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Reclaiming Platforms and Capitols: Feminist Activism and Free Speech on Social Media

I have always depended on the kindness of strangers.

Blanche DuBois in Streetcar Named Desire by Tennessee Williams

The master's tools will never dismantle the master's house.

Audre Lorde

Protesting Outside the Houses of (Hopefully) Kind Masters

In his book *Poverty Law and Legal Activism*, Gearey explores the efforts of lawyers and activists to combat poverty.¹ The title shines the spotlight on two phenomena: law and activism. On the one hand, there are the *laws* regulating the everyday fates of the poor, and on the other hand, there is the *activism* aiming to change, preserve or enforce these laws in order for them to better cater to the interests of the poor. As laws as a rule originate from the public authorities, it is only natural that those wanting to see laws changed should direct their activism towards the state as the principal creator and enforcer of laws. This is also what was done by Gearey's poverty activists. And, if the fates of the poor were not the responsibility of the state the lawmaker, what would be the alternative? Gearey writes

¹ Gearey, Adam, *Poverty Law and Legal Activism: Lives that Slide Out of View*, Abingdon, Oxon; New York, NY: Routledge, 2018.

about the weakening of the welfare system that took off in the US during the George W.H. Bush presidency, when the voluntarism and charity of kind-hearted Americans were offered as substitutes for a state-subsided system of welfare.² Hence, instead of relying on state-maintained welfare schemes, the poor could just as well depend on the kindness of private actors.

The questions of law, activism and the kindness of private actors also arise in the field of freedom of expression when looking at the relationships between social media platforms and their users. Here, I choose to focus chiefly on the role of the social media companies in the context of feminist activism of the 21st century. The platforms have featured both as sites and objects of feminist activism – sometimes both at the same time. On the one hand, social media platforms have provided arenas for feminist activism with global reach and reverberations, with the #MeToo-movement standing out as the leading legacy of digital feminist activism.³ However, in parallel with establishing new opportunities for feminist expression, the social media platforms have given rise to new modes of suppressing that very same speech. Many women engage in self-censorship on social media or have abandoned the platforms because of online hate and harassment, which the companies have failed to address.⁴ Also, the platforms themselves limit feminist speech by taking down content and blocking accounts that engage in such expression. Facebook's Community Standards constrain how the female body can be visually presented on the platform by, for instance, prohibiting pictures of "uncovered female nipples" with some exceptions, such as breastfeed-

² Ibid., 136–142.

³ E.g. Loney-Howes, Rachel et al., Digital footprints of #MeToo, *Feminist Media Studies*, 2021, DOI: 10.1080/14680777.2021.1886142; Trott, Verity, Networked feminism: counterpublics and the intersectional issues of #MeToo, *Feminist Media Studies*, 2020, DOI: 10.1080/14680777.2020.1718176.

⁴ Amnesty International, *Toxic Twitter*, 2018, ch. 5 "The silencing effect", <https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-5/#to-panchor> (Accessed 2021-04-26). As one woman told Amnesty: "The main thing that goes through my head every time I tweet anything feminist in nature is I'll probably get death threats if this gets any traction", Ibid. See also e.g. the special issue on online misogyny in *Feminist Media Studies*, vol. 18, no. 4, 2018; and Citron, Danielle Keats and Penney, Jonathon W, When Law Frees Us to Speak, *Fordham Law Review*, vol. 87, no. 6, 2019, 2317–2336.

ing, birth giving and protest.⁵ Moreover, Facebook has blocked accounts of women who had posted phrases such as “men are scum” in the context of discussion on sexual harassment, as these comments were regarded as hate speech under the Community Standards.⁶

The relationship between feminist activism and social media platforms is consequently multifaceted and full of contradictions.⁷ While social media platforms have provided the feminist struggle with a new valuable arena in the (digital) public sphere, new tools have emerged in parallel to dismantle it. The detrimental aspects of social media have prompted activism aimed directly towards the fathers of all these digital troubles, namely the platforms themselves. Some examples of protests directed towards the social media companies include: protestors stomping on print-outs of sexist, racist and violent tweets outside Twitter’s Tokyo office;⁸ a topless protest by feminist activists outside Facebook’s Korea office, after the company removed topless photos taken during an earlier protest;⁹ and a protest outside the Facebook headquarters in New York, where the protestors covered their naked bodies with stickers of male nipples,

⁵ Facebook’s Community Standards on Adult Nudity and Sexual Activity, https://www.facebook.com/communitystandards/adult_nudity_sexual_activity (Accessed 2021-04-26). See also e.g. Petersson, Charlee and Ottosson, Johanna, *Den nakna sanningen om blottande censur: om algoritmisering och fyrkantig disciplinering på Facebook*, Lund: Media and Communication Studies, Lund University, 2017, for a study of fourteen cases where Facebook has removed content depicting female nudity; and Are, Carolina, How Instagram’s algorithm is censoring women and vulnerable users but helping online abusers, *Feminist Media Studies*, vol. 20, no. 5, 2020, 741–744.

⁶ Gibbs, Samuel, Facebook bans women for posting ‘men are scum’ after harassment scandals, *The Guardian*, 5 December 2017, <https://www.theguardian.com/technology/2017/dec/05/facebook-bans-women-posting-men-are-scum-harassment-scandals-comedian-marcia-belsky-abuse> (Accessed 2021-04-26); van Zuylen-Wood, Simon, “Men Are Scum”: Inside Facebook’s War on Hate Speech, *Vanity Fair*, 26 February 2019, <https://www.vanityfair.com/news/2019/02/men-are-scum-inside-facebook-war-on-hate-speech> (Accessed 2021-04-26).

⁷ E.g. Locke, Abigail, Lawthom, Rebecca and Lyons, Antonia, Social media platforms as complex and contradictory spaces for feminisms: Visibility, opportunity, power, resistance and activism, *Feminism & Psychology*, vol. 28, no. 1, 2018, 3–10.

⁸ Thompson, Nevin, At Twitter’s Tokyo Office, Protesters Stomp on Hateful Tweets, *Global Voices Advox*, 11 September 2017, <https://advox.globalvoices.org/2017/09/11/at-twitters-tokyo-office-protesters-stomp-on-hateful-tweets> (Accessed 2021-04-26).

⁹ He-rim, Jo, Feminist activists protest topless, Facebook Korea apologizes, *The Korea Herald*, 3 June 2018, <http://www.koreaherald.com/view.php?ud=20180603000178> (Accessed 2021-04-26).

protesting against Facebook's and Instagram's policy banning photos of female nipples.¹⁰ There have also been temporary boycotts of the social media platforms due to, for example, the companies' inaction against hateful content directed against women.¹¹ In addition, when women were blocked from Facebook for posting "men are scum", a group of 500 female comedians co-ordinated a protest through a Facebook group where they simultaneously posted versions of the phrase on the platform (almost all were banned).¹²

Without aiming to downplay the importance and results of the above-mentioned activism, in the following I will suggest that future protests having the goal to change the behaviour of social media companies as masters of free speech should not, first and foremost, be directed towards the companies themselves. Rather, just like in the case of Gearey's poverty activists, the protests should be directed towards the lawmakers.

Free Speech by Virtue of Some Kind Strangers or Some Kind of Law

The fact that activists who are unhappy with the actions of the social media platforms choose to direct their protests against the companies and not the state might appear to be completely sensible at first sight. The relationships between the platforms and their users are regulated by contractual agreements, which the users have to accept when they start using the companies' services.¹³ Accordingly, it is the companies that set the rules as to what type of content is allowed and not allowed on their platforms. It is also the companies that are responsible for the actual hands-on enforcement of these rules. Sometimes, the activism has even yielded results, as when Facebook changed its policy on breastfeeding

¹⁰ Kari, Paul, Naked protesters condemn nipple censorship at Facebook headquarters, *The Guardian*, 3 June 2019, <https://www.theguardian.com/technology/2019/jun/03/facebook-nude-nipple-protest-wethenipple> (Accessed 2021-04-26).

¹¹ Griffin, Kathy, #WomenBoycottTwitter: Rose McGowan's suspension prompts protest, *The Guardian*, 13 October 2017, <https://www.theguardian.com/film/2017/oct/13/women-boycott-twitter-rose-mcgowan-protest> (Accessed 2021-04-26).

¹² See note 6 above.

¹³ E.g. Facebook, *Terms of Service* (last revised on 20 December 2020), <https://www.facebook.com/legal/terms/update> (Accessed 2021-04-26); Twitter, *Twitter Terms of Service* (effective as of 18 June 2020), <https://twitter.com/en/tos> (Accessed 2021-04-26).

pictures after persistent protests from a group of users.¹⁴ How could it then be a problem to aim the activism against the very companies who are directly responsible for making and enforcing the rules, and who also seem to be kind enough (at least once in a while) to change their policies as a result of the activism?

In order to understand why it might not be completely satisfactory from the free speech perspective to put pressure only on the social media companies themselves, it is helpful to look at the distinction drawn by Pettit between two concepts of freedom of expression: unhindered speech and protected speech.¹⁵ I will make use of Pettit's distinction in order to propose that the foremost target of the feminist activism that wants to promote freedom of expression and combat hate and harassment on social media platforms should be the lawmakers at the capitols, not the CEOs and coders on corporate campuses.

According to Pettit, *unhindered speech* means that one can express herself without anyone, whether public or private officials or other individuals, hindering her. Imposing penalties on speech or removing the option of expressing something are examples of hindrances that can be imposed on expressive activities. Consequently, speech is unhindered when it is not interfered with.¹⁶ In order to enjoy unhindered speech, it is enough that no one interferes with one's speech or is likely to do so. As long as this is the case, it is irrelevant that the others retain the power to interfere and that the speaker remains unprotected against that power. From the perspective of unhindered speech, one thus enjoys freedom of expression

¹⁴ Gillespie, Tarleton, *Custodians of the Internet*, New Haven: Yale University Press, 2018, ch. 6 "Facebook, Breastfeeding and Living in Suspension". The forms of activism employed included, for example, "nurse-ins" outside the Facebook headquarters and (of course) a Facebook group "Hey Facebook breastfeeding is not obscene". The above-mentioned protests outside Facebook's Korea headquarters resulted in Facebook apologising and restoring the censored pictures, see note 9 above. Also, after the nude protest outside Facebook's New York headquarters, the company agreed to a meeting with a group of stakeholders in order to discuss possible changes in the company's policies on nudity, National Coalition Against Censorship, Facebook Agrees to Reconsider Artistic Nudity Policies, *NCAC*, 5 June 2019, <https://ncac.org/news/facebook-agrees-to-reconsider-artistic-nudity-policies> (Accessed 2021-04-26).

¹⁵ Pettit, Philip, Two Concepts of Free Speech, In *Academic Freedom*, Jennifer Lackey (ed.), 61–82, Oxford: Oxford University Press, 2018.

¹⁶ *Ibid.*, 62–64.

when no one either interferes or is likely to interfere with her expressive activities.¹⁷

Consequently, a Facebook user enjoys unhindered speech as long as the company does not interfere with and is unlikely to interfere with her expressive activities on the platform.¹⁸ This means that activists who manage to make Facebook change its content policy with regard to, say, photos depicting female nipples can attain unhindered speech as they became free to post pictures of female nipples without interference, while Facebook is rendered unlikely to interfere as their content rules now allow such pictures. The same applies to activists whose protests result in Twitter taking action against hateful content and thus enabling them to engage in expressive activities on Twitter without being exposed to harassment. Accordingly, as long as there is no actual interference on the part of these companies with regard to the users' free speech exercise, it does not matter that they retain the power to – whenever they so wish – change their content policies and once again start banning nipple photos or allowing hateful content, while users lack protection against such interference.¹⁹

Protected speech, in contrast, is focused on protecting speakers from “the very possibility of” others interfering with their speech.²⁰ One's speech is protected when the others' option of interfering with her speech has been removed or such interference has been penalised. Speech becomes protected when obstacles have been put into place to guard the speech against the interference by others, regardless of how likely they are to actually interfere.²¹ Consequently, if freedom of expression is regarded as protected speech, then more is required than just the absence and unlikelihood of interference from the part of the others. Speech cannot be

¹⁷ Ibid., 66.

¹⁸ The fact that the users are *forced* to accept the terms of service of social media companies in order to use the platforms can of course be regarded as an interference by the companies as well. However, I choose to focus here on situations where the social media companies interfere with the actual expressive activities of the users on the platforms.

¹⁹ Within the framework of the republican conception of freedom as non-domination, which forms the basis for Pettit's concept of protected speech, acts of omission can also, in some situations, amount to interference, Pettit, Philip, *Republicanism: A Theory of Freedom and Government*, Oxford: Oxford University Press, 1999, 53–54. This means that by not addressing the hateful content that chills some users' speech, the platforms can be regarded as interfering with their free speech exercise.

²⁰ Pettit, Two Concepts of Free Speech, 64.

²¹ Ibid.

protected as long as others retain the power to interfere, even though they would be unlikely to use that power. It is therefore necessary that those with the power to interfere are actually kept from interfering, either by blocking the interference entirely or making it difficult or costly.²²

This means that a Facebook user who is merely free to post pictures of female nipples without interference cannot be said to have freedom of expression, understood as protected speech. In order for the user to enjoy protected speech in relation to the company, it is necessary that the very possibility of Facebook interfering with her free speech exercise is blocked or penalised. Similarly, a user who can express herself freely on Twitter without the fear of being muzzled by hateful attacks cannot be regarded as enjoying free speech as protected speech, as long as the very possibility of Twitter interfering with her speech by allowing her to be targeted with hate and harassment exists.

It is consequently easier to enjoy freedom of expression if it is regarded as unhindered speech than if it is equated with protected speech.²³ According to Pettit, unhindered speech is also the concept that is dominating in jurisprudence and politics.²⁴ However, Pettit presents normative, sociological and historical arguments in order to show why protected free speech should be regarded as superior to unhindered free speech.²⁵ In addition, he discusses the benefits associated with protected speech, related to it granting people the status of free speakers, enfranchising their silence and making them personally responsible for their speech.²⁶

But who is then responsible for making sure that the expressive activities of individuals are protected against the mere possibility of interference by others, for instance, by social media companies? According to

²² Ibid., 66.

²³ Ibid., 64, 66.

²⁴ Ibid., 61.

²⁵ Ibid., 69–71. Perhaps the most interesting justification in this context is the historical argument, which connects the protected free speech to the republican tradition of ideas and the conception of freedom as non-domination (also called republican freedom). If freedom is regarded as non-domination, it is not enough that others do not interfere with one's actions, but the individual must also be *protected against arbitrary interference* by others. Apart from absence of interference, absence of domination is thus also required. See e.g. Pettit, *Republicanism: A Theory of Freedom and Government*, ch. 3 "Liberty as Non-Domination".

²⁶ Pettit, Two Concepts of Free Speech, 73–77. On enfranchisement of silence, see also Pettit, Philip, Enfranchising silence, In *Rules, Reasons, and Norms*, Oxford: Oxford University Press, 2002, 367–377.

Pettit, this protection “is provided by law [...] that is subject to democratic, constitutional control, not exposed to an unconstrained will on the part of those in power”, together with social norms.²⁷ Consequently, protected speech cannot be achieved by legal protections “provided at the whim of a benevolent autocrat or elite body”.²⁸ The legal regulations providing for protection of speech can take many forms, from constitutional provisions through criminal sanctions and tort remedies to local norms at an institutional level.²⁹ This means that in order to guarantee social media users protected speech, the state the lawmaker has to get involved and create a system of regulations that keeps the social media companies from interfering with the users’ free speech exercise.

So, this is where the law steps in as an essential tool for creating the necessary safeguards for protected free speech. By protesting outside the corporate headquarters instead of the houses of parliaments, users can at best achieve unhindered freedom of expression, but not protected freedom of expression. As Pettit puts it: “It is only by dint of law and regulation—and supportive social norms—that speech gets to be protected, and gets to count as free.”³⁰

Depending on the Kindness of Platforms or Positive Tools of the State

One reason for the lack of protests against the power of social media companies outside parliaments may be found in the way in which the right to freedom of expression has historically been perceived. In its classic guise, freedom of speech has chiefly required that the state refrains

²⁷ Pettit, *Two Concepts of Free Speech*, 65. According to Pettit, protected speech requires that speech is “protected by public law or by the public rules of a corporate body like a university, which has its own domain and government.” *Ibid.*, 61. Pettit thus seems to suggest that it is sometimes possible for private corporate bodies, rather than the state, to provide protection for speech. He also maintains that protection is necessary only “when there is no natural obstacle or hurdle stopping some from interfering with others”, *Ibid.*, 65.

²⁸ Pettit, *Two Concepts of Free Speech*, 65.

²⁹ *Ibid.*, 65, 67–68.

³⁰ *Ibid.*, 67.

from interfering with citizens' free speech exercise.³¹ Freedom of expression has thus traditionally been regarded primarily as a negative right that applies against the state. Therefore, it may seem counterintuitive that the state should actively interfere in the relationships between private social media companies and their individual users. In the context of freedom of expression, "[f]reedom is not thought to involve the state acting so much as the state not acting."³²

Recently, the under-appreciated positive dimensions of freedom of expression have gained more attention in the free speech scholarship.³³ However, this does not mean that freedom of speech would previously have been some kind of stranger to positive elements. Examples of positive aspects of the right to freedom of expression include: the right to use some public (and sometimes private) places for expressive activities, the right to not have one's expressive activities interrupted by a hostile audience, the right to reply in mass media, government subsidies for media and arts, and media ownership controls.³⁴ The right to freedom of expression could accordingly be conceptualised as covering additional positive aspects in the context of social media as well.

Pettit's dichotomy between unhindered and protected speech is rooted in the distinction between the liberal conception of freedom as non-interference and the republican conception of freedom as non-domination. The concept of protected speech grows out of the republican conception of freedom, which entails that anyone who is subject to a master – no matter how gentle or kind – cannot be regarded as free.³⁵ According to Carolan, the republican tradition accords well with a more positive conception of freedom of expression, as republicanism "views positive action

³¹ E.g. Stone, Adrienne and Schauer, Frederick, Introduction, In *The Oxford Handbook of Freedom of Speech*, Adrienne Stone and Frederick Schauer (eds.), xi–xxiii, Oxford: Oxford University Press, 2021, xx; Kenyon, Andrew T, Complicating Freedom: Investigating Positive Free Speech, In *Positive Free Speech: Rationales, Methods and Implications*, Andrew T Kenyon and Andrew Scott (eds.), 1–9, Oxford: Hart, 2020, 1; Barendt, Eric, *Freedom of Speech*, 2nd ed., Oxford: Oxford University Press, 2007, 14.

³² Kenyon, Andrew T, Positive Free Speech: A Democratic Freedom, In *The Oxford Handbook of Freedom of Speech*, Adrienne Stone and Frederick Schauer (eds.), 231–248, Oxford: Oxford University Press, 2021, 231.

³³ E.g. Kenyon, Andrew T and Scott, Andrew (eds.), *Positive Free Speech: Rationales, Methods and Implications*, Oxford: Hart, 2020.

³⁴ Kenyon, Complicating Freedom: Investigating Positive Free Speech, 2–3; Barendt, *Freedom of Speech*, 100–108.

³⁵ E.g. Pettit, Two Concepts of Free Speech, 70–71.

in defence of freedom to be a legitimate, if not the primary, purpose of the state”.³⁶ It is the duty of the state to address the potential of domination and the issuing imbalance of power – both between the state and citizens and between private actors.³⁷ It is thus the mission of the lawmakers to start looking for legal tools to dismantle the power imbalance between the social media platforms and their users.

Just as it is difficult to imagine a functioning welfare system that would solely depend on the charity and kind-heartedness of private actors, it is impossible to “enjoy free speech by the gift or tolerance or indifference of others”. Instead, enjoying protected free speech requires having the “robustly entrenched rights of a free speaker”.³⁸ Consequently, laws are needed in order to establish a functioning system of freedom of expression, just as they are needed to create a functioning welfare system. It is always possible that free speech activists manage to make the social media companies change their minds with regard to the permissibility of some kind of content. The companies may very well be kind enough to change their rules and help the users achieve unhindered speech without a need for the state to step in. Accordingly, with regard to unhindered free speech, “protection of the law is just one of many possible means for removing hindrances to speech” and speech is equally free when the companies themselves act in order to remove barriers to free speech.³⁹ In contrast, if the users do not want to depend on the kindness of social media companies in order to be able to express themselves freely, but

³⁶ Carolan, Eoin, Promoting Civic Discourse: A Form of Positive Free Speech under the Constitution of Ireland?, In *Positive Free Speech: Rationales, Methods and Implications*, Andrew T Kenyon and Andrew Scott (eds.), 65–81, Oxford: Hart, 2020, 71. For a justification for regulating hate speech in order to protect free speech on the basis of the republication conception of freedom, see Bonotti, Matteo, Religion, Hate Speech and Non-Domination, *Ethnicities*, vol. 17, no. 2, 2017, 259–274. On the relationship between hate speech and republican freedom, see also Di Rosa, Alessandro, Performative Hate Speech Acts. Perlocutionary and Illocutionary Understandings in International Human Rights Law, *The Age of Human Rights Journal*, no. 12, 2019, 105–132. See also Pettit, Two Concepts of Free Speech, 66–67 regarding hate speech. On the relationship between republican freedom and free speech in social media, see Ardito, Alissa, Social Media, Administrative Agencies, and the First Amendment, *Administrative Law Review*, vol. 65, no. 2, 2013, 301–386.

³⁷ Carolan, Promoting Civic Discourse: A Form of Positive Free Speech under the Constitution of Ireland?, 71.

³⁸ Pettit, Two Concepts of Free Speech, 61.

³⁹ Ibid.

instead enjoy protected free speech, then protection provided by the law becomes “essential”.⁴⁰ I have chosen to exemplify this digital free speech dilemma by focusing on the example of feminist activism, but much of what is said here could be applied to other expressive activities on social media as well. All social media users are but strangers in the houses of these masters of the platforms, depending on their kindness.

Postscript – Platforms’ Kindness Will Not Solve Platforms’ Problems

The power of social media companies over the public sphere, free speech and democracy became tangibly clear in January 2021 when supporters of President Trump stormed the Capitol in Washington D.C. after being spurred on by his activities on social media. Twitter, Facebook and several other social media companies reacted by clearing out Trump from their platforms, demonstrating thus that not even the president of the country whose laws made the rise of these companies possible can be sure of enjoying unhindered or protected speech against them. As a result, Trump is gone not only from the Capitol but also from the platforms. There is now a chance to reclaim both of these spaces as sites of peaceful protest and democratic activism. As argued above, in order to reclaim the platforms, one must start by reclaiming the capitols. Because that is where the lawmakers with the (positive) tools for dismantling the platforms sit.

⁴⁰ Ibid.

