID-19 was “targeted to attack Caucasians and Black people” while sparing those who are “Ashkenazi Jews and Chinese,”<sup>37</sup> he certainly intended to convince a private New York City audience of the truth of his often-articulated conviction that the global pandemic was conspiratorially concocted—a conviction he defended when he later recharacterized his remarks as “accurately point[ing] out” that the United States is “developing ethnically targeted bioweapons.”

Should opinion statements that reflect false empirical allegations count as violations of moral obligations, so that if they are culpably uttered, they are eligible for private avoidance, prevention, or punishment? Or ought opinion statements to be grouped with other statements that are thought to lack truth value so as to be judged impermissible only if they fall into one of the previous categories of impermissible utterances? Ought they to be eligible for aretaic blame but not deontic blame because they are matters of right and can thus be condemned only for being suberogatory? We want to suggest that this question may not be as pressing as it seems because many opinion statements—even many that plausibly count as violations of moral obligations—appear eligible for immunity from

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35. *NC Church Stands By Sign Saying Quran “Should Be Flushed”*, WFMY NEWS 2 (May 24, 2005), <https://www.wfmynews2.com/article/news/local/nc-church-stands-by-sign-saying-quran-should-be-flushed/83-403836504> [<https://perma.cc/3RVJ-KTCT>].

36. Sometimes, it is not even clear whether the opinion statements have a truth value. Consider Harry Frankfurt’s category of “bullshit.” HARRY FRANKFURT, *ON BULLSHIT* (2005). George Fletcher characterizes Frankfurt’s category as “a concept that inhabits a space between truth and falsity.” GEORGE FLETCHER, *IN COMMEMORATION: HERBERT MORRIS, UCLA PROFESSOR OF LAW AND PHILOSOPHY* 236 (2023).

37. Jonathan Weisman, *Robert F. Kennedy Jr. Aims Bigoted New Covid Conspiracy Theory About Jews and Chinese*, N.Y. TIMES (July 20, 2023), <https://www.nytimes.com/2023/07/15/us/politics/rfk-jr-remarks-covid.html> [<https://perma.cc/43GN-QPGQ>].



others' interference. It is to this second category of speech acts that we will turn in the next section, leaving loose the thread of whether the fact-opinion distinction upon which the law has so troublesomely relied is a distinction upon which morality itself relies for purposes of delineating permissible from impermissible speech. But before we turn to the category of speech acts that are prohibited but immunized from others' interference, let us take up one final category of speech acts that might be eligible for inclusion in the category of prohibited speech.

iv. Speech that Violates the Constraints of Distributive Justice: Some speech appears to be impermissible simply because there is too much of it. Just as concerns for distributive justice obligate us not to take more than our fair share of benefits or shirk more than our fair share of burdens, so it seems plausible that one ought to share airtime with others in zero-sum circumstances. We are all familiar with colleagues who exceed their allotted limits on panels and at conferences, and while small transgressions appear at most suberogatory, gross violations appear to violate the rights of both other speakers and members of the audience. Similarly, those who dominate discourse in other group settings in which an egalitarian distribution would accord all a short amount of time to voice their views—from dinner parties to book clubs to organizational meetings to class discussions to community gatherings—cross the line between abusing a right and violating the rights of others. How much is too much is highly context-sensitive and thus cannot be settled in the abstract. However, the moral importance of this category of impermissible speech is located within distributive justice. Its impermissibility does not turn on the harmful qualities of its content but on its comparatively excessive quantity.

## 2. Speech Acts that are Impermissible but Immunized Against Others' Adverse Responses

Those who accept our taxonomy of impermissible speech acts might nevertheless insist that when it comes to speech, people ought often to be accorded a "right to do wrong"—that is, they ought to enjoy a generous license to speak their minds, even when so doing proves psychically offensive or hurtful to others and lacks all substantive merit. They might insist that just as state officials and state institutions are constitutionally obligated not to interfere with a great deal of speech that falls into the categories discussed in the previous section, individuals are morally obligated to refrain from interfering with, preventing, or punishing a good deal of speech that is, itself, a violation of speakers' obligations.

As we mentioned in Part I earlier, it would be a flat violation of standard deontic logic to insist that while X has a duty not to do A, X may nevertheless have a permission to A. If X has a duty not to do A, it is not the case that X has a permission to do A; and if X has no permission to do A, X has no right to do A. So those seeking to accord speakers generous "rights to do wrong" cannot seriously mean that speakers ought to be left to spew vile, hurtful, false claims because those speakers have moral rights to violate their moral duties. Instead, what those who counsel liberal tolerance of illiberal speech must mean is either



that (a) it would be itself wrongful for *others* not to bestow immunities upon those who speak in impermissible ways; or that (b) the speech in question is not, in fact, morally prohibited; it is merely aretaically suberogatory, and for that reason must be thought to be permissible. In the next Part, we shall take up speech acts that are permissible, but suberogatory. In this part, our goal is to explore when and why genuinely prohibited private speech might nevertheless merit an immunity that precludes individuals from taking adverse actions in response to it.

Why should we sometimes have to tolerate another's violation of our rights or the rights of others? Why should any of us have to hold our tongue or stay our hand when another is violating an obligation in a manner that is hurtful to others or harmful to public goods? In other words, why would individual wrongdoers ever enjoy immunities from others' acts of interference with their wrongdoing, particularly when that wrongdoing is both culpable and unjustified? Here are five possible answers.

*a. Speech that is Less Harmful to Tolerate than to Suppress*

First, sometimes efforts to regulate others' misconduct ricochet, causing more harm to the victims of that misconduct or to those who respond than is caused by the misconduct to begin with. This is a common concern with efforts to suppress "sins" outside the context of speech. It may sully, demean, degrade, or dispirit those who have to pry into others' conduct through unseemly means (e.g., by peering through peepholes) or by undercover participation in the very activities they seek to curtail. In the context of speech, victims of defamation must always worry that in suing those who have uttered injurious falsehoods about them, they will augment their own reputational damage by having to republish the false speech for which they seek redress. Wrongdoers might thus rightly be accorded immunities from interference or reprisal when those who would be called upon to respond to their wrongdoing will endure harms greater than are caused by leaving such wrongdoers at liberty.

We often accord people who speak impermissibly an immunity from interference or redress precisely because we recognize that to effectively condemn or suppress their misconduct would require someone to "stoop to their level." When one must resort to shouting to silence a shouter or ad hominem to subdue a bully, one is right to weigh the degree to which that remedy will do more harm to one's own psychic poise and moral standing than good; and that, of course, turns on how culpably wrongful the speech is and who and how many it victimizes. (Recall Republican primary candidate Marco Rubio's ill-fated effort during the 2016 Presidential campaign to answer the denigrating moniker that Donald Trump had assigned to him—"little Rubio"—by ridiculing Trump's "little hands" and inviting rally-goers to conclude that other of Trump's body parts were similarly small.)

*b. Speech that Serves an Educative Function*

Second, liberty is often the price that must be paid for effective education, and the exercise of liberty by those who still have much to learn very often produces mistakes. We have to be willing to tolerate others' mistakes when and if those mistakes can be predicted to teach important lessons that will insulate against their repetition in the future. Of course, there are plenty of mistakes we are not prepared to allow others to make, however effective they might be in advancing the maturation of their judgment. Actions that threaten physical harm to persons and property, falsehoods that lead to ill-gotten gains or impose undeserved setbacks to others' important interests, and words and deeds that rise to the level of bullying or harassment are just a few examples of the sorts of moral mistakes that we plausibly will not trade for others' long-term acquisition of moral wisdom. But as parents well appreciate, children have to be able to make bad choices that setback their own interests, and even those of their family, when those mistakes will help them make better future choices. When children are afforded the freedom to make such mistakes, they effectively possess a moral immunity from interference by their parents and other (specified) family members.

If paternalistically motivated freedoms are ever justifiably accorded to adults in non-familial settings as a means of further developing their good judgment, adults in such circumstances will similarly enjoy immunities from others' interference with, prevention, or punishment of their impermissible use of those freedoms. While libertarians traditionally reject the notion that others are ever justified in treating adults paternalistically, the upshot of educational paternalism is to leave people at liberty to say or do things that may not only abuse their rights, but positively violate them. While we do not want to get ahead of ourselves, the standard defense of a broad license to speak freely points to the educational value of allowing true speech to combat false speech in a metaphorical marketplace of ideas. As Oliver Wendell Holmes Jr. famously insisted: "[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."<sup>38</sup>

*c. Speech That is Made More Valuable by its  
Autonomous Utterance*

The third basis upon which people might be thought to have immunities to do and say impermissible things derives from a view that the autonomy with which actions are performed significantly affects their value. There are three variations on this thesis. The first variation holds that autonomy adds value to all actions, even evil ones, so even evil actions have a trace of goodness if they are performed autonomously. The second variation holds that autonomy makes bad actions worse and good actions better, so while impermissible actions are not made better

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38. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

by having been freely chosen, permissible ones acquire increased value when freely willed. The third variation holds that while their autonomous choice does not affect bad actions one way or another, good actions are made more valuable when they are the product of autonomous choice. It follows from all three of these variations that according people immunity to make (certain) impermissible choices is likely instrumentally necessary to their making maximally valuable choices, for only if they have the license to choose between the permissible and the impermissible with impunity (again, subject to plausible constraints), will they have the ability to make the sorts of autonomous good choices that are of ultimate moral value?

In many circumstances, we are largely indifferent to the reasons why people behave morally. Whether people refrain from murder, rape, kidnapping, drunk driving, and the like because they consciously choose to safeguard human life or because they feel coerced by the prospect of serious legal sanctions matters little, for we do not judge their autonomy so dear that we would accord them a license to choose wrongly as a means of protecting it. But it may be that most speech derives a significant amount of its value from the fact that it freely expresses the personal beliefs and values of its speakers. Certainly, coerced speech appears both epistemically and morally suspect. Coerced confessions are likely unreliable evidence of the guilt of the speaker, and symbolic pledges provide poor windows into the souls of those who undertake them to honor others' expectations. If what people say is valuable, in significant part, because *they* have chosen to say it, then there may be good reason to ensure that they feel free to speak without the threat of interference, prevention, or punishment. And this is just to say that there may be plausible grounds to accord people generous immunities when it comes to what they say, if not what they do.

*d. Speech that Must be Tolerated Out of a Concern  
for Equality or Reciprocity*

It is worth recalling the lesson from the previous section; namely, that the value of distributive justice may exert pressure on when and why speech ought to be tolerated. It may be that certain instances of impermissible speech by other speakers ought to be thought to be immunized against our interference, prevention, or punishment simply because those speakers accorded us the ability to speak our minds without fear of their intervention. The values of equality and reciprocity may thus dictate that others be allowed to engage in impermissible speech when we, or those who represent us, were accorded the same immunity. As is always true when these values exert moral force, it may seem paradoxical to suggest that because a wrong happened once, it should happen twice; that because one person misbehaved, that should provide a license for another to do the same.<sup>39</sup> Still, those who do not reject these values altogether can surely contemplate instances in

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39. Such are the standard tropes of those generally skeptical of equality as a value, such as Larry Alexander, Joseph Raz, and Peter Westen. We do not share the equality skepticism of such theorists.

which those who have spoken against the views of others in ways that have caused offense or harm ought not to complain when those they injured do the same.

*e. Speech Possessing a Truth-Value About Which  
There is Reasonable Epistemic Doubt*

Finally, perhaps the most substantial category of speech that ought to enjoy an immunity from interference, prevention, and punishment concerns matters about which reasonable people can, in good faith, disagree, either empirically or ethically. Spirited scientific and moral disputes that pit against one another people who can claim reasonable grounds for their opposing judgments are ubiquitous. Epistemic humility alone counsels against suppressing speech that concerns unsettled matters—from the morality of abortion to the consequences of climate change, from the ability of capitalism to protect future generations to the justifiability of assisted suicide, from the degree to which police forces are infected by latent racism to the fairness of paying CEOs of Fortune 500 companies hundreds of times more than their employees, from the sources of blame for Middle East conflict to the sources of blame for the continued enjoyment of the benefits of past colonialization, and so forth. When none can fairly claim a corner on the truth, all those whose arguments rest upon bases about which reasonable people can disagree ought to enjoy an immunity to speak, even while others may be convinced that their arguments have no merit and are, for that reason, impermissible.

It may be tempting to think that this category is redundant with already articulated bases for refraining from the suppression of speech. It might be argued, for example, that one who participates in good faith in a reasonable debate is necessarily non-culpable because reasonable words and deeds are, by their nature, non-negligent. Since impermissible speech cannot be fairly blamed or punished unless it is culpable, this category of speech is, *ex hypothesi*, ineligible for a response and, hence, without the need for any immunity.

But this would be a mistake. While it may be illegitimate to impose sanctions on someone who non-culpably violates an obligation, impermissible but innocent speech may be akin to the innocent taking of another's property; namely, others are fully entitled to intervene to prevent such innocent wrongdoing. If matters of reasonable disagreement properly invite legitimate disputes, then those who contribute to such disputes will need to be immunized not just from punishment, but from interference or prevention, at least until one side of the debate emerges as a clear winner (as is the case regarding debates about whether the Earth is flat, slavery is moral, climate disruption is anthropogenically caused, or marriage ought to exclude gay couples).

It may also be thought that this argument duplicates the educational argument articulated above. But while it has a family resemblance to that argument, it is distinct. The argument here is not that we must tolerate others' (manifestly) false speech as an instrumental means of encouraging them to arrive at true beliefs from which a greater amount of (manifestly) true speech will flow in the future.

This argument is rather that we ought to take reasonable disagreement by well-motivated people to heuristically indicate the unsettled nature of the truth of empirical and moral propositions.<sup>40</sup> Reasonable disagreement ought to make us reluctant to believe or claim that our views are, in fact, manifestly true, or that others are manifestly false. It ought to sow a sense of epistemic modesty and instill a sense of epistemic doubt. As a result of a matter being in reasonable dispute, those who speak about it ought to be immunized from others' intervention, however convinced those others are about its falseness and, thus, its impermissibility. In short, when people ought to be in doubt about the truth of what they and others assert, all ought to be immune to others' efforts to silence them.

### 3. Speech Acts that One Has a Right to do but Which Are Nonetheless Suberogatory

As with many other types of actions beyond speech, even though we are subject to numerous negative and positive obligations that prohibit some actions and require others, we enjoy a great many permissions that afford us discretion concerning our words and deeds. Some of these permissions – the ones often called “agent-centered prerogatives” – allow us to do actions that are inconsistent with what would maximize good consequences or otherwise accord with the balance of first-order reasons for action. They allow us to waste our talents and our time, to squander our wealth, to imperil our health, to sustain dysfunctional relationships, and to otherwise dedicate ourselves to the pursuit of the simple pleasures that John Stuart Mill thought worthy only of pigs.<sup>41</sup> These permissions usually function as full-fledged rights in the sense we articulated in Part I. Namely, they give rise to correlative obligations on the part of others not to compel, interfere with, or prevent their exercise. They accord individuals spheres of liberty within which their choices are inviolable.

Yet their inviolability does not mean that such strongly permitted actions cannot be praised or blamed. It does not mean that they cannot be hailed as heroic—as actions that go beyond the call of duty so as to be supererogatory. And it does not mean that they cannot be condemned as abuses of rights so as to be suberogatory. Gossip very often involves the moral evaluation of others' exercises of their rights. Those who regularly give their energy, time, and dollars to others (e.g., through volunteer work, charitable giving, or neighborly generosity) are extolled, while those who stand on their rights to do things that are offensive or irksome to others (smoking proximate to another's open window, making an eyesore of their property, or driving without a muffler) come in for biting criticism.

The blame and praise that is regularly attached to permitted actions has long been a source of puzzlement. If actions are morally blameworthy, for example,

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40. That the disagreement with our own beliefs by reasonable people is grounds for epistemic doubt about the truth of our own beliefs is often traced to Henry Sidgwick. HENRY SIDGWICK, *THE METHODS OF ETHICS* (MacMillan & Co. Ltd., 7th ed. 1907) (1874).

41. JOHN STUART MILL, *UTILITARIANISM* 34 (George Sher ed., Hackett Publ'g Co. 1979) (1861).

then those actions must be, in some sense, actions that ought not to be done. But actions that are strongly permitted are actions that people have the right to do. What could it mean to say that someone ought not to do something but that she is perfectly free to do it? In answer, we have elsewhere argued that the “non-obligatory oughts” that are reflected in our praise and blame of others’ permitted actions are aretaic in nature.<sup>42</sup> Actions that are strongly permitted are matters of deontic right. But as we have argued, people are aretaically obligated to cultivate virtues and suppress vices, and exercises of deontic rights can very often reveal virtues and vices in ways that invite aretaic appraisal. Virtues and vices are attributes of character; they are dispositional states that concern both actions and mental states. Actions can often lay bare actors’ dispositional natures, revealing them to be the sorts of people whose first instincts are to be brave or cowardly, greedy or generous, honest or deceitful, patient or impatient, humble or egotistical, and so on.

Supererogatory actions are actions that reflect virtuous dispositions. They are actions that derive their “oughtness” from the dispositional states that we each aretaically “ought” to cultivate that, in turn, are evidenced by our actions. The soldier who throws himself on the grenade to protect his buddies in a trench does a supererogatory deed if it reflects a selfless concern for the well-being of others over his own (as opposed to, say, a self-serving desire to commit suicide in a way that will be misconstrued as an act of heroism). Inversely, suberogatory actions are actions that reflect vicious dispositions. They derive their “ought not-ness” from the dispositional states that we each aretaically “ought not” to indulge. The colleague who consistently pays meticulous attention to ensuring that she gets change right down to the penny when a check is split amongst a group is surely entitled to that amount of money in return, but her preoccupation appears to reveal suberogatory tendencies toward miserliness and jealous distrustfulness.<sup>43</sup>

It would seem a fool’s project to attempt to catalog ways in which speech may be suberogatory, for the vices are many, and their potential revelation through endlessly variable speech acts is practically infinite. However, as we anticipated in the previous segment, we are inclined to put a good deal of weight on the line between truth and falsity when theorizing about the difference between suberogatory and prohibited speech. In our view, one generally has a right to speak truthfully. While this right is not exceptionless (one presumably has no right to spill state secrets in social settings), we are prepared to defend the view that others can have no right to their false beliefs, which means that one can do them no wrong by shattering their illusions. This does not mean, however, that it is blameless to do so. On many occasions, the truth hurts, and when it does so for no good reason—or a very bad reason—its utterance appears eligible for aretaic blame. Generous compliments and self-deprecating attributions of credit to others very commonly

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42. See, e.g., Hurd, *supra* note 11.

43. Nietzsche derided this as a use of “shopkeeper’s scales” to mete out precisely what one deserved. FRIEDRICH NIETZSCHE, *The Dawn*, in *THE PORTABLE NIETZSCHE* 76, 86 (Walter Kaufmann ed., trans., 1954).



evidence the virtue of kindness. Inversely, none generally need to know that they lack the beauty, intelligence, talent, popularity, admiration, respect, or vitality they try to project in person and via their Instagram accounts, and those who would seek to set them straight would likely reveal motivations that stem from unworthy sources in their souls. The same goes for all sorts of other truths that are properly withheld for the sake of protecting the well-being of an individual or group. While we can always imagine good reasons for telling any truth, we can also imagine how odious aspects of character are manifested when someone goes against the wishes of adoptive parents by truthfully telling a young child that she was adopted; or by truthfully telling someone that their parents really committed suicide rather than dying in an accident; or by letting a student know that when she was admitted to law school, it was despite her academic record, not because of it; or by telling a friend that her husband had an affair that ended years ago; or by revealing private and embarrassing facts about a colleague over cocktails purely to titillate a nosey audience. When we blame others for not keeping their mouths shut, even when we cannot deny that the claims they made were true, our blame is not predicated on their violation of a deontic duty but rather on the aretaic judgment that their words betrayed poor character by evidencing cruelty, opportunism, self-aggrandizement, or an eagerness to exert power over others.

Moral libertarians who believe that there are no positive deontic duties are particularly in need of an account of why we find it morally abhorrent for people to refuse to give aid to strangers even if it would be relatively costless to do so. Even those who reject moral libertarianism—but who nevertheless embrace the view that positive duties are considerably weaker in stringency than negative duties<sup>44</sup>—have to be able to explain why we disproportionately assign blame to bad Samaritans relative to the modesty of the positive duties they might have breached. The most plausible account available to both libertarians and those who discount the stringency of positive duties is an aretaic one along the lines that we have sketched. In cases in which people turn away from the plight of others, we ask: What kind of a person would fail to save a drowning coal miner after daring him to jump into a water-filled coal cut?<sup>45</sup> What kind of person would stand by and simply watch a deranged mother beat her infant child?<sup>46</sup> What kind of person would fail to call 911 when a woman is being stabbed at the common entrance to their shared apartment building?<sup>47</sup>

In the context of speech, moral libertarians are committed to the thesis that people never violate deontic obligations by holding their tongues, even when others need full-throated defenses. Moreover, those who discount the stringency

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44. See our earlier discussion of this position *infra* in Part I.

45. See *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959).

46. See *Pope v. State*, 396 A.2d 1054 (Md. 1979).

47. *Kitty Genovese*, HISTORY.COM (January 5, 2018) <https://www.history.com/topics/crime/kitty-genovese> (last updated May 21, 2021) [<https://perma.cc/F6B9-AFJK>].



of positive duties, rather than denying their existence altogether, will similarly find many instances in which the duty to speak is sufficiently weak to reduce the deontic wrongdoing of those who remain silent to moral misdemeanors. Yet those who fail to speak out when others are made targets of verbal abuse, defamatory aspersions, humiliating taunts, cruel jokes, and racist, sexist, homophobic, and bigoted attacks invite harsh judgments—judgments that can only be explained on aretaic grounds if libertarian and positive duty discounters are right. Silence when evil threatens to triumph<sup>48</sup> strongly evidences a cowardly fear that one will be similarly targeted, a selfish willingness to protect one's own privileges at the expense of others' far graver losses, a greedy jealousy to preserve undeserved advantages that would be lost with truthful remonstrances, a slothful temptation to take the easy road, and so forth. Those who have a spare view of our deontic obligations may still account for the vigor with which we condemn those who fail to speak up in response to injustices, for they can plausibly construe our blame as aretaic, rather than deontic or as judgments of others' character, rather than more narrow judgments about their particular act tokens at razor points in time.

#### 4. Speech Acts that One Was at Liberty to do but Which Are Nonetheless Suberogatory

One who has a naked liberty does no wrong in exercising it. Nonetheless, such a liberty does not generate correlative obligations on the part of others to avoid interfering with or preventing its exercise. In other words, when one has a naked liberty to speak or act, another may have precisely the same liberty to prevent one's exercise of that liberty and vice-versa. If liberties were all that morality provided, we would all effectively live in a moral state of nature. We could do as we please, but so could others, and the practical result would be that we could not complain of any wrongdoing when others' efforts outcompeted our own. For this reason, many doubt that morality ever affords people naked liberties that allow them to engage in combat as a means of triumphing in the exercise of their freedoms.

Still, it appears that in certain contexts, the best understanding of morality is that some actions are governed solely by naked liberties.<sup>49</sup> This may particularly be true of speech acts. Think of a football game in a crowded arena in which fans of opposing teams seek to yell over one another. Or a rock concert where fans are jumping up and down, singing and screaming as the band plays a popular hit. Or

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48. Edmund Burke was given credit by John F. Kennedy in a 1961 speech for saying, "[t]he only thing necessary for the triumph of evil is for good men to do nothing." But, apparently, Burke never said this. Instead, its earliest formulation was that of John Stuart Mill, who wrote in 1867: "Bad men need nothing more to compass their ends, than that good men should look on and do nothing." *The Only Thing Necessary for the Triumph of Evil is that Good Men Do Nothing*, QUOTE INVESTIGATOR (Dec. 4, 2010), <https://quoteinvestigator.com/2010/12/04/good-men-do/> [<https://perma.cc/4LZG-KH2Q>].

49. Hohfeld's well-known example is from buffet lines, where one is nakedly at liberty to take the last remaining shrimp salad, but then so is everyone else, who are also at liberty to prevent your taking of that salad by some means other than taking it themselves first. HOHFELD, *SOME FUNDAMENTAL LEGAL CONCEPTIONS*, *supra* note 4, at 34–35.

a public square in which impassioned political or religious advocates standing atop soap boxes deliver blaring messages through megaphones in an effort to drown out and draw the crowd away from one another. It would seem that in all these cases, people do no wrong to speak in ways that prevent or contradict the messages of others, and those others have no obligation to refrain from interfering with or preventing their efforts and can, in turn, seek to do the same in response.

Of course, as we made clear in the previous segment, that speech in certain contexts is a matter of liberty does not mean that it cannot be aretaically condemned. One may do no wrong to scream and stomp on the metal stands at a football game, but those around can fairly draw unfavorable conclusions about one's character if one fails to attend to the ways in which one's means of expression are causing others to manifest irritation and frustration. In cataloging the ways in which speech may be blameworthy, we can certainly add to the list speech that is subject to naked liberties but is nevertheless suberogatory by virtue of manifesting vice, not virtue.

### III. PERMISSIBLE PRIVATE RESPONSES TO BLAMEWORTHY SPEECH

#### A. *The Three Kinds of Responses to Wrongful Speech Revisited*

As we set forth in Part I, it is fruitful to distinguish three broad categories of responses that might be available to private individuals who anticipate or encounter another's wrongful actions. Those same three types of responses are also usefully distinguished when the wrongful actions to which one is responding are speech acts. First, if asked to *enable* blameworthy speech acts, one might well refuse to do so, and such refusal would be an omission on the part of the potential responder. If one's help is necessary for the speaker's ability to reach a targeted audience, then such a refusal will effectively constitute a means of preventing the speech in question. But, even if the speech is effective without one's requested help, one's refusal to enable it may ensure that one is not complicit in its commission. Notice that a special case of this omissive category of responses is exemplified by one who simply walks away or otherwise avoids becoming an audience member of the speech in question. By avoiding the speech, one removes oneself from an audience whose willing presence might be thought—by itself—to aid and abet the speaker.

Second, one might well actively *prevent* blameworthy speech from transpiring altogether, or one might interrupt or interfere with the speech such that, even if it transpires, its effectiveness in achieving audience uptake is compromised, diminished, or defeated. Such a preventative response is analogous to the use of physical force in self-defense, defense of property, and defense of others, for its goal is to prevent an attempt from coming to fruition. One can imagine innumerable ways in which prevention or interference might rob a speaker of a meaningful audience, from the proverbial shepherd's crook that once dragged bad acts off Vaudeville stages to turning off microphones, banning speakers from using

private spaces, or making enough racket that their speech cannot be understood amidst the cacophony.

And finally, one may contradict, condemn, or otherwise *sanction* blameworthy speech after-the-fact, effectively responding to it in a manner that accords speakers their just deserts and reduces the prospect of its repetition in the future. One version of such an after-the-fact response might simply seek the (re-)education of the speaker and others on the theory that blameworthy speech is a function of ignorance concerning empirical or moral matters that can be corrected via more educative speech. An alternative version of this after-the-fact response might be punitive and thus justified by its promise to deliver one or more of the legitimate ends of punishment, *e.g.*, by intimidating the speaker or others out of repeating such speech in the future; or by imposing a penalty proportionate to the speaker's moral deserts in a manner that accomplishes private retribution.<sup>50</sup>

It is commonly accepted that the third kind of response, the resort to after-the-fact sanctions for wrongdoing, is subject to proportionality restraints.<sup>51</sup> In the context of rightful responses to wrongful speech, it is important to ask whether something like such a proportionality restraint also limits the second response—the preventative response—as well as the third (or punitive) response. Such importance arises because of certain well-known but mistaken views about how only speech can be proportional to prevent speech.

Our general view is that preventative actions need not be proportional to the actions they seek to prevent. This premise should not surprise those who have followed our work on self-defense because we have long resisted the notion that defensive actions are hostage to a proportionality principle—a principle that one can use no greater level of force to defend oneself than the level of force with which one is threatened.<sup>52</sup> Instead, we have argued that rights to bodily integrity can be defended with whatever level of physical force is *necessary* to the task. If requests, warnings, demands, and non-deadly physical means prove ineffective, one is entitled to reach to deadly force to defend against an assault that does not, itself, threaten deadly force.<sup>53</sup> In short, one does not simply have to suffer a rights violation if one has no efficacious means of defending against it short of disproportionate, and even deadly, force. Inversely, if one can reliably prevent a deadly attack through moral persuasion rather than the use of deadly force, then the use

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50. Nothing in modern versions of retributivism suggest that the achieving of retributive justice is exclusively a matter of state—rather than individual—function. *See, e.g.*, MICHAEL S. MOORE, *The Moral Worth of Retribution*, in PLACING BLAME, *supra* note 28.

51. *See* Heidi M. Hurd & Michael S. Moore, *The Ethical Implications of Proportioning Punishment to Deontological Desert*, 15 CRIM. L. & PHIL. 495, 495–514 (2021).

52. Heidi M. Hurd, *Stand Your Ground*, in THE ETHICS OF SELF- DEFENSE (Christian Coon & Michael Weber, eds., 2016).

53. Thus, we affirm the Maine Supreme Court's ruling in *State v. Philbrick*, 402 A.2d 59, 61 (Me. 1979), that if the only means of preventing an uninvited crotch grope is the use of deadly force, such use is permissible.

of deadly force, while proportionate to the threat, is unnecessary and therefore illegitimate.

Inasmuch as we generally take necessity rather than proportionality to be the moral measure of the means to which one can resort in defending one's rights, we are inclined to cleave to that view with regard to the prevention of wrongful speech. In particular, we reject the common claim (typically advanced by those who espouse the naïve version of the "speech is special" thesis) that the only legitimate response to blameworthy speech is "more speech." More generally, we reject any view that would restrict preventative actions to those that are in the same category or a category of lesser moral significance than the actions they prevent. Thus, speech that would reveal the great secret of where the Allies in World War II would land on the French coast could legitimately have been prevented by deadly force, as could speech that exposes the identity of undercover intelligence or law enforcement agents whose lives depend on sustained secrecy. Here, as elsewhere, the sole concession we are prepared to make to those who seek to impose a proportionality constraint is to acknowledge that *de minimis* wrongdoing does not license whatever preventative response is necessary to prevent it. *De minimis* wrongful speech (such as someone chuckling at an off-color joke), like *de minimis* wrongful touching (such as someone brushing one during the boarding of a crowded plane), may not be prevented by deadly force, however necessary that force might be to prevent such an insignificant rights violation.

We recognize that our views fly in the face of the received wisdom about speech enshrined in America's First Amendment jurisprudence. By virtue of its "no prior restraint" doctrines, First Amendment jurisprudence allows virtually no state actions that prevents speech—even for culpably wrongful speech the punishment of which it would allow. We take these legal doctrines restricting state power not to be mirrored in the morality of individual responses to wrongful speech. Even as legal doctrines about state action we question the "no prior restraint" restriction. The refusal to allow the state the power to prevent wrongful speech when it could do so by injunction, physical restraint, or otherwise, elevates the importance of sustaining a proverbial marketplace of ideas over the value of protecting victims from suffering the wrongs that such speech imposes upon them. We see this as part and parcel of the naïve "speech is special" view we rejected earlier. Imagine telling the prospective victim of a physical assault that no protective order will be issued, even though it could predictably prevent the assault, but that the state will gladly punish the assault after it takes place.

#### *B. The Permissibility of Enabling, Disrupting, Preventing, and Punishing Blameworthy Speech*

The obligatoriness or permissibility of the available responses to blameworthy speech will vary, and vary in their stringency, depending on the nature of the speech to which they are responses. Therefore, we shall proceed by examining the permissible responses that are available to each of the four kinds of blameworthy speech that we delineated earlier.

### 1. Permissible Responses to Speech Acts that are Themselves Impermissible

Inasmuch as one has stringent negative duties not to violate others' deontic rights, one is presumably (*prima facie*) obligated not to enable speech that one anticipates will be wrongful and not of a type that will not merit immunity. After all, to aid and abet prohibited speech is to be complicit in its wrongfulness. This means that when one can anticipate that another's speech will fall within Category 1, so as to be flat-out morally impermissible, one must refrain from doing anything with the intent to aid or abet the speaker's blameworthy expression—just as one must avoid intentionally aiding someone in the commission of a crime.

In some circumstances, our obligations may go beyond the negative ones that preclude us from actively enabling another's prohibited speech. We may have positive duties to actively prevent, interfere with, or after-the-fact address such speech. Speech that is racist, sexist, bigoted, homophobic, or otherwise intentionally abusive or denigrating invites prevention, interruption, rebuke, and condemnation, as does speech that promotes provable and dangerous falsehoods (such as then President Trump's public suggestion that injecting bleach might cure COVID<sup>54</sup>).

Just how numerous are the occasions on which we have positive obligations to prevent or rebuke wrongful speech is surely a matter of considerable dispute, for it is likely to turn more generally on the contested question of when we have obligations to aid others. The law is notoriously stingy in its Good Samaritan requirements, demanding positive interventions on others' behalf only in circumstances in which one shares with them one of only a few legally-recognized special relationships.<sup>55</sup> Certainly, most are likely to agree that when someone with whom one has a legally-recognized special relationship (*e.g.*, one's child or one's spouse) is threatened by another's wrongful speech, one has positive obligations to take preventative measures or, if it could not be prevented, to condemn and sanction it after-the fact. The question is whether our moral obligations exceed those enforced against us by law. Are we morally obligated to raise our voices against those whose speech threatens to harm friends? Colleagues? Members of our communities? Fellow citizens? Members of oppressed groups regionally or globally? And how much risk to ourselves do these positive obligations require? Presumably, if efforts to prevent or sanction impermissible speech will predictably invite death threats, we need not speak up, just as we need not risk drowning to save another from drowning. But do our positive obligations require us to speak up for others when doing so will predictably lead to our own public malignment, ghosting, social shunning, reputational injury, and the like? Answers to

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54. Jeffrey Kluger, *Accidental Poisonings Increased After President Trump's Disinfectant Comments*, TIME (May 12, 2020), <https://time.com/5835244/accidental-poisonings-trump/> [<https://perma.cc/NPU7-PECS>].

55. See, *e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 104–06, 251–53 (Carolina Academic Press, 9th ed. 2022).

these questions implicate the scope of our personal liberty, for, as is well recognized, the more expansive our positive obligations to aid others, the narrower the spectrum of liberty within which we are permitted to pursue our own projects and goals.

It is important to remember that even if our positive obligations are spare, such that one is typically not positively obligated to actively prevent or sanction impermissible speech, one may still be blamed for failing to do so. Importantly, our deontic obligations do not exhaust our tools of moral appraisal. One who remains silent in the face of another's wrongdoing when they could efficaciously prevent it or condemn and sanction it after the fact can be aretaically blamed for cowardice, opportunism, selfishness, a lack of empathy, and the like. In other words, those who display aretaic failures when they fail to prevent or condemn blameworthy speech may be eligible for aretaic condemnation themselves. Such condemnation is a staple of everyday gossip; we very often blame people for failing to defend their friends and colleagues, for refusing to speak out against injustices, for going along in order to get along, rather than taking unpopular—but principled—stands. Thus, we need not postulate extensive positive obligations to make sense of, and justify blaming, those who fail to speak out against blameworthy speakers.

## 2. Permissible Responses to Speech Acts that are Themselves Impermissible but Immunized Against Others' Adverse Responses

Now consider the available responses to Category 2 speech—speech that is impermissible but immunized from others' interventions. Is one permitted to enable immunized speech? Does an immunity from interference and punishment convey upon a wrongful speaker a *de facto* right to others' aid? We think the answer is: plainly not. Just as one cannot aid an act that is merely excused rather than justified (an excused act is still a wrongful act, even as it is not blameworthy), one also cannot aid a speech act that is immunized because an immunized speech act is still a wrongful speech act, even if it must be tolerated in the name of other values. Thus, one may not intentionally aid someone whose intent is to use speech to emotionally distress others, whose speech will be manifestly empirically or morally false, or whose speech will be intrinsically wrongful, even if coincidentally benign. When one's aid would be required for such speech to achieve uptake in a targeted audience, one's refusal to assist effectively silences the speech. This happy coincidence does not make a refusal to aid and abet immunized speech itself impermissible, for one has no positive duty to give aid to wrongdoers, even if their immunity generates a negative duty not to prevent or sanction their impermissible deeds.

Of course, this is what immunity does: it creates negative duties of noninterference on the part of others. The "right to do wrong" that is enjoyed by an immunized speaker is a right against others taking action to thwart or punish the speaker's wrongdoing. While one need not positively aid the speaker, one may



not positively prevent, interrupt, disrupt, condemn, or otherwise impose burdens on the speaker as a means of punishing impermissible but immunized speech.

Can one still resort to aretaically blaming immunized speakers for exploiting their immunities to say prohibited things? Can one castigate them for being cynical, opportunistic, and exploitative, in addition to manifesting whatever vices are reflected in the content of their prohibited speech? We all draw private conclusions about others' character even when we think they ought to be left at liberty to make their moral mistakes in public. We cannot help but add their impermissible speech to the existing body of data from which we draw conclusions about their dispositional traits.

Still, in Part II, we surveyed three reasons why people might be granted immunities to say what they are morally prohibited from saying. We suspect these three reasons bar the expression of aretaic blame as much as they are reasons to refrain from active efforts to prevent or sanction immunized speech. Some speech is immunized because efforts to suppress it would cause more harm than the prohibited speech itself. Surely, condemning<sup>56</sup> the character of a wrongful speaker might cause an escalation of wrongful conduct on the part of the speaker and others in a manner that could make such condemnation itself condemnable. Second, some impermissible speech is immunized because allowing it to compete for favor within the proverbial marketplace of ideas will be the best means of educating the speaker and others about its lack of merit. Again, if the aretaic condemnation of an immunized speaker squelches such speech, it may too squelch the achievement of this important educative goal. Finally, some blameworthy speech is immunized to encourage speakers to arrive at true beliefs and say valuable things autonomously. This goal may require them to autonomously express false beliefs or say unworthy things on route to cultivating the ability to say things that are of maximal moral value. Once again, aretaic condemnation may inhibit the effort to nurture the autonomous expression of valuable propositions, and, thus, it may thwart this third reason to immunize impermissible speech. Inasmuch as all the reasons to immunize speech are very likely to be good reasons not to impugn the character of wrongful speakers, it would seem that wrongful speech that must be deontically tolerated must also be aretaically tolerated. In short, character assassination is not an available alternative when one is estopped from taking actions to silence a speaker who enjoys an immunity to say outrageously offensive, false, and hurtful things.

### 3. Permissible Responses to Speech Acts that Are Themselves Acts the Speaker Had the Right to do Which Are Nonetheless Suberogatory

Considerable debate can be expected over the legitimacy of mounting adverse responses to speech acts that are morally permissible, the topic to which we now

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56. "Condemn," in the sense of, "express a condemnation." Of course, we may make a condemnatory judgment about wrongful but immunized speech that we keep to ourselves, and, in that sense, *condemn* such speech.



turn. By our earlier laid-out conception of rights, if an act is strongly permissible, one has a right to do it—that is, one has a protected permission, the correlative of which is a duty on the part of others not to prevent or interfere with that act. Others may have no positive duty to enable another to do an act with which they take umbrage, but it is baked into the very notion of a strong permission that one can exercise it without others' interference. This would seem to settle the question of whether others can take active steps to prevent, interfere with, or disrupt a speaker from taking morally legitimate means by which to communicate with a targeted audience.

But what about after-the-fact condemnation? When speech acts are strongly permissible, but one can draw from a speaker's exercise of their freedom unfavorable judgments about the speaker's character, is one entitled to condemn their speech on aretaic grounds after the fact? Is one allowed to impose private sanctions on the speaker, say, by ghosting them? Is one permitted to rally others to the cause of condemning and socially shunning them in an effort to make them a pariah within their community?

We recognize that many will find it puzzling to say that what is deontically morally permissible can be privately sanctioned because it is nevertheless aretaically blameworthy. Still, we are inclined to think that virtue is properly rewarded and vice is properly sanctioned through informal social means that originate in individual judgments about others' character. Surely, I need not invite to dinner a colleague who I believe to be humorless, cowardly, self-promoting, or possessed of racist or bigoted dispositions. Surely, I can avoid them in the workplace and, even quite indiscreetly, shun them. How else could virtue be rewarded and vice suppressed save through informal social methods of approval and rejection? Impermissible speech that is immunized might be an ineligible object of overt aretaic blame, but permissible speech need not be.

One might suggest that there should be categories of permissible speech that should also enjoy immunities from after-the-fact condemnation. What categories might those be? One proposal might be to immunize all true speech. It might be suggested that no one should suffer social setbacks when what they have said is true, however painful, unpopular, disturbing, or unpleasant its consequences. However, there are undoubtedly many circumstances in which the revelation of truths serves no good, and thus, it is hard to maintain that sunlight is always advantageous. Why should we not condemn and shun those whose truth-telling is opportunistically self-aggrandizing while being of no plausible benefit to others? Why should we not make clear our aretaic disapprobation when someone positively revels in telling others unhappy truths about their family members or when someone repeats unkind gossip to the target of that gossip or spills secrets entrusted to them? Truths are often more vulgar, titillating, unkind, and vicious than lies. When their telling reveals unsavory aspects of their speakers' character, they seem properly to invite private demonstrations of condemnation.

The fear, of course, is that arguably valuable truths will invite social condemnation in the name of values other than truth. When a student at a prominent

private art school in America expressed the view during a regularly scheduled critique that students of color were accorded far gentler treatment than their non-minority classmates, particularly when their work engaged contemporary issues of social justice, a firestorm broke out that embroiled the institution for weeks. The truth of the claim was considered quite irrelevant. Instead, the speaker was branded a “racist” and was repeatedly made the object of public condemnation by both students and faculty, and the rest of the class very overtly shunned him until he quit his degree program. Unsurprisingly, no serious attention was accorded to the merits of the student’s charge—a charge that arguably deserved fair-minded consideration and nonconfrontational conversation in an effort to detect whether it revealed a form of “reverse bias” that faculty ought to be cognizant of in future student critiques.

Still, while critics may fear that aretaic reprisals will work to suppress true speech that arguably has value, the only arena in which our character traits are properly an object of praise and blame, reward and punishment, is the arena of private interactions. To think that we must pull our punches within that arena is to think that vices are immune from criticism. However, people’s vices are the stuff of daily gossip, and they motivate the expenditure of millions of dollars a year in therapy as people seek to make changes in their own dispositional traits that will allow them to sustain happier, healthier relationships with others. We simply do not live our lives as though we believe that people’s revealed character traits are illegitimate objects of appraisal. Moreover, surely speech, even when true, often reveals aspects of character that are fully deserving of blame and recrimination. If people have to hold their tongues in order to prevent their bad character from revealing itself, then hold their tongues they should. As Aristotle maintained, habit is likely to breed a desire to do habitual actions for their own sake. If people stop saying unkind, disrespectful, denigrating things that reveal unworthy aspects of their character, they may cease to be unkind, disrespectful, and denigrating. Then perhaps their truths would not be purchased at others’ expense or at an expense to their own souls.

#### 4. Permissible Responses to Speech Acts that Are Themselves Acts the Speaker Was at Liberty to do Which Are Nonetheless Suberogatory

When we enjoy a mere naked liberty to speak, we are under no obligation not to speak, but others are also under no obligation to leave us free to speak. Our permission to speak is thus not protected by correlative duties on the part of others to refrain from preventing, interfering with, or disrupting our speech. We are, as it were, in a moral state of nature. We are free to sing and shout, but so are others when their doing so will drown us out; we are free to induce an audience to come to us, while others are free to compete for that audience’s favor; we are at liberty to express ourselves, while others are at liberty to ensure that our attempt to communicate our expressions fails.

As mentioned earlier, naked liberties to speak may seem to be no more than fictions of philosophers’ over-active imaginations. We rather think that they are

simply few and far between. Whenever we imagine a circumstance in which no one could fairly take umbrage with people creating an incomprehensible cacophony by shouting, screaming, and stomping—say, at a football game or a rock concert—the best explanation of the liberties that are being simultaneously indulged is that they are all naked. No one wrongs anyone else by shouting over them; no one is wronged when their voice is drowned out in the crowd.

If there are circumstances in which an act of speech is the exercise of a mere naked liberty, then these are circumstances in which no one owes duties of restraint to others that, if satisfied, would allow others to be heard. Efforts to prevent, interfere with, or disrupt others' speech are fair game. But none could be entitled to punish anyone's speech after the fact, for none can complain of any wrongdoing that could merit sanctioning.

Still, while after-the-fact punishment may be unjustified, inasmuch as one's character may be revealed by how people use their naked liberties, it remains perfectly possible to find aretaic fault with others' speech in circumstances in which it interferes with that of others. We have all been irritated by the patron in a quiet restaurant who speaks in a loud, booming voice or laughs in a shrill, piercing manner. It is hard to say that they are not at liberty to do so or that we could not do so in return, but we surely can blame such people for their pathetic desire to attract others' attention when it comes at the expense of those others' enjoyment. So, while others' exercise of naked liberties may not be eligible for punishment, they are surely eligible for aretaic appraisal and condemnation. Such condemnation may have character-revising consequences that mimic those that might be achieved through the imposition of punitive setbacks; it is important to keep separate the notion that we can, as an aretaic matter, blame others for bad character, even when we cannot, as a deontic matter, punish their actions as wrongful.

#### IV. APPROPRIATE UNIVERSITY RESPONSES TO BLAMEWORTHY STUDENT SPEECH

##### A. *Four Models of the Mission of Private Universities in Educating Their Students*

As stated before, we shall focus our attention only on private universities, avoiding the complications that arise for public universities by virtue of their being branches of the state (and thus subject to the legal intricacies of America's First Amendment jurisprudence). Our interest in this paper is moral, not legal, so we shall here continue our focus on private actors (to whom the First Amendment does not apply), which, in this context, means private universities.

Over the past decade, private university administrations have often been called upon to react to controversial speech or controversial reactions to speech, by students, faculty, or invited outside speakers.<sup>57</sup> Before we address those situations

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57. University administrations have also been chided for their own speech, or the lack thereof, on issues of public interest, such as the recent Hamas-Israel conflict. In the interest of brevity and focus, we intentionally side-step these latter situations in this paper, much-discussed as they have also been.

involving student speech, it is useful to recognize that there are different and competing ideals of what universities should be (or at least aspire to be) in their role as educators of the populace—ideals that dictate quite different administrative responses to controversial speech.

We have found it useful to distinguish four different models of the role of private universities that inform how university administrators ought to conceive of and perform their own roles.<sup>58</sup> Before coming to those four models, however, we should deal with the thought that perhaps one could circumvent a choice between these competing models by adopting a consent-based view of legitimate university governance. This view rests on the notion that in a large country like the United States, there need not be universal choice of the educational mission for higher education because the many private universities can reflect radically different understandings of their central roles. Some universities, for example, may pursue what we shall call a liberal agenda; others may seek to honor and teach a specific school of thought, say, social conservatism; still others may pursue religious indoctrination; and some might seek to prepare students for a particular profession or a role within a particular sector, such as the military. On the view here considered, so long as there exists a wide diversity of educational approaches and so long as each university is honest and transparent about the approach that it has adopted, students who choose to attend any given university cannot complain when the institution regulates student speech in accordance with its publicized vision of its mission. After all, voluntary and informed consent is morally magical: it makes right what would otherwise be wrong, or at least insulates from criticism what readily could be criticized by one who did not acquiesce to it.<sup>59</sup> On this consent-based view, when students who have knowledge of a university's distinct philosophy freely choose to attend that institution, their consent bars them from complaining about administrative decisions in accordance with the institution's publicized mission. On this line of thinking, even in a society that prides itself on liberal tolerance of a diversity of competing ideas, there should be no complaint about universities that specialize in non-liberal missions because, overall, there will be a diversity of viewpoints *between* different universities of the sort that liberals might otherwise seek *within* each university.

We shall not pursue this avoidance of the necessity for appraising different models of university governance because even if it is true that student choice should insulate universities from subsequent student complaints about their mission-driven choices concerning exercises of speech, those who found and shape

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58. One need not think of these as four models of what private universities are *in toto*, across the broad range of their activities and functions. We think of these models more narrowly, conforming with the narrowing of our topic mentioned in the Introduction. Given our focus on university administrators' responses to *student* speech (rather than faculty speech or speech by the universities themselves), we see these as models of how universities might conceive of themselves vis-à-vis the students that they are educating, will educate, or have educated in the past. This focus on universities' educational mission allows us to exclude the inclusion of research-driven ideals in our construction of these models.

59. Heidi M. Hurd, "The Moral Magic of Consent," 2 LEGAL THEORY 121, 121–46 (1996).

private universities must each choose to pursue a vision of their institution's essential mission. The four models that we shall explore are intended to provide a menu of such administrators' possible choices no less than to provide a menu for choosing a model for universities in general. Whatever the reach of the choice, in other words, the choice set is the same, namely, a choice between the four models to which we now turn.

### 1. The Market Model

The first model is what we shall call the "market model." In this model, education is a product that consumers buy on the open market in the same way that cars, insurance, bananas, and other products and services are purchased. The mission of private universities would be to anticipate and respond to market demands—to identify and fill market niches so as to outcompete other institutions for "customers." The consumers of higher education are, in the first instance, prospective and present students (and the parents or others who fund them). However, past students are, in the second instance, important enduring customers, for universities must continue to compete for their dollars within the market for philanthropy. Good college administration in this model consists of decisions that satisfy the institution's customers; it keeps its present students happy, creates a demand on the part of prospective students for its product, and inspires past students to continue their financial support for that product.

While universities' long-standing deference to alumni demands for successful athletic programs, their recent reorganization of those athletics programs to maximize exposure and TV revenue, and their attempt to outcompete each other by building palatial student dormitories and resort-like fitness centers all evidence some acceptance of this market model, most administrators publicly eschew this model, even as a market model appears to explain many of their institutional choices. They laugh and roll their eyes when told the story of a colleague years ago who responded to a student complaint by saying: "You clearly think you're a consumer buying a car. But you're wrong. You *are* the car." Most educators rightly see that to make educational decisions on the basis of the uneducated preferences of those who have purchased an education is to let the blind lead the blind. Surely, if educators have expertise worth purchasing, it includes expertise about what is worth knowing and how it is best learned, including what speech advances or detracts from its acquisition. And such expertise can hardly be attributed to those who seek to buy it because they do not have it.

### 2. The Majoritarian Model

The second model is likely to generate results that closely align with those of the market model. However, this model rests on a majoritarian social philosophy, not on a utilitarian social philosophy that implicitly underlies the market model. The impulse behind majoritarianism is a democratic one: the majority has the right to govern, fix the terms of social interaction, and dictate the rights, duties, and permissions that are codified in rules and enforced against all members of the

applicable community. As applied to university governance, this model dictates that university administrators should consider the views of all of their constituents and act in accordance with what a majority of those “stakeholders” would deem appropriate.

There is much to be said in the political arena for the majoritarian model. Not only does democracy appear to outcompete all of its competitors by being, in Churchill’s words, “the worst form of Government except for all those other forms that have been tried,”<sup>60</sup> but more positively, it appears to honor values of fairness, autonomy, and the “liberty of the ancients.”<sup>61</sup> Even so, there is room for dispute in the political context as to what this model implies for political leaders. Should those in power simply discover and then passively implement the views of the majority? Or should those in power ascend Theodore Roosevelt’s famous “bully pulpit” to advance their own views—views that are not designed to mimic or reflect popular views but are advanced in the service of persuading a majority of their value? Whatever the case, in the political context, there is a clear sense of whose views are eventually supposed to triumph in circumstances of controversy: those of the citizens of the state in question. It is far less clear whose views should be represented in the decisions of university administrators according to a majoritarian model. Who exactly are the stakeholders whose views require representation in private university decisions about the educational mission? To take one problem, if the views of students are tabulated and given equal weight to the views of faculty and the administration, then those who need education in order to know what they need will be dictating what they get without knowing what it should be. The majoritarian model seemingly lacks an essential attribute for the model to have purchase, namely, any answer to the question, “a majority of whom?”

### 3. The Liberal Model

The third model, which we call “the liberal model,” is a familiar one commonly touted by university administrators.<sup>62</sup> In this model, universities should mirror liberal states. Liberal states do not seek to coerce or even promote any particular conception of the good life for individuals. Instead, they seek to protect rights and provide a fair framework where all citizens are afforded an equal opportunity to pursue their own vision of the good life. Tolerance of diverse, often competing, views of the good is the touchstone of liberal states. State interference

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60. *The Worst Form of Government*, INT’L CHURCHILL SOC’Y (Feb. 25, 2016), <https://winstonchurchill.org/resources/quotes/the-worst-form-of-government/> [<https://perma.cc/WJ2R-W5E4>].

61. See generally BENJAMIN CONSTANT, *THE LIBERTY OF ANCIENTS COMPARED WITH THAT OF THE MODERNS* (1819), [https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/2251/Constant\\_Liberty1521.html](https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/2251/Constant_Liberty1521.html) [<https://perma.cc/N9X7-8LZE>]. For further discussion capturing our reserved enthusiasm for democratic processes in his collection of essays, see E. M. FORSTER, *TWO CHEERS FOR DEMOCRACY* (1951).

62. See, e.g., SIGAL R. BEN-PORATH, *FREE SPEECH ON CAMPUS* (2017).



is reserved for occasions where views are acted on in ways that harm or wrong others.

When applied within university settings, this model counsels administrators to foster the free expression of a variety of viewpoints, and it demands studied neutrality when decisions threaten to advance or retard some viewpoints at the expense of others. Indeed, according to liberals, the most significant accomplishment of higher education is its ability to carefully consider and entertain opposing viewpoints. The neutral perspective lays the foundation for critical analysis, but above all, for acceptance of freedom of speech itself. Interventions that prevent, interfere with, disrupt, or sanction behaviors, including speech acts, are legitimate in this model only in cases in which that conduct can be predicted to proximately harm or wrong another.

The liberal model prizes a diversity of course offerings that will allow for the exposure of students to a plethora of distinct and competing ideas and experiences, a diversity of invited speakers to campus, and a generous understanding of academic freedom that allows a diverse faculty to tailor courses as they think best. The model at least mouths the paramount goal of advancing truth by educating students on how to themselves reason to the truth, but those who defend this model often evince skepticism about whether there is a truth of the matter to be discovered about moral, political, or aesthetic issues (as opposed to scientific ones). They often seek to bolster the liberal case for intellectual tolerance of mistaken views with a relativist meta-ethic that denies that there really can be mistakes on these matters of morals.<sup>63</sup> Even when proponents of this model believe that there is a fact of the matter to be discovered about moral and political ideals, the liberal model counsels epistemic modesty and encourages sustained doubt about whether anyone has, in fact, discovered the truth. As liberals are quick to remind critics, entrenched dogmas, long thought to be self-evident, have repeatedly been discredited in the history of thought, and thus, the value of truth itself demands tolerance of viewpoints that are taken by most to be manifestly false. “The spirit of liberty is the spirit which is not too sure that it is right.”<sup>64</sup>

#### 4. The Perfectionist Model

The fourth model is what we shall call (again appropriating familiar labels from political theory) “the perfectionist model.” Here, the avowed goal for

63. It is an infamous freshman mistake to argue that because all moral truth is relative to people’s individual beliefs, it follows that all people’s conceptions of the good are deserving of equal tolerance. The mistake lies in not seeing that if each person’s beliefs are equally true, then it must be moral for a person who thinks that tolerance is *immoral* to be intolerant of the actions of those with whom she disagrees!

64. Learned Hand, “*The Spirit of Liberty*” Speech by Judge Learned Hand, 1944, in celebration of *I Am an American Day*, THE FIRE, <https://www.thefire.org/research-learn/spirit-liberty-speech-judge-learned-hand-1944> [<https://perma.cc/PAF8-7KNL>]; see also Representative John F. Kennedy, *Remarks of Representative John F. Kennedy at an “I Am An American Day” Program*, Mineola, New York, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM (May 8, 1947), <https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/mineola-ny-19470518> [<https://perma.cc/NL5Z-7K3X>].

universities in both their educational and research activities is the same: it is the discovery of truth and the advancement of truth through the inculcation of true beliefs. Typically, perfectionists consider moral, political, and aesthetic beliefs to be no different than beliefs about matters in physics, chemistry, mathematics, or anthropology: all are capable of being true or false, and the mission of the university is to advance the discovery of, and promote the belief in, the true ones.

A well-known variant of this perfectionist model is Aquinas', according to which moral truth runs out in its details; God, Aquinas thought, was too busy to work out the details of the morality of bailments of personal property, for example, so that a variety of alternative human law arrangements could be equally good. Another related variant is that shared by John Finnis and Robert George, both Aquinians, too: under this view, there are multiple basic goods, all of which are incommensurable, and that individual choice thus makes right for each individual the pursuit of a small subset of those goods over others. As Robert George has claimed: "[H]uman life and health, friendship, knowledge, and skillful work and play, are incommensurable because they provide *ultimate* reasons for choice and action . . . . [These goods] cannot be weighed and measured in accordance with an objective standard of comparison."<sup>65</sup> Such alternative versions of perfectionism allow it to approach the liberal model in terms of toleration, and are hence often called "perfectionist liberalism." After all, if morality permits people to choose amongst competing conceptions of the good—because by realizing different, incommensurable goods, none can be thought better than others—then perfectionists will not only tolerate, but champion, the pursuit of diverse goals and lifestyles.

We call this fourth model "perfectionist" in all its variations because, like the earlier models, it is based on well-known political ideals. Political perfectionists eschew liberal limitations on state action, for they are willing to use the power of the state to induce and even coerce the perfection of their citizens' beliefs, actions, and character. A perfectionist vision for a university would likewise mandate that class offerings, methods of teaching and evaluation, required course curricula, course content, outside speaker invitations, research agendas, and student activities and initiatives all be tailored to further the knowledge, moral behavior, and virtue of community members. While it is not logically implied by perfectionism, most self-identified perfectionists tend to have a fair bit of confidence not only that truths both exist and are knowable by most of us but that they know what they are; they do not, in other words, share the epistemic modesty characteristic of many liberals.

While we have starkly described these models as ideal types, there are well-known tendencies by political theorists to qualify each of them so as to lessen the opposition between them. For example, both liberals and perfectionists have

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65. ROBERT P. GEORGE, *Does the "Incommensurability Thesis" Imperil Common Sense Moral Judgements?*, 37 AM. J. JURIS. 185, 187 (1992). George's view on this matter is critically discussed in Heidi M. Hurd, *When Can We Do What We Want?*, 29 AUSTL. J. LEG. PHIL., 37, 37–69 (2004).

offered amendments that bring the content of their two models into closer proximity. Liberals, for example, have been anxious to insist that neutrality has limits and that no one needs to tolerate obviously unreasonable views.<sup>66</sup> Even on the liberal model, astrology need not be taught in astronomy, *Mein Kampf* need not be read in politics, and no one needs to give airtime to defenses of slavery in ethics. Likewise, perfectionist liberals not only tolerate a variety of answers to moral and political questions when dealing with incommensurable values or with indeterminate details, as discussed above; they will also admit that seemingly false views ought not to be suppressed when there is a chance that they may be true, or when their expression may lead to insights, adaptations, rejoinders, and rejections that may themselves be truth-promoting. They are also anxious to give people the unfettered freedom to make mistakes when they are heuristic means of arriving at truths or when the cultivation of autonomy requires tolerating autonomous errors.<sup>67</sup> Still, these conciliatory moves do not come close to collapsing these two models. Liberalism and perfectionism remain distinct and quite different visions for the educational mission of institutions of higher education, and administrators are unlikely to be able to pursue one vision without offending the other.<sup>68</sup>

Each of these four models has implications for the sorts of responses (outlined in Part III) that university administrators should employ when dealing with the four categories of blameworthy speech (distinguished in Part II). In what follows, we shall simply paint with a broad brush the most obvious ways the different models will counsel different administrative actions in response to the different ways speech acts can go morally awry.

### *B. Model-Specific Responses by Private Universities to Blameworthy Student Speech*

#### 1. University Responses to Speech Acts that are Themselves Impermissible

Recall that there are numerous ways in which speech may count as flat-out impermissible (that is, impermissible and without any immunity). It may be intrinsically wrongful, even if it does not prove harmful (e.g., defamation of the dead); it may be wrongful because it is harmful (e.g., speech that threatens or incites physical harm to others or that is uttered solely to cause others fear or psychic distress); it may be wrongful because it is false and of a sort that cannot be redeemed by its educational benefits or autonomy-promoting consequences (e.g., fantastic conspiracy theories); and it may be wrongful simply because it offends against considerations of distributive justice.

Consider, for example, the recent case of Patrick Dei, a 21-year-old computer science undergraduate at Cornell University, who posted a series of insults and threats on a website established and employed for campus sorority and fraternity

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66. See JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

67. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1988).

68. That said, at least two of us probably deserve to be thought of as perfectionist liberals; we join our liberal colleagues when it comes to outcomes, but we are perfectionist in our methods.

discussions of Greek issues. Signed with the screen name “Hamas,” Dei’s posts referred to Jewish people (presumably including his fellow students) as “rats and pigs,”<sup>69</sup> and he explicitly “made threats to ‘bring an assault rifle to campus and shoot all you,’ to ‘stab’ and ‘slit the throat’ of Jewish men, rape Jewish women and throw their bodies off a cliff, and behead Jewish babies.”<sup>70</sup> Dei was arrested and charged with making threats to kill or injure others, a federal crime with a potential five-year prison term.<sup>71</sup> The University canceled classes on the subsequent day, and it is hard to imagine that the University will not ultimately move to expel Dei.<sup>72</sup>

There are good reasons to think that all the models of higher education would converge to admonish university administrators not only to refuse to enable anyone seeking to give voice to Category 1 speech of this sort but also to take positive steps to prevent, interfere with, and/or sanction such speech. However, in principle, the first two models are vulnerable to the charge that even some speech within this category ought to be tolerated (if not Dei’s particularly ghastly example) and perhaps that some such speech should even be enabled. On the market model, if a university were tailored to serve students who positively sought out an educational environment that permitted moral free-for-alls, then presumably so long as the university could not be thought to be complicit in any ensuing criminal deeds or a joint tortfeasor in any ensuing private wrongs (as a university would be if it enabled speech of the sort published by Dei), the university would deliver its promised product to its customers only by taking a hands-off approach to morally impermissible speech. The same would be true under the majoritarian model if a majority of students within a university were to prefer that the administration stay its hand in response to intrinsically wrongful or harmful speech.

To make matters worse, both of these models would presumably exert pressure on administrations to interpret what should count as an intrinsically wrongful or harmful speech act in light of what the university’s student consumer base (in the case of the market model) or its student majority (in the case of the majoritarian model) would consider wrongful or harmful. Put differently, both of these models would counsel administrators to define the meaning of wrongfulness and harmfulness relative to the views of the majority of students. Moreover, quite

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69. Sharon Otterman, *After Antisemitic Threats, Cornell University Cancels Classes on Friday*, N.Y. TIMES (Nov. 2, 2023), <https://www.nytimes.com/2023/11/02/world/middleeast/cornell-antisemitism-class-canceled.html> [https://perma.cc/YD4S-DU7M].

70. Richard Luscombe, *Cornell cancels classes citing ‘stress’ after antisemitic threats lead to arrest*, THE GUARDIAN (Nov. 2, 2023), <https://www.theguardian.com/us-news/2023/nov/02/cornell-university-cancels-class-arrest-antisemitic-jewish-student-threats> [https://perma.cc/QQ2S-64D6].

71. *Id.*

72. *Id.* Although the recent refusal of the Harvard, University of Pennsylvania, and M.I.T. presidents to classify Palestinian students’ calls for genocide against Jews to be impermissible speech (“bullying or harassment”) gives us less certainty about this. *Heads of 3 top US colleges reduse to say calling for genocide of Jews is harassment*, THE TIMES OF ISRAEL, (December 6, 2023) <https://www.timesofisrael.com/university-leaders-grilled-by-us-house-on-campus-antisemitism-amid-israel-hamas-war/> [https://perma.cc/HY3X-MRD2].

obviously, this would guarantee a tyranny of the majority with regard to the kinds of speech that the university should allow with impunity. Universities that cater to evangelical Christians might find no fault with speech that denigrates members of the LGBTQ+ community; others providing an educational niche for racists, bigots, sexists, and the like might condone speech praising the KKK and neo-Nazis.

We take these implications to be so much the worse for the market and majoritarian models. In contrast, neither the liberal nor the perfectionist model would condone the failure of university administrators to interfere with or punish harmful speech of the sort described in Part II and of the sort grimly illustrated by Cornell's Patrick Dei. Both would concur that such harmful and wrongful speech ought to be prevented or sanctioned. Liberal toleration ends when these kinds of wrongs are done, or these kinds of harms are caused, and virtue is not enhanced for anyone, speaker or audience, by making these kinds of wrongful or harmful speeches.

Still, liberals and perfectionists would likely find grounds for disagreement over what should count as Category 1 wrongful speech. They might disagree about what counts as morally prohibited, and they might disagree about whether given instances of prohibited speech are flat-out impermissible, or impermissible but immunized (so as to fall into Category 2). Liberals might argue, for example, that Mill's famous harm principle ought to serve as the measure of when speech is wrongful so that only harmful speech of Dei's sort—as opposed to intrinsically wrongful speech—is eligible for prevention and punishment. Liberals might further argue for a fairly narrow understanding of Mill's harm principle so as to limit its application to speech acts that threaten physical harm to persons or property (again, as Dei's did). Perfectionists would likely insist that some speech that is not harmful is nevertheless intrinsically wrongful, and for that reason, it is eligible for inclusion in the category of speech that is impermissible (*e.g.*, blasphemy, defaming the dead). Moreover, they would likely insist on a broader understanding of the category of harmful speech, extending the meaning of harm to include speech that is offensive or distressing rather than simply physically threatening.

When we outlined in Part I the numerous ways in which speech might be thought to fall within Category 1, we deliberately included grounds that perfectionists might use to find speech prohibited. However, it is important to recognize now that our capacious list might be shortened considerably by administrators who embrace a liberal model, circumscribe the category of prohibited speech to that of harmful speech, and define harmful speech to exclude speech acts that threaten only offense or emotional injury. On such an approach, racial slurs, sexist jokes, religious insults, and untruths that are likely to have no impact on others' physical welfare would be relegated to the category of permitted speech that might legitimately come in for aretaic blame but cannot be deontically prohibited.

Still, many who embrace a liberal model will retain a more generous interpretation of what counts as Category 1 speech. They will allow Mill's harm principle

to be reinterpreted as a “wrong principle,” and they will thus join perfectionists in recognizing that there can be “harmless wrongs” that are themselves morally prohibited, not simply aretaically suberogatory.<sup>73</sup> If these liberals depart from perfectionists with regard to how such wrongful speech ought to be treated, it will then likely be by virtue of thinking that more of it should be immunized from reprisal.

## 2. University Responses to Speech Acts that are Themselves Impermissible, but Immunized Against Others’ Adverse Responses

As we theorized in Part III, prohibited speech acts that enjoy immunities would be, in principle, ineligible for prevention, disruption, or punishment on any of the models of higher education that we outlined. This is, after all, the point of an immunity: it insulates a wrongdoer from interference or reprisal. An immunity does not, however, entitle the wrongdoer to positive forms of assistance. Inasmuch as the speech that is insulated is wrongful, any intentional effort by another to facilitate its expression would count as a kind of complicity, and there may be any number of reasons to think that the accomplice would not enjoy an immunity, even if the speaker does. For example, suppose students are immunized from others’ interference or reprisals because such an immunity will facilitate their moral maturation, affording them the liberty required to learn the errors of their ways. In that case, this basis for immunity will not necessarily carry over to university administrators, who assist such students by providing a forum for their blameworthy speech, a website for their posts, or a billboard for their posters.

For example, Stanford University found value in refusing to sanction the clearly impermissible speech of Stanford law students who shouted down a student-invited speaker, Judge Stuart Kyle Duncan. Instead, Law School Dean Jenny Martinez mandated the education of all students (not just the offending students) about the ethics of free speech. The Assistant Dean for Diversity, Equity, and Inclusion, Dean Tirien Steinbach, enjoyed no similar immunity for her wrongful public support of the wrongful law student speech. She was immediately suspended from her administrative duties.<sup>74</sup>

By way of a somewhat different illustration of this issue, recall the 2017 dust-up at Middlebury College in Vermont, when a student group invited Charles Murray to speak about his latest book. Murray, a member of the American Enterprise Institute who had established a reputation for introducing categories of race into social studies, was drowned out by hundreds of protesters who chanted, stomped their feet, and set off fire alarms. Middlebury administrators,

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73. See, e.g., Michael S. Moore, *Liberty’s Constraints on What Ought to be Criminalized*, in CRIMINALIZATION: THE POLITICAL MORALITY OF THE CRIMINAL LAW 182, 192–212 (A. Duff et al., L. Farmer, S.S. Marshall, and M. Renzo, eds., 2014).

74. Vimal Patel, *At Stanford Law School, the Dean Takes a Stand on Free Speech. Will It Work?*, N.Y. TIMES (April 9, 2023), <https://www.nytimes.com/2023/04/09/us/stanford-law-school-free-speech.html> [https://perma.cc/YH3H-GHAH]; Soumya Karlamangle, *Behind the Story: Free Speech Controversy at Stanford*, N.Y. TIMES (April 12, 2023), <https://www.nytimes.com/2023/04/12/us/stanford-law-free-speech.html> [https://perma.cc/3WZ4-CMEF].



anticipating this possibility, had prepared a broadcast studio to which a senior administrator, who was to deliver a critical response to his address, escorted him. As part of protest actions leading up to Murray's talk, a number of Middlebury faculty members signed a letter that explicitly argued against the administration's active enablement of Murray's visit. "Rather than lend legitimacy to this event," the letter stated, "we respectfully request you stand up for a campus that is intellectually open and culturally diverse, but one that does not fall prey to the designs of external organizations who peddle partisan propaganda in the guise of 'public scholarship.'" <sup>75</sup> Despite the administration's end-around that allowed Murray's show to go on, the faculty's letter, coupled with its failure to subdue the protests, drew headlines that charged Middlebury with a failure to live up to its own standards of free speech. This motivated the college to revise its mission statement in a manner that more publicly accorded immunities to both students and administrators with regard to speech that is legal. Its "Open Expression Policy" "protects the expression of all community members up to the point that their expression prevents another's expression from being heard or experienced." <sup>76</sup> As such, Middlebury "both *protects* peaceful assembly and expression and *prohibits* interference with the exercise of such freedoms by others on our campus." <sup>77</sup> Put bluntly, Middlebury now immunizes all speech that is not illegal, and this immunity is clearly intended to extend to those who aid such speech.

Of course, proponents of all the models could disagree about when and why someone should be immunized from adverse consequences for speaking impermissibly. Proponents of the market and majoritarian models are wedded to recognizing immunities when their respective constituencies would think them advantageous. The extent to which they will tolerate what ought not to be said is thus a function of the scope of their students' tolerance. To the extent that students lean toward intolerance, such models leave little room for administrators to employ tolerance in the service of encouraging its acquisition.

In contrast, liberals and so-called "perfectionist liberals" heavily weight the values of liberty and autonomy and are likely to insist that a considerable amount of unfortunate student speech should be tolerated in the name of encouraging the acquisition of moral knowledge, emotional maturity, and the autonomy necessary to make maximally valuable autonomous choices over the long run. <sup>78</sup> They are thus likely to find educational and autonomy-enhancing value in refraining from interfering with student speech that does not threaten or incite harm to others, although they may disagree about the definition of harm and thus about whether

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75. *Letter from Middlebury Faculty*, MIDDLEBURY CAMPUS (Mar. 2, 2017), <https://www.middleburycampus.com/article/2017/03/letter-from-middlebury-faculty> [<https://perma.cc/8KPJ-C8KU>].

76. *Frequently Asked Questions about Open Expression*, MIDDLEBURY COLL., <https://handbook.middlebury.edu/assets/faq.pdf> [<https://perma.cc/UK6C-UH7A>].

77. *Id.*

78. Thus, the Stanford Law School Dean took the incident in which students drowned out an invited Judge to be a teaching moment for her students, rather than an occasion for sanctions.

psychic injury, offense, or setbacks to other goods properly trigger protective interventions.

Thus, for example, liberals and perfectionists (including perfectionist liberals) might disagree about the manner in which the University of Chicago dealt with the 2022 inflammatory social media postings of a student who took umbrage with a course that anthropologist Rebecca Journey announced she would teach in the following semester entitled “The Problem of Whiteness.” The course, which Journey had taught before without incident, was to cover the historical changes to, and cultural impacts of, the racial category “white”—material that might seem to the uninitiated to be academically provocative, but that in fact occupies a mainstream niche in the discipline of anthropology. Daniel Schmidt, a sophomore who boasted a large social media following, reacted to the announcement of Journey’s course by posting online accusations that she was bringing anti-white hatred to the elite ranks of the academy and by providing personal details about Journey that allowed his readers to gain frightening access to her private life. Journey was then inundated with dozens of hateful electronic messages from complete strangers, many of them threatening violence.<sup>79</sup>

One might expect perfectionists (and perhaps even perfectionist liberals) to deny Schmidt an immunity from institutional reprisal, for his postings both made false charges about the rationale for and content of a mainstream course in anthropology and implicitly invited a resort to physical harm as a means of squelching Journey’s curricular choice. However, the University of Chicago refused to sanction Schmidt. Instead, it pointed to its 2014 “Chicago Statement,” which constitutes a sweeping endorsement of academic and individual freedoms to express viewpoints without censorship or consequences. “Because the University is committed to free and open inquiry in all matters, it guarantees members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn,” reads part of the statement.<sup>80</sup> “[I]t is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.”<sup>81</sup> While Journey might have thought that this language would be invoked to protect her course from those, like Schmidt, who took offense at its title and its supposed content, her two formal complaints against Schmidt were dismissed by the University, and she was thus forced to cancel the course as a felt means of protecting her own safety. She has no plans to restore it. Schmidt, in turn, was completely immunized from adverse institutional action and able to continue his studies righteous in his belief that he rescued the value of whiteness from the dangers of critical scrutiny.

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79. Vimal Patel, *At UChicago, a Debate Over Free Speech and Cyberbullying*, N.Y. TIMES, (July 3, 2023), <https://www.nytimes.com/2023/07/03/us/university-of-chicago-whiteness-free-speech.html> [https://perma.cc/H3G4-GNYF].

80. *Chicago Statement: University and Faculty Body Support*, FIRE, <https://www.thefire.org/research-learn/chicago-statement> [https://perma.cc/V89E-8A36].

81. *Id.*

### 3. University Responses to Speech Acts that Are Themselves Acts the Speaker Had the Right to do Which Are Nonetheless Suberogatory

On October 7, 2023, Hamas terrorists crossed the Gaza border. They swarmed kibbutzes in southern Israel, where they brutally tortured, raped, and slaughtered 1,200 Israeli citizens—many of them women, children, and the elderly—and kidnapped 240 more. That very evening, a Harvard student group calling itself the Harvard Undergraduate Palestine Solidarity Committee posted to its Instagram page a statement co-signed by 33 other Harvard student organizations. The statement declared:

We, the undersigned student organizations, hold the Israeli regime entirely responsible for all the unfolding violence . . . . The apartheid regime is the only one to blame . . . . The coming days will require a firm stand against colonial retaliation. We call on the Harvard community to take action to stop the ongoing annihilation of Palestinians.<sup>82</sup>

This statement was immediately criticized as being “completely wrong and deeply offensive” by Harvard professors and student groups, as well as by former Harvard President Larry Summers.<sup>83</sup> Harvard’s Jewish Center, Hillel, immediately objected that the statement represented “further hatred and anti-Semitism.”<sup>84</sup> Demands were made that Harvard immediately disavow the statement and end the student group’s affiliation with the University and that the signatory student groups retract their endorsements. Five signatories did so within three days; nine eventually acceded to these demands.<sup>85</sup> After a three-day silence for which she was intensely criticized, Harvard’s President, Claudine Gay, issued a series of statements that lamented the “death and destruction unleashed by the attack” by Hamas,” and assured the university community that Harvard “rejects terrorism” and stands against hatred of both Jews and Muslims.<sup>86</sup>

This already-infamous example of campus unrest provides numerous examples of speech (and silence) that might best be thought of as strongly permissible but suberogatory. Some, of course, might be inclined to classify the students’ statement as impermissible, for they might think, with former Harvard President Larry Summers, that it was both manifestly false on the merits and that it instilled reasonable fear in Harvard’s Jewish students that they might themselves become

82. *Joint Statement by Harvard Palestine Solidarity Groups on the Situation in Palestine*, INST. FOR PALESTINE STUDIES (Oct. 10, 2023), <https://www.palestine-studies.org/en/node/1654370> [<https://perma.cc/ZD9Q-7WCD>].

83. J. Sellers Hill & Nia L. Orakwue, *Harvard Student Groups Face Intense Backlash for Statement Calling Israel ‘Entirely Responsible’ for Hamas Attack*, HARV. CRIMSON (Oct. 10, 2023), <https://www.thecrimson.com/article/2023/10/10/psc-statement-backlash/> [<https://perma.cc/V7HV-KPVV>].

84. *Id.*

85. *Id.*

86. Ariel Zilber, *Larry Summers blasts Harvard’s ‘delayed’ Israel statement: ‘Fails to meet needs of the moment’*, N.Y. POST (Oct. 10, 2023), <https://nypost.com/2023/10/10/larry-summers-blasts-harvards-delayed-israel-statement/> [<https://perma.cc/U35K-WPRP>].

targets of physical attacks. Many would characterize the students' statement as an expression of a political opinion or theory that, however historically disputable and morally objectionable, is generally within the rights of students within a university setting that encourages the free trade of moral and political views. However, being within their rights did not insulate its authors from legitimate blame. As Harvard's President maintained, "our students have the right to speak for themselves," but she went on to condemn the co-signatories for effectively abusing that right in a manner that revealed crass political opportunism.<sup>87</sup> Of the Hamas attack, she wrote: "Such inhumanity is abhorrent, whatever one's individual views of the origins of longstanding conflicts in the region . . . We will all be well served in such a difficult moment by rhetoric that aims to illuminate and not inflame."<sup>88</sup>

None of President Gay's efforts to lower the temperature of the dispute quelled the move by some law firm partners and corporate CEOs to learn the names of the student members of the organizations that signed the statement so that they could ensure that such students would be barred from their employment.<sup>89</sup> Their expressed desire to disassociate themselves from people whom they judged to lack the character required to join their ranks was presumably well within their rights. As Erwin Chemerinsky insisted, employers have a right not to hire people whose views they disagree with, and those who speak their minds cannot complain when others do the same in response: "[Y]ou can't express your views and then say, 'Those who criticize me are chilling my speech.'"<sup>90</sup> Indeed, as we argued in Part III, blaming and shaming would seem to be the compliments that virtue pays to vice, and none should think that the strong permissibility of their speech exempts them from private sanctions that are responsive to their aretaic failures. Still, as too often happens, the Harvard students' blameworthy speech motivated blameworthy speech on the part of others. "[W]ithin days, students affiliated with those groups were being doxxed, their personal information posted online. Siblings back home were threatened . . . And a truck with a digital billboard . . . circled Harvard Square, flashing student photos and names, under the headline, 'Harvard's Leading Antisemites.'"<sup>91</sup> Category 3 suberogatory speech may deservedly invite proportionate sanctions, but Category 1 impermissible speech (defamatory or threatening, for example) is itself wrongful and thus per se disproportionate to desert. Nadine Strossen, a former president of the American Civil Liberties Union, characterized the students' statement as "deplorable" but

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87. *Id.*

88. *Id.*

89. Eren Orbey, *The Anguished Fallout from a Pro-Palestinian Letter at Harvard*, THE NEW YORKER (Oct. 20, 2023), <https://www.newyorker.com/news/dispatch/the-anguished-fallout-from-a-pro-palestinian-letter-at-harvard>, [<https://perma.cc/TC9F-HJF5>].

90. Anemona Hartocollis, *After Writing an Anti-Israel Letter, Harvard Students Are Doxxed*, N.Y. TIMES (Oct. 18, 2023), <https://www.nytimes.com/2023/10/18/us/harvard-students-israel-hamas-doxxing.html> [<https://perma.cc/J79P-UHWL>].

91. *Id.*

went on to insist that “[t]he concept of proportionality, elusive as it is, is very woven into the fabric of not only American law, but international human rights law,” and the doxxing effort “seemed like an overreaction . . . especially when [the students] were young and just starting out.”<sup>92</sup>

In an effort to prevent controversial speech from escalating into campus crises, Colgate University struck a committee to reconsider and revise its official approach to academic freedom and freedom of expression.<sup>93</sup> According to Stanley Brubaker, a political science professor who was among the founding members of the committee, Colgate had previously identified a lack of intellectual diversity as a potential hazard to free expression. As he explained, the ensuing challenge was not to permit inclusion and diversity to become priorities that would further limit free expression. The “most common danger [to free speech],” he explained, “is to understand diversity as a set of values to which everyone in the community, in the name of social justice, must profess allegiance—or face exile.”<sup>94</sup> Colgate’s committee went on to adopt a unique procedure by which to vet invitations to controversial outside speakers. Spencer Kelly, who chaired this Colgate committee in 2021, described how the procedure was employed when the contentious linguist John McWhorter was proposed for a visiting lecture. Dubbed a “speakeasy,” several dozen students, faculty, and staff members were assembled in a nonconfrontational setting to discuss the merits and impacts of inviting McWhorter to speak. The result of the ensuing spirited exchange was a decision to issue an invitation, and the lecture attracted a large and peaceful crowd that included many of those who had opposed his visit. McWhorter was among those who were assuaged by this unusual vetting procedure. He candidly told those who sought his permission to subject his candidacy to this vetting that he had received similar invitations that had thereafter been revoked by institutions who were fearful of embarrassing audience behaviors.

Some might consider Colgate’s strategy to be an excellent demonstration of either the market or majoritarian model at work, for it appears to judge the acceptability of a speaker’s views by use of focus groups that provide consumer feedback or deliver what might alternatively be achieved by taking polls. Still, both liberals and perfectionists might celebrate this approach, for it appears to encourage respectful debate and discussion amongst constituents whose reward for participation is to have their views taken seriously. Both might celebrate it as a means of peacefully cultivating both cognitive and volitional maturity that well-serves the ability of students to make informed autonomous choices that enable their effective pursuit of worthy long-term goods. At a minimum, it teaches

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92. *Id.*

93. Spencer D. Kelly & Yukari Hirata, *Preparing the Campus for a Controversial Speaker*, INSIDE HIGHER ED. (May 31, 2023), <https://www.insidehighered.com/opinion/views/2023/05/31/preparing-campus-controversial-speaker-opinion>, [<https://perma.cc/NS63-FXMC>].

94. Mary Griffin, *Colgate University professor Stanley Brubaker on Colgate’s new statement of commitment to free expression*, FIRE (Oct. 22, 2018), <https://www.thefire.org/news/colgate-university-professor-stanley-brubaker-colgates-new-statement-commitment-free> [<https://perma.cc/F969-56JB>].

student committee members to assess ex-ante whether the speech they can anticipate from a guest will be deontically permissible, and it generates positive obligations on their part to object to the invitation if they believe that it will violate the rights of members of their community. But it further encourages them to “look into the souls” of invited speakers to determine whether the speech, even if permissible, will nevertheless reveal aspects of character that are condemnable. This, by itself, might not be grounds to deny speakers invitations, for aretaically blameworthy speech might prove importantly educational, and even perfectionists should defend expressions that demonstrate vice if they have the effect of promoting the cultivation of virtue. By inviting reasoned discussion of controversial speakers, Colgate honors the liberal injunction to protect “the right” while allowing for the safe competition of competing conceptions of “the good,” and it arguably cultivates the conditions of autonomy that maximize the moral worth of choices between competing goods so as to serve the agenda that perfectionist liberals would fix for institutions of higher education.

#### 4. University Responses to Speech Acts that Are Themselves Acts the Speaker Was at Liberty to do which Are Nonetheless Suberogatory

As we mentioned earlier, some are skeptical that people might ever find themselves in micro-states of nature in which their actions are not impermissible but in which others are fully entitled to interfere with, disrupt, or prevent those actions. Still, one can imagine that people might employ consent to magically transform the morality of competitive actions that are designed to cancel one another.<sup>95</sup> Indeed, we might call that football (or tennis, soccer, basketball, boxing, chess, and all manner of other games that permit players to act in ways that block or eliminate the gains of others’ actions).<sup>96</sup> And it may be that consent lurks behind other examples of actions that appear to be governed by naked liberties so that the real moral work to vindicate such actions is being done by consent rather than the presence of naked liberties. That being said, there are cases in which competing speech acts appear to enjoy naked liberties, and one has to resort to philosophical slights of hand (such as pulling the notions of “hypothetical consent” or a “social contract” out of one’s hat) in order to predicate those liberties on consent.

Thus, for example, there appear to be public (or quasi-public) venues where efforts to thwart one another’s speech are morally legitimate. Speakers who

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95. Hurd & Moore, *The Hohfeldian Analysis of Rights*, *supra* note 6, at 351–52.

96. There are party games that derive their enjoyment from their explicit requirements that players shout over other players. But, of course, what really gives license for such shouting is the players’ consent to play these games. Both “Pit” and “Happy Salmon” have allowed for many happy hours of shrieking and screaming during our lives, and we highly recommend both games to those who feel the need to shout at their children, spouses, friends, colleagues, or neighbors. Pit, which was first sold by Parker Brothers in 1904 and remains trademarked by Hasbro to the present day, was modeled after the Chicago Board of Trade and U.S. Corn Exchange. Happy Salmon has been sold since 2016 by North Star Games.



simultaneously deliver contradictory speeches in public squares that either drown one another out or draw others' audiences away do not appear to wrong one another, even as they prevent one another from achieving any uptake of their messages. Fans at sporting events who shout encouragement to their team of choice do not appear to violate the rights of the opposing team's fans, even as their shouting prevents the shouts of those fans from reaching the opposing team. And when people place signs triumphing various social justice causes on the city-owned strip of lawn between the sidewalk and street in front of their houses, do other taxpaying citizens have a duty to leave them in place, or can they as readily take them down?

Recent examples of campus speech acts that would seem to take advantage of (mere) naked liberties are provided by the cases of people who have been caught removing posters that reflect support for one side or the other of the Hamas-Israeli war. Yazmeen Deyhimi, a pre-law junior at New York University, was caught on video tearing down posters that had been hung outside NYU's Tisch Hall by Jewish students lamenting the fate of the hostages held by Hamas after the October 7, 2023, kidnappings. Hundreds of NYU students, many of them Jewish, demanded that the University discipline her, many arguing for her expulsion. More than 6,000 university members signed a petition that called the behavior "anti-Semitic" and demanded that NYU guarantee its Jewish students a hate-free and safe environment.<sup>97</sup>

The context in such a case is everything. Did the university designate the location of the posters for such a purpose so as to accord those who hung the vivid reminders of the Hamas hostages a protected permission that generated a correlative duty on the part of others (Deyhimi included) not to interfere with or prevent their intended effect on passers-by? Or did those who hung the posters have no greater claim to the wall space than anyone else (Deyhimi included) so that what went up could just as legitimately come down? It is certainly easy to imagine spaces on campuses that are governed solely by naked liberties, such that students are free to use those walls, bulletin boards, sidewalks, and open quads to promote their causes, but they do not have claims against others whose own similar pursuits cancel out their own. Whether Deyhimi was at moral liberty to negate the efforts of others who sought to keep alive public sympathy for Hamas hostages ultimately depends on whether the quasi-public spaces of NYU's private campus were best construed as arenas in which those who hung the posters had robust rights to unencumbered expression, or whether they enjoyed the real estate their expressions claimed only until others chose to occupy it.

Of course, as we argued in Part III, even when speech acts are governed by (mere) naked liberties, they are eligible for aretaic appraisal, and they can come

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97. NYU's administration released a statement saying: "We take the matter seriously, and we are looking into it." Armin Rosen, *Why a Nice Girl Vandalizes Israeli Hostage Rescue Posters*, TABLET MAGAZINE (October 19, 2023), <https://www.tabletmag.com/sections/news/articles/why-a-nice-girl-vandalizes-israeli-hostage-rescue-posters>, [<https://perma.cc/DV5B-6KF4>].

in for aretaic blame. That Deyhimi may not have violated deontic rights when she removed the hostage posters does not settle the question of whether she deserved potentially scathing aretaic condemnation. If her actions indeed betrayed deep-seated anti-Semitism, then the characterological blaming and shaming she came in for from 6,000 campus members can hardly be thought illegitimate. Whether university administrators in a case like Deyhimi's ought to add punitive setbacks to such social condemnation turns on the model of higher education that they implicitly embrace, for predictably, universities can be expected to revert to those polestars when settling on responses to demonstrations of aretaic vice in addition to deontic failures.

Once again, then, universities that, in fact, adhere to market-based or majoritarian models (whatever their claims to the contrary) can be expected to put their proverbial forefingers in the air to determine which way the winds are blowing. A letter from 6,000 community members is likely to provide a *de facto* "poll" that constitutes either a measure of how the consumers within the university's market niche can best be humored or how the majority of the university's community would "vote" if the matter was genuinely to be resolved democratically. In stark contrast, liberals who limit the jurisdiction of universities to the protection of rights and who thus take the coercion of virtue and the suppression of vice to be wholly illegitimate would refuse to sanction Deyhimi if her act of taking down the posters was genuinely a matter of (naked) liberty. While the university could not complain about the use of speech by thousands of other students to condemn the bigotry they took Deyhimi's actions to evidence, the university could not add administrative sanctions to such social shaming without leaving liberalism for perfectionism. Inasmuch as perfectionists, in principle, are not opposed to the use of administrative sanctions to shape their students' characters, the question in Deyhimi's case would largely be one of parsimony: was her public shaming sufficient to force a soul-searching reckoning with her apparent dispositional bigotry? Would her long-term abilities to cultivate unbiased sympathies towards others' suffering and to be more cognizant of the impacts of her own words and deeds on those around her be best encouraged by the additional imposition of administrative burdens? Or would she best learn about and address her own character defects if she were required to grapple with the humiliation heaped upon her by her peers, whose condemnatory judgments are likely to cut to the quick of her character better than university sanctions that are easily construed as "sin taxes" that simply have to be "paid"?

## V. CONCLUSION

Although, as co-authors, we share a great many views about the morality of a great many actions, we do not claim to have a three-way consensus about the model that private institutions of higher education ought to embrace generally and ought to exemplify when responding to blameworthy student speech acts in particular. If pressed with a contentious example, one of us will likely provide an impassioned defense of liberal neutrality; one of us will navigate a middle line by

championing a version of autonomy-respecting perfectionist liberalism; and one of us will insist that while the state (including state universities) has no business regulating speech so as to encourage the development of citizens' character, it is squarely within the proper role of private educators to cultivate students' moral and emotional maturity. What we have tried to do, in light of our philosophical disagreements, is to sketch the various positions that are compatible with the competing models of higher education in an effort to make clear that, in some (and perhaps many) circumstances, the responses that administrators may favor when confronting blameworthy forms of speech may be inconsistent either with their own private philosophical commitments or with the model that their institution has publicly championed. As we have argued, the models that private educators can choose from will dictate quite different, and often quite incompatible, administrative choices. The legitimacy of particular university responses to instances of blameworthy campus speech thus cannot be adjudicated without first settling the question of whether private institutions of higher learning ought to cleave to liberal restrictions that bar them from doing more than enforcing their students' deontic rights or whether they ought to cultivate in their students attributes of good character that will enable their students' pursuit of the good, even as this will require an allegiance to a theory of the good that is only at home within some version of perfectionism.

APPENDIX: FLOW CHART OF SIX QUESTIONS ABOUT THE MORAL STATUS  
OF ANY ACTION

Question-1: Did the actor, X, who said A, have a duty with respect to the saying of A?

Question-2: If yes, was this a duty on X to say A (in which event X had a right to say A), or a duty on X not to say A?

Question-3: If this was a duty on X not to say A, did X nonetheless possess an immunity from others preventing or interfering with X's saying of A?

Question 4: If the answer to Question-1 was no (X had no duty one way or the other), did X have the right to say A (in which event others had a duty not to prevent or interfere with X's saying of A), or was X only at liberty (a "privilege") to say A (in which event others were under no such duty not to prevent or interfere with X's saying of A)?

Question-5: Irrespective of whether X had a right to say A or only a privilege to do so, was X's saying of A aretaically bad even though not deontically wrongful?

Question-6: If it was aretaically bad of X to say A, was this suberogatory, a failure of supererogation, or quasi-superogatory of X to say A?