

Between Rhetoric, Social Norms, and Law: Liberty of Speech in Republican Rome

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I

The importance of liberty of speech appears to take centre stage in the current powerful revival of Neo-Republicanism as one of the fundamental basic liberties of our modern societies.¹ Although the extent to which such liberty is limited to certain domains or is conditioned upon certain requisites will be ultimately dependent on the historical and social context in which it is elaborated, it remains essential that in every civic community that values liberty as a status of non-domination (i.e. of not being subjected to the power of interference), each member must enjoy un-dominated access to those choices, which that society regards as basic liberties. In our modern society, Pettit argues, one of these basic liberties is indeed freedom of speech.²

Thus, although there might be differences in what sort of speech is protected in any given society (so that, for example, one can speak one's mind at all times, except when this threatens public order or amounts to hate speech - variables that can be differently interpreted), it is essential that there are public laws and norms that secure liberty of speech in those domains. To live in a political system that empowers its citizens to enjoy the central value of liberty from domination and thereby ultimately achieves justice, the citizens, Pettit argues, have to pass three tests: the 'eyeball test', according to which every citizen should be able to look their fellow citizen in the eyes without fear or deference; the 'tough luck test', according to which citizens should be prepared to accept and embrace the notion that if certain policies of which they disapprove are implemented, it is a matter of tough luck and thereby they must be accepted; and finally 'the straight talk test', according to which citizens should feel empowered to express their own opinion without fear of repercussions or deference.³ To be passed successfully, this latter test requires, first, that no one is in the position of possibly being

¹ For a rather comprehensive list of English works in Neo-Republican thought of the last twenty years see P. Pettit, 'The Globalised Republican Ideal', *Global Justice: Theory, Practice, Rhetoric* 9.1 (2016), pp.47-68.

² P. Pettit, 'Republicanism across Cultures', in J-H. Kwak and L. Jenco (eds.), *Republicanism in Northeast Asia* (London: Routledge, 2015), pp.15-38.

³ P. Pettit, *Just Freedom: A Moral Compass for a Complex World* (New York: W. W. Norton, 2014), esp. 181-2 and 210.

obstructed, penalised or coerced in the domain of speech because he is effectively protected by law and customs; and second, that it is common knowledge amongst the members of the community that these protections are in place.⁴

Although this political philosophy finds its inspiration in the historical reality of the Roman Republic, it seems that in the course of the Republican period citizens shared a recognised ability to speak freely in public, but did not enjoy equal status with one another in the domain of speech as protected by law.

Nowhere in our sources concerning the Republic is there any attestation of liberty of speech as a legally guaranteed right of Roman citizens, which, equally recognised to every member of the civic community, protects the individual from the power of interference in the domain of speech. Although, as Brunt reminds us, ‘we simply do not know that humble people would themselves never have claimed [this] right’⁵, it remains a rather interesting fact that, in the preserved accounts of the struggles for the establishment of the plebeians’ political and civic rights, we do not find any reference to call for its establishment – a fact that is even more striking when we consider that, as a collective, ordinary people expressed their opinions in public on various occasions, such as, for example, in theatrical performances and mimes.⁶

The fundamental question I would like to address here is why, in the course of the Republic, the right to speak freely was not protected by law and never came to be recognised as a formalised, subjective, right in Republican Rome.⁷

⁴ P. Pettit, ‘Enfranchising Silence: An Argument for Freedom of Speech’, in T. Campbell and W. Sadurski (eds.), *Freedom of Communication* (Aldershot, Hants, England; Brookfield, Vt., USA: Dartmouth, 1994), pp.45-55.

⁵ P.A. Brunt, *Fall*, p.315.

⁶ Amongst the most recent contributions to the debate: C. Courier, *La plèbe de Rome et sa culture (fin du IIe siècle av. J.-C. - fin du Ier siècle ap. J.-C.)* (Rome: École Française de Rome, 2014); C. Rosillo-López, *Public Opinion and Politics in the Late Roman Republic*, (Cambridge: Cambridge University Press, 2017); A. Angius, *Repubblica delle opinioni*.

⁷ The closest attestation of this is to be found in Cic. *Plan.* 33 where, in the context of contention between the equites’ and the senators’ ability to speak their own mind, Cicero states: ‘What! are these cavillers themselves tolerable, who suggest that freedom of speech on the part of a Roman knight (*libertas equitis Romani*) is intolerable? What has become of the tradition of old? And the equity of our legal system, where is it? (*ubi illa aequitas iuris?*) Where is the freedom of ancient days (*ubi illa antiqua libertas*), which it is now high time should be rearing her head and proudly renewing her youth after the tyranny of our civil calamities?). However, it seems that Cicero here refers to a customary practice of the higher echelons of society, as opposed to a legal right. See K. Raaflaub, ‘Aristocracy and Freedom of Speech in the Greco-Roman World’, in I. Sluiter and R. M. Rosen, *Free Speech*, pp.21-40 on aristocratic contest for freedom of speech.

Modern accounts of liberty of speech in Rome often do not make a clear analytical distinction between the right to speak one's own mind and the actual practice of doing so. As a result, given that, on the whole, the custom of speaking freely was pervasive in the Republic,⁸ a general scholarly consensus gathers around the idea of the existence of liberty of speech in Rome, which often is not fully distinguished from the existence of a legally protected right to speak freely.⁹

There are, of course, some very notable exceptions to this trend. Momigliano, for example, discussing the difference between Roman *libertas* and Greek *eleutheria*, stated that 'Rome never knew equality and liberty of speech', despite a number of democratic rights afforded to Roman citizens.¹⁰ 'As a whole,' he argues, 'as Kloesel acutely observed, freedom of speech belonged to the sphere of 'auctoritas' rather than to that of 'libertas''¹¹ as the right of free speech was well protected only for men of high rank.¹² This view was also propounded by Wirszbuski, who maintained that in Rome 'the citizen had a vote, but he had no right to make his voice heard: freedom of speech, in the sense that any citizen had the right to speak, did not

⁸ For exceptions, most notably the case of the poet Naevius, see below, 000.

⁹ See, most recently, T.E. Strunk, *History after Liberty: Tacitus on Tyrants, Sycophants, and Republicans* (Ann Arbor: University of Michigan Press, 2016), p.133. I. Sluiter and R. M. Rosen, 'General introduction', in Id. *Free Speech in Classical Antiquity* (Leiden-Boston: Brill, 2004), p.13, reviewing the contributions, state that 'on the Greek side the issues constantly obtruding themselves concerned the status of *parrhesia* as a right or otherwise, and the limits of *parrhesia* (*when* is it acceptable, and *when* not?). On the Roman side, the practice of veiled language was emphasised and problematized.'

Interestingly H. Baltussen and P. J. Davis (eds.), *The Art of Veiled Speech: Self-Censorship from Aristophanes to Hobbes* (Philadelphia: University of Pennsylvania Press, 2015), p.318, refer to 'an inherent right to freedom of thought and expression' as a distinctive feature of societies that purport themselves as descendants from the cultural traditions of the ancient Greeks and Romans.

¹⁰ R. Di Donato (ed.), A. Momigliano, *Nono contributo allo studio della Storia degli Studi Classici e del Mondo Antico* (Rome: Edizioni di Storia e Letteratura, 1992), p.49; see also Id. 'La Liberta' di Parola Nel Mondo Antico', *Rivista Storica Italiana* 83 (1971), pp.499-524 = R. Di Donato (ed.), A. Momigliano. *Sesto Contributo Alla Storia Degli Studi Classici e Del Mondo Antico II* (1980), pp.403-36, and Id. 'Freedom of Speech and Religious Tolerance in the Ancient World', in *Annali della Scuola Normale Superiore di Pisa. Classe di Lettere e Filosofia*, ser. 3, 4.2 (1974), pp.331-49 = = R. Di Donato (ed.), A. Momigliano. *Sesto Contributo Alla Storia Degli Studi Classici e Del Mondo Antico II* (1980), pp.459-76 = S.C. Humphreys, *Anthropology and the Greeks* (London: Routledge, 1978), pp.179-93, esp. p. 185f.

¹¹ A. Momigliano, *Review Discussion* of 'L. Robinson, Freedom of Speech in the Roman Republic'. A dissertation submitted to the Johns Hopkins University, Baltimore (printed by J. H. Furst Company, Baltimore; distributed by the author, Centre College, Kentucky, 1940)'; *JRS* 42 (1952), pp.120-4; H. Kloesel, *Libertas*. (Breslau: R. Nischkowsky., 1935), p.26.

¹² On this see K. Raaflaub, 'Aristocracy and Free Speech in the Greco-Roman World' in I. Sluiter and R. M. Rosen *Free Speech*, p.57.

exist in the Roman Assemblies.’¹³ In comparison with the Greek world, where *parrhesia*, in his view, was a right to defend or to bestow upon a citizen, Scarpat claims that the Roman Republic, and even less so the Empire, never knew the right of free speech.¹⁴

According to these scholars, the reasons for such absence in Rome lies in the intrinsically aristocratic nature of the Roman political system, which never approximated, in Scarpat’s opinion, nor wished to emulate the model of Athenian democracy. For liberty of speech to be configured as a field that needed legal protection, it required not only an aspiration to political equality, which, these scholars argue, Romans never experienced as they were deprived of any meaningful political autonomy, but also the development of the rights of individual conscience, which the Republic did not know. For this to be developed, Arnaldo Momigliano argues, following Benjamin Constant, it required the opposition of an individual religious conscience to the authority of the commonwealth, which, first exercised by the Christian church, established an alternative focus of true, legitimate, power in the commonwealth of God.

Even those scholars who, like Peter Brunt, argue in favour of the existence of an ancient right to freedom of speech in Republican Rome, find themselves conceding that in *contiones*, the assemblies where public affairs were debated, Roman citizens did not have a right to speak.¹⁵ As Pina Polo notes, addressing the people at a *contio* was a prerogative of a magistrate, but never a citizens’ right.¹⁶ Since only the magistrate, who called the assembly and presided over it, had the right to address it, the contemporary sources talk about a *potestas contionandi* as a prerogative of the magistrates, but never about a *ius contionandi* as an entitlement of the Roman citizens, which in Rome, Pina Polo argues, never existed.¹⁷ It was this magistrate who

¹³ Ch. Wirszbuski, *Libertas as a Political Idea at Rome During the Late Republic and Early Principate* (Cambridge: Cambridge University Press, 1950), p.18 and n. 2.

¹⁴ G. Scarpat, *Parrhesia greca, parrhesia cristina* (Brescia: Paideia editrice, 2001), p.137. For a different understanding of *parrhesia* as less of right than an attribute of citizenship and a social expectation see D.M. Carter, ‘Citizen Attribute, Negative Right: A Conceptual Difference between Ancient and Modern Ideas of Freedom of Speech’, in I. Sluiter and R. M. Rosen, *Free Speech*, pp.197-220 and D. Konstan, ‘The Two Faces of Parrhesia’, *Antichthon* 46 (2012), pp.1-13.

¹⁵ P.A. Brunt, *Fall of the Roman Republic* (Oxford: Clarendon, 1988), p.315.

¹⁶ F. Pina Polo, ‘*Contio, Auctoritas, and Freedom of Speech in Republican Rome*’, in S. Benoist (ed.), *Rome, une cité impériale en jeu. L’ impact du monde romain selon Fergus Millar* (Leiden-Boston: Brill, 2012), pp.45-58; for a full analysis of the evidence see F. Pina Polo, *Las contiones civiles y militares en Roma* (Zaragoza: Monografías de Historia Antigua, 1989), pp.74-80.

¹⁷ Pina Polo, ‘*Contio, Auctoritas and Freedom of Speech*’, p.52. CIL III392=ILS 7192 (inscription from Alexandria Troas, first century AD) presents the only extant reference to *ius contionandi*, which, in Pina Polo’s opinion, should be understood as an honorary grant for Caius Iulius Iunianus, who had not been a magistrate. On this inscription see F. Pina Polo, ‘Ius

decided who else could speak, in what order and for how long.¹⁸ With few exceptions, these were usually distinguished people, members of the elite, either magistrates in office or ex-magistrates, and indeed many of them were *consulares*. In theoretical terms, the right to speak freely before an assembly was expression either of the *potestas* of the magistracy held by the orator or of his *auctoritas*, the high social status recognised by the rest of the civic community, but was not one of the rights inherent in Roman citizenship.¹⁹

Most recently, developing an argument put forward by Martin Jehne in a novel direction, Andrea Angius has mounted a powerful counteroffensive to this contention.²⁰ Discussing the case of P. Scaptius, an old plebeian man, who, according to the narratives of Livy and Dionysius of Halicarnassus, in 446BC intervened in a debate between the Arcians and Ardeans over a neighbouring territory, both Martin Jehne and Andrea Angius note that the appeal to the tribunes by Scaptius against the consuls, who ordered him to be removed from the assembly, is an attestation of the citizens' right to speak.²¹

contionandi y contiones en las colonias romanas de Asia Menor acerca de CIL III 392', *Gerión* 7 (1989), pp.95-106.

¹⁸ In an interesting passage, which seems affected by a certain degree of misunderstanding, Dio Cassius discusses the opposition of Favonius and Cato to the proposal about provincial arrangements: 'that day was used up in such wise that the tribunes could not speak at all. For in all the meetings of the people in which they deliberated, the right to speak was given to the private citizens ahead of the magistrates, to the end apparently that none of them, captivated beforehand by the opinion of a superior, should conceal any of his own ideas, but should speak out his mind with entire frankness' delete the whole quotation? (39.35.1-2).

¹⁹ Pina Polo, 'Contio, Auctoritas and Freedom of Speech', p.53. In a similar vein, C. Rosillo López, *Public Opinion and Politics in the Late Roman Republic* (Cambridge: Cambridge University Press, 2017), pp.27-30. See also R. Morstein-Marx, *Mass Oratory and Political Power in the Late Roman Republic* (Cambridge: Cambridge University Press, 2004), p.163 and D. Hiebel, *Rôles institutionnel et politique de la contio sous la république romaine: pp.287-49 av. J.-C* (Paris: De Boccard 2009), pp.97-98.

²⁰ M. Jehne, 'Scaptius oder der kleine Mann in der großen Politik. Zur kommunikativen Struktur der contiones in der römischen Republik', *Politica Antica* 1 (2011), pp.59-87 and A. Angius, *La Repubblica delle opinioni. Informazione politica e partecipazione popolare a Roma tra il II e il I secolo a.C.* (Milano, 2018), esp. pp.303-8.

²¹ Liv. 3.71.3-5 and Dion. Hal. 11.52.1-4, whose text concerning the events just before Scaptius' speech has, however, not been preserved. Although he states that ultimately the right of citizens to speak was almost exclusively exercised by the political elite, Martin Jehne, 'Scaptius', 2011, p.81 observes: 'Daß Scaptius spricht, ist ein Ausbruch aus seiner Rolle als einfacher Plebeier, das ist ungehörig, ist aber – wie auch das Eingreifen der Tribune zeigt – im Prinzip Teil der Bürgerrechte.' Taking this argument to an overall different conclusion, Angius, *Repubblica delle opinioni*, p.309, states: 'sembra chiaro che il diritto di parola fosse rivendicabile, in misura uguale, da chiunque godesse della cittadinanza romana a prescindere dallo status o dalla discendenza. Che la mancata concessione della parola configurasse una violazione della *libertas* del cittadino e' del resto mostrato chiaramente dall'episodio di Scapzio, a cui al rifiuto dei consoli l'uomo invoca l'*auxilium* dei tribuni.'

Responding to Scaptius' request to talk in the interest of the commonwealth (*de re publica dicere*), the consuls declared he was untrustworthy (*vanum eum*) and ought not to be listened to and indeed removed from the assembly. In response, Scaptius appealed to the tribunes of the plebs, who, Livy tells us, guaranteed him the possibility to say what he wished to say and, he adds, the plebs wished to hear.

However, although at first sight the intervention of the tribunes of the plebs appears a very strong evidence in support of freedom of speech as a right, the recourse to the *auxilium* of the tribunes of the plebs does not signify that speaking freely in the political arena was a Roman civic right. The so called *ius auxilii* enabled the tribunes to provide assistance to any citizen against any form of arbitrary punishment by a magistrate, that is a punishment that was perceived as unjustified, and was not exclusively limited to provide assistance against the violation of existing rights.²²

Nor do the following cases that Angius adduces attest the existence of a *right* to speak freely in public, shared equally by all citizens, but rather indicate that the *ability* to do so existed and *expectation* of speaking freely in assembly was prevalent, regardless of whether they were ever transformed into actuality. Seneca the Elder, in his *Contraversiae*, discusses two cases where being barred from speaking freely *in contione* functioned as a punishment: the first was a case of inappropriate behaviour, the second, a case of theft. Discussing the instance of the man who was raped when wearing women's clothes (*raptus in veste muliebri*), Seneca states that 'an unchaste man shall be barred from speaking in public. A handsome youth betted he would go out in public in women's clothes. He did so, and got raped by ten youths. He accused them of violence, and had them convicted. Forbidden by a magistrate to speak to the people, he accuses the magistrate of injuring him.'²³ In the second case, Seneca attests, 'a thief shall be barred from public meetings.' A man who had accused a rich man of treason dug through his wall at night and took a writing-case containing letters from the enemy. The rich man was convicted. When his accuser wanted to speak at a public meeting, he was barred by the magistrate. He sues him for injury.'²⁴ Quintilian too discusses two cases where the barring from public speaking *in contione* functioned as punishment for two distinct groups, those who have exhausted their patrimony and the male children of a prostitute.²⁵

²² F. De Martino, *Storia della costituzione romana*, I (2nd ed., 1972), pp.353-63; and M. Humbert, *Institutions politiques et sociales de l'antiquité* (Paris, 1989), pp.249-51. A.W. Lintott, *The Constitution of the Roman Republic* (Oxford: Clarendon Press, 1999), pp.125-8.

²³ Sen. *Contr.* 5.6..

²⁴ Sen. *Contr.* 10.6.

²⁵ Quint. *Inst. Or.* 3.11.13 and 7.6.3.

It seems that all these cases make a very important point: speaking freely in public was recognised as an ability that all Roman citizens expected to share amongst them, and, as such, could be subject to limitations and even oppression. It is not a coincidence that, as Ineke Sluiter and Ralph Rosen point out, in Rome the phenomenon of veiled speech was thematised much more than the practical political aspects of free speech.²⁶ However, nowhere in the sources does the right of a Roman citizen to speak one's mind appear to be legally protected.

Of course, Republican Rome knew laws regulating free speech and perhaps even later provisions had passed concerning *iniuria*.²⁷ However, in these cases, as later on under Augustus, these measures acted as means of restraints and inhibitions and did not directly address the right of the individual to speak freely. There is an essential difference between the individual right of free speech and the right not to be slandered. The line of demarcation may well be the same, but one reaches it from opposite perspectives.

II

Although we do not know whether every citizen, regardless of his station in society, had the possibility of expressing his opinion without fear of retaliation or repression and deference in any context of his life,²⁸ it seems that people, on the whole, did *de facto* enjoy a considerable amount of liberty to speak their own mind. It is sufficient to think about the conspicuous role played by invective in Roman public oratory, or the irreverence of the theatrical performances and mimes, or even the personal vituperation that plays such a remarkable part in some Latin poetry, to appreciate the extent of liberty of speech practiced in the Roman Republic.

The altercation between Clodius and Cicero, for example, that took place in the senate in 61BC or the heated exchange between Piso and Cicero that culminated in Cicero's *in Pisonem* and Piso's rejoinder, show the extent to which one could go to deprecate one's opponent: *belua* (beast), *carnifex* (murderer), *maialis* (pig) were only some of the epithets that one could adopt to win his case and cast the opponent as an outsider.²⁹ Nor was this sort of abuse confined to

²⁶ I. Sluiter and R. M. Rosen, *Free Speech*, p.13.

²⁷ See below, 000.

²⁸ P. A. Brunt, *Fall*, p.314.

²⁹ On Clodius and Cicero see Cic. *ad Att.* 1.16.10 with H. van der Blom, 'Character Attack and Invective Speech in the Roman Republic: Cicero and as target', in M. Icks and E. Shiraev (eds.), *Character Assassination throughout the Ages* (New York: Palgrave Macmillan, 2014), pp.40-3. On the exchange between Piso and Cicero see V. Arena, 'Roman Oratorical Invective', in W. Dominik and J. Hall (eds.), *Companion to Roman Rhetoric* (Blackwell, 2007),

public oratory. The poet Catullus famously portrayed Egnatius as ‘son of rabby Celtiberia, made a gentleman by a bushy beard and teeth brushed with Spanish urine,’³⁰ and Horace did not spare from ridicule a tremendously annoying chatterbox, of whom he desperately tries to dispense with.³¹

Nor was this exercise of free speech the exclusive preserve of members of the elite. Even the theatre and the mimes provided occasions for speaking freely on the part of actors, authors, as well as the opportunity for endorsement or rejection by the wider audience as a collective. During a performance at the Apollinarian games of 59BC the actor Diphilus, probably a freedman as his name suggests, declaimed the verse ‘to our misfortune art thou great’, pointing at Pompey who was in the audience. In the midst of general approval, with people recalling it several times, and, without any hesitation, he, certainly not a man of high rank, accused Pompey of his excessive power again by gesture.³² Pompey was indeed, at the time, a target of public attack, against whom, so it seems, anyone who wished to do so could launch his assaults. Even ‘a country townsman, smelling of his father’s slavery,’ as Valerius Maximus describes him, ‘unbridled in his temerity, intolerable in his presumption, was allowed to recall with impunity the gaping wounds of the civil wars, now overlaid with shrivelled scars. So, at that time it was at once very brave and very safe to insult Cn. Pompeius. But the considerably lowlier lot of the following individual does not permit me to deplore this at greater length.’³³ But Pompey was not the only prominent politician of the late Republic to be subjected to open criticism. Laberius, an *eques* of fiercely free speech (*eques asperae libertatis*), as Macrobius describes him, famously challenged Caesar’s power, professing ‘the need for him whom many fear to fear many’, while in his mimes Publius Syrus, an ex-slave from Syria, commented on current political circumstances that so greatly worried the main political protagonists of the time that they kept each other informed about them.³⁴

pp.149-60, esp. pp.152-3 and I. Hammar, *Making Enemies. The Logic of Immorality in Ciceronian Oratory* (Stockholm: Lund University, 2013), pp.233-7 and pp.266-71.

³⁰ Catul. 37. pp.19-20; on Egnatius see also 39. For other examples see also Catul. 16; 23; 30.

³¹ Hor. *Sat.* 1.9. See also Hor. *Sat.* 1.4 and *Sat.* 2.3.

³² Cic. *Att.* 2.19.3; Val. Max. 2.6.9.

³³ Val. Max. 6.2.8.

³⁴ Lab. *Mim.* 98–124; 125; 126 r.3. On the famous episode of Laberius see Macr. *Sat.* 2.7.1-9; on Syrus and the politicians’ preoccupations with the comments of mimes on current political affairs see Cic. *Att.* 14.2.1 (on Publius Syrus’ approval of the ‘liberators’); 14.3.2 (referring to the *mimorum dicta*); *Fam.* 7.11.2. On the relation between censorship and freedom of speech on stage see G. Manuwald, ‘Censorship for the Roman Stage?’, in Baltussen and Davis (eds.), *Art of Veiled Speech*, pp.94-114, esp. pp.102-3.

These examples, abundant in our sources, are not refuted by the famous episode concerning the return of Scipio Africanus from Numantia. Instigated by Cn. Carbo to comment on the death of Tiberius Gracchus, Scipio stated that Ti. Gracchus had been rightly killed. Responding to the uproar of the enraged people, Scipio contemptuously replied that “Let people to whom Italy is a stepmother hold their tongues,” he said. Then as shouts went up, “You won’t make me afraid of those I brought in chains now that they are loose.” The whole people had been a second time insultingly chided by a single man and (such is the honour paid to virtue) held their peace.’ Confronted by these contemptuous and trenchant words of one of the leading members of the community, the people held quiet, not because they were subdued by his *auctoritas*, thereby unable to exercise their liberty of speech. Their ‘silence’, Valerius Maximus explains, ‘was not a tribute to fear (*nec timori datum est silentium*), but because many anxieties of Rome and Italy had been brought to an end thanks to the Aemilian and Cornelian clans, the Roman populace was not free-spoken to Scipio’s free speech (*sed quia beneficio Aemiliae Corneliaeque gentis multi metus urbis atque Italiae finiti erant, plebs Romana libertati Scipionis libera non fuit*).’³⁵ Free to express their own mind without fear of those in power, as they have done on other occasions, the Roman people chose deliberately not to do so, as a sign of grateful respect for all the accomplishments that the *gentes* Aemilia and Cornelia had achieved on behalf of Rome.

In a world where private citizens could, at least in theory, speak up in assembly, where an auctioneer could address Publius Nasica and other magistrates in office with sarcastic openness and witticism, and knights could attack members of the highest nobility, it could be legitimately said that liberty of speech was indeed a reality.³⁶ As often repeated in scholarship, it was an idea that was included in the overarching notion of *libertas*, and in most cases the correspondence between *libertas* and liberty of speech is made patent by the context.³⁷

³⁵ Val. Max. 2.6.3. This episode is often discussed in Roman texts: see, for example, Cic. *de orat.* 2.106, Vell. 2.4.4. C. Rosillo-López (ed.), *Political Communication in the Roman World. Impact of Empire*, 27. (Leiden; Boston: Brill, 2017), p.40 observes how Valerius Maximus viewed the freedom of Scipio and that of the plebs on the same level

³⁶ Cic. *Plan.* 33-5.

³⁷ P.A. Brunt, *Fall*, p.314 rightly refutes the argument that the absence of a single word to indicate freedom of speech attests that the Romans did not value it. See *ThLL* s.v. *libertas*, 1314.70. Brunt is followed, amongst others, by S.G. Chrissanthos, ‘Freedom of Speech and the Roman Republican Army’, in I. Sluiter and R.M. Rosen, *Free Speech*, pp. 341-68, esp. pp.343ff. and A. Angius, *Repubblica delle opinion*, p.300; C. Rosillo López distinguishes between liberty of speech and liberty of speech in public in *Public Opinion*, p.29 and p.221.

III

Most importantly, a public statement of one's own mind could be described as either an expression of *libertas* or an act of *licentia*, depending on the application of the wider socio-cultural and ethical framework to the specific context. On the whole, in the case of satires, for example, *libertas*, when applied to describe a speech act, always had a positive value, while *licentia* often implied going beyond the acceptable norm, indicating a form of free speech that could be legitimately perceived as threatening or that incited disapproval. 'The threat of *licentia*, and the way it could confront the audience with unpleasant truths, is always lurking behind the satirist's use of their *libertas*. And satire's critics will see *licentia* only.'³⁸

In his *Facta et Dicta Memorabilia*, under the heading of *libere dicta aut facta*, Valerius Maximus states that: 'located between virtue and vice, [the liberty of a passionate spirit (*libertas autem vehementis spiritus*)] deserves praise (*laus*) if it has tempered itself beneficially, blame (*reprehensio*) if it has launched out where it should not. It is rather pleasant to the ears of the vulgar than approved in the minds of the wisest, being more often protected by the indulgence of others (*aliena venia*) than by its own good sense (*sua providentia*). But since it is my purpose to go through the parts of human life, let it be recounted with good faith on my side and judgment as itself (*propria aestimatio*) deserves.'³⁹

Liberty of speech, Valerius Maximus tells us, is placed between virtue and vice. If operating within its perceived legitimate limits, it is conceived as an ability with a positive moral force; if, on the other hand, it oversteps its recognised boundaries, it is rather thought as a faculty of morally deplorable descriptive power. These boundaries are, in part, established, enforced and regulated by the audience. Rather than an intrinsic sense of self-regulation (*propria aestimatio*), it is the audience's indulgence (*venia*) that makes utterances into either free expression of one's mind, which thereby describe a virtuous situation, or into insulting slanders, which damage somebody's reputation, and shed a negative moral light on the described act.⁴⁰ The parameters that in this context establish the distinction between *libertas* and *licentia* are determined by the understanding of the *mos maiorum*, the customs of the ancestors and its related values, on the part of the audience, understood as the wider community at large. This set of social, cultural,

³⁸ I. Sluiter and R. M. Rosen, *Free Speech*, p.17.

³⁹ Val. Max. 6.2. *praef.* See C. Steel in C. Steel and H. Van der Blom (eds.), *Community and Communication: Oratory and Politics in Republican Rome* (Oxford University Press, 2013), pp.151-155, who discusses the case of Pompey and Mancina.

⁴⁰ Val. Max. 6.2.3 refers to the patience of the Roman people when confronted by the trenchant remarks of P. Scipio Africanus.

and political norms that regulate both the public and the private sphere was based, the ancient theorists tell us, on *consensus multorum*, which transformed an individual disposition, personal judgment or choice (*mos*) into a *consuetudo*, a common usage shared by the whole community.⁴¹ As these norms and values were in constant flux, the establishment of one specific model of ancestral behaviour and its related values depended on the *auctoritas* of the individual or group who proposed it as well as on the people, that is the largest section of society, who gave their consensus on this model and thereby transformed it into *consuetudo*. The *auctoritas* of the individual who performs a speech act delimitates a specific socio-cultural attitude about the modalities and extent of free speech, and, our sources tell us, is essential to the elaboration of the wider social *consensus* around them. Thus, when discussing the figure of the adviser, Quintilian states that ‘the personality (*persona*) of the adviser also makes a lot of difference. If his illustrious past, his noble family, his age, or his fortune raises expectations, we must take care that what is said is not out of keeping with the man who says it. The opposite situation requires a humbler tone. For what is *libertas* in some is called *licentia* in others, and, while some need nothing but their personal authority (*auctoritas*), others can barely protect themselves by sound reasoning (*ratio*).’⁴²

Thus, for example, the magistrate of Placentia, M. Catricius was inflamed by *libertas*, Valerius Maximus tells us, when he resisted the Roman consul’s threatening request of hostages with a witty and, even arguably, disrespectful, response: if the consul had many soldiers with whom he could attack, the Placentian magistrate, on his part, had many years. The audience, in this case the Roman legions, ready to attack at the consul’s command, ‘stood amazed (*obstipuerunt*) as they beheld such sturdy remnants of old age. Carbo’s ire having very little material on which to vent its fury, since it would take away but a very meagre life-space, collapsed upon itself.’⁴³

On the other hand, if men of all sorts, and in particular those of low birth, attacked men of great *auctoritas*, their mockery is qualified as *licentia*.⁴⁴ Although Pompey tolerated even the attacks of people of low birth, his forbearance exposed him to further criticisms (*maledicere*). In his altercation against L. Libo before the censors, as mentioned above, Helvius Mancina of Formiae, son of a freedman and a very old man, launched his attacks against Pompey with an

⁴¹ V. Arena, ‘Informal Norms, Values, and Social Control in the Roman Participatory Context’ in D. Hammer (ed.), *Companion to Greek Democracy and the Roman Republic: A Comparative Approach* (Chichester, U.K.- Malden, MA: Wiley-Blackwell, 2014), pp.217-238.

⁴² Quint. *Inst. Or.* 3.8.48.

⁴³ Val. Max. 6.2.10.

⁴⁴ Val. Max. 6.2.4..

intolerable attitude (*intolerabilis spiritus*) and at the Apollinarian games, on at least two occasions, as discussed earlier on, Diphilus accused Pompey of excessive power, displaying an attitude that Valerius Maximus describes as effrontery (*petulantia*), a far cry from the positive exercise of *libertas* of speech, exercised by men of *auctoritas*.

During the course of the Roman Republic, the regulation of the *regimen morum* was guaranteed by the censors, magistrates in charge of the *cura morum*, whose remit was the preservation and control of the traditional Roman values.⁴⁵ They were in charge of the *mores* of the whole community, and their sphere of intervention was so extensive that, alongside military discipline and magisterial abuse, it also included interference in private life; as Dionysius of Halicarnassus famously said, the censors seemed to exercise their authority even in the bedroom of Roman citizens.⁴⁶ Although the censors did not operate according to an established list of prescribed acts, they intervened against any deed that seemed contrary to ‘the advantage of the state’ and the well-being of the whole community, as also attested by the oath they took at the beginning of their mandate.⁴⁷ Those acts that fell under this category were, of course, open to interpretation and included those utterances that, perceived as inappropriate, were indeed conceived as acts of *licentia* rather than of *libertas*. The censors, Gellius tells us, reduced a man to the rank of an *aerarius*, no longer registered in his own century, but liable to pay the tribute, because in response to his question whether he had a wife, he joked that he indeed had a wife, but not the one he wanted. ‘The censor, then,’ Gellius tells us, ‘reduced him to a commoner (*aerarius*) for his untimely quip, and added that the reason for this action was a scurrilous joke made in his presence (*causamque hanc ioci scurrilis apud se dicti subscripsit*).’⁴⁸ The classification of this speech act as an act of license that needed to be punished was determined by the personal judgment of the censor, who did not deem it fitting the *gravitas* and *auctoritas* of his high magistracy. In a similar vein, citing a passage from Book 7 of the *Memoirs* of Sabinus Masurius, Gellius reports the episode that took place under the censorship of Scipio Nasica and Marcus Popilius. When, in response to the question of why he took better care of himself than of his animal, the knight replied ‘I take care of myself, but Staius, a worthless slave, takes care of the horse.’ This answer, Sabinus Masurius seems to report, ‘did not seem sufficiently respectful (*visum est parum esse reverens responsum*), and

⁴⁵ Astin 1988.

⁴⁶ Dion. Hal. 20.13.2-3.

⁴⁷ Zon. 7.19.

⁴⁸ Gell. 4.20.5.

the man was reduced to a commoner, according to custom (*ut mos est*).⁴⁹ According to the *mos*, as interpreted by the censors, the utterance performed by the knight was judged disrespectful towards the censors, an act of licence, that earned the perpetrator of excessive free tongue a harsh punishment. It is important to observe that the *nota censoria* did not procure any permanent damage to a politician's career, as an individual could be reinstated to his previous status by the next censors, nor was it a legal sanction. Its effects were rather based on the consensus of the wider community: if the community at large had not acknowledged the complex of civic norms applied by the censors as core values of the society, the censors' action would have been void of any value.⁵⁰ Nor did the general edict of the praetor seem to alter this framework. The praetor, who gave a suit against anyone who committed or instigated *convicium*, originally understood as the concerted shouting of insults and later as chanting or bawling in public, did so if he judged that the insults had acted *adversos bonos mores*.⁵¹

Far from being a matter of subjective right, the ability to speak one's own mind was a moral quality, which was positioned between two opposites, liberty of speech and licence. Although, as Rachel Langland splendidly shows, these exemplary episodes preserved in Valerius Maximus, to which one can add those attested in Gellius, functioned as moral tools whose purpose was to mediate between the universal of moral rules and the particulars of a specific historical context, the issue of liberty of speech highlights more specifically the rhetorical nature of Roman values.⁵²

⁴⁹ Gell. 4.20.11. See also Liv. 27.11.12 about L Metellus, expelled from the Senate in 209 while ranking as *quaestorius*. 'Then the rest of the *album senatorium* was made up, with eight men made *praeteritus*, among whom was M. [sic – L.] Caecilius Metellus, notorious as having advised the desertion of Italy after the disaster at Cannae.' Thanks are due to Lee Moore, who drew my attention to these cases. In his unpublished dissertation (p. 231), Lee Moore raises the hypothesis that 'M. Cornelius Maluginensis, expelled from the Senate in 174 while ranking as praetorius, might have suffered this because of a joke he had made 6 years prior.' Cf. Gell. 10.6 on the remarks of Claudia, the daughter of Appius Claudius Caecus, at the end of the plays where she had been a spectator. The *plebeian aediles* Gaius Fundanius and Tiberius Sempronius imposed a fine upon her because of her arrogant language against the people, which they perceived as damaging 'the dignity of Roman conduct.' It is probable that the aediles could exercise this form of censorship as the magistrates responsible of *ludi* and their public order.

⁵⁰ G. Clemente, 'I censori e il senato: i mores e la legge', *Athenaeum* 104 (2016), pp.446-500.

⁵¹ Dig. 47.10.15.2-12; A.W. Lintott, *Violence in republican Rome* (Oxford: Clarendon, 1968), 8-10 and on general edict *de iniuriis* Gaius 3.220; Dig. 47.10.15.2-12 and 47.10.25ff.

⁵² R. Langlands, 'Roman Exempla and Situation Ethics: Valerius Maximus and Cicero's de Officiis', *JRS* (101) 2011, pp.100-122. On the relation between ethics and rhetoric see Ead., *Exemplarity Ethics in Ancient Rome* (Cambridge: Cambridge University Press, 2018), pp.109-11.

If Roman exemplarity acknowledges the proximity between virtues and vices and invites learners to reflect about the boundaries between them, functioning as ‘situation ethics’, the neighbouring nature of these moral qualities had also a function in rhetorical arguments as it could also be exploited, as rhetorical treatises show, to persuade the audience of the validity of one’s own cause.

As attested by these texts of the late Republic and early empire, this technique, called *distinctio*, or, in Greek, *paradiastole*, allows for re-describing an action by adopting the opposite evaluative term so as to shed a different moral light on the action under discussion and win the audience over.⁵³

Discussing the *genus deliberativum*, the author of the *Rhetorica ad Herennium* states that one has to show that the virtues wielded by one’s opponent consist of qualities contrary to those adopted, so ‘if it is at all possible,’ the author says, ‘we shall show that what our opponent calls justice is cowardice, and sloth, and perverse generosity; what he has called wisdom we shall term impertinent, babbling, and offensive cleverness (*quam prudentiam appellarit, ineptam et garrulam et odiosam scientiam esse dicemus*); what he declares to be temperance we shall declare to be inaction and lax indifference; what he has named courage we shall term the reckless temerity of a gladiator.’⁵⁴ A very similar list of examples of neighbouring virtues and vices, to which, Cicero warns in the *Partitiones Oratoriae*, we should pay attention so as not to be deceived by our adversaries, includes precisely a certain way of speaking: as for the author of the *Rhetorica ad Herennium prudentia*, wisdom, that, given the context seems to include wisdom of spoken words, could be passed for an *inepta, garrula et odiosa scientia*, a foolish, chatty and offensive knowledge, so for Cicero *prudentia disputandi*, wise ability to discuss, could be passed for *concertatio captatioque verborum*, a “controversy and feint of words” and *vis oratoria*, the “powerful force of oratory”, for *inanis quaedam profluentia loquendi*, a “certain empty flux of speaking.”⁵⁵ In his rhetorical treatise, discussing the peculiar traits of the unskilled orator, Quintilian states that such an orator tends frequently to be rude, and prefaces this point as a way of explanation by observing that ‘moreover, there is a close connection between virtues and vices, which enables rudeness to pass for frankness, rashness

⁵³ The importance of this classical rhetorical figure for early modern authors has been brought to the fore by Q. Skinner, *Reason and Rhetoric in the Philosophy of Hobbes* (Cambridge: Cambridge University Press, 1996) and more recently revisited in Id., *From Humanism to Hobbes: Studies in Rhetoric and Politics* (Cambridge: Cambridge University Press, 2018), esp. pp.89- 117.

⁵⁴ Rhet. Her. 3.3.6.

⁵⁵ Cic. *Part. Or.* 2.23.81.

for courage, and extravagance for abundance'. Now the unskilled speaker is more openly and more frequently rude, even endangering his clients, and often also himself. But this itself earns good opinions, because people are only too pleased to listen to what they would not have been prepared to say themselves.⁵⁶ This is also applicable, Quintilian continues in Book 5, in the case of judicial oratory. 'The point here', he argues, 'is that, if he [our opponent, in this case the accuser] has spoken ineffectively, his actual words should be quoted; if he has used energetic and vigorous language, we should restate the facts in our own milder terms. (Cicero does this in *Pro Cornelio*: "He touched the document.") This can be combined with a defence move; for example, if we have to defend a debauchee, we can say "He has been charged with having a somewhat liberal life-style." Similarly, a mean man can be called "thrifty," a slanderer "outspoken".⁵⁷

As attested by these examples, among the standard instances of *paradiastole* that recur in Roman rhetorical texts, the other instance that is often repeated is that of the slanderous utterances that can be re-described as frank statements, an expression of free speech. As Quintilian himself points out, this technique, emphasised almost excessively by Cornelius Celsus, found full elaboration in Aristotle: 'Aristotle makes another point,' Quintilian tells us, 'which Cornelius Celsus later stressed almost too much, namely that, as virtues and vices are, in a way, next door to each other, we should be prepared to replace words by their nearest neighbours, calling a foolhardy man brave, a prodigal generous, a miser thrifty. The procedure also works the other way. It is true that the real orator, the good man, will never do this, unless led into it by the public interest.'⁵⁸

As Quintilian explains in Book 8, rationalising the theory of the *paradiastole*, no one in Rome truly thought that liberty of speech signified the same thing as the liberty of slander, but rather that a certain action in a certain context could be described by one as the exercise of free speech and by another as sheer slander.⁵⁹ Whether the orator who applies this re-description is successful will depend on the audience and their moral and social norms.

⁵⁶ Quint. *Inst. Or.* 2.12.4. Cf. Quint. *Inst. Or.* 4.2.75-7.

⁵⁷ Quint. *Inst. Or.* 5.13.27.

⁵⁸ Quint. *Inst. Or.* 3.7.25; Cornelius Celsus 7fr. Marx. On Aristotle see Arist. *Rhet.* 1.1367a.29-1367b.30, where he explains how this nature of virtue enables one to denigrate virtuous actions by assigning them the names of neighbouring vices and, vice versa, to justify moral actions by assigning them the names of neighbouring virtues, so that even the choleric man may be passed for open and frank Cf. Arist. *EN* 2.6. (1106b36-1107a5). Langland, *Exemplary Ethics*, p.125, claims that Roman exempla are often positioned on the boundaries between virtues and their related vices to encourage ethical reflection.

⁵⁹ Quint. *Inst. Or.* 8.6.36.

Since in the late Republic liberty of speech was understood as a quality with a positive descriptive force, it could be adopted in rhetorical arguments to win the audience over to one's cause in two fashions: first, as discussed above, to place the action under dispute in a different moral light; second, to enhance the audience's emotions towards the concerned action, which, as a result of a successful re-description, should either inspire an afresh acquired sympathy or a newfound outrage.

Thus, the author of the *Rhetorica ad Herennium* refers to frankness of speech (*licentia*), that is 'when talking before those to whom we owe reverence or fear, we yet exercise our right to speak out', as a figure of speech (*exornatio*), 'which can be handled with pungency, which, if too severe, could be mitigated or with pretence' to render it more agreeable to the audience.⁶⁰ The aim of this figure, as Quintilian explains, is to intensify emotions, and some people, he tells us, call this figure *exclamatio*.⁶¹ If an utterance is described as an exercise of liberty of speech, not only will it be evaluated in positive terms, but it will also solicit a positive emotional response towards it and the whole affair involved.

From the above discussion, it follows that an utterance is an action that can have a positive moral quality, thereby being described as an exercise of liberty of speech, or rather a negative moral quality, thereby being described as an act of slander. Because of its very nature, therefore, liberty of speech in Rome could not have been the subject of legal protection.

In the late Republic, according to an account informed by Stoic philosophy, the formulation of an utterance was conceptualised as the ability that distinguishes human beings from the wild beasts. This ability, as Cicero clearly states, fulfils two essential functions in society: first, it unites human beings in society together; second, it allows men to learn from one another. According to this account, Nature provides human beings with *ratio*, which manifests itself in

⁶⁰ *Rhet. Her.* 4.36.48-37.50, where the reference to a *ius nostrum* does not denote the existence of a legal right to speak freely, but rather, as clear from the context and the labelling of the issue as *licentia*, the exercise of a natural *facultas* that belongs to human beings. See *ThLL* s.v. *licentia*, 7.2.1354.55 for the positive meaning of *licentia* (as related to *licere*) attested in the Republic alongside the well-known notion of *intemperantia*. See also Rufin. p.33: *parrhesia, oratio libera, quam Cornificius licentiam vocat*. On this point see discussion in Scarpat, *Parrhesia greca*, p.133 whose discussion of *licentia* as objective liberty to act or speak is not convincing. Cf. Cic. *Att.* 9.2a.2 (=169SB): talking about Pompey, Cicero states that 'furthermore, he knows that a complaint from him on that subject would be out of court (*deinde etiam scit ἀπαρησίαστον esse in ea causa querelam suam*).' On the adjective see Pol. 22.12.2.

⁶¹ Quint. *Inst. Or.* 9.2.27. See also Quint. *Inst. Or.* 9.3.99 and Rutilius 2.18.

the faculty of speech. It follows that speech is the rational ability that distinguishes human beings from animals and that enables a ‘life of sociable rationality or rational sociability.’⁶²

As Cicero argues in the *de re publica*, it was the *vinculum sermonis* that brought society together, ‘[Reason] likewise, when it found men uttering unformed and confused sounds with unpractised voices, separated these sounds into distinct classes, imprinting names upon things just as distinguishing marks are sometimes placed upon them, thus uniting the race of men, solitary before, by the pleasant bond of communication by speech.’⁶³ Developing this point in the *de officiis*, he then states that ‘it seems we must trace back to their ultimate sources the principles of fellowship and society that Nature has established among men. The first principle is that which is found in the connection subsisting between all the members of the human race; and that bond of connection is reason and speech (*eius autem vinculum est ratio et oratio*), which by the processes of teaching and learning, of communicating, discussing, and reasoning associate men together and unite them in a sort of natural fraternity. In no other particular are we farther removed from the nature of beasts; for we admit that they may have courage (horses and lions, for example); but we do not admit that they have justice, equity, and goodness; for they are not endowed with reason or speech (*sunt enim rationis et orationis expertes*). This, then, is the most comprehensive bond that unites together men as men and all to all; and under it the common right to all things that Nature has produced for the common use of man is to be maintained.’⁶⁴

However, not only has the faculty of speech enabled the formation of society and allowed its functioning by persuading people and curbing excessive, potentially destructive, passions, but also, as Cicero makes Balbus argue in the *de natura deorum*, it facilitated the learning and teaching that empowered a community to operate properly: ‘then take the gift of speech, the queen of arts as you are fond of calling it—what a glorious, what a divine faculty it is! In the first place it enables us both to learn things we do not know and to teach things we do know to others; secondly it is our instrument for exhortation and persuasion, for consoling the afflicted and assuaging the fears of the terrified, for curbing passion and quenching appetite and anger;

⁶² J. Allen, ‘The Stoics on the origin of language and the foundations of etymology’, in D. Frede and B. Inwood (eds.), *Language and Learning* (Cambridge: Cambridge University Press, 2005), p.27. On the role of *logos* in building a society M. Schofield, *The Stoic Idea of the City* (Cambridge: Cambridge University Press, 1991), p.67 ff, esp. p.72.

⁶³ Cic. *rep.* 3.3. See also Cic. *fin.* 2.45. See also the reference to the ability to speak in the context of the discussion of the power of eloquence at Cic. *de inv.* 1.4.5. Cf. Cic. *De orat.* 1.

⁶⁴ Cic. *off.* 1.50-1. See also Cic. *off.* 1.12. On the role of eloquence that enabled the persuasion of the people to *ratio* and the foundation of society see Cic. *de inv.* 1.1-2.

it is this that has united us in the bonds of justice, law and civil order, this that has separated us from savagery and barbarism.’⁶⁵

Speaking was, therefore, considered a distinctive ability of human nature, which could gain a positive or a negative moral quality according to how its use was judged in relation to the context.⁶⁶

The important insight that these texts show is that in Rome liberty of speech was understood as a virtuous quality, closely bordering its correspondent vice, rather than an action or field of actions that should be protected by law. One does not legislate on a human quality of speaking freely, no more than one does not legislate on the quality of being courageous.

IV

To be sure, in the course of the Republic it is possible to observe the implementation of laws and legal proceedings that in both private and public spheres protected the individual or the community (although the latter is rather controversial) against slander. These legal means, which should be rightly understood as limiting the liberty of speech in Rome, aimed at protecting the receiver of the attacks, as opposed to the right of an individual to express freely his opinion.

The XII Tables, the *actio de iniuria*, or the *lex Cornelia de iniuria et maiestate*, despite their varying degrees of historical reliability, all potentially show an attempt to protect citizens against slanderous attacks, which, in the case of criminal proceedings such as the *quaestio pro publica utilitate*, could be constructed as a defence of those in power.⁶⁷

⁶⁵ Cic. *de nat. deorum* 2.148-9.

⁶⁶ Cic. *leg.* 1.26-7: having listed the gifts of Nature to humans, such as *celeritas* of the mind, the senses, a bodily form (*figura corporis*), upright posture, and facial expressions, he adds ‘I will pass over the special faculties and aptitudes of the other parts of the body, such as the varying tones of the voice and the power of speech, which is the most effective promoter of human intercourse (*omitto opportunitates habilitatesque reliqui corporis, moderationem vocis, orationis vim, quae conciliatrix est humanae maxime societatis*).’

⁶⁷ XII Tables, 8.1 Crawford. On the meaning of *occentare* see Fest. p.191L s.v. *occentassint* with discussion in Momigliano, *Review Discussion* of ‘L. Robinson, *Freedom of Speech*’, pp. 120-124. Cf. Cic. *Tusc.* 4.4. On the procedure *de iniuria* see Andrew Borkowski and P. du Plessis, *A textbook Roman Law*, (Oxford: Oxford University Press, 2010, 4th ed.), pp.338-42. For its historical consideration see A. Angius, *Repubblica delle opinioni*, p.93 ff. See the famous cases of Accius and Lucilius Rhet. ad Her. 1.24; 2.19. On the famous case of the poet Naevius see Gell. 3.3.15; Naev. *Pall.* 72-74 r.3 = 69-71 W.; *Pall.* 113 r.3 = Inc. 27 W.; and the cautionary note of G. Manuwald, ‘Censorship’, pp.96-7 who considers the possibility of these verses as utterances of comedy slaves, with a metaliterary dimension. On the *lex Cornelia*

However, although the existence of legal means that limit the liberty of speech is certainly intrinsically related to the issue of the actual exercise of free speech, it should not be confused with the existence of a right to speak freely.

If liberty of speech could easily be interpreted as irreverent *licentia*, this potential shift renders manifest that, therefore, liberty of speech was not conceived as a right, since speaking up could not otherwise have been considered as a sign of impertinence. As Konstan argues in his study on the Greek notion of *parrhesia*, ‘the exercise of a right cannot be considered an abuse of the right. *Parrhesia* in the democracy ought to be wholly positive.’⁶⁸

It appears evident that the Roman citizens of the Republic could indeed speak freely and, at least in theory, not only men of *auctoritas* were entitled to do so. Although speaking freely appears to be conceived as a quality that is more appropriate to men of *auctoritas*, it does not follow that, as Kloesel and Momigliano suggest, liberty of speech was mainly a matter of *auctoritas*. As the historical reconstruction above shows, although unprotected by law, the Roman people at large was endowed with the faculty to speak their own mind. This could indeed have been frowned upon, but not forbidden – as a punishment, the thief or the squanderer were deprived of their possibility to address assembly.

However, this power to speak freely was not a matter of right, but rather the exercise of a personal ability, constitutive of human nature, that was regulated by contemporary social norms.

It follows that the question concerning the possibility of private citizens to address a *contio* in terms of either the exercise of a civic and political right proper of Roman citizens or a discretionary concession by the presiding magistrate is ill posed. Roman citizens, I have argued, did not have a *right* to speak freely; they had an ability to do so, which, on the whole, they exercised, albeit, of course, within the legal limitations of the period. The exercise of this ability was considered an act of free expression or, rather, of impudent slander according to circumstances judged by contemporary social norms. In other words, speaking freely was not a matter of right, because it was the positive moral quality that characterised a natural ability

de iniuria et de maiestate (Dig. 47.10.5) and its content see P.A. Brunt, *Fall*, pp.316-7, who considers only the *lex Cornelia de maiestate* of historical nature; *contra* R.E. Smith, ‘The law of libel at Rome’, *Classical Quarterly* 1 (1951), pp.169-79; A.D. Manfredini, *La diffamazione verbale nel diritto romano* (Milano: Giuffrè, 1979), pp.223-45 and most recently C. Bur, *La citoyenneté dégradée: une histoire de l'infamie à Rome (312 av. J.-C. 96 apr. J.-C.)* (Rome: École française de Rome, 2018), pp.338-40. See also Cic. *rep.* 4. 11-12 on the role of the censors rather than the theatre stage as the appropriate locus to exercise checks on abusive language.

⁶⁸ D. Konstan, ‘The Two Faces’, p.3.

of human beings, and thereby it could not have provided a field of legislation. It was not the ‘straight talk test’ that modern Republicanism requires for the establishment of a free and just society.

This essay is an analysis that attempts to solve an historical problem posed by the reality of the Roman Republic: the reasons why the Romans of the Republic did not develop a right to free speech. It does not aim to find in ancient Rome solutions that could directly be applied to solve contemporary problems.⁶⁹ It does, however, aim at identifying, with the greatest historical accuracy possible, a past conceptualisation of and attitude towards the issue of liberty of speech, an intercultural value that takes different forms in different societies at different times.

By doing so, it shows that in the Republic the Romans did indeed hold a way of thinking about liberty of speech, which is distinctively different from our current, almost intuitive, way of conceptualising it. By stripping this ancient notion of its historical specificities and considering its inherent logical propositions, it is possible to observe that for the Romans, liberty of speech belonged to the realm of ethics: it was a moral quality sustained by contemporary social norms and was not subjected to legislation. Speaking, the Romans claimed, is what distinguishes us from wild beasts, and we have, therefore, the moral duty to enact it in a positive moral manner, that is to speak freely, without recurring to laws that inevitably end up protecting the interests of a group or groups and their specific speech regimes.⁷⁰

By looking at the Roman Republic, we can perhaps think again about our way of conceptualising the idea of liberty of speech and consider the importance of a virtuous attitude in the exercise of our natural ability to speak.

⁶⁹ For this approach see V. Arena, ‘Ancient History and Contemporary Political Theory: The Case of Liberty’, in V. Arena (ed.), *Liberty: An Ancient idea for the Contemporary World? Ancient Liberties and Modern Perspectives*, Special issue of the *Journal of the History of European Ideas* 44.4 (2018), pp.641-57.

⁷⁰ A. Julius, *Shameless Authors* (forthcoming).