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When Protest and Speech Collide

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1. Introduction

In March 2001, student protesters at Brown University confiscated stacks of that morning's *Brown Daily Herald*, the student newspaper, before they were distributed. David Horowitz, a right-wing provocateur, had purchased space for a large ad that had been refused by several other student papers, consisting of a bullet-point panel arguing against racial reparations, and including especially provocative statements such as, "... in the thousand years of [slavery's] existence, there never was an anti-slavery movement until white Christians—Englishmen and Americans—created one." That ad appeared in the paper a few days earlier.¹

In October 2013, also at Brown University, Ray Kelly, the N.Y.P.D. commissioner closely associated with the policy of "stop and frisk," rose to speak by the invitation of a campus center. Before long protesters, including students and other Providence community members, began disrupting the event with verbal outbursts harshly criticizing Kelly. Within a few minutes, university officials had cancelled the event, and Kelly did not speak. He was later invited back and spoke without interference.²

Brown University, then and now my own institution, is hardly unique in facing occasional occurrences of speech-interfering student protests. I lead with examples from my own institution because they have especially occupied my thoughts over these years, and also so as not to throw stones at other colleges from a glass house. The issues the two examples raise are not special to one university, and some have application even beyond the setting of college campuses. When speech interferes with speech, the set of values gathered under the deceptively simple phrase "free speech" are multiple and intricately related, as we will see. My goal here is not to argue that the protesters in

¹ For an account of the events before, during, and after the publication of the ad, see Kira Lesley, "Paying for Controversy," *Brown Daily Herald*, September 22, 2004: <http://www.browndailyherald.com/2004/09/22/paying-for-controversy/>.

² See an account of the events and of a Brown University report issued later at, Scott Jaschik, "How a Talk Got Aborted," *Inside Higher Ed*, February 21, 2014, <https://www.insidehighered.com/news/2014/02/21/brown-releases-analysis-how-lecture-got-canceled-due-protests>.

those cases acted well or badly, but to straighten out some distinctions without which our thinking about freedom of speech will be muddled. It might seem as if there are two positions: opposing the protesters, or supporting them. I hope to show that finding a correct verdict about such cases is not as simple as that suggests. Protest that interferes with speech on campus might be permissible only rarely. But few would say absolutely never, and it is important to know when and why it is justified, and subject to what constraints. More pointedly, I want to argue that the enormous moral presumption, which seems to be widely accepted, against speech-interfering protests, is not, in its enormity, warranted by a close look at the issues.

Even when it is not violent, a disruptive public protest often raises our hackles. Sometimes it is illegal, but even when it is not we might wonder whether it is morally justifiable.³ Of the many ways a protest can be disruptive, one way in particular—interfering with the ability of *others* to speak or express themselves—is thought to be especially damning. A protest that intentionally interferes with other speech (and let us limit ourselves to such intentional cases) is often vilified, as if it flies in the face of the principle of freedom of speech, or even of the Constitution itself. Depressingly often, in U.S. discussions, the vilification is mistakenly grounded on the First Amendment.⁴ In any case, if there is a principle of free speech *independent* of the Constitution's legal force, it is rarely stated or explained. Broadly, my question is whether, and in what ways, a protest's interfering with the speech of others ought to count against that protest—is it presumptively forbidden by a moral principle of free speech?

Two broad ways in which a protest might be problematic are: legally and morally. Each of these, in turn, divides into (at least) two. A protest (or any other speech) might have features that render the speech itself illegal. We may put aside that question about what legal regulations on speech there actually are (and, of course, there are many). Instead, the speech-interfering feature might, while not rendering a protest illegal, override the protest's *prima facie* protection against legal interference. That kind of legal matter will be pertinent here, among other things. In the moral category, there is the question whether a protest's interfering with speech ever morally grounds a moral permission for others (state or non-state actors) to interfere with the protest itself. This will arise indirectly. A second moral question, and the central one here, is whether and when a protest's interfering with speech is enough to render the protest morally wrong. There's speech. There's interference with speech. And there's speech that interferes with

³ I do not assume that "moral" standards are nothing but personal ethics, or that they are never essentially political in their nature, so I use the term perhaps more broadly than some. For my best attempt to answer the related view that political normativity is not a species of moral normativity, see my "Methodological Moralism in Political Philosophy," *Critical Review of International Social and Political Philosophy*, 20(3) (2017), pp. 365–79.

⁴ In an exchange about the *Herald* case, Stephen J. Fortunato Jr., a Rhode Island Superior Court judge, replied to an op-ed of mine: "Professor Estlund said that the First Amendment 'does [not] forbid remedial actions of the kind taken by the students. . . .' The jurisprudence of the U.S. Supreme Court and other courts is quite to the contrary." For reasons in the text above, this is a serious mistake. Both pieces were in *The Providence Journal*: "Stealing Newspapers for Free Speech?," April 6, 2001; "Brown Professor No Friend of Freedom," April 13, 2001.

speech. In light of legal and moral principles of freedom of speech, this presents us with a number of questions, including at least these: Does a protest's interfering with speech ever render it illegal, legally regulable, morally wrong, or (to coin a phrase) morally interferable (by law or otherwise)? After a brief survey of some points about its legality, I will concentrate mainly on the moral permissibility of speech-obstructing non-violent protest, refining our question as I go along.

Even if everything I say below were granted, it would be possible to hold that a proper balancing of considerations supports the conclusion that protests on campus that interfere with the speech of others are *virtually* never permissible. The absolutist judgment that such interference could *never* be permissible even in principle could only rest on a failure of imagination. History's variety allows us to imagine, if not cite, dark possibilities in which, for example, speakers are granted platforms at universities only at the approval of censorious and externally controlled campus administrations highly motivated to insulate a rising dangerous national governmental regime from dissent. Free speech rhetoric can be abused: Consider the absolutist position that *even then* it would be morally wrong (strategic questions aside) for protesters to interfere with the anointed speakers' publications or performances, because this is contrary to the mission of universities which is to fearlessly . . . , etc. I hope this would be widely rejected, even among those who believe such interference is almost always or even always wrong in the more familiar range of cases. When protesters are told that their obstructions are seriously wrong, this should not be credible to them or to us unless some thoughtful account can be provided of what it would take—what conditions would have to be like, however infrequent or unlikely such a scenario may be—to render such obstructions rightful. Only with such an account on hand of the line that would have to be crossed can people be expected to accept the claim that conditions have not crossed the relevant line.

2. Legal Questions

I begin with legal questions. Nothing is more central to the protections of the First Amendment, as widely interpreted, than public political expression, and especially protest.⁵ Nevertheless, lots of activities that clearly have a public, even dissenting message are nevertheless ultimately unprotected. Graffiti, for example, often makes its dissident message explicit, but it may be forbidden by law when it is applied to someone else's property. Indeed, for another example, the destruction of the Twin Towers was intended partly to convey political messages. Those messages, along with much graffiti, and many other forms of protest are, as a matter of their content, in the core of First Amendment protection, and yet those protections are decisively overridden by non-message features of those acts.

⁵ See e.g. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

An important anchoring point is that if, in some case, the protest's protection is overridden, it is *not* because the speech interfered with by the protest has constitutional protection. Interference by protesters would not violate anything in the Constitution, which only prohibits governmental interference. If a protest violates some principle of freedom of speech, that principle is not the First Amendment, but something else, presumably a moral principle. I turn to the moral questions shortly, focusing first on some points about law.

One important feature of the campus context, familiar to legal scholars but less well-understood in public discussion, is that private universities are constitutionally permitted to interfere with speech, roughly, however they see fit. The reason, again, is the anchoring point that the First Amendment forbids only governmental interference with speech. Public universities, by contrast, are governmental agencies, and so any restrictions they impose on speech are governmentally imposed, triggering the protection of the First Amendment, though of course many regulations on speech are permissible even so.

Fortunately, we can simplify our topic by putting aside private universities (or other institutions) that do not (as they legally need not) *emulate* the protections of the First Amendment. That is, many if not most private universities voluntarily vow not to restrict speech on campus in any way that the First Amendment would have forbidden if it had applied, even though it does not apply.⁶ Leaving aside private universities that decline to emulate the First Amendment, we can now suppose that, for our purposes here, the protection of speech on campus tracks the protections (which are sometimes violated in both cases) of the First Amendment.

While universities can and often do bind themselves to the shape of the First Amendment in this way, there is no reason to think that private actors generally are under any such promise or aspiration to limit their own interference with speech to that shape. Protesters, for example, could make some such declaration, but there is no basis for a presumption that they have done so (and, in fact, I've never heard of such a thing). If there is some principle of free speech to which protesters can legitimately be held when they have not so vowed, it would, as I have said, not be a legal standard, but a moral one.

Turning from evaluation of the protests, to evaluation of university actions: May a public or emulating college interfere with speech (such as a protest) that would otherwise be protected, in order to prevent it from interfering with the speech of others? Are protests on campus regulable on the ground that they interfere with other speech? It is, in fact, clear that the government or emulating university has latitude in the restriction of speech, even protest, when the rationale and effect are mainly matters of the time, place, or manner of the regulated speech, and the prevention of interference with the

⁶ For a critique of such emulation, see Randall Kennedy, "Private Universities and the First Amendment?," *The Chronicle of Higher Education*, September 21, 1994. <http://www.chronicle.com/article/Private-Universitiesthe/84740>.

speech or even convenience of others are acceptable rationales. “Time, place, manner” restrictions must remain viewpoint neutral,⁷ but regulating a protest on the ground that it interferes with the speech of others need not have any viewpoint-based element. The Supreme Court has held that even public universities may regulate speech in some ways properly related to the school mission that would not be permissible regulation outside of that context. Very likely, universities may constitutionally place some restrictions on speech with the rationale of preventing protesters and others from interfering with the ability of other campus speakers to express themselves.⁸ But we must keep in mind the anchoring fact that even if universities may restrict speech that interferes with the speech of others, that would not be for the sake of the protection of First Amendment rights of the speakers against protesters’ interference. There are no such rights. Also to be kept in mind is that regulability on that ground does not begin to show that the protesters’ speech-interfering behavior is indefensible or wrong. It would only show that the state or university has the legal option to restrict it. And, one further point, having that legal option has no bearing on whether such legal or institutional restrictions would themselves be morally permissible or even a good idea.⁹

3. Moral Questions

We began with, and now return to, the outrage and vilification often directed at protesters who interfere with other speakers on college campuses. Are such protests wrong, and when, and how severely wrong? Legal questions now aside, there is the question of when political protest that interferes with expression is morally permissible and when not. In this section, I introduce a series of points and distinctions that will give us a usefully focused question, which I then pursue in the remainder.

⁷ Even speech that enjoys the most extensive First Amendment protection may be subject to “regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

⁸ An Iowa case (1993) upheld the conviction for “disorderly conduct” of politically motivated hecklers at a speech by Bush (Sr.). This was not in a campus setting, but if such regulation is constitutional off-campus then it would seem a fortiori to be constitutional as a provision of a public university. Emulating universities could then place themselves under cover of that option to restrict such speech (498 N.W.2d 677 (1993), *STATE of Iowa, Appellee, v. Charles HARDIN, Appellant*. No. 91-1777. Supreme Court of Iowa. April 21, 1993). The regulation of speech in a school setting seems to be constitutionally permissible when credibly aimed at avoiding disruption of university activities, and not aimed at the content or viewpoint of the disruptive speech. Its interfering with lectures or classes would naturally count as a disruption of the regulable kind. Cases seem mainly to follow *Tinker v. Des Moines Independent Community School District* 393 U.S. 503 (1969), and, with some differences, *United States v. O’Brien* 391 U.S. 367 (1968). As for the university setting, see Appendix IV of the Strauss Report from the University of Chicago, January 2014 regarding the definition of “disruptive” for purposes of university regulation of protest. It clearly counts interference with expression, in certain contexts, as a significant warrant for regulation: <https://provost.uchicago.edu/sites/default/files/documents/reports/Report%20Protest%20and%20Dissent.pdf>.

⁹ My question here is not what rules would be appropriate. Like civil disobedience, such protests could in some cases be morally permitted even if they are properly forbidden and even punished according to legal or institutional rules.

A natural starting point might seem to be to assume that there is a broad moral presumption against interfering with the speech of others, but that is too broad. We interfere with each other's speech all the time, often permissibly so, even without any particular special justification. Interruption is ubiquitous, some talk louder than others at parties, we put our names on "no call" lists for advertising, and a million other things. But our narrower interest here allows us to focus on the case of interference with relatively formal cases of expression.

Two useful categories are *publications* and *performances*. The idea of a publication will be clear enough for present purposes. We might construe a category called "performances" as gatherings or meetings for (at least in significant part) the purpose of certain people expressing themselves to an audience. That would cover speeches, debates, spoken-word or poetry events, concerts, dance or theatrical performances, and more. The question I want to consider, now refining it, is whether and when a protest that would otherwise be morally permissible is impermissible on the grounds that it interferes with other speech in the form of publication or performance. Simplifying along one more dimension, we can focus on "interference" with speech where this intentionally and significantly limits the ability of the speaker to speak or reach the audience. This is not precise but it is meant to put aside unintentional or minimal interference, just for simplicity.

A final narrowing of our focus is also appropriate: I focus on the especially salient cases, namely those where the intentional interference with the speech of others is viewpoint-based, targeting speech toward which the protestors have antipathy.¹⁰ Here, then, are the defining features of the kind of protest I want to consider, referring to them for convenience as speech-obstructive protests, or for short:

Obstructive protests

Acts of protest that intentionally interfere with the publication or performance of expression by others on the basis of antipathy with that speech's viewpoint.

As a further focusing device, I will simply *assume* for the sake of argument that there is a moral reason of some weight against such obstruction with speech. Granting that, the question becomes what considerations, if any, should be thought to override the moral presumption against obstructive protest.

A special set of cases would arise where there is already a law, or the campus equivalent, that prohibits the interference involved, and which is not unconstitutional. Universities might have such internal rules. There is a general question about when, if ever, laws and similar rules can bring along moral obligations to obey, but that is not our question. Briefly, we know from the widely accepted category of civil disobedience

¹⁰ Antipathy for Ray Kelly's anticipated message at Brown in favor of intensive policing was central to the protesters' motives. In our other example, the Horowitz ad that had triggered dispute was not in the copies of the *Herald* confiscated by protesters, but had appeared several days earlier. See Lesley, "Paying for Controversy."

that many people accept that even illegal activity might sometimes be morally permissible, even admirable. We should not assume that obstructive protests count as civil disobedience; they often do not.¹¹ And even there we may wonder whether a case of civil disobedience faces an extra burden of justification insofar as it obstructs speech, if it does. There is, in any case, the underlying question, which applies whether or not an obstructive protest is in violation of laws or rules: Is there a *prima facie* moral prohibition on protest insofar as it is obstructive of the speech of others?

It is tempting, but misleading, to think of obstructive speech as a form of censorship. Censorship, even broadly construed, is only one way to intentionally interfere with speech. If a case of speech-interference is carried out by agents who are not in real or apparent positions of authority or formal power, then whatever else it is (and while it might or might not be wrong) it is not censorship. This matters because there are traditional objections to censorship that do not apply to speech-interference by people outside of formal power and authority. One traditional anti-censorship thought is that the state should not interfere with speech partly because it is unjust and dangerous for it to exert control over criticism and scrutiny, specifically, of the state itself. Another is that the state, or the university administration, already have such great power over many matters that their influence on the course of discussion (now about matters of all kinds) is in danger of being profound and overbearing, whereas interference by agents of lesser power poses less of a threat. Neither of these objections to censorship will normally apply when speech is interfered with by a group of protesters confiscating newspapers, or disrupting a speech. Whatever there is to be said morally against obstructive protests, it is plausibly less than it would be if they were cases of censorship.

4. How Interference Can Amplify

Even supposing there is a presumption against obstructive protest, here is a potentially mitigating factor: What if interference with some speech, for example interference by protesters, does not, in fact, suppress the dissemination of the message? There is a subtle point to consider about the sense in which a protest interferes with the expression of the message: it does not always reduce its dissemination, and in fact it often increases it, and these effects are often fully known in advance by protesters. This is more common than it sounds. In both of our opening examples, the message of the opposed speaker was, among other things, amplified, and predictably so. David Horowitz gained notoriety, and the message of his ad was spread far and wide. The Ray Kelly case is more complex, but certainly his message of aggressive policing was, as a result of the protest, made known to a larger audience than before. (I confess that I came to learn more about it, including arguments for and against.) Even if the event might also have been embarrassing to him, it may not have been *only* embarrassing (if it was at all), but also a badge of honor amongst some of his more vehement supporters, as well as a

¹¹ See Nussbaum in this volume (Chapter 10) for an instructive treatment of those questions.

source of sympathetic attention from certain new audiences. The question is not whether the protest results in a net gain for the speaker's aims, but whether the speaker's message was disseminated less widely, or more widely, along with whatever else happened, than it would have been without the protest. Probably, the dissemination of Kelly's message was wider, due to press coverage and public discussion of the protest, than it otherwise would have been. It matters, as well, that he returned later to speak without interference.

I do not mean to exaggerate the point. The publicity around a suppressed piece of expression tends to disseminate messages with which the speaker is *antecedently* associated. Sometimes this correlates importantly with what would have been said, and that is the point I am calling attention to, but that will not always be so. Insofar as the speaker's message would have been novel or less well-known there is indeed an important loss. One might say there is no way to know in advance, but that is patently not so. It cannot always be known in advance, that is true, and obstructive protest cannot possibly disseminate the very message that never sees the light of day. However, the point that is easily overlooked is that there are cases of both kinds.

There is no denying that obstructive protests intentionally interfere with certain communicative acts of others. However, often such viewpoint-based interferences cannot plausibly be seen as efforts to reduce the dissemination of the disapproved message at all, and this must matter to the ethics. Doing something you know will amplify a message cannot be seen as a way of suppressing that message, even granting that some speakers are interfered with. Noticing that fact (when it is so, which is not always) highlights the communicative nature of the protest itself, as distinct from its obstructive nature. The tactic of obstruction of speech might be used as a device for promoting the dissemination of the protesters' message, and judged to be worth it even if it is expected also to increase the dissemination of the protested message. The air of paradox is superficial. It is impossible to effectively communicate disagreement with some viewpoint without quoting or citing or at least referring to the opposed message—somehow putting it before your own intended audience, and so potentially adding to its dissemination yourself. Sometimes the additional dissemination is predictably substantial. The appropriate moral norms about interfering with expression must take account of this distinction. Where the dissemination is not reduced (and may be expanded), and especially where this is plausibly understood by the protesters, the moral presumption against obstructing speech should be less than it would otherwise be.¹² This does not mean the interference is sure to be permissible on balance, but it seems likely to make the difference in some cases. Also, even where it is still not

¹² It is true that such protests might predictably deter future speakers from expressing the protested message, and that must also be weighed. On the other hand, circumstances around a particular protest are sometimes easily seen to be singular, and not indicating a likely pattern of future protests targeting the message in question. Such a case might well be made for both of our opening examples. It would be different if, for example, all or many "conservative" messages were targeted, but that is not remotely the case in the Brown setting or in most others.

permissible, it is plausibly less wrong in that case than it would otherwise be, and that also matters in a context that often invites the most passionate vilification of protesters.

5. Civility and Non-Ideal Conditions

What background assumptions might lend support to the widely accepted view that it (at least) tends to be morally wrong to interfere with the speech of others? I want to think about two such assumptions that seem often to be held conjointly:

Ideal:

So long as there is general non-interference with speech, the course of discussion will not be skewed contrary to reason, and then social conclusions and decisions will tend toward the truth,

and,

Approximation:

Since general non-obstruction would (in certain circumstances) be good as described in Ideal, then in non-ideal conditions (so conceived) less obstruction is better than more.

Suppose that in some very general way, and under certain conditions, things *would* go best if there were little or no obstruction of speech as we are understanding it. It takes a moment to embrace this simplifying assumption, since it is clear that general non-obstruction would not always guarantee that things would go better, since it depends on the other circumstances. That is especially questionable if, say, there are members who are prone to lying and attacking others through speech, or if there are structural imbalances in the access of certain viewpoints to the channels of communication, and so on. This point is important, and we will come back to it. But there is an important fallacy to guard against, and it is best seen if we imagine that the background conditions are not unfortunate in that way, but are indeed favorable. Even in that imaginary circumstance, think about cases where there would regrettably be some obstruction. It is tempting to suppose (along with Approximation) that in that case it is best to keep such obstruction to a minimum—that zero obstruction would be best, but if that will not happen it is best to have as little as possible. But that is a fallacy (by which I mean an invalid form of reasoning that is widely tempting) and one that has real interest in the context of free speech.

Before looking at the free speech context itself, it is helpful to see the very general reason that is a fallacy. It is that the ingredients or elements in any valuable condition might only have their contributing value when combined with all the others. Think first of a cocktail of three medications you need to take daily. Now suppose one of them is missing. It is tempting, but fallacious, to infer that it is best if you at least take the other two rather than only one, or none. That all depends, and taking those two without the third could be dangerous, even if, when combined with the third, they are good for you.

For real medical examples, diachronic cases are especially common. If you will not finish a prescribed course of antibiotics (you can't or you just won't), you may be better off not to take the incomplete course. A synchronic case, slightly stylized, would be this: there is a medication that will help you very much, but the side effects are profound. There is a second medication that suppresses the side effects. If you can't or won't take the second medication you could be better off not taking the first one either. We might call the general form of the mistaken thought that you should at least take the subset of medications, the *fallacy of approximation*.¹³

That fallacy is easily seen to apply to the case of general tolerance or non-obstruction with each other's speech: It does not follow from the fact that general toleration would be valuable that *if there is* some obstruction or intolerance, obstruction ought still to be minimized. This is a bad form of argument, since (under the favorable conditions) the many instances of what we might call "toleration" of disapproved viewpoints rather than obstructing them *might* only have their value in the presence of all the others. Like the two pills out of three, the incomplete pattern of tolerance might be very bad, worse than certain patterns of lesser tolerance. Zero pills might be better than those two, and less toleration might be better than some patterns of partial toleration.

How might this be so? Alexander Meiklejohn (as it happens, a former student, professor, and Dean at Brown University) famously framed some valuable points about free speech in terms of the context of a town meeting.¹⁴ Of course, that is not an accurate microcosm of the diverse social universe of public political expression in every way, despite its value for illustrating certain points. On the other hand, this limitation of the metaphor is, perhaps, not as telling in the context that especially concerns us, the college campus, a form of association that gets much of its point from the value of deliberation and debate, and the aspiration of moving the state of opinion in a sound or correct direction.

The town meeting is a useful starting point for several reasons.¹⁵ In the context of a town meeting, not only are the normal standards of civil behavior clear, but they coexist with other sets of behavioral rules that are quasi-legal—publicly known and enforced rules of procedure such as *Robert's Rules of Order*. Such official rules of a town meeting are distinct from what also might be present and quite clear: the standards of civility or good meeting behavior. For example, the official rules of order may permit (presumably by their silence) a recognized speaker to ridicule opponents in a way calculated to disturb the meeting, but that would not settle whether this was within the speaker's duties of civility. So the standards of civility are not just the same as the official

¹³ This is a simplified presentation of what Lipsey and Lancaster called the question of "second best." R.G. Lipsey and Kelvin Lancaster, "The General Theory of Second Best," *The Review of Economic Studies* 24(1) (1956–7), pp. 11–32.

¹⁴ Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper Brothers Publishers, [1948]).

¹⁵ From about here through the following section I draw freely on Estlund, "Deliberation Down and Dirty," in T.R. Hensley (ed.), *The Boundaries of Freedom of Expression and Order in American Democracy* (Kent, OH: Kent State University Press, 2001), pp. 49–67.

rules of the meeting, and this distinction in a meeting context mirrors the structure of a broader political context, where there are laws permitting and regulating expression but also separate standards of civility with no force except that of a citizen's duty.

Let civility be whatever standard for participation in public deliberation (broadly conceived) is morally appropriate under whatever background conditions obtain. There is no general reason to assume that the content of civility is, under all conditions, similar to politeness. Let them be fairly polite in especially ideal conditions such as full compliance by all with these standards, and with other applicable rules, as well as other favorable circumstances we will come to shortly. Even so, it is implausible to think there are no adjusted standards of conduct when the background conditions fall short in certain ways—call these cases of *breakdown* of various degrees and kinds. Suppose that others are interrupting, or being disruptive, or that certain interests or viewpoints have special access to audiences, etc. If applicable standards of civility vary according to the type and degree of breakdown, this allows us to see how certain forms of sharp or disruptive expression can be accounted for within a theory of civility rather than as outside any applicable norms of civility at all.

Here is a simple second pair of examples, bringing us, again, face to face with protest that interferes with speech. In the first, suppose that attendance at a town meeting is limited by space and that passes are distributed on a first-come-first-served basis. Opportunities to speak are ample and fairly administered, and the public officials are respectful and responsive to the public. Suppose further that the matter under discussion is whether to pay for high school athletic uniforms with public money. Call this the “Local Town Meeting.” Under these conditions let us suppose that some or all of the following expressive tactics are condemnable by appropriate standards of civility, standards that I will call “narrow”:

- obtaining entrance with counterfeit passes in order to participate uninvited
- ignoring moderator's rules
- stepping to the microphone to speak out of turn
- shouting questions from the floor out of turn
- disrupting the meeting with chants.

Contrast the Local Town Meeting with a different meeting, an internationally televised public forum held at a government's request at a location chosen by that government, broadcast exclusively by one global network handpicked by the government, with attendance screened, and with the right to speak granted only to participants screened by the government's handpicked network. Suppose also that the issue to be discussed is not athletic uniforms but whether the United States should drop bombs on Iraq. This case is not hypothetical, but describes the ironically titled “International Town Meeting” held at Ohio State University in February 1998.¹⁶

¹⁶ For documentation of my characterization here and below of the events, see Estlund, “Deliberation Down and Dirty.”

The disruptive behaviors listed above, as plausibly impermissible at the Local Town Meeting, were all apparently engaged in by protestors at the International Town Meeting, and the setting puts them in a different light. There is much to be said for the view of a protestor at Ohio State who said, “If we had just been sitting there quietly listening, people watching on television would have thought we were supporters of the war, which we certainly were not. Sometimes you’ve just got to say what you think and make sure that your voice is heard. And, if they won’t listen in a polite manner, then you’ve just got to be rude.” The two town meetings, between them, capture the distinction for which I would like to find some plausible normative basis: narrow standards of civility that apply in some conditions, alongside wider, more permissive standards that apply in others.

6. Marcuse and the Town Meeting

Herbert Marcuse, in 1965 amidst a rising tide of anti-war and pro-civil rights protests, offered a defense of sharp and disruptive interventions in political expression, including what I have called obstructive protest.¹⁷ Marcuse wonders when private citizens might permissibly interfere with public political expression, a question he takes up from John Stuart Mill in order to offer a different answer. Marcuse agrees with Mill on a great deal. He agrees that there are objectively correct answers to many normative political questions, such as what is just or unjust. He also evidently agrees with Mill that under favorable conditions the truth will tend to prevail in the course of full and open public deliberation. He agrees that among the set of conditions that are most favorable to the social discovery of truth is a widespread tolerance. By “tolerance” Marcuse means, roughly, restraining oneself from interfering with the expression by others of views with which one strongly disagrees. Tolerance is not simply one of the social conditions favorable to the social discovery of truth; that epistemic function is what gives tolerance its point. Marcuse succinctly says, “The *telos* of tolerance is truth.”¹⁸ Tolerance is plausibly supported by other rather different values as well, such as a certain kind of respect, but the Marcuse argument can usefully be seen as granting to his objectors that promotion and pursuit of truth is a great value and one of the central points of social practices of toleration of disagreeable views.

Tolerance does not, by itself, promote truth, however. It promotes truth only in conjunction with certain other conditions. This gives rise to questions that Mill said little about: What are the other conditions that join with tolerance to promote truth? What is the effect of tolerance when those other conditions are violated in various ways? What implications does this have for the practical question facing a citizen, “Ought I to be tolerant of this highly disagreeable view?” On Marcuse’s view, wider more permissive

¹⁷ Robert Paul Wolff, Barrington Moore, Jr., and Herbert Marcuse, *A Critique of Pure Tolerance* (Boston, MA: Beacon Press, 1965), pp. 95–137.

¹⁸ Wolff, Moore, Jr., and Marcuse (1965, p. 90).

standards of civility come into their own when there is a failure in, or breakdown of, the conditions in which tolerance serves its purpose.

Consider the International Town Meeting, with these questions in mind. Here is the U.S. government, hoping to mobilize public opinion behind bombing a faraway country. We do not need to decide whether that bombing would be wrong in order to notice important distortions in the Millian truth-seeking function of free public discussion. For one thing, officials in the Clinton administration handed the cable television network C.N.N. exclusive rights to broadcast the event. C.N.N. was free to share the event with competing outlets but refused to do so, presumably in order to reap the ratings and consequent profits for itself. C.N.N. clearly had strong incentives to structure the event so as to favor the administration's aims, which included not only mobilizing support for bombing but also displaying public support to the leaders and citizens of other countries, including Iraq.

How do wider standards of civility serve the epistemic goal in these defective conditions? Marcuse's own argument does not discuss the context of a town meeting, but its structure is similar and instructive. He argued that there is a systematic cluster of interests (especially those associated with owners of productive capital) that have disproportionate control over the course of public, especially political, discussion. As a result, certain favored points of view can be made to attract support on grounds other than their merits, the actual reasons that exist in their favor. Behavior outside of the narrow bounds that would make sense under more ideal conditions is permitted in order to restore partially the truth-promoting value of public discussion. Marcuse calls for "selective intolerance," acts by private citizens that suppress messages that are so advantaged by power.

The International Town Meeting was not a town meeting at all, but a public event at a university, albeit one that was nationally televised. Let's consider whether it is similar in relevant respects to Ray Kelly's scheduled but aborted speech at Brown, and perhaps more generally to some other cases of interference with speeches by prominent figures invited to a college campus. It is striking in both cases that the chosen venue was a college campus, an institutional setting which, like no other, is traditionally (if sometimes naïvely) associated with the pursuit of the truth by way of free and vigorous criticism and defense of hypotheses and theories. A second association that many have with the institution of a college campus, crucially related to the first, is a kind of honor and prestige, more so than many other venues, and even where it is not more prestigious the prestige is distinctive. Arguably, it stems from the prior point, the traditional ideal of the free and vigorous exchange, critique, and defense of ideas. It is a certain kind of honor for a speaker to be of interest to a university community for that reason. However, at the International Town Hall there was no intention of involving the campus community in debate and discussion of the issues presented. Certainly, not all lectures and events on college campuses are interactive, that is not my point. This was called a Town Meeting, and held on a college campus, undoubtedly to position itself as a forum for the kind of free debate and deliberation traditionally associated with at least the ideals of town

meetings and college campuses. (There is some dispute about how much chance for Q&A was planned for the Ray Kelly event had it not been cancelled.)

The background epistemology of Marcuse's view is one according to which the truth *would* be promoted if views prevailed according to their rational merits. That is a contestable position for reasons that we cannot pursue here.¹⁹ I am not defending Marcuse's substantial view but pointing to his identification, in effect, of the Fallacy of Approximation in some familiar liberal thought: just because pure tolerance would be an essential part of a certain highly desirable condition does not mean it would be desirable without the other conditions. Sometimes when there is a missing element from some valuable or even ideal condition A, we can ask what value is thereby lost in that condition B: what kind, how much, etc. For example, if one person regularly interrupts others at a meeting, we might conclude that this lets his power skew the course of discussion in a non-rational or non-epistemic direction. We could restore that value without even thinking about the nature of the missing value if we could provide the missing element itself—stop his interrupting. But suppose that we will not or cannot provide it. In that case, only by thinking about the kind and extent of lost value can we think about whether there is some alternative way to partly or wholly restore that value. If there is, it would make the resulting situation, call it C, *less* similar to the ideal scenario A than B is. It would be a further deviation. Even so, in principle, the addition of the new element—the further departure—could, in principle, fully restore the lost value. That would be what I call a countervailing deviation.

Here are a few things that it does not mean. The idea of countervailing deviation is not the crude principle that “turnabout is fair play.” The profound disvalue of someone being raped is not, to any degree, restored by the perpetrator being raped in response, and the same will be true for many forms of wrong and injustice. That is no part of the idea that a countervailing deviation can sometimes restore certain kinds of value that an initial deviation damages. This approach is also entirely different from either (a) justifying disobedience to some norm, such as “free speech,” by showing that conditions of political obligation have simply been violated, leaving one morally free to disobey, or from (b) justifying disobedience on the ground that there is a certain outcome that would be good, which the disobedience aims at and will credibly promote. The idea of countervailing deviation makes neither of those claims. It claims rather that some value that the process would have had but for the triggering deviation would be partly restored by the countervailing deviation. The idea of countervailing deviation is essentially proceduralist in that way.

The idea of countervailing deviation, then, suggests a principled basis not for censorship—not the restriction of expression under the color of authority—but for selective interference by some individuals with the ability of others whose message has

¹⁹ One challenge is that there is no reason to believe the true position will be the one with the most reasons available in a given historical or institutional setting. In general, evidence is not bound to favor the truth. As I say, I won't pursue these questions.

unfair (from the standpoint, roughly, of reason) advantages.²⁰ The rationale of the interference is not simply to promote one's own views or aims, but to repair a severe structural flaw in a collective epistemic process of debate and discussion. The account raises plenty of questions, and the value it points to must surely be weighed with other values and requirements, but it also has promise for understanding the ethics of disruptive protests, including those that obstruct speech.

7. The Campus or the Broader Community?

The model of countervailing deviation naturally raises a puzzle that is salient for college campuses. What is the scope of the relevant deliberative or communicative community? What is the unit whose structural features are scrutinized for cases of counter-epistemic structural advantages? Is it that of a whole society? Is it the community of a particular college campus? Why one rather than the other? And, then, what if skewing is present, but it pulls in one direction nationally and in the opposite direction locally, i.e. on a particular campus?

Marcuse's own deployment of the idea of selective tolerance and what I have called countervailing deviation involves a structural feature that is held to obtain at the level of the whole society. Marcuse analyzed mid-twentieth-century American capitalist society in broadly Marxist terms, with these disproportionate communicative advantages accruing to points of view that were held by and advantageous to members of the classes who owned productive capital—owners, not workers. He was especially concerned with the concentration of wealth and power to shape the structure and content of mass media, and to shape our world and ourselves through advertising. Related analyses are common, if always controversial, in our own time some decades later, with much attention to economic inequality, and the effect of the concentration of wealth not only on the ability of sellers to turn us into buyers (as Marcuse lamented), but also increasingly its dubious impact on the institutions of electoral democracy.

For our limited purposes, the correctness of such accounts needn't be decided. Suppose it were true. That is, suppose that there were a credible case to be made that certain interests and viewpoints have a powerful advantage in the course of public debate owing to social-structural features, and that there is no credible case that those structural advantages for certain views are owed to any superior rational merits of those views. This would be troubling from an epistemic point of view. It may be a *prima facie* justification for acts of protest that seek to counter those power advantages with the assertion of speech-interfering power, such as obstructive protests, on the model of countervailing deviation.

²⁰ There are interesting issues in some cases about what counts as a countervailing view, but I cannot pursue the question here. I should also add that there is no presumption here that a discursive climate that, so to speak, leans to the left or the right must be *skewed* to the left or the right. That would require a further finding, about an imbalance in non-rational influences.

The puzzle I have mentioned—call it the *problem of the skew-unit*—arises due to the fact that whatever troubling advantages there might be for certain points of view at the level of society-wide structural features, there is no guarantee that these will be paralleled in the setting of a particular university. Suppose there were a broad skewing at the society-wide level in favor, on balance, of conservative and capitalist viewpoints, but on a particular college campus the skewing is in the opposite direction: toward the liberal-progressive, or social-democrat positions. In this case, obstructive protest on campus against viewpoints that are structurally favored nationally will necessarily only intensify the already counter-epistemic skewing that is (we postulate) present in the campus setting, and this must be troubling.²¹ To get the shape of the puzzle, imagine a large boat that is dangerously leaning in the water to the starboard side (right as one faces front). Passengers have boarded lifeboats, but one of them is leaning dangerously to the port (left) side. Suppose you were concerned with the skewing of the large boat, and so you moved more passengers on the lifeboat toward the port side. In leveling the large boat you necessarily skew the lifeboat only further. If, instead, you were concerned to level the lifeboat, by moving passengers rightward you would further skew the large boat to the right. If the society is the large boat and some college campus is the small boat (its being a lifeboat is, of course, an extraneous feature of the analogy), we have a puzzle about what kind of corrective obstructive speech could be called for by the model of countervailing deviations. And the version presented here is a simple one, supposing we had only two salient levels and simply opposed skewing. Real examples will often be more complex but raise essentially the same puzzle.

The case of the Ray Kelly protest at Brown may exhibit something like this structure. Or at least, the puzzle arises if it were granted for the sake of argument to the protesters that there is a society-wide structural advantage for conservative law-and-order views and a disadvantage for views asserting the burdens such policies place on members of certain minority groups. Even if that were so, it would be hard to make the case that the discursive climate at Brown at that time was also skewed in that direction. Arguably, it was skewed to some extent in the opposite direction. College campuses in general (in recent decades) tend to be politically much more liberal than the population as a whole,²² and Brown has for some time been, on balance, liberal even among colleges.²³

Do these factors cancel each other out for purposes of asking whether the obstructive protest might be justified as a case of countervailing deviation? That's one possibility, but I think the question bears more thought. Protest on a college campus is *also* protest in a national social framework. Certainly, the epistemic climate on a campus

²¹ I have used the crude left/right categories just for illustration. The countervailing deviation approach invites sophisticated analysis in support of any alleged systematic structural advantage for certain viewpoints.

²² See Scott Jaschik, "Moving Further to the Left," *Inside Higher Ed*, October 24, 2012. <https://www.insidehighered.com/news/2012/10/24/survey-finds-professors-already-liberal-have-moved-further-left>.

²³ "Brown University, founded in 1764, has the reputation of being the most eccentric and liberal of the Ivies," *Forbes*, "Best U.S. Colleges for International Students: 2016 Ranking." <http://www.forbes.com/colleges/brown-university/>.

does seem to be of importance in its own right, and is tied to some important interests of the students and faculty. However, it is not obvious whether that is overridden by the overall societal climate and its epistemic adequacy. Perhaps the answer will depend on the issues in question. The example of the student newspapers might be more local, motivated in large part by protesters' complaints about the structure and climate of discussion on campus, and the paper's alleged role in skewing it.²⁴ The issues about policing in the Ray Kelly case, by contrast, were not about policing at Brown, but policing in cities around the country. Where the issues in question are urgent national ones—other examples might be certain controversial wars, or federal civil rights issues—this might strengthen the salience of the societal level for purposes of the countervailing deviation analysis. In our partly hypothetical Ray Kelly example, then, that may lend some support to the obstructive protest even if Brown skewed in a direction opposite to society generally. Far more would be needed to pronounce on that case, and its role here is only to help in identifying some of the important questions.

8. Conclusion

I conclude by pulling the points together. Universities' central mission involving production and transmission of knowledge depends on certain kinds of freedom of expression, even though it cannot be simply read off from the speech clause of the First Amendment. There are legal aspects to it, along with quasi-legal aspects around a university's own rules, but there are also moral aspects. In particular, political protest, despite its protection (to varying degrees) in law and university rules, is sometimes disruptive, and is often subjected to moral criticism when it not only expresses a point of view but also interferes with performances or publications which are efforts at speech and expression themselves. That kind of interference is not itself a violation of anyone's constitutional rights, and even if it is permissibly restricted or punished (by law or rules) that would not suffice to show that it is always wrong. Addressing that question requires going beyond issues about permissible regulation of such activity. Speech-obstructive protest certainly interferes with some liberty of others, but so does protest that merely blocks a sidewalk, slows traffic, or breaks the quiet. There is no compelling basis for thinking that interfering with speech in particular raises the bar for the protest's moral permissibility to an especially great height. Certainly, any of those kinds of disruption still call for justification: plausibly in terms of what might be achieved, why less disruptive methods are not sufficient, how the disruption is proportionate given the specific goals, and so on. But the idea that interference with speech is always or almost certainly wrong may rest on an idealized picture of the discursive ecology in a society or a university community. If, however, some points of view are systematically disfavored either by illegitimate uses of institutional or other power, or by structural social features with a similar effect, it is hard to see the value in freezing

²⁴ See Fortunato Jr., "Stealing Newspapers for Free Speech?"

and ratifying those distortions by insisting on a blanket moral prohibition on interfering with speech.

This suggests a permitting rationale for some obstructive protests, what I have called countervailing deviation, though this idea faces challenges about what counts as a countervailing point of view, and about which is the relevant unit (the society or the campus) for assessing the question of such institutional skewing. These challenges for the countervailing deviation model are serious, but they do not show that it is never sufficiently determinate in practice. Those inclined to act on that basis must subject their analysis to these challenges, and in some cases they will turn up difficulties, but other times perhaps not.

It will naturally be asked whether this framework is too easily abused. But it is not clear what kind of objection that is. If the relevant kind of skewing is present then the intervention is corrective, even though this is bound to be controversial even where it is true. It might seem as though there is an additional question about whether there is a justification one could give in publicly acceptable terms. That would certainly be harder to provide, since the claims of distortion will usually be controversial. But, even if it might be pragmatically helpful to protesters when they can provide one, it is not obvious that any such demand for publicly acceptable justification is appropriate here, even if it is appropriate in the case of state action. As I have emphasized, the issues about obstructive protest are quite different in light of the fact that the interference in question is not an exercise of state or institutional authority. It still raises moral questions, and obstructive protest will certainly be morally wrong in many cases. But, for the reasons I have laid out, the moral presumption against protest that interferes with the speech of others, even in the setting of a college campus, is not as overwhelming as is often supposed.²⁵

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²⁵ Thanks to Corey Brettschneider, Alison McQueen, Martha Nussbaum, and an anonymous referee for helpful comments on drafts.

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