

Regulation,
Regulators, and
the Crisis of Law
and Government

Regulating for Communication

Onora O'Neill

Policy Brief

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The Foundation for Law, Justice and Society

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Regulation, Regulators, and the Crisis of Law and Government

This programme examines the regulatory system in the wake of the global financial crisis, assessing its current weaknesses, the role of legislative and judicial bodies, and identifying measures for future reform of both markets and regulatory regimes. It aims to shed light on the recent failures of regulators, often captive of the very industries they are meant to regulate, and examine ways to improve the accountability and effectiveness of the regulatory system.

Executive Summary

- Current discussions of media freedom and regulation fail to distinguish differing conceptions of freedom of expression, or their justifications, and consequently cannot offer adequate reasons for preferring one rather than another approach to media regulation.
- It is uncontroversial that some types of *speech act* — for example, defamation, hate speech, intimidation, breaches of privacy and of confidentiality — should be prohibited and sanctioned, although details are often disputed. However, regulation of *speech content* (in the semantic, not the Ofcom sense) is often seen as an unacceptable violation of freedom of expression.
- Moreover, restrictions on speech content are readily undermined by techniques ranging from fictionalizing to data mining: censorship of content is open to subversion. This is inevitable given the indeterminacy of *content (meaning)*. Regulation of speech acts is more feasible — not always more acceptable — because the courts can provide authoritative rulings on the classification of speech acts.
- Appeals to the importance of free speech for discovering truth offer too narrow a justification of media freedoms because a lot of media content does not make truth claims. Appeals to the importance of individual freedom of self-expression also cannot justify media freedoms, since the media are not in the business of self-expression. Appeals to generic rights to freedom of expression for individuals and the media also cannot justify media freedoms. The Human Rights conventions endorse, but do not justify, a generic and indeterminate view of freedom of expression.
- The most plausible justification of media freedom appeals to the importance of free speech and media freedoms for securing the communication on which social, cultural, and political life depend. The communication needed for social, cultural, and political life rules out controls on media *content* (censorship) but requires some regulation of media process in order to secure intelligible communication that readers, listeners, and viewers can assess.
- A convincing account of media freedoms needs to take seriously the fact that the media are in the business of communication, and to deal with the reality that communication that is inaccessible, unintelligible, or unassessable to readers, listeners, and viewers fails.
- Accessible, intelligible, and assessable communication requires some focused regulation of media process, but no regulation of media content.

Regulating for Communication

Media freedom and media regulation

My underlying aim in this policy brief is to look at some influential arguments for media freedoms, and to try to work out which claims and conclusions about the form and limits of media regulation they would permit or (perhaps more surprisingly) require.¹

My reason for starting at this level of abstraction is entirely practical: we are in the midst of vociferous discussion about press freedom and press regulation, much of which begs the basic questions. We constantly hear naïf claims that because press freedom is important, press regulation is unacceptable. Such assertions beg questions because they fail to consider *which* conception(s) of press freedom and *which* conception(s) of press regulation can be justified. We cannot make headway in answering one of the central questions of our times without explaining *why* one rather than another conception of press and media freedoms can be justified, and we need to do so if we are to say anything useful about which forms of press and media regulation are and are not acceptable. Gestures towards vague or dogmatic claims about press freedom are pointless, and their constant repetition does not make them convincing.

Speech content and speech acts

I begin, however, with a preliminary question that I think is too often neglected: should regulation of media (or other) speech bear on *speech content* or on *speech acts*?

Both approaches have been tried. Most obviously, traditional forms of censorship prohibited content that was classified (for example) as blasphemous or as obscene. Some newer forms of speech regulation, including data protection legislation, seek to regulate content that is classified as personal. However, the regulation of *speech acts* is more common, as well as generally more feasible and less controversial. Speech acts such as defamation, hate speech, threatening, bribing, intimidation, fraud, passing off, or breach of confidence can be

regulated, prohibited, or even criminalized; in some cases this is seen as uncontroversial. Other claims that certain types of speech act should be regulated, prohibited, let alone criminalized are seen as controversial or unacceptable.

Limits of content regulation

By contrast, content regulation — still in the semantic, not the Ofcom sense of the term — is nearly always problematic and difficult. There are generic reasons for this.

Given the indeterminacy of meaning (content), there will be many ways of understanding any given proposition. So attempts to regulate speech by regulating content will be open to uncertainty. A proposition may be open both to interpretations under which its use would violate a particular regime of content regulation, and to interpretations under which its use would not do so. Attempts to regulate speech content because it is (for example) *blasphemous* or *obscene* illustrate the point well: content that apparently falls under these headings may be open to other, unobjectionable readings, and conversely, seemingly innocuous content may be offensive to some people.

Consequently, attempts to regulate speech content have often been defeated or rendered ineffective by methods such as fictionalizing, suggestion, parody, or satire, which communicate prohibited content while bypassing, or appearing to bypass, the censored categories of content. They can also be bypassed by publishing permitted content from which restricted or prohibited content can be inferred: prohibiting inferences is not feasible. And where information is in organized form, restricted

content may be revealed by data mining and mashing, which may reveal information that would otherwise have been secure, confidential, or private.

Limits of speech act regulation

Do analogous difficulties arise in attempts to regulate speech acts? Acts too, and thereby speech acts, may be described in many ways, and disputes about their permissibility may arise from this indeterminacy. What one person sees as a threat, another may view as a joke; what one views as fraud, another may see as routine commercial practice; what one judges defamatory or abusive, others may see as no more than tasteless. And so on.

Indeterminate speech acts differ from indeterminate speech content because we often have authoritative procedures for fixing the classification of speech acts, but not for fixing the classification of speech content. The courts can determine that a certain speech act was (or was not) abusive, coercive, or defamatory. However, we do not grant the courts powers to determine the meaning of speech content, beyond certain defined areas (interpretation of contracts, of the law itself). We no longer accord the courts, or any other body, unrestricted authority to interpret speech content, precisely because we have long concluded that free speech and media freedoms must be protected. Today's disagreements are about differing versions of these freedoms and cannot be resolved without considering the arguments for each conception of free speech.

Many of the classical arguments for speech rights — freedom of speech, of worship, of the press, of self-expression, of expression, artistic freedom, academic freedom — leave it unclear whether the object of regulation is speech content or speech act. However, in general the more influential and well-known arguments, and as I see it the more adequate ones, focus on the regulation or non-regulation of types of *speech act* rather than of *speech content*. Three types of arguments for speech rights recur in (and now beyond) the liberal tradition. They differ greatly since they rely on *different assumptions* and reach *divergent conclusions*.

Speech rights and the discovery of truth

Many of the earlier arguments for speech rights focus on speech acts that aim at truth, that is, on truth claims. This argument was articulated by Milton, reinforced by Mill, and has been repeated by many. Boiled down to essentials, it amounts to the thought that unless we permit and protect the utterance and publication of false claims, we will not be able to check or challenge others' claims or assertions, and so will hamper discovery of truth. Milton made the point with fine confidence, but his argument has problems:

... 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?²

Many later writers follow Milton's thought that truth will be revealed merely by permitting false claims to contend with true claims. If we seek truth we should allow confrontation, competition, or conflict, and Truth will emerge victorious. The same line of thought is provided by one of Mill's arguments for free speech, in which he argues for 'the clearer perception and livelier impression of truth, produced by its *collision with error*'.³ It also recurs in approximately twenty images of a *marketplace of ideas*.⁴

However, arguments for freedom of speech and publication that invoke these metaphors of conflict and triumph ignore the *ethical and epistemic norms and disciplines* that are actually required for truth seeking. Truth seeking is demanding, and discovery of truth is not achieved by mere confrontation or assertion. We have only to think of the procedures and disciplines used for truth seeking in legal procedures or in academic research to remind ourselves that where truth is the aim, ethical and epistemic norms must be respected. Procedures of inquiry that fail to seek or respect relevant evidence, to aim for accuracy and provide appropriate qualifications, or that are less than honest, do not help the discovery of truth.

There is a second reason why appeals to the needs of truth seeking cannot justify media freedoms. Such appeals are only relevant to speech that seeks truth, and offer no reasons for freedom for speech that does not aim at truth. A great deal of communication, including much media communication, does not aim at truth: short stories and puzzles; opinion pieces and horoscopes; artistic and literary content may include truth claims, but in the main have other aims. So appeals to the needs of truth seeking cannot offer a *general* vindication of media freedoms, although they may be relevant to those parts of media communication that make truth claims.

Where media speech does aim at truth, sound arguments for media freedoms are likely to justify *requiring* disciplines and standards that are indispensable for discovering and communicating truth. Arguments from the needs of media truth seeking — including the needs of investigative journalism — are therefore likely to support appropriately regulated rather than wholly unregulated media. This is not to dispute that a special case for *selective* exemption from requirements to demonstrate adherence to these disciplines may be justified for genuine investigative journalism in matters of *genuine* (not merely asserted) public interest.

Speech rights and self-expression

A second and equally famous argument for speech rights focuses on the importance of protecting individuals' freedom to express themselves. This argument was powerfully made by Mill, subject to the caveat that individual rights of self-expression do not include rights to perform speech *acts* that harm others (shouting fire in a crowded theatre; inciting a riot, etc.).

This argument is not an adequate defence of media freedom. It is an argument for freedom for individuals to express themselves, provided that their self-expression is innocuous. It does not vindicate generic freedom of expression for powerful organizations, or for the media. Any convincing argument for media speech rights needs to justify speech rights for the media, including the powerful parts of the media.

Unfortunately, the ubiquitous use of the phrase 'freedom of expression' to cover both individual and media speech rights in the post-Second World War

Human Rights Declarations⁵ has blurred this issue. The phrase is sometimes taken as indicating that media freedom of expression should mirror the expansive freedom of individual self-expression for which Mill argued.

This is simply an error. There is no general argument against restricting the speech of powerful institutions, and we do so in many ways. Corporations that invent their accounts are not seen as expressing themselves: the phrase 'creative accounting' is sarcastic. Governments that lie are widely condemned; even governments that fail to disclose information in the interests of transparency are now widely criticized. The speech of the powerful is not mere self-expression.

Generic rights to freedom of expression

The Human Rights documents do not justify determinate speech or media freedoms for two distinct reasons. The first is that Declarations do not justify — they deliberately short-circuit justification. The second is that the Human Rights documents proclaim a highly indeterminate *generic* right to freedom of expression that is intended to cover both individuals' speech rights as well as institutional, including media, speech rights. However, the more complete formulation in the ECHR lists many permissible restrictions on freedom of expression in its second clause.

Speech and communication

A fourth type of argument for speech freedoms focuses on the communicative use of speech. This line of thought is ubiquitous, so much so that it is not associated with any single thinker. Mill used this argument (as well as appealing to the needs of truth seeking and self-expression), when writing about 'liberty of thought and discussion'; in the US this line of thought is particularly associated with Alexander Meiklejohn.

A focus on the needs of communication is appropriate for an account of media speech. The media evidently aim to communicate. They are not in the business of self-expression, having no selves to express, and are not confined to communicating truth claims. This approach to the justification of media freedoms seeks

to show which configuration of speech rights can best protect and enable the communication needed for social, cultural, and political life.

Necessary conditions for communication

If media freedom is justified because it supports the communication needed for social, cultural, and democratic life, then the media must indeed communicate, and must respect any norms and standards that are indispensable for successful communication. Speech acts fail to communicate if they are *inaccessible to, unintelligible to, or unassessable* by their intended audiences. The first two of these conditions are seemingly uncontroversial, but they are not empty. The third condition is more demanding, and I shall say most about it.

Since the media aim to communicate, they have reason to want their speech to be accessible to readers, listeners, and viewers (at least upon payment). Equally, they have reason to aim for intelligibility. Yet accessibility and intelligibility are both non-trivial demands. Whereas *self-expression* will work even if it is inaccessible to some or unintelligible to those to whom it is accessible, *communication* fails if either requirement is ignored. So an appeal to the importance of communication offers a further reason to reject generic arguments for unconditional media freedom of 'self'-expression.

A requirement that media speech be *assessable* by its intended audiences demands more. Readers, listeners, and viewers need to assess others' communication, including media communication, if they are to play a part in social, cultural, or political life. The assessability of media communication can be secured by limited regulation of media process, combined with prohibition on any censorship of media content. Such regulation could go some way to address the asymmetries of power and information that can make it hard or impossible for readers, listeners, and viewers to assess what they read, hear, and see in the media. The necessary regulation of media process can often be secured by greater *openness* about communication.

For example, there is no risk of censorship, or control of content or licensing in requiring media process to meet any of the following five standards:

1. *Openness about payments from others.*

At present readers, listeners, and viewers often cannot tell whether money has been paid to a media organization to publish 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: precisely, to determine who paid for what. Did the 'celebrities' and their agents pay for the publication of certain stories? Who paid for the clothes, holidays, hotels, and meals that are 'reviewed'? What benefits in kind were provided to the media, and by whom? Who paid whom to cover certain stories, or not to cover them?

Which media content was actually provided by other organizations? Are others' press releases 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 supposedly other content is really covert advertisement? Should not advertising standards apply to all paid-for content, including that paid for or provided in kind?

2. *Openness about payments to others.*

At present readers, listeners, and viewers often cannot tell whether money has been paid, or favours provided, either by or for media organizations in order to obtain certain content. Did the media pay for private information about others, including about supposedly public figures? Were payments made for confidential commercial or political material? Who paid whom to cover certain matters, or not to cover them?

A limited exemption from requirements to disclose payments, or perhaps only exemption from requirements to disclose the names of suppliers of information would be needed for *genuine* investigative journalism. Even in this case, readers, listeners, and viewers could often be informed *that* payments had been made, and even *how much* had been paid, even if names of informants had to be withheld.

3. *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

those interests. While the media demand transparency about the interests of those working for or controlling other powerful organizations, transparency within the media is often avoided. But if readers, listeners, and viewers are to assess media claims, knowing the interests of those who make them will help. It is easy and inexpensive to provide a list of interests on a website and to update the list regularly, and it is not difficult to indicate conflicts of interests within an article or feature.

Doing this routinely would allow readers, listeners, and viewers to tell which interests financial and property journalists have in the matters on which they 'report'; whether those writing or opining on taxation pay the taxes on which they opine or not. They would be able to tell which political and other causes owners and editors, journalists and programme-makers support and fund.

4. **Openness about errors.** Parts of the media have devised ways of correcting errors promptly. Other parts have not, or correct only trivial errors. The practice is useful not only to those misrepresented, but more widely because it helps all readers, listeners, and viewers to gauge the degree to which media communication is reliable. The correction of errors is a standard discipline in any truth seeking activity, including journalism.
5. **Openness about (most) sources.** The most reliable way of enabling others to assess claims is to provide evidence and cite sources. Good writing and reporting do this, and while a small proportion of media speech may (as suggested) need special treatment, that does not apply to the vast majority of media communication. So while 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, there is no general case for failing to tell readers, listeners, and viewers what the important sources are — as good journalists have long done.

Too wide an acceptance of a practice of hiding or failing to cite sources can fuel journalism that is lazy, even if not corrupt, because not open to the assessment and comments of readers, listeners, and viewers. Unless we can rely on a default assumption that the media will provide readers, listeners, and viewers with evidence for their claims and indications of their sources, readers, listeners, and viewers cannot tell whether there is any source, let alone a reliable one, behind a 'story'.

Some conclusions

I have argued that a convincing account of media rights must take the fact that the media are in the business of communication seriously. It will therefore endorse an account of media freedoms that protects content from censorship but regulates media process to ensure that communication is accessible, intelligible, and assessable for readers, listeners, and viewers.

The media fail if they do not respect the ethical and epistemic standards required for adequate communication. These standards rule out censorship of content, but require better forms of media process, backed by adequate regulatory bodies that have robustly secured independence from government and business interests, *including media* interests. It is not merely *permissible* to regulate media process, but *necessary* to do so if the media are to communicate successfully with their readers, listeners, and viewers.

Notes

- 1 It develops and compresses some themes from my Reuter's Lecture, 'The Rights of Journalism and the Needs of Audiences', 22 November 2011. Available at: <http://reutersinstitute.politics.ox.ac.uk/fileadmin/documents/presentations/The_Rights_of_Journalism_and_Needs_of_Audiences.pdf>.
- 2 Milton, John (1918 [1644]) *Areopagitica. A speech for the Liberty of Unlicensed Printing to the Parliament of England*, ed. Sir Richard C. Jebb. Cambridge: Cambridge University Press, para 31.
- 3 Mill, John Stuart (1989 [1859]) *On Liberty*, ed. Stefan Collini in J. S. Mill 'On Liberty' and Other Writings. Cambridge: Cambridge University Press, p. 20.
- 4 The idea of 'free trade in ideas' lying within 'the competition of the market' occurs in Justice Oliver Wendell Holmes, Jr's dissent in *Abrams v. United States*, 250 U.S. 616, 630, 1919.
- 5 *Universal Declaration of Human Rights (UDHR)* of 1948, Art. 19: <<http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng>> and *European Convention on Human Rights (ECHR)* of 1950, Art. 10: <<http://www.hri.org/docs/ECHR50.html>>.



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Onora O'Neill combines writing in political philosophy and ethics with a range of public interests and activities. She comes from Northern Ireland and has worked mainly in Britain and the US. She was Principal of Newnham College, Cambridge from 1992 to 2006, President of the British Academy from 2005 to 2009, chaired the Nuffield Foundation from 1998 to 2010, and has been a crossbench member of the House of Lords since 1999 (Baroness O'Neill of Bengarve). Her books include *Constructions of Reason; Autonomy and Trust in Bioethics* and *A Question of Trust* (the Reith Lectures). She currently lectures and writes on accountability and trust, science policy, justice and borders, the future of universities, the quality of legislation, and the ethics of communication.

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The Foundation for **Law, Justice and Society**

Wolfson College
Linton Road
Oxford OX2 6UD

T · +44 (0)1865 284433

F · +44 (0)1865 284434

E · info@fljs.org

W · www.fljs.org

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