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SYMPOSIUM ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AT SEVENTY

SPEECH DUTIES

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Using the example of harmful speech online, this essay argues that duties to others—a core component of our humanness—require us to consider the impact our speech has on those who hear it. The widening availability of tools for sharing information and the rise of social media have opened up new avenues for individuals to communicate without the need for journalistic intermediaries. While this presents considerable opportunities for expression, it also means that there are fewer filters in place to manage the harmful effects of speech. Moreover, the structure of online spaces and the uneven legal frameworks that regulate them have exacerbated the effects of harmful speech, allowing mob behavior, harassment, and virtual violence, particularly against minority populations and other vulnerable groups.[1]

A renewed emphasis on speech duties—the obligations of speakers to consider the impact their speech might have on others—could provide an important counterweight to what otherwise seems like pervasive online hatred. Human rights law recognizes that individuals have "special duties and responsibilities" to ensure that they do not express themselves in ways that harm the rights of others. Individuals have the right to free expression, but they should exercise that right in a way that seeks to mitigate the possible harms of their speech. Recognizing such duties on the part of individual speakers could help to fill some of the gaps in efforts to respond to hate speech, for example speech that inflicts harm but falls short of violating domestic law or platform terms of service.

Considering the relevance of speech duties to online hate also sheds light on the role that the concept of duties might play in international human rights law. Current scholarship has focused too narrowly on the *individual* aspect of duties as a set of moral obligations that we have to one another. Duties, however, also give rise to a correlative obligation on governments and other duty bearers to create an enabling environment in which those duties can be, and are likely to be, carried out. This essay argues that as part of their responsibilities to "prevent or mitigate" human rights harms linked to their operations,[2] social media companies should design platforms that enable and encourage the exercise of speech *responsibilities* as well as speech *rights*. The essay uses insights from cognitive science and psychology to argue that what is missing in the design of social media platforms are cues to remind users of their shared humanity and thus the responsibilities they have to one another.

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[1] Danielle Keats Citron, Hate Crimes in Cyberspace 56–72 (2014).

[2] John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31, Principle 13 (Mar. 21, 2011) [hereinafter Guiding Principles].

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Human Duties and Speech

Although human rights law typically envisions the individual as a bearer of rights rather than responsibilities,[3] individual duties have long played a role in international human rights law.[4] Despite concerns that a reference to individual duties would be seen as a pretext for states to limit rights,[5] there are several references to "duties" in core human rights documents, including in Article 29(1) of the Universal Declaration of Human Rights (UDHR). Further references to duties are found in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, and most robustly in two of the regional human rights treaties, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.[6] Even if not explicitly referenced, duties can also be understood as implicit in each of the positive rights expressed in human rights law.[7]

Recent scholarship has revisited the idea of individual duties as a way of responding to both ongoing critiques of and new challenges to international human rights. The human rights framework has long been critiqued as overly individualistic, allowing unbridled freedom that itself operates to harm the rights of others.[8] More recently, a rights-heavy regime has been critiqued as inadequate for responding to new problems such as climate change, which require the exercise of individual responsibility.[9] Recent scholarship has therefore returned to the concept of duties as an important counter-balance to rights. This scholarship has emphasized that human duties are premised largely on responsibilities to others, which arise out of our shared humanness as well as our relationships with others.[10]

It is not entirely clear, however, what functional role individual duties play in international human rights law beyond serving as a moral exhortation to act with consideration and respect for others.[11] Such duties are sometimes enforceable, as for example through their instantiation in international criminal law. In most other instances, individual duties—while not legally enforceable against an individual under international law—are only seen as allowing and in some instances requiring states to impose duties under domestic law.[12]

Article 19(3) of the ICCPR illustrates the way in which the concept of duties within human rights law does both of these things. Article 19 of the ICCPR, which protects freedom of expression and opinion, is the only article that explicitly references duties in the main body of either of the two primary human rights covenants, and it is the only

[3] John H. Knox, *Horizontal Human Rights Law*, 102 AJIL 1, 1 (2008).

[4] *See generally* Douglas Hodgson, Individual Duty Within a Human Rights Discourse (2003).

[5] Knox, *supra* note 3, at 9–10. *See generally* Erica-Irene A. Daes, Freedom of the Individual under Law: A Study on the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights (1990).

[6] *See, e.g.*, Makau Wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 Va. J. Int'l L. 339, 359–64 (1995).

[7] Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 Harv. Hum. Rts. J. 51, 53 (1992).

[8] *See, e.g.*, Eric R. Boot, Human Duties and the Limits of Human Rights Discourse 4–5, 69 (2017); Hodgson, *supra* note 4, at 211–18.

[9] Fernando Berdion Del Valle & Kathryn Sikkink, *(Re)discovering Duties: Individual Responsibilities in the Age of Rights*, 26 Minn. J. Int'l L. 189, 244 (2017).

[10] *See, e.g.*, Aaron Xavier Fellmeth, Paradigms of International Human Rights Law 29, 40–41 (2016); Daes, *supra* note 5, at 52, para. 221; Boot, *supra* note 8, at 95; Hodgson, *supra* note 4, at 98; Del Valle & Sikkink, *supra* note 9, at 197; Ben Saul, *In the Shadow of Human Rights: Human Duties, Obligations, and Responsibilities*, 32 Colum. Hum. Rts. L. Rev. 565 (2001).

[11] Fellmeth, *supra* note 10, at 29.

[12] Knox, *supra* note 3, at 10. An emphasis on duties might also be seen as a methodological approach that allows us to clarify the nature of rights. Boot, *supra* note 8, at 67.

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specific right called out as having corresponding duties in the entirety of the International Bill of Human Rights. Article 19(3) provides:

> [t]he exercise of the rights provided for in paragraph 2 of this article [protecting freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The travaux préparatoires of the ICCPR indicates some general concern with individuals exercising their expressive rights in ways that might harm the rights of others,[13] but the drafters were primarily concerned that private actors such as journalists and newspapers might use their position to drown out other voices—particularly in situations of media concentration.[14] The language of "duty" in Article 19(3) was added to make clear that "opinion makers" were obligated "not to abuse their power at the expense of others."[15] Speakers have duties under ICCPR Article 19(3) to avoid expressing themselves in ways that infringe on the expressive rights of others—although at the time the ICCPR was drafted, only the media was thought to have the power to do this.

Although media dominance remains an important concern, the ability of *individuals* to affect the speech of others has increased tremendously since Article 19(3) was drafted. The rise of social media and the ability to communicate widely at the touch of a button have provided immense power to ordinary individuals. This power can help to fuel protest and revolution,[16] but it also creates the potential for extraordinary harm. The structure of online spaces also exacerbates the effects of harmful speech, allowing mob behavior, harassment, and virtual violence. Behaviors ranging from general vitriol and barely masked racism, homophobia, and sexism to overt trolling and harassment seem to pervade the internet.

Often these harms are justified in the language of rights. In many ways, this is the paradigmatic illustration of the risks of unbridled freedom. In the United States, commentators have begun to speak of the "weaponizing" of the First Amendment[17] to describe efforts that focus attention solely on the question of whether the speaker has the right to speak, regardless of the value of his or her expression or the harms that this expression inflicts on others. The corrosive effect of this minimalistic conception of rights means that the internet looks and feels—and often is—increasingly unsafe for many.[18] Meaningful dialogue and exchange are still found online, but are overshadowed by the volumes of careless or intentionally malevolent trolling, insults, and abuse that tend to populate the comments section of any widely shared social media post.

What roles might Article 19(3)'s mention of duties play in this context? It can certainly play the same roles that duties have generally played in international human rights law, imposing a few individually enforceable duties and otherwise relying on the state to enforce the remainder under domestic law. International criminal law enforces

[13] Marc J. Bossuyt, Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights 386 (1987).

[14] Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 350 (1993); *see generally* Molly K. Land, *Toward an International Law of the Internet*, 54 Harv. Int'l L.J. 393, 448–49 (2013).

[15] Nowak, *supra* note 14, at 349.

[16] *See* Zeynep Tufecki, Twitter and Tear Gas: The Power and Fragility of Networked Protest (2017).

[17] Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. Times (June 30, 2018).

[18] *See generally* Citron, *supra* note 1.

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some speech duties by providing a basis for prosecuting individuals who incite international crimes.[19] Article 19(3) also requires the state to put limits on speech in order to ensure that the rights of others can be fully protected.[20]

There is, however, a third way of understanding the role played by duties in the context of speech. In addition to being directly enforceable in some instances, and enforceable through state regulation in others, speech duties also give rise to a correlative duty upon governments and private entities to create an enabling environment in which individual duties can be, and are likely to be, carried out. States, for example, are obligated to create the structural conditions needed for the fulfillment of rights,[21] and Article 28 of the UDHR emphasizes that "[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

Social media companies, in turn, have the responsibility under the UN Guiding Principles on Business and Human Rights to "address adverse human rights impacts with which they are involved" and "to prevent or mitigate human rights harms linked to their operations."[22] Yet their current efforts to respond to harmful speech by identifying and removing it from their platforms are unlikely to be successful in preventing or mitigating all human rights harms. Social media companies already struggle to identify content explicitly prohibited under national laws. Forced to draw almost impossible lines between social commentary and advocacy of violence at scale, the regulation that social media companies provide will be inevitably both overbroad and underinclusive.[23]

Top-down solutions that require social media companies to remove potentially harmful speech from their platforms are unlikely to be satisfying in terms of either democratic accountability or freedom of expression. Bottom-up approaches that focus on encouraging more responsible speech could be an important complement to the efforts of companies in seeking to prevent and mitigate speech harms linked to their platforms.

The Architecture of Responsible Speech

Far from encouraging responsible speech, however, social media platforms are currently structured in ways that *undermine* our ability to live up to our responsibilities as speakers. Algorithms that determine what content to prioritize are often tailored to promote more extreme and controversial content.[24] Features of anonymity, including unidentifiability, invisibility, and lack of eye contact, as well as the nature of asynchronized communication in the online environment, all contribute to what researchers have called "toxic disinhibition."[25] The lack of social cues makes it easier for individuals to forget that there are actual people on the receiving end of their speech,[26] and encourages them to imagine an audience sympathetic to their views.[27]

Insights from cognitive science and psychology indicate that one of the most effective ways of encouraging more responsible communication is to remind speakers of the humanness of their audience. Studies have

[19] *See* Richard Ashby Wilson, Incitement on Trial: Prosecuting International Speech Crimes (2017).

[20] U.N. Human Rights Committee, Hertzberg and Others v. Fin., Comm. No. 61/1979, at 124, U.N. Doc. CCPR/C/15/D/61/1979 (1982).

[21] *Cf.* Boot, *supra* note 8, at 162–67 (arguing that states should take steps to cultivate civic virtue, including through education).

[22] Guiding Principles, *supra* note 2, Principles 11, 13(b).

[23] *See* Human Rights Watch, *Germany: Flawed Social Media Law—NetzDG Is Wrong Response to Online Abuse* (Feb. 14, 2018).

[24] Amanda Taub & Max Fisher, *Facebook Fueled Anti-Refugee Attacks in Germany, New Research Suggests*, N.Y. Times (Aug. 21, 2018).

[25] Noam Lapidot-Lefler & Azy Barak, *Effects of Anonymity, Invisibility, and Lack of Eye-Contact on Toxic Online Disinhibition*, 28 Computers Hum. Behav. 434, 434–36 (2012); *see also* Arthur D. Santana, *Virtuous or Vitriolic*, 8 Journalism Prac. 18 (2014); John Suler, *The Online Disinhibition Effect*, 2 Int'l J. Applied Psychoanalytical Stud. 184 (2005).

[26] Citron, *supra* note 1, at 59.

[27] *Id.*

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shown, for example, that the absence of reminders about the humanlike capacities of those with whom we are communicating—for example, the sound of the human voice—contributes to our dehumanization of those with whom we disagree.[28] A subtle clue about the heterogeneity of the audience, such as photographs of audience members,[29] could orient the speaker toward the diversity within the audience. Social media platforms could also provide users with cues about the interests and connections that they may have in common with members of their audience.

Platforms can also incorporate structures that encourage individuals to take on specific roles in their exchanges. In the context of online education, for example, research indicates that students are more likely to engage in meaningful discourse in an asynchronous communication context if the platform offers guidance about what is expected of those who take on different roles within the group.[30] The structure of Wikipedia as well as the culture the platform has created around editing illustrate how roles can promote more successful expressive interactions. Structures that limit the spontaneity of online sharing may also promote more considered expression.[31]

Finally, smaller groups may also help to promote speech duties. We are more likely to attend to the consequences of speech if the speech takes place in the context of an ongoing relationship because we have an incentive not to damage that relationship. Thus, platforms that encourage the formation of small groups based on preexisting relationships (e.g., WhatsApp groups rather than the comments section of YouTube), or where users are provided with signals about how they are connected to a person (via a friend of a friend or a classmate), might cue us in to thinking about that relationship and thus the impact of our speech.

Conclusion

Freedom of expression is not in fact "free" if it comes at the expense of silencing others. Being human means being a part of relationships and humanity at large, and that requires us to conduct ourselves with respect and consideration for others. Social media companies can help us achieve this goal and promote more responsible speech by reminding us of the humanness of those with whom we interact. In particular, this renewed emphasis on duties might fill the gap in preventing and mitigating the harms of speech that falls short of trigging government regulation.

Moreover, a turn to duties also provides a roadmap for future regulation of complex problems that require the exercise of individual responsibility. Even where governments might refrain from enforcing duties directly, duty bearers can still create architectures that help us fulfill our responsibilities to each other and to our communities. States and companies need to help us become more fully human—including in living up to our responsibilities to one another—so that we may work together to solve the complex human rights challenges before us.

[28] Juliana Schroeder et al., *The Humanizing Voice: Speech Reveals, and Text Conceals, a More Thoughtful Mind in the Midst of Disagreement*, 28 PSYCHOL. SCI. 1745, 1760–61 (2017).

[29] Katrin Wodzicki et al., *Does the Type of Anonymity Matter? The Impact of Visualization on Information Sharing in Online Groups*, 14 CYBERPSYCHOLOGY, BEHAV., & SOC. NETWORKING 157, 157–58 (2011).

[30] Patricia K. Gilbert & Nada Dabbagh, *How to Structure Online Discussions for Meaningful Discourse: A Case Study*, 36 BRIT. J. ED. TECH. 5, 16 (2005).

[31] Alexander Brown, *What Is So Special About Online (As Compared to Offline) Hate Speech?*, 18(3) ETHNICITIES 297, 305 (2017).

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