

## 5 Duties and Rights 1: Freedom of Expression

### **Rights Before Duties: Historical Sketch**

**D**igital innovations are not the only changes that have reshaped the ethics of communication. A generation or more before the digital revolution, ethical discussion was disrupted by challenges of quite a different sort. Until the twentieth century, discussions of norms and standards in Western cultures were embedded in ethical and cultural traditions that saw duties as fundamental. Ethical discussion addressed the agent's question 'What ought I (or we) do?', and aimed to identify and to justify required and prohibited types of action. Discussions of the ethics of communication followed this pattern. They covered a wide variety of duties and prohibitions that bear on communication, ranging from requirements to speak honestly, to keep promises and to respect evidence, to prohibitions of deceit and defamation, disinformation and discourtesy, and many others.

However, this traditional focus on a broad range of duties was first questioned, then widely rejected, in the aftermath of the First World War. At the start of the war it had still been usual to see duty as fundamental to ethics. Patriotic duty was often seen as exemplary, and Horace's well-known line 'Dulce et decorum est pro patria mori' was quoted with approval.<sup>1</sup> After the war had led to the slaughter of a generation, admiration for patriotic duty was widely

rejected, and sometimes derided – notably in Wilfred Owen’s famous poem ‘Dulce et Decorum est’, which dubbed this long tradition ‘the old lie’.<sup>2</sup>

This change was later generalised, and between the wars rejection of patriotic duty expanded into wider unease about duties. In the 1930s this unease grew, and made its mark in philosophical writing, when the logical positivists dismissed not only duties but the whole of ethics (and a good deal else) as ‘literally meaningless’. If ethics was rejected, did it follow that ethical standards were merely subjective? Claims that ethics is ‘merely subjective’, a matter of ‘my values’ or ‘my principles’, indeed became more prominent, yet did not offer a stable position.<sup>3</sup>

A less subjective response to the eclipse of duty emerged when the horrors of a second World War made strengthening support for ethical standards a matter of urgency. In the 1940s some parts of the traditional ethics of duty were reinforced but others were set aside. This was done by shifting perspective from that of agency to that of recipience, and treating rights rather than duties as fundamental. Duties with corollary rights were reaffirmed, those without counterpart rights were set aside.<sup>4</sup>

If all duties had had correlative rights, a shift of perspective from prioritising agents and their duties to prioritising recipients and their rights would have had few practical implications. However, traditional ethical discussion had covered many duties without counterpart rights, and these were marginalised or ignored once rights were taken as fundamental.

Discussions of duty had traditionally distinguished *perfect* (=complete) from *imperfect* (=incomplete) duties.

Perfect duties – keeping promises, refraining from lying or blackmail, and many more – were seen as ‘complete’ because they are not discretionary. They require action in any relevant situation and do not permit exceptions in favour of inclination. Imperfect duties, by contrast, leave agents some discretion over whether or not to act in relevant situations. Since duties with counterpart rights are claimable, they are not discretionary, so must be perfect duties.

However, there are also perfect duties that bear on communication but lack counterpart rights, so cannot be claimed by others. These duties are not discretionary (if they were they would be imperfect duties). Examples include duties to self, and many epistemic duties such as duties to listen or pay attention, duties not to exaggerate and many others, as well as other duties that bear on communication such as civility or decency. Few would see these as optional requirements, yet although they are not discretionary, they are not claimable and are not matched by counterpart rights. According priority to rights rather than duties had profound implications for the ethics of communication because it ignores both *imperfect* (=incomplete and discretionary) duties, and perfect duties without counterpart rights.

These distinctions between types of duty are now seldom mentioned in everyday ethical discussion, but remain clear and interesting. The reason that they have fallen into disuse is, it seems, largely that it has become usual to look at ethical norms and standards from the perspective of rights, rather than of duties, hence from the perspective of *recipience* (or more specifically of *claimants*) rather than of *action*. Once the classical agent’s question,

‘What ought I (or we) do?’ was replaced with versions of the recipient’s question ‘What are my rights?’ (more crudely ‘What am I entitled to?’ or ‘What ought I get?’), duties without counterpart rights were easily marginalised and likely to be overlooked. Treating rights rather than duties as fundamental offers a narrower view of ethical requirements, and has striking implications for the ethics of communication.

### **The Turn to Rights: Freedom of Expression**

Digital communication technologies have emerged since the middle of the twentieth century, and a focus on rights has shaped, even dominated, many discussions of the ethics of digital communication. Although it is far from obvious which of the many ethical and epistemic norms and standards that can bear on digital communication matter most, human rights principles are widely seen as central. Yet, they are evidently far from sufficient. A consequence of treating rights rather than duties as basic is that discussion of the ethics of communication, including digital communication, has increasingly focused on a remarkably limited number of ethical and epistemic norms and standards, and in particular on just two human rights.

The *Universal Declaration of Human Rights* (UDHR, 1948) and the *European Convention on Human Rights* (ECHR, 1950) both include rights to *freedom of expression* and to *privacy*, which evidently bear on communication. I shall comment on these rights in this chapter and the next, but will bracket current disputes between those

who hold that rights are fundamentally moral and those who think that they have only political backing.<sup>5</sup>

Article 19 of the *Universal Declaration of Human Rights* gives the right to freedom of expression a famously succinct formulation:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The formulation is striking partly because it seems to anticipate technologies that emerged decades later, when digital technologies revolutionised capacities to ‘seek, receive and impart information and ideas through any media and regardless of frontiers’.

The most notable feature of the right to freedom of expression is that it is in the first place a right to *hold* and *express* content, including opinions and ideas, and secondarily a right to communicate information. Freedom of expression is of course not merely a right to *self-expression*,<sup>6</sup> but a right to hold and express content that bears on all communication – and yet the text of *UDHR* Article 19 mentions communication of information only as a secondary matter. Many earlier discussions of rights to *free speech*, to *press freedom*, to *religious freedom* and to *academic freedom* had seen these as rights that matter for originators, but did not see originators primarily as ‘expressing’ content, or treat communication with others as an afterthought. In particular, where the exercise of rights bears on significant public

goods, including democratic public life, reliable and informative media, trustworthy cultures and institutions, and competent research and inquiry, rights to communicate with others are of huge importance.

The slightly later formulation of the right to freedom of expression in the *European Convention on Human Rights* does rather more to recognise the importance of recipients as well as of originators, but it too privileges originators. It has two clauses, the first stating what the right protects, the second qualifying those protections. The first runs:

Art 10.1. 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.

Despite the reference to *receiving* information and ideas, the focus is again very much on the rights of originators. Curiously, the human right that refers most explicitly to communication with others is probably the right to freedom of religion.<sup>7</sup>

However, the second clause of Article 10 as formulated in *ECHR* acknowledges that freedom of expression must be qualified in many ways in order to respect not only other human rights, but a wider range of ethical and epistemic requirements:

10.2 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.

### **Communication or Expression?**

The change of terminology from a focus on *freedom of speech* to a focus on *freedom of expression* in both human rights documents is, I think, significant. It is a change that treats the expressive use of speech as primary, and its communicative uses as secondary, thereby stressing the rights of originators but paying less attention to the needs or the rights of recipients. Communication, however, requires more than rights that protect expression: it also requires originators to reach recipients who must be able to understand and assess what is communicated. Everyday communication works only if it actually links speakers to hearers, writers to readers, performers to audiences.

Communication between individuals works only if originators and recipients respect a range of interlocking requirements. Originators who respect ethical and epistemic standards must enable recipients to assess and interpret their communication, and to judge which ethical and epistemic requirements are respected, and which are flouted. Communication that aims to address or engage wider

audiences, including that required for democratic politics, for the media, for scientific research, and for public and cultural activity, requires respect not merely for freedom of expression, but for many other norms and standards that bear on inquiry and debate.

Why, we may wonder, was the long-standing view that communication, rather than expression, was central to an account of free speech given reduced prominence in the era of human rights? One reason was perhaps that the proliferation of new communication technologies during the past century and a half had made parts of the traditional vocabulary seem awkward. The successive invention and spread of telegraphy, telephony, fax, radio, film and television in the century before digital technologies emerged, and their widespread use, meant that some neutral term was needed. Terminology that referred to specific technologies or institutions – *press freedom*, *freedom to publish*, *freedom of the airwaves* and indeed *political freedom* – could seem narrow or outdated. However, the choice of the phrase ‘freedom of expression’ as a generic, supposedly technology-neutral, term to cover rights that bear on communication was, I believe, unfortunate. In expressing matters there is no requirement to be or to seek to be accessible to, intelligible to or assessable by others: what is expressed need not be communicated successfully to anyone. Communication, however, requires originators to do more than express content.

### **Circumstances Alter Cases**

It is hardly controversial that originators must be free to express content: if they were not, there could be no



communication. But there are good reasons (as well as bad ones) for qualifying this right. Even the most famous and distinguished proponents of rights to freedom of expression have argued for qualified accounts of this right.

For example, John Stuart Mill famously argued for a strong view of rights to express content (which he distinguishes from rights to *self-expression*), yet sees expression of content as a matter of communication, and as needing to meet further requirements:

the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.<sup>8</sup>

Mill concluded that this right must be qualified. His well-known illustration of an acceptable reason for limiting freedom of expression points to the harm speech acts can inflict. He wrote:

An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.<sup>9</sup>

The difference between the cases is that in the latter circumstances these words are 'such as to constitute . . . a positive instigation to some mischievous act'.<sup>10</sup>

A similar, and again well-known, illustration of reasons for qualifying freedom of expression in certain circumstances was proposed by the American jurist Oliver Wendell Holmes, who wrote:

the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting 'Fire' in a theatre and causing a panic . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils . . . It is question of proximity and degree.<sup>11</sup>

Many discussions of the ethics of communication refer to these celebrated formulations of acceptable reasons for qualifying rights to free speech, and conclude that expression of content that would cause harm, or imminent harm, or is a clear and present danger, may be prohibited or restricted. But the fact that some communication is likely to harm others, while providing a *prima facie* reason for prohibiting it, does not show that the *only* reason for prohibiting or regulating communication is that it is likely to harm others. Speech that violates ethical and epistemic requirements sometimes harms, sometimes produces a mixture of harms and benefits, and sometimes secures overall benefit. Ethical claims about freedom of expression must take account of ways in which a variety of other ethical and epistemic norms and standards may qualify rights claims in particular circumstances – as acknowledged in *ECHR* Article 10.2. They do not throw all the weight on predicting whether prospective communication of some type will

harm, or whom it will harm, in a particular context.<sup>12</sup> The canonical human rights documents open the way to considering how freedom of expression may and should be qualified, yet may not take full account of the range and complexity of the ethics of communication.

### Private and Public Harms

Appeals to prospective harm can be useful in some cases, but are much less so in others. Where speech acts are *intended* to inflict *private harms* – harms to individuals – a focus on harms can be useful for working out which communication should be prohibited, regulated or protected.<sup>13</sup> Comments posted on social media platforms are indeed sometimes intended to harm individuals, for example by promoting suicide or anorexia, by body-shaming or bullying, by distributing violent or pornographic content, or by slander and defamation. However, arguments that appeal to requirements not to harm individuals will not cover all cases.

It is notable that many of the ethical and epistemic norms and standards that bear on communication, and have long been taken seriously, are ignored in the human rights documents. Yet requirements and standards such as honesty and truthfulness, courtesy and civility, or aiming for accuracy and clarity, and many other ethical and epistemic standards that have no counterpart rights are vital for communication that is not merely intelligible and assessable, but ethically and epistemically acceptable.

An assumption that rights to freedom of expression and privacy are *all* that matters is particularly implausible

when communication bears on public goods, including democratic governance, public affairs, cultural activities and scientific research. As Bernard Williams reminded us, the epistemic and ethical requirements for communication that aims at truth are substantial:

in institutions that are expressly dedicated to finding out the truth, such as universities, research institutes, and courts of law, speech is not at all unregulated. People cannot come in from outside, speak when they feel like it, make endless irrelevant, or insulting, interventions, and so on; they cannot invoke a right to do so, and no-one thinks that things would go better in the direction of truth if they could.<sup>14</sup>

An excessive, let alone exclusive, emphasis on freedom of expression is strikingly inadequate not only for ethically and epistemically acceptable communication that makes truth claims but also for communication that bears on public policy, including democratic politics. Freedom of expression is needed in these and many other contexts, but is seldom all that matters.

An excessive focus on rights to freedom of expression, combined with lack of attention to other ethical and epistemic norms, provides part of the context for aggressive contemporary culture wars. On one side, libertarians advocate unrestricted freedom of expression and claim that a great many ways of qualifying rights to freedom of expression simply breach that right. Some of them maintain that permitting and protecting speech acts that misinform or disinform, or that foment discord, are required in order to protect freedom of expression. Their opponents – both

‘woke’ and merely politically correct – sometimes support excessive restrictions on freedom of expression by demanding legislation that prohibits or penalises ‘offensive’ speech of various types. Yet since offence is in the eye of the beholder, neither taking offence at others’ speech, nor seeing oneself as a victim of their speech acts, can show that action or speech to which offence was taken went beyond what rights to freedom of expression permit. Neither libertarian nor politically correct views of freedom of expression engage with a full enough account of communication, or of the ethics of communication.

Scientific inquiry too requires freedom of expression, but again duly qualified freedom of expression that takes account not only of the complexity of communication but of a wide range of relevant norms and standards. Scientists indeed need to be free to communicate and to publish their findings, but scientific communication also requires respect for many other ethical and epistemic norms and standards. These include respect for evidence, openness about the methods used to seek evidence, respect for claims others have established and honesty about all, including unexpected, experimental results. Research ethics covers these and many other detailed and demanding requirements, and penalties for breaching even the less central ethical and epistemic duties can be substantial.<sup>15</sup>

Democratic debate too requires more than unqualified freedom of expression for citizens. Most evidently, it demands respect for others’ political claims and communication: attentive listening as well as robust expression of views. Democratic governance also requires institutional

structures that bear on and protect communication in numerous ways.<sup>16</sup> Freedom of expression is indeed indispensable for democracy, as for other activities and purposes, but it provides only a starting point for an account of the ethics of communication in democratic political life.

Yet enthusiasts for freedom of expression, and more generally for a rights-based approach to ethical norms and standards, often ignore other important requirements for democracy. The spread of libertarian versions of populism in some parts of the world in the first two decades of the twenty-first century both rests on and has promoted narrow views of the ethics of communication, in which freedom of expression is seen as central, but other standards for ethically and epistemically acceptable communication are ignored or perhaps taken for granted. In the most problematic cases, combining exaggerated conceptions of freedom of expression with digital connectivity has promoted the proliferation of fake news, spiralling disinformation, filter bubbles and conspiracy theories. All of these may foster cognitive fragmentation and threaten the integrity, and even the future, of a democratic public sphere as well as respect for scientific and other research. Too often the hopes for better and wider communication with which digital technologies were first greeted have been undermined not only by their misuse, but by an ethical focus that sets too much store on a narrow account of ethical standards that is centred on a limited number of human rights.<sup>17</sup>