

Media Freedoms and Media Standards

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Since the promulgation of the human rights Declarations of the mid twentieth century, 'freedom of expression' has become the generic way of referring to the speech rights not only of individuals but of the media. One unintended consequence has been a widespread tendency to favour accounts of media freedoms that focus on rights to speak, write and publish content, but take little account either of the power of the media or of the needs of their audiences. A more plausible approach to the justification of media freedoms would focus on communication rather than on expression of content, would take account of the power and interests of those who communicate, and would take the needs of readers, listeners and viewers seriously. A focus on norms for communication, including norms for adequate communication of truth claims and commitments, can support a stronger and better account of the speech rights and wrongs, both for individuals and for the media.

1. Introductory Thoughts

The themes of this lecture are more topical than could have been foreseen, since Lord Justice Leveson is about to publish his report into the events and implications of the phone hacking scandal. His terms of reference are both retrospective and prospective. His retrospective task is that of

Investigating the extent of unlawful and improper conduct by News International or other newspaper organisations,

and to undertake a more general inquiry into 'the culture, practices and ethics of the press', that covers press relations with police and politicians.

His prospective and even more difficult task is to make recommendations

for a new and more effective policy and regulatory regime that supports the integrity and freedom of the press, the plurality of the media and its independence from Government.

The arguments that I shall set out today bear on the second of these tasks.

2. The Right to Freedom of Expression

Let me begin by citing authorities, not because arguments from authority carry weight in all contexts—often they do not or should not—but simply because very many contributors to current debates hope to settle the basic issues merely by appealing to certain authorities. Their confidence is in my view misplaced, not only because arguments from authority offer limited justifications, and because the favoured authorities offer no more than indeterminate guidance, but also because those authorities focus largely on the rights to speak, write and publish content, but take little account either of the power of the media or of the needs of their audiences.

The popular authorities I have in mind are the great post-war declarations of rights, UDHR and ECHR (in parallel debates in the US the authority invoked would be the *First Amendment* to the US Constitution: *Congress shall make no law abridging the freedom of the press*).

Both of the human rights documents of the mid twentieth century proclaim a universal right to *freedom of expression*. The ECHR approach to freedom of expression, like its approach to many other human rights, is more thoughtful and articulate than that of UDHR, and it is instructive to look at its formulation of rights to *freedom of expression* in Article 10.

Article 10.i of ECHR starts with a ringing assertion that

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

However, article 10.ii – far less often read or cited—qualifies Article 10.i by stating that

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

In short, the most cited contemporary authority that proclaims rights to freedom of expression does *not* assume that this is an unconditional right, or that it may not be restricted by legislation and regulation.

So much for any hope that a mere appeal to the human rights documents can show just what rights to freedom of expression require, let alone that it can show that freedom of expression should be wholly unrestricted or unregulated—and of course we have plenty of legislation that regulates certain sorts of speech acts. The Declaration proclaims a *qualified* right to freedom of expression, but leaves it to legislatures and to courts to determine which qualifications and restrictions are and are not needed and acceptable at a given time and place, with its particular opportunities and constraints. To work out what sorts of reasons

might be invoked to show which restrictions are acceptable we have to do more than appeal to authority. We need to work out how the idea of freedom of expression can best be interpreted for a given context.

3. Rights to Self-Expression

We often meet suggestions that the best way to interpret the contemporary idea of *freedom of expression* is to turn to John Stuart Mill's arguments that we may curtail *rights of self-expression* only if they are likely to harm others. I think this move will lead only to disappointment.

In Ch I of *On Liberty*¹ Mill argued that individuals need strong rights of self-expression if we are to recognise 'the permanent interests of man as a progressive being', and respect individuals' 'sovereignty over their own minds and bodies'. Respect for this 'sovereignty' means that when individuals act in ways that do not harm or threaten harm to others, their actions should not be restricted. Mill famously concluded that

...the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of any of their number, is self-protection.

The application of this principle enables Mill to argue for strong rights of self-expression *for individuals*, since individual acts of self-expression *for the most part* do not harm or risk harm to others. Individual acts of self-expression even when (for example) unintelligible, untrue, or cavalier about evidence may do little harm to others, although they often harm the speaker's reputation. By contrast, when individuals express themselves in ways that menace others or destroy their reputations, that defraud or that incite, their action is not classified as acceptable self-expression.

However, the application of the harm principle to public policy as opposed to individual action is not easy. It is one thing for a judge, considering a particular speech act performed in a particular context, to consider its effects, but a different matter to make Utilitarian calculations of the likely effects of *types* of action. Yet many liberals who do not think of themselves as Utilitarians regularly suggest that the harm principle can be used to guide the formulation of public policy. Their conclusions vary. Today it is widely claimed that *offensive* speech should be permitted², but that *defamatory* and *provocative* speech should not. Meanwhile we have criminalised *hate* speech, and there is disagreement about how we

¹ John Stuart Mill (1859) *On Liberty*, in *On Liberty and other writings*, ed. Stefan Collini (Cambridge: Cambridge University Press).

² Cf. "What is freedom of expression? Without the freedom to offend, it ceases to exist. Without the freedom to challenge, even to satirise all orthodoxies, including religious orthodoxies, it ceases to exist. Language and the imagination cannot be imprisoned, or art will die, and with it, a little of what makes us human" Salman Rushdie, *Imaginary Homelands*; more recently Stefan Collini, *That's Offensive! Criticism, Identity, Respect*, Kolkata, London and New York: Seagull Press, 2011.

should view *insulting* speech. There are endless debates about what should count as defamatory, or insulting, or provocative, or as an expression of hatred. When we reflect on the assumptions that lie behind the harm principle, and the calculations that its application would actually require, I think that we have to conclude that it is unlikely to resolve these disagreements.

In short, I doubt whether Mill’s harm principle is of much use in trying to draw sharp distinctions between the likely consequences of various *types* of speech act. Some instances of certain types of speech may be harmless; others may risk or lead to great harm. Whereas the courts can often reach conclusions about a *particular* speech act performed in a *particular* situation, it is hard to generalise across *types* of action and therefore hard to make use of the harm principle to show that, for example, *offensive* or *insulting* speech is permissible or that *defamatory* or *hate* speech should be prohibited. Cases differ.

Indeed, even before we embark on the perils of Utilitarian calculation, it will often prove impossible to reach agreement on the classification even of *particular* acts that some think offensive or provocative, or indeed an example of hate speech. For example, consider the infamous Danish cartoons controversy³, where some—including the editor of the newspaper *Jyllens Posten*, who published the cartoons in order to challenge the self-censorship of which he thought his fellow citizens guilty—argued that the cartoons might be offensive, but that their publication was permissible,⁴ while others claimed variously either that such offense should be prohibited or that what had been published was not merely offensive but far worse, and should have been prohibited for those further reasons. At the end of the story the magnitude of the resulting harms was huge. Many hundreds were dead. But the contributions of many different agents to these serious harms had become impossible to disentangle. This tragic story suggests to me that the harm principle offers surprisingly little practical guidance for policy formulation.

4. Individuals and Institutions

Even if the harm principle *could* be put to good use in working out the limits of individuals’ rights to express them, this would, I think, have limited relevance to media freedoms. Mill’s argument applies to beings who can express themselves: but organisations, including media organisations, are not in the business of self-expression: they are not *selves* in the relevant sense.

So Mill’s argument that individuals should enjoy freedom of self-expression so that they can express their individuality in ways that are harmless to others cannot be transposed to justify the proper configuration of speech rights for powerful organisations, where publication does not express individuality and may not generally be harmless.

³ For the facts see Jytte Klausen *The Cartoons that Shook the World*, New Haven, Conn: Yale University Press, 2009. Statistics on deaths and injuries attributable to the publication of the cartoons are given on p.107.

⁴ Fleming Rose in Times.

Indeed, I know of no general argument that shows that we should not restrict the speech of powerful institutions, and note that we often do so. Corporations that invent their accounts are not seen as expressing themselves: the phrase 'creative accounting' is not praise but sarcasm. Governments that lie are widely condemned. Public bodies that fail to disclose information (those lacking in transparency) are now widely criticised. The speech of public bodies and professionals is regulated in very many ways, and often for good reason. It is, I think, simply a mistake to see the speech of the powerful as *self-expression*.

As I see it, the phrases *freedom of self-expression* and *freedom of expression* are what is known as *false friends*, and we cannot hope to justify a determinate conception of media freedom by borrowing from arguments for individual rights to freedom of self-expression. Where then can we turn?

5. Speech Rights and Truth-Seeking

Many of the earlier arguments for speech rights focused neither on self-expression nor on generic rights to freedom of expression, but more narrowly on the need to protect speech for the sake of discovering truth. This argument was nobly put by Milton. It was endorsed by Mill in passages that are quite separate from his arguments for individual rights of self-expression. It has been reiterated by many others.

Milton's forthright and memorable version of this argument is rhetorically grand, but his argument has defects:

... though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?⁴

Like many later writers, Milton here suggests that truth can be revealed merely by allowing false claims to *contend* with true claims. If we seek truth we should permit the utterance and publication of claims that may be false so that they can encounter *confrontation*, *competition* or *conflict*, and so that truth will emerge victorious. Mill too used this line of thought in some of his other arguments for free speech, and claims that 'the clearer perception and livelier impression of truth, [will be] produced by its *collision with error*'.⁵ The same thought about the capacity of truth to win through in contests can also be found in twentieth century arguments in favour of a so-called *marketplace of ideas*⁶.

However arguments for freedom of speech and publication that invoke these metaphors of conflict and triumph are simplistic. They ignore the *ethical and epistemic norms and*

⁵ John Stuart Mill (1859) *On Liberty*, in *On Liberty and other writings*, ed. Stefan Collini, Cambridge: Cambridge University Press.

⁶ "free trade in ideas" within "the competition of the market" Justice [Oliver Wendell Holmes, Jr.](#)'s dissent in [Abrams v. United States](#), 250 U.S. 616, 630 (1919); "marketplace of ideas" opinion by Justice [William J. Brennan, Jr.](#) from 1965

disciplines that are actually required for truth-seeking in specific domains. Truth-seeking is demanding,⁷ and discovering truth needs more than confrontation or assertion. We have only to think of the ways in which truth-seeking has to be organised and disciplined when it is important to be able to distinguish what is true from what is false. As Bernard Williams pointed out, “...in institutions dedicated to finding out the truth, such as universities, research institutes, and courts of law, speech is not at all unregulated.” When truth and falsity matter to us, we need to respect the relevant ethical and epistemic norms.⁸ Procedures of inquiry that fail to seek or respect relevant evidence, to aim for accuracy, to take account of arguments, to provide appropriate qualifications, or that are less than honest, do not help the discovery of truth.

Today arguments for the importance of testing truth claims against evidence and argument are perhaps most often found in discussions of science and scientific method: if science works by conjecture and refutation we must permit the publication of content that may be false, so that we can subject it to scrutiny. But science is not advanced by mere confrontation or conflict between differing claims. It requires both those who conjecture and those who seek to refute to respect numerous and demanding disciplines for seeking, assessing and integrating evidence and argument. Boiled down to essentials, arguments from the needs of truth-seeking amount to claims that unless we insist on appropriate *disciplines of truth-seeking*, we will not be able to check or challenge one another’s claims or assertions, and that this will hamper the discovery of truth.

However, there is a second and quite separate reason why appeals to the needs of truth-seeking cannot offer an adequately general justification for media freedoms. This second limitation arises because a great deal of media speech does not aim at truth. Short stories and puzzles; opinion pieces and horoscopes; artistic and literary content have other aims. So appeals to the needs of truth-seeking cannot provide a *general* vindication of media freedoms.

Where media speech aims at truth, whether in routine reporting (sports results, stock market quotations) or in genuine investigative journalism, the best arguments for media freedoms are likely to require disciplines of truth-seeking that are analogous to those that are essential for other sorts of inquiry that aims at truth. Consequently arguments from the needs of truth-seeking—including the needs of investigative journalism—will demand that the media observe the relevant disciplines of truth-seeking. Typically these will include testing and checking the relevant evidence, and in some instances of genuine investigative

⁷ John Dunne, *Mighty is Truth...*

⁸ Cf. “...in institutions dedicated to finding out the truth, such as universities, research institutes, and courts of law, speech is not at all unregulated.”, Bernard Williams *Truth and Truthfulness*, Princeton N.J: Princeton University Press, 217, 2002. Mill slightly surprisingly concurs: “The dictum that truth always triumphs over persecution is one of those pleasant falsehoods...”. John Stuart Mill (1859) *On Liberty*, in *On Liberty and other writings*, ed. Stefan Collini (Cambridge: Cambridge University Press) 30.

journalism this process may need special protection. Although genuine investigative journalism forms only a small part of journalism that aims at truth, it has, I think, a claim to special treatment, and a case can be made not for exemption from the relevant disciplines of truth-seeking, but for *selective* exemption from some requirements to *demonstrate* adherence to those disciplines in matters of *genuine* (not merely asserted) public interest. I shall say no more on this point, which is a subject of intense debate at present.

6. Speech and Communication

For I want to turn now to a third type of argument for freedom of expression which, I think, offers a basis for a more adequate interpretation of freedom of expression than appeals either to individual rights of self-expression or to the needs of truth-seeking can provide. This type of argument appeals only to the *generic requirements for adequate communication*. It is a type of argument which takes seriously not only the rights of speakers and writers, publishers and broadcasters, but the needs of audiences—of readers, listeners and viewers—and sees these as offering reasons for setting some constraints on the rights of speakers, writers and journalists, and of media organisations.

You will not now be surprised to learn that the versatile John Stuart Mill also put forward this type of argument, which can be found in his discussion of ‘liberty of thought and discussion’, and some of you may recognise it as a type of argument sometimes used in the US tradition of First Amendment jurisprudence (which is where the actual configuration of speech rights is debated in the US) by, among others, Alexander Meiklejohn⁹.

I think that recognising that much speech, and all media speech, aims to communicate is likely to offer a more convincing and more robust basis for identifying the best configuration of media speech rights because its scope is appropriate. The media are in the business of communication of many sorts, not in the business of self-expression, having no selves to express, and they do not confine themselves to communicating truth claims. The question that we should address is therefore: what configuration of media speech rights—that is of freedom of the press—would best protect and enable the communication needed for social, cultural and political life?

Speech acts may fail to communicate for many reasons. Some fail because they are *inaccessible* to some or more intended audiences. Others fail because they are unintelligible *to intended audiences*. Others that are both accessible and intelligible to intended audiences may fail because they are *unassessable* by those audiences. The first two of these conditions are seemingly uncontroversial, and may seem unimportant because the media have such an evident interest in meeting these standards: but they are not empty. The third condition is more demanding, and I shall say more about it.

⁹ Alexander Meiklejohn, who thought the essential reason for protecting speech, was that the free exchange of different ideas was necessary for democratic society. See his *Freedom of Speech and Its Relation to Self-Government* (Harper and Brothers 1948); *The First Amendment is an Absolute*, [1961 Sup. Ct. Rev. 245](#) (an incautious title!). See discussion of his work in Lee Bollinger’s work.

If media speech is to be *assessable* by its intended audiences, it must not only be accessible and intelligible to them, but must offer them the means to assess what is claimed. Where media content is not assessable, communication will be systematically impaired, with resulting damage to those aspects of social, cultural and democratic life that depend on media communication. So we seemingly have reasons to demand that the media make what they communicate assessable by intended audiences. However some may fear that such a requirement would itself threaten or undermine media freedom, and thereby the contribution that free media can make to social, cultural and democratic life.

7. Regulating Process not Content

I think that this conundrum can be resolved by directing regulation only at media process, and not at media content. Regulation of media content would indeed risk censorship. This is equally true of so-called self-regulation, which so often amounts to self-interested regulation, and may result in selective self-censorship. Equally, it would risk damage to social cultural and political life if powers to regulate content could be used to control or undermine others, or to damage or distort public debate and political process. The argument does not need rehearsing, but it is often formulated in unconvincing ways. Moreover, regulation of content is often ineffective because it can be circumvented in so many ways, ranging from parody and innuendo, to 'offshoring' supposed content so that unnamed others appear to be the sources.

By contrast regulating media *processes* can enable audiences to assess media claims: and who could see that as objectionable? Focusing media regulation on media process would help readers, listeners and viewers to judge what they are told, and go some way to address the asymmetries of power and knowledge that are now permitted to distort and bias media communication. I illustrate the point with five examples of ways in which media processes could be regulated without any risk of censorship in order to make media communication more assessable by intended readers, listeners and viewers. Each of these suggestions for the regulation of media process demands no more than a degree of openness about the methods and standards that lie behind media communication—and openness is something that the media often demand of others. **The five examples that I offer are:**

A. Openness about Payments from Others. At present readers, listeners and viewers often cannot tell whether money has been paid *to* a media organisation to secure certain content. If readers, listeners and viewers are to assess what the media 'report' they need to be able to distinguish paid for and non-paid for content: who paid for what? Did the 'celebrities' and their agents pay for the publication of certain 'stories'? Who paid for the lovely clothes, holidays, hotels and meals that journalists ostensibly 'review'? What benefits in kind were provided, who by and for whom? Which parts of the content were actually written by other organisations, whose press releases are being substituted for genuine reporting without appropriate labelling? What is the point of requiring a distinction between advertisements and other content if a lot of the supposedly other content is really unlabelled advertisement?

B. Openness about Payments to Others. At present readers, listeners and viewers also often cannot tell whether money has been paid, or favours provided *to* informants or others in order to obtain certain content. *Who* paid whom to provide private information about others, including about supposedly public figures? *How much* was paid in order to obtain certain sorts of information? Even in cases where there are reasons not to disclose the names of informants, or the exact sums disbursed, disclosing *that* money has been paid provides relevant evidence for readers, listeners and viewers who are seeking to judge a 'story'. It may also help more transparent accounting in media organisations.

C. Openness about Interests. Owners, editors, programme makers and journalists have interests, like others in positions of influence, but remain curiously exempt from requirements to disclose them. While the media demand transparency about the interests of those working for or in control of other powerful organisations, transparency for the media is often avoided. But if readers, listeners and viewers are to assess media claims, knowing the interests of those who make and control them is useful. It is cheap and easy to provide a list of interests on a website and to update the list regularly; and it is also not difficult to indicate conflicts of interests within an article or feature.

If this were done routinely it would allow readers, listeners and viewers to tell what interests financial and property journalists have in the matters on which they 'report'. They could determine whether those writing or opining on taxation actually pay the taxes on which they opine, or whether they are non-doms. They would be able to tell which political and other causes owners and editors, journalists and programme makers support and fund.

D. Openness about Errors. Parts of the media have devised ways of correcting errors. Other parts have not, or correct only trivial errors. The practice is useful not only to those who are misrepresented, but more widely because it helps all readers, listeners and viewers to gauge the degree to which media communication is reliable.

E. Openness about (Most) Sources. The most reliable way of enabling others to assess claims is to provide evidence and cite sources. That is something that good writing and reporting do, and while a small proportion of media speech may (as noted) need special treatment, that does not apply to the vast majority of media communication. So there may be a case for a *tightly drawn public interest* exemption that allows *some* sources to be kept confidential for *specific* reasons in *particular* situations in matters of genuine public interest. But there is no general case for refusing to inform readers, listeners and viewers what the important sources are—as good journalists have long done.

Too wide an acceptance of the practice of hiding sources can fuel journalism that is lazy, or even corrupt, because it is not open to the assessment and comments of readers, listeners and viewers. Indeed it permits unsourced and even invented material to masquerade as investigation. Unless there is a default assumption that the media will provide readers listeners and viewers with evidence for their claims, and indications of their sources, they

will not be able to tell whether there is *any* source, let alone what they would judge a reliable source, behind a ‘story’.

8. Some Conclusions

I have argued that if we are to find a convincing account of media rights we need to take seriously the fact that the media are in the business of communication, and that communication fails if it is not accessible, intelligible and assessable for readers, listeners and viewers. The media fail if they do not respect the ethical and epistemic standards required for at least adequate communication to intended audiences. These standards do not require others to have control of or a veto over media *content*: on the contrary, they are incompatible with censorship. But they do require better media *process*, under adequate regulation. In my view at least minimal statutory backing and guaranteed independence from government, from business and from media interests, will be needed.

There is much more to be said about how such regulation should be structured. For now I simply note that the arguments I have advanced here show not merely that it is *permissible* to regulate media process, but that it is *necessary* to do so if the media are to communicate with their readers, listeners and viewers in ways that enable intended audiences to assess media claims. We should regulate the media only with the aim of ensuring that they indeed communicate, while leaving the content communicated up to those who produce it. If they are adequately open about the processes that govern their communication, then their audiences will be better able to judge whatever content they communicate.