

Chapter 1

Ethics and Freedom

Mass Media Accountability

FREEDOM and responsibility are two sides of the same coin when one looks at the U.S. mass media system. But there often are major differences of opinion as to which side society most needs to have facing up.

This is a problem that faces all mass communicators. It could be a journalist considering whether to exercise the freedom to destroy a reputation, preferably for a useful purpose. Or it could be the head of an advertising agency pondering the appropriate creativity limits in regard to an anti-abortion ad—one that could well offend sensibilities on both sides of the issue at the same time it catches the attention of millions of television viewers. In both cases, is freedom to publish or broadcast the overriding value, or should the journalist and advertising executive take other factors into consideration and stop short of exercising the full freedom they have?

Similar concerns have emerged in regard to cyberspace communication. To take just one example, how much freedom should online advertisers have in regard to behavioral targeting—the practice of sending ads to people based on the interests displayed in their Web-surfing history. Does the freedom to use new methods of advertising trump an individual's right of privacy—the “right to be let alone”?

To some degree, it's a chicken-and-egg situation. Freedom of expression is guaranteed by the First Amendment to everyone, and that gives the mass media “ethical breathing room” to make their own decisions to be responsible or irresponsible. But if their decisions are seen as continually irresponsible, the result has often been public (or government) pressures to curtail media freedom in favor of requiring increased responsibility. This is a potential problem for the news media, but an existing one for the advertising and entertainment industries which are already regulated more than are news media.

These competing values are the crux of the arguments that follow. Each author agrees that both freedom and responsibility are important if the mass media are to function properly in society. Julianne H. Newton maintains that the media cannot be allowed to hide behind the First Amendment in order to justify irresponsible behavior. David Gordon argues that freedom of expression must be protected at almost any cost, regardless of whether the media are ethical or responsible.

One other aspect of this dilemma also merits some consideration, although it is not discussed directly in the following material. That's the question of to whom or what the media should be responsible or accountable, assuming that some level of responsibility is expected. Is it to society as a whole—that is, to the general public? To specific audiences or subaudiences? To their owners and stockholders? To their peers, or perhaps to some general notion of “ethics” appropriate for the mass media? To more than one of these groups, or perhaps to some others as well? These questions are well worth further thought, as you ponder the different perspectives on the freedom/responsibility relationship presented here.

GORDON: Freedom of expression in news, entertainment or persuasive communication must be zealously defended regardless of whether it is exercised ethically.

Inroads on freedom of speech and of the press in the United States were part of the reaction to the 9/11 attacks on the World Trade Center and Pentagon. These incursions were advocated and implemented in the name of national security, perhaps most notably in the USA PATRIOT Act of 2001. Although relatively few voices opposed these developments at the time (only one senator, Russell Feingold of Wisconsin, voted against the Act), more opposition has been expressed with the passage of time and further analysis has raised concerns about what core values are threatened by a knee-jerk devotion to “national security” concerns. Some changes were made in the statute during the reauthorization process in 2005–06 but critics continued to express concern about the law’s damage to rights of expression.

Prof. Geoffrey Stone of the University of Chicago Law School made a strong argument in 2004 for robust protection of First Amendment freedoms and values, perhaps especially in times of national crisis. He argued that curtailing free speech, even in wartime, winds up endangering national security because it undermines the democratic process to which freedom of speech is essential (Stone, 2004).

Freedom of the press is arguably at least as important to democracy as is freedom of speech, as we move headlong into the complexities of the Information Age. Together, as a pair of First Amendment scholars (Sanford and Kirtley, 2005) noted, these two freedoms protect both individuals in expressing their opinions and beliefs, and the ability of news and information outlets to provide “citizens with the knowledge they need in order to govern themselves and to use their votes wisely.” The First Amendment, of course, also protects communications of far lesser importance but it nonetheless “remains the heart of American democracy” (Sanford and Kirtley, 2005, pp. 267 and 263).

Back in 1974, writing for a unanimous Supreme Court, Chief Justice Warren Burger noted that the First Amendment guarantees a free press but does *not* require a responsible press. That comment, in *Miami Herald Publishing Co. v. Tornillo* (418 U.S. 241, 1974), was part of the Supreme Court’s rejection of a Florida law that *required* newspapers to provide specific reply space to political candidates whom they had attacked on their editorial pages.

The decision epitomizes the position taken by those who believe that we dare not even *begin* to limit freedom of expression in the service of requiring responsible use of that freedom.

There is no doubt that giving the media this degree of freedom inevitably leads to considerable discomfort in some segments of society, and sometimes to potentially difficult or even dangerous situations. But that's really no different from the risks we accept by embracing democracy as our chosen form of government. In a democratic society, the people are given the ultimate power to decide and they retain that power even when a large minority of the people think the decisions are wrong. The antidote for wrong or even foolish or dangerous political decisions is to rejoin the political battles and convince enough people to make the right decision the next time. It is *not* to impose restrictions on the political dialogue or the political process in order to prevent "wrong" decisions.

But legal restrictions aren't the only threats to the media's First Amendment freedoms. Ethical considerations can also be invoked as a vehicle for curtailing various types of expression. And if it's crucial to protect the legal underpinning of the First Amendment in the face of national security concerns, as Stone (2004) argues, then certainly it follows that ethics arguments also should not be allowed to erode freedoms of speech and of the press.

The ideal situation, of course, would be to have *both* freedom of expression and responsible exercise of that freedom. However, human nature being what it is, there will always be people who abuse protected freedoms of expression. That, I believe, is simply a cost of doing business in a society that values the right to express oneself freely—a right that must be zealously protected against all incursions, even those attempted in the name of ethics.

Leonard Pitts Jr., a *Miami Herald* columnist, put it well in mid-2009 in decrying the use of the word "Nazi" in connection with that summer's bitter debate over health care reform. The First Amendment, he wrote,

says we can say whatever we want. It doesn't say it has to be intelligent.

And, yes, you are even protected if you liken [President] Obama or [ex-President] Bush to Hitler. Yet every time I hear that, it makes me cringe for what it says about our collective propensity for historical amnesia.

(Pitts, 2009)

Regardless of the "cringe factor" in some freely exercised speech, any efforts to legislate or otherwise require ethics at the expense of the First Amendment will aim for a cure that is worse than the disease—and, as will be noted later, run the risk of preventing change in society's moral values.

Theodore Glasser, writing in the mid-1980s, made an eloquent argument for coupling First Amendment freedoms with requirements for responsible use of those freedoms, taking issue with what he called "an essentially libertarian construction of the First Amendment, [in which] questions of responsibility are effectively reduced to questions of conscience" (Glasser, 1986, p. 81). Glasser proposes instead an "'affirmative' theory of the First Amendment," in which the press is not just free *from* government control, but is free from it in order to *do* or *accomplish* something—for example, to "accommodate and disseminate a broad range of expression" (Glasser, 1986, p. 90) or otherwise to provide what democracy requires from a free press.

Glasser (1986) argues that the press must somehow be made “as free from the whims of the marketplace as it is free from the authority of the state,” so that it “is at all times free to conduct itself in accordance with its highest ideals.” He suggests some first steps that journalists can take (individually and collectively) “to challenge the unabashedly self-serving view of the First Amendment that equates press freedom with property rights,” but eventually concludes that only government “can restore confidence in the press by insulating the press from influences inimical to the highest ideals of American journalism” (Glasser, 1986, pp. 93 and 96).

And that’s where I have to part company with Glasser. His argument is appealing, particularly in light of the way that economics have negatively impacted the amount and quality of journalism being practiced. But Glasser’s conclusion must be resisted in order to protect the First Amendment values which are a necessary condition for communicators’ freedom to make personal ethical choices. It’s those personal choices, instilled and sharpened (it is hoped) over the years in individuals, that should hold the press—and the persuasive media—to their own highest ideals.

To attempt to *require* ethical conduct in connection with the First Amendment would be to allow the regulatory camel to get its nose into the tent of free expression. And once that nose is in, the issue becomes not *whether* some curtailment of free expression is permissible, but rather *where* to draw the line, *how far* to extend the regulations, and *who* gets to make those decisions. I suspect that’s why Chief Justice Burger—no zealot in supporting many aspects of the First Amendment—drew a sharp line in the face of Pat Tornillo’s attempt to force his way onto the *Miami Herald*’s front pages in response to a pair of editorials attacking his political candidacy.

Although elementary fairness might have dictated that the *Herald* give Tornillo such a prime opportunity to respond, Burger made it clear that this was not something the state government could mandate, even though the Florida legislature had tried to do just that via the law (passed six decades earlier) that Tornillo attempted to invoke. Burger was willing to let the *Herald*—which had, in fact, followed its usual procedures in offering Tornillo reply space inside the paper—determine the conditions under which Tornillo could respond. Government interference with this process, Burger wrote, would impinge on the paper’s freedom to determine its own contents.

And that’s as it should be for all of the mass media, with government prohibited from imposing requirements for responsible use of free speech, because any such requirements would limit that freedom. This prohibition is a major reason why efforts to establish a broad legal right of access to the media have gone nowhere. Attorney Jerome Barron, in his unsuccessful argument in the *Tornillo* case as well as in an earlier book (Barron, 1973), urged the establishment of such a “right of access” rather than leaving access decisions to the media. But the unanimous *Tornillo* decision effectively foreclosed such a *legal* requirement and left the question of providing access (or “fairness”) as *ethics* issues to be determined by the media themselves.

Such responsibility in communication should, by definition, be an ethical rather than a legal concern. And, because ethics involves choice, people are free (and likely) to make some “wrong” decisions about communicating responsibly, and, if they choose, to cater to those audience segments that enjoy various types of “less ethical” media content or practices. In

our society, mass media ethics must be based on a “first principle” that ensures zealous protection for freedom of both informational and persuasive expression while leaving us fallible mortals free to chart our own ethical (or unethical) courses, guided by our own principles (let’s hope by something more concrete than the “conscience” that Glasser doesn’t fully trust) regarding responsibility.

I could be persuaded that private individuals ought to retain some rights to sue the media for irresponsible communication that damages their reputation in an unwarranted manner. But I much prefer Justice Hugo Black’s position that the best response to libelous material is not a lawsuit but rather the opportunity to respond and set the record straight. The value of such an approach, as the remedy for defamatory publications or broadcasts, is borne out by a study reporting that *libel* plaintiffs—especially those allegedly damaged in connection with public rather than private matters—were far more concerned with correcting false statements about themselves than they were in recovering monetary damages (Bezanson et al., 1987, pp. 4–5 and 79–81).

Such an approach, invoking “more speech” rather than monetary damages, would also help avoid the problem of media self-censorship that has cropped up in response to large libel verdicts. This “chilling effect” of large verdicts, not to mention the cost of defending a libel suit even if you win, is a very real consequence (particularly for smaller, less affluent media outlets) of the law’s goal of providing remedies for the more irresponsible instances of defamation. It illustrates well one type of problem that can follow the camel’s regulatory nose into the free expression tent.

LEGAL LIMITS ON FREE EXPRESSION

Of course, some governmental limits or regulations on the exercise of free speech have received Supreme Court sanction and help delineate the context within which ethical choices must be made. Restraining publications that are obscene or directly incite violence (see *Near v. Minnesota*, 283 U.S. 697, 1931) or that *clearly* threaten “national security” (see *New York Times Co. v. U.S.*, 403 U.S. 713, 1971—the *Pentagon Papers* case), is permissible, the Supreme Court said. In both cases, however, the Supreme Court ruled that the conditions required to permit prior restraint were *not* present. Another area where expression is regulated by the government is in the federal requirements imposed on broadcasters (see especially *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 1969, which held that enforcement of the Federal Communications Commission’s now-terminated Fairness Doctrine did *not* violate broadcasters’ First Amendment rights). Other examples are potential restrictions on expression that could threaten a criminal defendant’s right to a fair trial, and the limits that still remain on some non-political aspects of “commercial speech” (i.e., advertising) that fall outside the First Amendment’s protection.

None of these, except perhaps some of the “commercial speech” restrictions, are likely to be undone by the courts, although the Fairness Doctrine was repealed in the 1980s by the Federal Communications Commission. Such law-based ethical notions as broadcasters serving the “public interest, convenience and necessity”—required by the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (47 U.S. Code)—are

unlikely to be scrapped entirely, and the repeal of the Fairness Doctrine has certainly not ended an ethical allegiance to the general principle of fairness on the part of many broadcasters.

“Hate speech,” discussed below, is another area where courts have upheld some restrictions as not violating First Amendment protections. Rodney Smolla (1992), a First Amendment scholar, put it very well in discussing the protections afforded hate speech under the First Amendment and the ethical balance that is needed. He noted that society should consider “the feelings of victims with humility and with respect for the integrity of their assertions” that hate speech damages them. Indeed, he wrote, the “issue is whether this pain must be endured as part of the cost of freedom of speech, or whether the actions of [hateful speakers] crossed the threshold from protected expression to unprotected infliction of harm” (Smolla, 1992, p. 168).

All of this leads to two key points: first, the short-run need to make sure that the government imposes no further limitations on freedom of expression (for you and me, as well as for the media) in the name of *mandated* responsibility—or even accountability; and, second, the longer-run need to develop the ethics-based arguments supporting a strong presumption of protection for *everyone’s* freedom of expression, regardless of whether it is used responsibly.

Restrictions on freedom of expression can come from private parties as well as from the government, and these are no less dangerous to societal health if they are successful. The brief and quickly abandoned attempt in late 2007 by Verizon to prohibit an abortion rights group from sending text messages to its supporters brought immediate waves of criticism, which led to the policy reversal (Liptak). The incident occurred while the U.S. Congress and others were first considering so-called net neutrality laws, which would prohibit Internet access providers from barring messages because they disliked their content or from providing lesser levels of service to some people, again depending on factors such as whether the providers approved of the content. (See Chapter 8 for further discussion of the “net neutrality” concept.)

One final comment in regard to legal limits on free expression—I am *not* arguing that existing limitations should all be scrapped, though you might think so at times when you come to Julianne Newton’s side of this discussion (see pp. 44–55). As I noted above, the legal boundaries of protected speech form the context *within which* ethical decisions must be made, and it’s those boundaries that must, I believe, be protected from further encroachment. Newton’s implication to the contrary, I’m not *justifying* “reckless, negligent or harmful” mass media behavior. Rather, I’m arguing that it exists despite our wishes to the contrary, and it can’t be allowed to become the basis for additional restrictions on freedom of expression.

“HATEFUL SPEECH” IN THE REAL AND VIRTUAL WORLDS

Let’s look at hate speech as an example of why *more* speech rather than restricting speech is the route to follow, when dealing with irresponsible uses of freedom of speech. U.S. Court rulings in hate speech cases have held that only very precise provisions prohibiting such

speech in specific, narrow circumstances can overcome the First Amendment protections for speech in general. Words that present a clear threat of violence, or that involve speech on “private” topics totally removed from the arena where public issues should be debated, are among the very few types of hate speech that might properly be subject to regulation (Smolla, 1992, p. 167).

This approach differs from some other countries—Germany, for example, where there are stronger prohibitions on anti-Semitic and other hate speech. But because hate speech in the United States is (in most instances) legal, we need to come to grips with the damage that it can do to the fabric of society. And we need to consider whether there should be some sort of extra-legal mechanisms used to encourage responsibility even if it can’t (or shouldn’t) be enforced. As is, our general willingness to put up with it most certainly fails to discourage, much less prevent, various kinds of “hateful” speech that may be legal while still being highly offensive and perhaps damaging.

This approach, though, makes sense in regard to free expression in general, throughout a democratic society. The antidote for wrong, dangerous, or offensive speech should be *more* speech by those who disagree, rather than restrictions on the original statements. The key here is that we must be willing to provide protection even for speech that offends us, and even if that speech offends us greatly. To quote Justice Oliver Wendell Holmes’s dissent in *United States v. Schwimmer*, we must safeguard “freedom for the thought that we hate” (279 U.S. 644, at 655, 1929) every bit as much as freedom for words we find agreeable. Or, as Massachusetts Congressman Barney Frank said much more recently, “the First Amendment protects hateful people’s right to be hateful.”

The antidote for wrong, dangerous, or offensive speech should be *more* speech by those who disagree,

A classic example of the complexity of trying to control hateful speech—and how that can backfire—is the 1978–79 controversy surrounding the attempts of the National Socialist Party of America (a small, Illinois-based Nazi organization) to march in the Chicago suburb of Skokie, a community with a large Jewish population, including many concentration camp survivors. The village proceeded to enact three ordinances aimed at creating conditions under which this and future requests of this type could be denied. One of the three required proof of \$350,000 in liability insurance, to cover possible costs to the village if the parade led to any kind of disorder or damage. And the first group to be denied a parade permit because it couldn’t post that bond? A group of Jewish war veterans who wanted to demonstrate, a few months later, *against* the Nazi group (Hamlin, 1980, pp. 77–79)!

Protecting offensive speech clearly runs counter to various contemporary efforts to deal with so-called hate speech, among them campus speech codes that aim to prohibit or punish such speech. The problems with such codes, as with all attempts to regulate “irresponsible” communication, are the questions of who gets to decide what “irresponsible” really means and what criteria can be used to provide consistency from one situation to another. The fact that linguistic and political fashions change from one generation to another further complicates the attempt to answer these questions, because what is seen as derogatory or offensive speech today may become much more acceptable a decade or two hence, much as calling one a socialist during the Cold War would have been seen as highly damaging to one’s reputation, while today it’s at most a very mild epithet.

Perhaps more central to this discussion is the issue of whether “hate speakers” should be given free rein on cable television’s public access channels or in the various venues

available on the information superhighway. The cable access issue has arisen in a number of cities, and the usual response has been to allow the hate speech to air and then seek opposing groups to provide the “more speech” antidote. One danger in this approach has been that city councils, if they don’t agree with an open access policy, can cut or eliminate funding for public access channels, or simply abolish the channel, as happened in Kansas City in the late 1980s after the Ku Klux Klan—a white supremacist group—sought to use the channel.

An analysis of four cities where controversies over hate speech access erupted in the 1980s is relevant to the Internet today. That analysis demonstrated “that the most prudent, responsible, and ethical course is to permit outrageous speech and counter it with positive messages” (Harmon, 1991, p. 146). It examined ethical theory and concluded that approaches suggested by John Milton’s *Areopagitica*, John Stuart Mill’s espousal of the societal benefits of doctrinal competition, “the ‘free expression as utilitarian’ view espoused by David Hume” (Harmon, 1991, p. 152), John Locke’s social contract approach, and John Rawls’s distributive justice theory all supported the “more speech” remedy to this problem. So, I would add, does the “free marketplace of ideas” concept inherent in the social responsibility model for the mass media.

As Harmon (1991, p. 153) concluded: “regardless of whether one views free expression as a natural right, a utilitarian tool, or a component of the social contract, one comes to exactly the same conclusion about the [Ku Klux Klan’s] use of cable access.”

In other words, hateful speech should not be restricted because it too is entitled to the freedom guaranteed by the First Amendment. And even hateful speech may contribute in some marginal ways to the dialogue necessary for an informed, democratic society. But it should most certainly be countered by opposing viewpoints in a marketplace of ideas that remains open even to hateful ideas.

If this is the best solution to hate speech on cable access channels, it also will be the best approach to combating irresponsible use of freedom of expression wherever it occurs in the mass media (or more generally throughout society, although that’s a broader discussion than is appropriate here). If freedom of expression is zealously guarded for everyone, it is available for the speech we agree with as well as for speech we find offensive. And it will help safeguard society—and us—by having hateful ideas out in the open rather than forcing them to fester underground because they can’t get access to media channels.

Hate speech, though, has the capability of running rampant on the Internet far more than on public access TV, potentially regulated only by federal law and—on moderated lists or chat rooms—by the criteria set up in regard to participation (if they are enforced). Bloggers may or may not feel constrained to avoid speech that others will find hateful; those that are under the umbrella of a news organization or a similar entity can be reined in by the organization’s guidelines, but independent unaffiliated bloggers can spout hateful language freely, if they choose. But they can also be countered by others who have access to the various cyberspace forums where such blogs appear.

This “more speech” approach is going to do less damage in the long run, on the Internet as elsewhere, than trying to craft restrictions that are narrow enough to avoid the risk of also preventing speech that is relevant (even if only in peripheral ways) to a self-governing society. There is some logic behind attempts to prohibit patently “obscene” speech (however

the courts define that term) on the Internet, especially where children are concerned, but in other situations I'd argue that attempts to make communication on the Internet more "responsible" by prohibiting certain kinds of content are, themselves, inherently unethical. That's equally important whether the prohibitions are mandated by the government or by private parties and countenanced by the government. The latter possibility is why the net neutrality legislation mentioned elsewhere in the book is so important.

This "more speech" approach is not likely to sit well with people who are concerned about "responsible" behavior on the Internet, which they see as having fairly minimal controls—not to mention the minimal inhibitions that sometimes show up there. But I believe it makes sense here in the same way that I suggested it does in regard to public access channels—that "more speech" rather than restrictions should be the answer. The Internet, after all, is a platform that's open to anyone with access to a computer and the knowledge to erect a "soapbox" in cyberspace, and hateful speech can be answered fairly easily and, equally important, in the cyberspace forum where it occurred.

SOME FURTHER CONSIDERATIONS

If the "more speech" remedy is the best way to deal with hate speech on cable access channels and the Internet, it seems logical that it is also the best approach to combating irresponsible use of freedom of expression wherever it occurs. It is worth stressing again that, if freedom of expression is zealously guarded for everyone, it is available for the speech we agree with as well as for speech we find offensive. That is a necessary safeguard for a self-governing society.

This approach also protects each of us individually, if those in power find *our* ideas offensive or hateful. It's well worth recalling that such political and social movements as abolition, women's suffrage, civil rights, and opposition to the Vietnam and Iraq wars all started out as unpopular positions within the body politic. Had those in power been able to suppress the upstart opposition, American history would be vastly different.

When political positions, ideas, or social philosophies clash, as Mill would point out, the only way to modify "erroneous" ideas short of force or violence is to subject them to the test of competing opinions. Mill would also note that even the most wrongheaded ideas may have a grain of truth in them, and that grain will be lost if they are silenced. In other words, we must rely on the guarantees of the First Amendment, forbidding government interference—even to mandate "responsibility," as Newton (and Glasser) would do—so that we can come, sooner or later, to an appropriate societal consensus forged from unfettered, robust, and wide-open discussion and debate. Newton's contention that we can protect free expression while also facilitating responsible expression is true to some degree, but there are times when we have to choose between freedom and responsibility. Favoring one over the other always has trade-offs. But when push comes to shove, I have to come down on the side of freedom and take my chances with responsibility simply because people can't choose to be responsible without the freedom to make that choice.

In the second half of this chapter, you will see that Newton is concerned about the "more speech" formula because not everyone has equal access to mass media or equal expressive

ability. There's not much that can be done about the latter, but the former concern can be dealt with by increasing the channels that are available for expression—public access TV channels and access to the Internet, among other possibilities. As to the idea of everyone attending to everyone else's ideas, that's beyond what's possible even in an ideal society.

I certainly would encourage various efforts (including education) to convince people—in the traditional media, on public access channels and online—to act responsibly. But if they choose not to do so, I believe that a utilitarian perspective works best for a democratic society. Some people or groups within the society may be damaged by various kinds of “irresponsible” speech, but this is one of the prices that utilitarianism requires that we pay in order to achieve the greatest benefit for the society as a whole.

Followers of John Rawls would disagree, and argue that those most directly attacked by hate speech are the people most in need of protection. They would be willing to scale back the First Amendment in order to provide that protection, thereby sacrificing at least some of the freedom necessary for an open and informed society, in order to protect the relatively few victims of hate speech. Utilitarians, by contrast, would preserve the First Amendment freedoms that benefit us all in both the short and long runs, at the short-term expense of the victims of hate or other irresponsible speech.

In the last analysis, this is one situation where Kant's categorical imperative is worth following if we believe in the benefits of absolute freedom of expression. Even stopping short of espousing an absolutist position, we could frame a general proposition that freedom of expression should be protected regardless of whether it is used responsibly or irresponsibly. Using a rule utilitarian approach, we can argue that giving the widest possible latitude to freedom of expression will, on balance and in the long run, always produce the greatest amount of good and perhaps even “happiness” for the greatest number of people in the society. I believe this is true whether one focuses on the news media, whether one is concerned with the legal and ethical dimensions of entertainment content, advertising or public relations materials, or whether one is dealing with broader issues such as hate speech.

British ethicist H. L. A. Hart (1963) argued that it is not morally desirable to legislate ethical behavior:

The use of legal punishment to freeze into immobility the morality dominant at a particular time in a society's existence may possibly succeed, but even where it does it contributes nothing to the survival of the animating spirit and formal values of social morality and may do much to harm them.

(Hart, 1963, p. 72)

In other words, enforcing responsible communication behavior (“morality,” in Hart's terms) may well not succeed. Even if it does, such enforcement may damage both the underlying value of free expression and the societal change it can help bring about. Mill would support the latter argument, in his concern that any moment's “truth” should continually be tested rather than allowed to become unchallenged dogma.

American ethicist Deni Elliott (1987) argued that First Amendment freedom is an inadequate basis for defining media responsibility. The law, she wrote, is “problematic as a basis for moral responsibilities because one cannot derive duties from rights” (Elliott, 1987,

p. 7). In other words—Theodore Glasser’s arguments to the contrary—we cannot use protected rights of expression to impose duties and responsibilities on a speaker without risking serious damage to those protected rights.

Let’s take an example from the news realm—the 2006 publication by several newspapers of stories exposing a secret government program to “monitor the financial transactions of terror suspects” (“Story on secret program. . .”, 2006) I hope I have convinced you that the papers had to be left free to make their choices, whether you consider their decisions to be unwise and damaging to national security, or ethical and necessary for an informed society. Or, think for a moment about whether or not it’s irresponsible for the entertainment industry to produce programming that unreasonably invades people’s privacy, or makes them look ridiculous. And go back to the example in the introduction to this chapter, of the anti-abortion ad that is likely to offend greatly the sensibilities of a lot of people while succeeding in getting the attention of the audience. I hope you’ll agree that government should let these industries make their own decisions on such matters rather than trying to define and mandate “responsibility,” thus leaving to the public the final decision on whether to pay attention.

The important issue for our purposes is to protect free expression as fully as possible. An Aristotelian balance between freedom and responsibility will not work here. If freedom is used irresponsibly (immorally, in Hart’s terms), we can certainly use our own freedom of expression to argue for more responsibility, in either the news or the entertainment and persuasion sectors of the media. But we may well fatally threaten our own freedom of speech, as in the Skokie march example noted earlier, if we try to legislate or otherwise impose what we consider to be ethical, responsible communication standards as part of our traditional freedom of expression.

KEY POINTS

- People can’t choose to act responsibly without the *freedom* to make that change.
- The antidote for “wrong” or dangerous or hateful speech should be a Kantian or rule utilitarian approach supporting *more* speech (and access to channels through which to deliver it effectively), *not* restrictions on speech.
- Restrictions on “the thought we hate” are very hard to craft narrowly enough to prevent their impinging—down the road—on expression that we would agree with.

NEWTON: Freedom of expression cannot be allowed to become an excuse for irresponsible media conduct—in news, entertainment, public relations or advertising.

When early humans developed ways to communicate consciously, they probably were more concerned about food, shelter and impending danger than whether they were free to express themselves as they wished. Nevertheless, their lives depended on how they responded to each other and to their environments.

We 21st-century humans would do well to acknowledge that our lives also depend on how we communicate. As a species, we evolved the ability to integrate and express intuitive and rational mental processes to formulate wise decisions about how best to live our lives—individually and collectively. And as 21st-century participants in a world with global communication capabilities, we have more resources for large-scale and wide-reaching communication than preceding generations.

I agree with David Gordon’s core position that free expression must be “zealously defended.” However, I also believe that almost anything—including the defense of free expression—can be taken to such an extreme that it actually negates its original purpose. As Veronica A. Shoffstall (1971) wrote, “After a while you learn that even sunshine burns if you get too much.” My point is that people—and the messages and media systems they create—sometimes fall back on the principle of freedom of expression to excuse their bad behavior rather than take responsibility for the consequences their behavior engenders. Support of ethical and responsible conduct in the development and dissemination of media messages must be core to the determination of what is and is not protected as free expression. Unethical and irresponsible conduct is not acceptable in media messaging. However, the concept “cannot be allowed” requires careful consideration and substantively differs from wholesale advocacy of legal restrictions against free expression.

A BIG-PICTURE PERSPECTIVE

One way to gain perspective on the proposition that “freedom of expression cannot be allowed to become an excuse for irresponsible media conduct” is to place it within the contexts of everyday life and the long-term sustainability of our species and planet. Mass-mediated communication begins and ends with individuals. In everyday life, we communicate with friends, family, acquaintances and even strangers in face-to-face encounters through one-on-one or group interaction, through handwritten letters via snail mail, and through such electronic technologies as phones, e-mail and social networks in cyberspace. The quality of those communications varies according to our individual physiological and psychological abilities to interact meaningfully with others, the amount of time and thought each of us contributes, and the extent to which we consider the potential positive or negative effects of our communications.

Parallels can be drawn between individual communication and community, national and global levels of communication across mass-mediated news, entertainment and persuasive genres. In a packed movie theater one person shouting “Fire!” can incite panic among hundreds of people, perhaps injuring many as they flee in panic. An example that is more than hypothetical is Orson Welles’s 1938 radio adaptation of H. G. Wells’s *War of the Worlds*, which incited reactions ranging from alarm to panic in the minds of many listeners. The potential benefits and consequences of our communications expand with geographic and temporal boundaries. For example, an international audience watching the Super Bowl perceives a carefully constructed image of American might and wealth, an image that overflows entertainment boundaries and creates lasting images and perceptions of reality that guide future behavior and opinion beyond U.S. borders.

In theory, it is tempting to argue simply that each of us should communicate—whether individually or collectively, interpersonally or via mass media—in ways that do no harm. An ethical idealist might argue that individuals should not lie or say hurtful things to one another, that news magazines should not use misleading computer-manipulated images on their covers, that movie producers should not make films that model violent actions, or that television advertisers should not use enhanced visuals that misrepresent reality to entice viewers to buy products. One also can argue that communication, as a broadly conceived human activity, should enhance our lives individually and collectively while doing no harm.

Of course, “shoulds” do not always translate into “doings.” We do not live in an ideal world. We live in a real world in which real people help and harm, attend to and ignore one another. So, how do we protect the ideal of free expression by encouraging responsible free expression without undermining the very concept we want to protect—freedom?

In theory, it is tempting to argue simply that each of us should communicate . . . in ways that do no harm.

DEFINITIONS

Let’s define key concepts to make sure you’re reading and interpreting the words the way I am in this chapter.

Freedom is the core concept for which we need to establish meaning—and the most problematic. In the United States, freedom is associated with the “right to life, liberty and the pursuit of happiness.” In the Western tradition, discussions of free will, or the ability, without restriction, to choose for oneself how one should live and act, have occupied great philosophical and legal minds for more than 2,000 years. In Eastern traditions, freedom often encompasses inner enlightenment, a state of existence one can reach regardless of external physical or legal circumstances, and responsibility to community. On the other hand, in both Western and Eastern traditions, the idea of freedom can threaten personal and societal security. One might argue, for example, that a society without laws or restrictions to insure a basic level of general safety would lead to a state of untenable chaos. Without traffic lights at busy intersections, navigating city streets would be far more dangerous than it already is. Traffic lights regulate comings and goings so people take turns moving through intersections. If we ignore a red light and speed through an intersection, because we believe we should be free to do so, we risk getting a ticket or worse—physically harming ourselves

or others. So we agree to restrict our freedom of expression—using “driving” as a metaphor for “expression”—to establish laws that facilitate order and safety.

People still are “free” to disobey, but consequences discourage the likelihood that people will disobey. Does this same line of reasoning apply to other forms of expression? Must we agree, for example, to restrict free speech to decrease the likelihood that the language we use does no harm?

Expression refers to the outward conveyance of information, ideas or sending forth of thoughts, emotions and behaviors beyond the mind (through expressive gesture and other actions) into the air, onto paper or canvas, through the Internet, or by any other means, including all forms of mass media. Yet communication does not necessarily occur each time we express ourselves. Communication, or shared meaning, requires a degree of reception, interpretation and understanding of an expressed message.

Freedom of expression, then, is quite complex. Do we refer to the ability to say or do whatever we want in the interest of self-fulfillment and inalienable rights? Or do we refer to the ability to explore our ideas and interests without restriction as long as we are not harming someone? Does that someone include oneself?

Believing in absolute freedom of expression, with no accountability, could mean we believe it is acceptable to lie and to defame someone for personal gain. Gordon advocates more expression to counter expression with which we disagree. Yet research indicates that negative press, advertising and rumor, even if quickly and publicly proven untruthful through more expression, can permanently damage a political candidate or other individual.

Consider the example of the Swift Boat Veterans versus presidential candidate John Kerry during the 2004 campaign. No amount of “more expression” and positive discourse—including multiple publications in major newspapers, news magazines and television news broadcasts—will erase the doubt about Kerry’s military heroism planted in some voters’ minds by misleading and erroneous political ads. In a controlled experiment of reader perception, Zillmann et al. (1999) determined that one-sided photographs result in distorted reader memory of news items, even when the one-sided photographs were published alongside accurate and balanced verbal reports.

Although libel and slander laws cannot entirely discourage people from intentionally trying to hurt others with untrue statements, they at least provide a framework for protecting most individuals against malicious verbal and visual attacks in news media and beyond. So, we have learned that legal penalties that restrict free expression sometimes are necessary to guide responsible exercise of free press and speech and to protect individuals and the broader public from false information. Restrictions on certain types of advertising fall into a similar category.

Let’s define other terms in our proposition. The meaning of *allow* seems straightforward: “permit” or “tolerate.” Yet those terms are passive, and an effective democracy requires active participation. Active interpretations of the term allow are “agree to” or “consent to.” So, if we knowingly allow something to happen, in theory, we are agreeing that it is acceptable. A friend once asked me—as we sat quietly in front of a campfire—“Isn’t doing nothing doing something?” Realistically, however, it is not within the power of every individual to prevent all actions he or she believes should not occur. The important point

for our discussion is that individual and group expression—and non-expression (as a form of expression)—can effect change in ways that both enhance and harm.

An *excuse* is a reason or explanation. Again, however, a more active interpretation of the concept “excuse” is “pretext” or “justification” for behavior. Saying a behavior is excused can mean we are willing to accept that behavior for a particular reason regardless of whether our decision is justified in the sense that the behavior enhances rather than harms.

Irresponsible carries a similar range of implications. Dictionaries include “immature,” “careless” and “foolish” in the definition of irresponsible, implying a lesser degree of culpability that can more easily be forgiven than can deliberate intention. On the other end of the definitional continuum are the words “reckless” and “negligent,” which imply a degree of wrongful, often aware and potentially harmful behavior.

Media are environments through which signals are conveyed. Each medium has characteristics that influence the signal conveyed via that environment. In everyday use, the word *media* often refers to mass media, which convey messages to varying numbers of people. One problem with discussing “mass media” is that people often think of them as organizations and corporations—vague “its” or “theys” “out there” somewhere that somehow send us content of all forms. It is important to remember that mass media are comprised of groups of individuals who own the organizations and corporations, gather and produce content, and disseminate content to a variety of users in a variety of forms. These individuals are capable of being responsible in ways that enhance rather than harm and they can be held accountable for their actions. Also important to remember is that the Internet makes possible mass communication by a wider range of individuals—both professional and non-professional—than ever. Anyone who can access the Internet can distribute content of almost any variety to global audiences.

The proposition we are exploring in this half of the chapter characterizes media by their functions, or “purposes”: news (information), entertainment (amusement) and persuasion (influence). Each function can be fulfilled via a number of media, ranging from signs to newspapers to television and the Internet. The functions also overlap. Advertising can inform and entertain in the service of influencing consumption. News can entertain as it informs and influences opinion. Entertainment can inform and influence behavior as it evokes pleasure. Consider, for example, the Oscar-winning film *Philadelphia* (1993), which not only entertained millions of people but also informed them about the AIDs crisis—and helped bring AIDs to the forefront of the public agenda, thus influencing opinion and possibly behavior. The popularity of blogs and online publications has expanded the ability for anyone to write and publish about almost anything.

Conduct refers to behavior—the performance of actions and deeds.

So, where are we, now that we have clarified meanings and use of concepts? We might restate the proposition in the following way. *The fact that we value and protect free expression does not justify reckless, negligent or harmful behavior by practitioners of media communication.* I believe in this interpretation of the proposition with which we began. It suggests that there may be a place for carefully considered guidelines that encourage socially responsible expression and discourage socially irresponsible expression by media.

GORDON'S ARGUMENT

Here are the key points I take from Gordon's discussion:

- 1 Freedom of expression primarily refers to free speech and press.
- 2 Limiting free speech and press threatens democracy.
- 3 Irresponsible use of freedom is unethical.
- 4 Having the government try to enforce ethical speech and press conduct will not succeed (because there always will be some people who will find ways to abuse freedoms) and will cause more damage than good (because it limits those who are ethical as well as those who are unethical).
- 5 The best response to unethical expression is more expression by those who disagree.
- 6 Balancing freedom and responsibility will not work because we should not use rights to impose responsibilities.

Let me address Gordon's line of reasoning. Freedom of expression takes many forms. The First Amendment to the U.S. Constitution protects the forms of expression known as religion, speech, press, assembly and petition by requiring that "Congress shall make no law" abridging those freedoms. Through the years since 1791, when the first ten amendments (the Bill of Rights) were enacted, U.S. courts have extended the meaning of the term "Congress" to include the federal government and the states. The courts also have extended what we might normally consider "speech" to include activities such as flag burning. The issues are so complex that even First Amendment scholars have found them perplexing.

I believe that individual free expression is central to this discussion. Individuals create and perceive the expressions conveyed by media. The range of media—especially new media—increasingly facilitate individual expression through participation in media expression. Even a mass audience of viewers, readers and users is comprised of individuals who perceive and potentially respond to mediated messages, which emphasizes the importance of individual free expression.

Does freedom of expression also extend to sexual freedom, clothing, dance and art, burning the flag, gestures, smoking in public places, telling or showing lies in advertisements, praying in public, or luring children into dangerous encounters via Internet personae? An absolutist might say "yes" to all of these expressive forms. However, Gordon rightly notes policies and court rulings that regulate publications that are obscene, incite violence or threaten national security, threaten an individual's right to fair trial, use false "commercial speech" or inflict harm through "hate speech." Some of these policies and court rulings that do limit freedom of expression are excellent examples of the "responsible" conduct I support. Others, as Gordon also notes, raise problems even as they try to solve problems. That potential, in turn, leads Gordon to assert that "freedom of expression should be protected regardless of whether it is used responsibly or irresponsibly."

As a general principle, Gordon's assertion makes sense—especially in a society that values differences of opinion as a path to ultimately wise and well-informed decision-making for the majority of those in that society. However, when I weigh my deeply held

passion for free expression against equally deep passions for respecting others and for socially responsible citizenship that does no harm, I conclude that democracy is better served with carefully considered guidelines for responsible conduct. Indeed, a number of the regulations that Gordon describes are such guidelines. Furthermore, contrary to his suggestion that I favor silencing unpopular opinion, I favor free and open expression, regardless of its popularity. Key to my argument, however, are the concepts of *responsibility* and *accountability*.

At this point more clarification of terms will help. By *ethics*, I refer both to the study of right and wrong and “to the human pursuit of a beneficent life” (Newton, 2004, p. 433). Right generally is associated with “correct” or “good.” Wrong generally is associated with “incorrect” or “bad.” Beneficent refers to helpful. (Its opposite, maleficent, refers to “harmful.”) The problem, as Gordon notes, is determining who gets to set the standard for right and wrong? What happens if one person’s “right” is another person’s “wrong”?

An example of this dilemma is whether news media should publish the name of a rape victim. Although it generally is legal to do so, traditional policy in many news organizations prohibits publishing names in such circumstances. The policies were created in order to avoid doing more harm to the victim, someone many people consider vulnerable and in need of protection from embarrassment, shame or reprisal—which might further victimize the already-harmed individual. One feminist-based argument, however, states that rape is a crime of violence rather than a sexual act and that not naming someone who was raped implies the victim has indeed been shamed by what happened, thus further victimizing and disempowering that individual. Another argument, one that influenced the *Winston-Salem (NC) Journal* to enact its long-standing policy of naming rape victims, stressing fairness to the person accused of the crime. (This topic is discussed further in Chapter 10.) In this example, then, one person’s “good” is another person’s “bad.” The point of such policies—whichever way they go—is that those who run the newspaper organizations weigh the pluses and minuses of naming rape victims and determine policy based on careful thought about potential consequences. That is responsible free expression.

Ethics, which usually refers to high standards for living one’s life, often forms the basis for laws establishing safety within and among groups of individuals: as a general principle, killing another person is considered wrong and is against the law. Yet killing someone in self-defense or as an act of war can be a legal act. In a democratic society, people elect government officials to help make laws. Laws are regulations, usually with clearly stated consequences for violating them, that in effect become minimum standards for living in that society, rather than higher codes for living. Laws have to be obeyed or disobeyed.

Ethics, on the other hand, can be innate, cultivated, discovered and chosen. Cognitive neuroscientist Michael Gazzaniga (2005) argues that we “instinctively react to events,” that our brains interpret our reactions, and “out of that interpretation, beliefs emerge about rules to live by.” He adds, “Sometimes they have a moral character; sometimes they have an utterly practical nature” (Gazzaniga, 2005, pp. 144–145). The First Amendment is itself a rule that emerged out of the nation’s founders’ reactions to their experiences, their interpretations of those reactions, and the beliefs that emerged.

I agree with Gordon that ethics cannot be enforced through laws. However, to some extent, the responsibility that supports ethical behavior can be encouraged, if we define

responsibility as answerability or accountability. And ethical behavior can be encouraged or discouraged by policies and guidelines that stimulate discussion and educate about potential consequences. When news organizations weigh consequences of publishing or not publishing the names of rape victims, and subsequently adopt formal policy, they encourage responsibility and accountability among their staffs and the reading community. Similar considerations have led to the formulation of policies about the posting of comments concerning online stories.

Consider the free-speech dilemma of deciding whether to publish information that police prefer to keep out of the public eye? Melinda Kletzok (2008), public information officer for the Eugene (Oregon) police department, described a situation in which a local television station obtained exclusive information about a widely publicized crime. The station had the legal right to scoop other Eugene stations by airing the information in its evening newscast. Yet the station made an ethical decision against airing the information—because it agreed with the police’s contention that doing so would tip off the perpetrators and impede investigation. Airing the information would have been irresponsible—and the station decided not to use the First Amendment as an excuse for doing so.

Following this line of reasoning, we might argue that the First Amendment, as a legal document, is grounded in ethics and assigns responsibility. It defines perimeters beyond which our government may not extend itself, establishing a prohibition against laws abridging free expression. In Gordon’s words, this keeps “the regulatory camel” from getting “its nose into the tent of free expression.” Yet the First Amendment is itself a regulation that requires “the regulatory camel to get its nose into the tent” in order to protect freedom of expression. The First Amendment protects free expression even as it restrains government. By enacting the amendment, we, as a democracy, assumed responsibility for protecting freedom of expression. See where this leads? We began our system of government with a mandate restraining that same government in order to insure freedom. Is it so big a leap to consider that guidelines may be needed in order to make sure free expression itself is not abused under the guise of protecting that very freedom?

Some may call this argument tautological, meaning it comes back on itself and is therefore invalid. I do not see it that way at all. I usually do not support either/or oppositions. Issues seldom are clearly right or wrong: they are dynamic, with nuances and complexities that do not have absolutely right or wrong resolutions. In other words, we can protect free expression while also facilitating responsible expression.

Note that the proposition with which we began this half chapter uses the phrase “cannot be allowed.” To me, the use of that phrase does not mean that we should enact laws and regulations to limit free expression. Rather, it means that we who hold truly free expression dear must create ways to facilitate responsible and beneficent expression and communication and to discourage irresponsible and harmful expression. It is a matter of ethics and responsible citizenship. Here, Gordon and I agree.

But what about Gordon’s position that the best response to unethical expression is more expression by those who disagree? That works quite well in an ideal society in which, first, everyone has equal power, equal access to media for expression, and equal expressive ability; second, everyone waits his/her turn to “express;” and third, everyone attends to everyone else with equal, fair, truthful and respectful consideration. As I noted earlier, and

The First Amendment protects free expression even as it restrains government. By enacting [it], we, as a democracy, assumed responsibility for protecting freedom of expression.

as Gordon notes, we live in a real world, not an ideal one, although it often is tempting to live in media worlds rather than corporeal worlds.

Nevertheless, the fact that humans have not yet succeeded—though some have tried—in establishing such a society is a specious rationale for dismissing the value of contemplating and working toward such a society as a goal in the quest of freedom. On the contrary, it is unethical—especially given the existence of countries such as the United States with its bountiful resources—to accept a laissez-faire perspective about free expression. Those who hold financial, social, political, institutional and physical resources too often dominate discourse, not only in the United States but also in other countries. In particular, those given legislative, judicial and policy-making power in a democratic society have responsibilities to those they represent and govern, including those whose voices are drowned out by the more powerful. One can also make an ethical argument that those who “have” should share with those who do not. An example of individuals seeking to correct the imbalance of access to computers and the Internet—and thus the imbalance of voices—is MIT Prof. Nicholas Negroponte’s One Laptop Per Child Project, which gives laptop computers to children in developing countries. The project’s educational goal is “to provide children around the world with new opportunities to explore, experiment and express themselves” (One Laptop Per Child, 2008). Leaving the children’s participation in the global dialogue to chance would essentially bar them from exercising free expression in cyberspace and be a grossly irresponsible misuse of freedom of expression as an excuse to do nothing.

An example of responsible media conduct is the Canadian Film Board’s Filmmaker-in-Residence program. One project seeks to help pregnant homeless teens improve their lives by putting cameras in the girls’ hands. Given wider and more powerful voice via media technology and distribution through the Internet and exhibitions, the girls have gained access to the public and to political leaders who can help mobilize support systems.

A nuanced but significant point regarding these two examples is important here. In the first example, good intentions have not always resulted in good consequences. The introduction of laptops to a few children in a community shifts family hierarchies in unpredicted and sometimes negative ways. The laptops usually go to the oldest child, who gets to go to school, leaving younger children behind. One has to ask, however, should those few children not gain voice via access because all children are not given access?

In the second example, a key to the program’s success is empowerment of individual girls to communicate with one another as well as with public audiences. Stories that would not be told to outside adults are told to peers with cameras, thus enriching the depth and validity (and thus the freer the expression) of the visual and verbal information exchanged and disseminated.

Finally, I disagree with Gordon’s last point—that we cannot derive responsibilities out of rights. I believe rights encompass responsibilities. Rights empower those to whom they are extended. Rights make freedom possible—and rights can be abused, as the proposition at the head of this half chapter argues. Rights deserve to be protected through responsible use; irresponsible use of rights often results in the opposite of freedom: loss of rights.

SO, WHAT DO WE DO?

Although absolute freedom of expression may be a right that people value and desire, absolute freedom can be akin to absolute power. Without checks on power—and carefully considered guidelines for responsible exercise of freedom—we are neither free nor powerful. We have to be free to say “No” before we are truly free to say “Yes.”

Is there any such thing as completely “free expression”? Do you tell your significant other, always, what you think about his or her hair or lovemaking? Do you always tell the rude person behind you in line what you think? Do you always strike out verbally at someone you really want to hurt, or yell at the police officer who has just stopped you for speeding, or picket your boss’s office because you feel you’ve not been dealt with fairly?

Gordon probably would argue that even though the above scenarios present situations in which people are less likely to express themselves freely, protecting free expression means still having the right to say exactly what you want, even if it is irresponsible to do so and regardless of the consequences. The issue, for me, is that humankind has come a long way since we developed conscious means of expressing (and not expressing) ourselves. Even though we still are capable of barbaric behavior, we have learned to value civility, a characteristic of interaction based on mutual respect and good will, rather than on purely self-fulfilling behavior. In fact, well-considered civility can be in an individual’s and society’s best interest because it can help prevent unwise statements and actions that might be harmful or even threaten life.

Power and freedom can go both ways—toward those who are reasonable and good and toward those who are not. Aristotle and Confucius carry the day for me. For Aristotle, the best path was to seek the middle ground between extremes, a principle he called the Doctrine of the Mean. “Every knowledgeable person avoids excess and deficiency, but looks for the mean and chooses it,” Aristotle wrote in his *Nicomachean Ethics*, Book Two (*circa* fourth century B.C.E., 1106a20–b9, p. 100 in Tredennick, ed.). In regard to “self-expression,” Aristotle posited “Truthfulness” as the mean between “Boastfulness” and “Understatement.” Confucians believe that humans are relational beings and that respecting one’s community in the interest of the common good is key to living a good life. This communal-based understanding of rights includes the “duty to speak frankly when the violation of propriety and justice is in question,” writes Confucian ethicist David B. Wong (2004, p. 35). Wong argues for “the interdependence of [individually grounded] rights and community” (2004, p. 33)

Also following the wisdom of Alexis de Tocqueville, Wong (2004) stresses “the dangers of an atomistic individualism that leaves citizens isolated, pursuing their purely private interests, and quite ineffective in making their voices heard in the political sphere because their voices are single.” The consequence “is not enough community . . . to support effective democracy” (Wong, 2004, pp. 41 and 42). Another way to think about this point of view is that if we say anything at any time, we may relate to no one. Moderation and compromise encourage us to consider both possibilities and consequences, while also attending to core principles in which we believe—such as freedom of expression. Conversely, strict adherence to principle or duty (deontological ethics) at the expense of goal or consequence (teleological ethics) too easily results in absolutist positions that may be neither ethically congruent nor tenable.

Gordon applies utilitarianism and the categorical imperative to support his position. I favor the theory of universal ethics proposed by media ethicist Clifford Christians, who grounds his argument in “the sacredness of human life” as a universal value, or protonorm, that “will either flourish or wither,” depending on individual and group action (Christians, 2005, p. 12). Christians writes: “The ethics of human sacredness is a people’s manifesto, calling us to fulfill our duty to honor life, while insisting with credibility that the big-time media symbol-makers and government elite fulfill their specialized obligations too” (Christians, 2005, p. 12). In this way individuals, both alone and collectively, move beyond the norms of specific cultures and nations to embrace a sustainable ethic that enhances life. And media act in socially responsible ways.

To address our core proposition—that “freedom of expression cannot be allowed to become an excuse for irresponsible media conduct”—I have developed a four-track, integrative model that facilitates ethical decision-making about issues related to free expression. The model reviews the purposes, platforms, practices and potentials of expressive conduct and supports ethical expression and communication:

- 1 Consider the *purpose* of a particular expression to understand intentions and motivations. Why is someone saying this? Why might they be feeling this way? What thinking might be behind this expressive action?
- 2 Examine the *platform* of an expression to become aware of the potential audience for, as well as the form of, the expression. Who is likely to view, hear or read this expression? Will the form keep the expression among a few individuals or will it be conveyed around the world?
- 3 Review *practices* to comprehend the process of creating the message form and its content. How was this expression determined? Is there a more responsible way to express this message and convey it to those who need to hear it?
- 4 Envision *potentials* to focus attention on possible or probable effects or consequences of conveying an expression. What might happen if I say this? Will it hurt or help someone? Is the hurt justified because it will help others? To what extent will this message harm someone and is it worth the harm?

Applying the model to the Skokie scenario described in Gordon’s half of the chapter offers an excellent example of how the model will help prevent implementing a harmful policy without fully considering the range of issues.

- *Purpose*: Did Skokie leaders want to protect their community from physical damage and violence, or did they want to stop the Nazi group? Did the Nazi group want to express its opinion through lawful assembly, incite violence or make a point about free expression?
- *Platform*: Was the platform the Nazi group chose one of effective expression, or one calculated to cause pain and distress?
- *Practices*: Did the Nazi group determine the most effective means for conveying its message? Was this an issue of free expression or of intent to harm? Did the community leaders determine the most effective means for handling a potentially violent situation?

- *Potentials*: Did the Nazi group consider the consequences of inciting hatred toward themselves by expressing hatred for others? Did the community leaders consider the consequences of setting policy that would prevent all those without financial resources from marching in their community?

Applying the model to an ethical dilemma such as the Skokie march requires only that we evaluate to the fullest extent possible how each component might be addressed while honoring universal ethics and social responsibility. The model requires no laws or regulations. It does, however, require education about the nature of human communication, free expression and ethical decision-making, and it requires implementation through the exercise of free expression. “Not allowing” irresponsible conduct can be as simple as changing the channel or as complex as beginning a campaign to change the dominant content of a local television station—or challenge a court ruling. The more we carefully consider purposes, platforms, processes and potentials, the more likely we are to hold ourselves—and others—accountable.

IN CONCLUSION

Humans evolved expressive abilities as part of their means of survival. In a world in which differences sometimes outweigh similarities, we need every form of expression we can muster in order to understand one another. It is important to remember, however, that one reason we have survived and evolved as a species is because we also evolved the capacity for knowing when and how best to express what we think and feel. Our conscious and nonconscious reactions to events and ideas and subsequent interpretations of our reactions are the very thoughts and feelings that lead us to express ourselves—for good or for bad.

Make no mistake: I am passionate about protecting freedom of expression. Gordon and I agree more than we disagree. Indeed, free expression must be zealously protected as a fundamental right in what First Amendment scholar Prof. Kyu Ho Youm terms the “great laboratory of experiment” that is the United States (personal communication, November 3, 2007). However, it took legal action in the form of a constitutional amendment restraining government to guarantee the freedom to experiment with open expression. It takes legal action to protect private individuals from the publication of damaging lies and to protect children from Internet stalkers. We need guidelines that facilitate socially responsible citizenship—by individuals and mass media alike.

We must remember that individuals create, compose and act as the government, and individuals create and consume media and their content. Individual disagreement, civil disobedience, codes of ethics, policies and regulations all have their place in protecting our freedom of expression. Freedom itself is an ethic the United States agreed to support, a right through which we seek to accomplish the democratic goal of equality for all.

We owe it to the ethic of freedom to protect free expression by exercising our right responsibly.

KEY POINTS

- Unethical and irresponsible conduct is not acceptable in media messaging, and unlimited freedom can threaten personal and societal security.
- Laws are regulations that in effect become minimum standards for living in a society, rather than higher (ethics) codes for living.
- By enacting the First Amendment, we assumed the responsibility to protect freedom of expression, and to restrain our government in order to insure that freedom. We need guidelines to make sure that free expression is not abused under the guise of protecting it.
- Following Aristotle's "middle ground" approach and Christians' (2005) theory of universal ethics, we can protect free expression while also facilitating responsible expression.

MERRILL: Commentary

What a great chapter to begin this book of controversies! Both David Gordon and Julianne Newton have pulled out all the stops in defending their positions. Their presentations are solid, well-written, articulate, and thought-provoking. This is perhaps the most complex—and basic—topic that a book about ethics can confront. The authors have done it well.

But, sad to say, they have left the question open. No satisfactory answer—at least not a simple, direct one—is given by either. However, this is a perennial dialectic—freedom versus responsibility—that has troubled philosophers throughout the ages. It lies at the very foundation of ethics. We must be free in order to be responsible—or at least to aspire to responsibility. But this very freedom opens the door to unethical actions or irresponsibility.

Gordon takes more the radical libertarian position on this controversial issue. It is the position I prefer, although I realize that it permits ethical misbehavior. It puts the onus directly on the ethical agent whose freedom propels him or her into an existential personal commitment.

A more moderate—and perhaps more rational—position is taken by Newton, whose controlled-freedom position supports the legacy of Plato. Or, as she says, the legacy of Confucius or Aristotle. At any rate she contends that freedom of expression cannot be allowed as an excuse for irresponsible media action. Freely determined media expression that is irresponsible simply is not acceptable. Period. She does recognize that freedom is "the core concept" and the most problematic. Freedom is certainly problematic, but for me it is no more troublesome than "responsibility." In fact, if one does not denude "freedom" from its pure meaning, it is actually a very meaningful concept. Responsibility, on the other hand, is subjective and relative and, in any context, filled with powerful semantic noise.

Gordon comes close here to being a freedom purist, a strict libertarian. For him, freedom of expression is to be protected *even when exercised unethically*. That's a strong statement.

It finds an uncomfortable spot in a book like this one—on ethics. But not really—not for the libertarian who sees freedom as anterior to, and more important than, ethics. Saying one is for freedom is not the same as saying that one is against ethics. In the U.S. context, Gordon notes that the First Amendment requires a free press but not a responsible one. Responsibility, says Gordon, must be left to the press itself.

Quoting Theodore Glasser (1986), Gordon invokes what is often called “positive freedom”—freedom to accomplish something. So, says Glasser, freedom *requires* something of the agent: to accomplish something. This view Gordon rejects, as do I. If I am an editor and I want to “sit on my freedom,” doing nothing positive, then so be it. Freedom includes the freedom to do nothing as well as to be negative, harmful, and—yes—even unethical.

Newton is almost as pure in her legalism as Gordon is in his libertarianism. Irresponsible media conduct is not acceptable. Period. The media, like all of society, need rules, controls, limits, and guidance. Just who these “philosopher kings” of the media will be, Newton never says. But presumably they would be in the judicial branch of government. The old “internal” controls of the media simply have not worked, she says, and little empirical evidence is needed to agree with her.

But the question remains: if ethics is not legalism, and morality not law, therefore, when we get outside forces handing down ethical standards, is that still in the realm of ethics?

Since my concept of ethics is quite different from law by being self-determined and self-enforced, I must fall back on Gordon’s position of libertarianism. As Gordon insightfully says, ethical arguments can and do erode freedom by curtailing or eliminating many actions. The corollary is, of course, that freedom can and does erode ethics by, in essence, circumventing “the right” action whenever desired. This is one of the weaknesses of utilitarianism: that it provides a rationale for pragmatic action rather than for ethical action. And freedom, unless self-controlled, loses its essence and turns into a kind of authoritarianism.

A bothersome point in Gordon’s argument: if an action is forced upon someone, it cannot be responsible (ethical). Why is this? If I am forced to be ethical, am I not still ethical? Do I have to act from self-realization of moral values? If I am stopped by a traffic light, is this any less ethical than if I stop myself at a lightless intersection? The results are the same, and Newton’s position reasserts itself in this controversy. But then Newton argues that the First Amendment is grounded in ethics. I am puzzled again. The amendment says that Congress shall make no laws abridging press freedom. Does this mean that laws are unethical? That free press actions are ethical? Where is the “grounding” Newton mentions?

Interestingly, Newton prescribes a “four-track model” revolving around Christians’ (2005) call for us to fulfill our “duty to honor life”—what he regards as the ethics of “human sacredness.” In spite of its vagueness, this humanistic admonition is immune to criticism. But one wonders, if there is a sacredness about human beings, why we would need to worry about being unethical. And, we might wonder also just what is meant by “honoring life.” The journalist who takes a trip on a government airplane or who prints the name of a youthful offender or who exposes the crimes of another person—this journalist may honor life. Does this make such actions ethical? The concept is so full of semantic noise that it falls into the pit of meaninglessness.

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People who mainly side with Gordon, and I am one of them, see any limitation of freedom of expression (by outside forces) as dangerous. It is dangerous for several reasons: it opens the door to any would-be determiner of “right” or “correct” expression; it assumes that media people cannot make their own decisions; it propagandizes a monistic concept of responsible communication, and it is nothing more than incipient authoritarianism in the guise of ethical communications behavior.

Those siding with Newton in this controversy contend that morality dictates such limitations on freedom. Unlimited freedom, they say, is socially harmful, counterproductive to the development of a moral sense, unintelligent, and potentially disruptive to social harmony, and perhaps even to national security. A strong—and basically rational—argument. Underneath our contentious exteriors, it seems that we are automatically enjoined to place ethics ahead of freedom, the community good ahead of individualistic proclivities. Most of us seem to be quite willing to place ethics in the hands of someone or some body outside ourselves—but then we get into the realm of law. Law, of course, can give more stability to society than can individual ethics. This is the slippery slope of the freedom–ethics dialectic.

Now if Newton means that free expression may be limited in some ways (meaning self-control or self-limitation), I agree with her. But if she condones an outside person or entity doing the limiting, even in the name of morality, I cannot agree with her, although I must admit I am increasingly prone to. This is a topic ever-open to discussion and refinement, and it is hoped that these two thoughtful persons have stimulated you to further and vigorous consideration of it.

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