

The future of free speech

Human Rights activist Aryeh Neier speaks about the future of free speech.

Like many proponents of free speech, I think it is the most important of all rights. It is intrinsically important because a crucial aspect of our humanity is our ability to express ourselves freely and to exchange information, ideas and insights with each other without restraints that are imposed by the state. Its essential instrumental role is that freedom of speech makes it possible for us to defend all our other rights. We can call attention to violations and we can organize with others through the exercise of free speech to defend our rights. In this way, we can also secure our rights to fair and equal treatment, our right not to be punished cruelly and our protection of a zone of privacy. With freedom of speech, we have the possibility of making known that disasters are taking place and, thereby, to bring about the shifts in public policy that are needed to avert them or to mitigate them. For example, if the people of rural China had been free to speak out about Chairman Mao's "Great Leap Forward," the great famine that killed more than 30 million people in the period 1958-1962 could not possibly have reached such catastrophic proportions. Freedom of speech also makes it possible to obtain and impart information and ideas that are necessary if we are to govern ourselves democratically.

As a general rule, I oppose limits on speech that involve the content of speech. Among other reasons, I believe such limits vest a level of discretion in the authorities that will almost inevitably result in abuses. That is because speech is infinitely variable. There is no limit on the number of ways that a particular thought can be expressed. The corollary is that there is also no limit on the number of ways that the authorities can interpret speech or impute a particular thought to a speaker. Our legal system is founded on the view that forms of conduct that may be prohibited should be defined as precisely as possible so that we know when a transgression will take place and can regulate ourselves in ways that avoid doing anything that is illegal. It is, of course, possible to prohibit the use of certain words. Beyond that, however, precision is not possible where speech is concerned because there are so many ways to use other words to convey the same meaning or to read that meaning into other words.

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To the extent that limits on speech are appropriate, I believe that they should involve the time, the place and the manner of speech. No one has the right to burst into this room and disrupt the proceedings here by making a speech of his own even if what he has to say would be perfectly appropriate if he had previously reserved use of this room for his own purposes. One can be prohibited from using a megaphone to conduct a political rally in front of a hospital or late at night in a quiet residential neighborhood. There are times and places where it may be appropriate to shout fire, but one can be punished for doing so falsely in a crowded theater where a panic may ensue before anyone can persuade the crowd that there is no fire. I think one could legitimately be punished for confronting another person directly with such insulting epithets as would actually provoke a fight. Where time and place are concerned, it seems only appropriate to uphold freedom of speech in circumstances in which contrary points of view may also be expressed freely and considered before harm takes place. That is not possible in a crowded theater when someone yells fire or in a sudden street confrontation involving insults. There are also political circumstances that make it impossible for free speech to take place that I will discuss in a few moments.

The most widely debated questions that now confront proponents of free speech like me is whether we should modify these views because of widespread racism and xenophobia in Europe and other parts of the world and the role that may be played by hate speech in contributing to this development; whether the fury ignited in a number of countries with predominant or substantial Muslim populations by portrayals of the Prophet Muhammad that are regarded as derogatory, and the violence resulting from these episodes, should make us impose curbs on such provocations; and whether we should modify our views because the internet makes it possible to disseminate hateful and outrageous messages instantaneously to vast numbers of persons all over the world.

So far as hate speech is concerned, it is important to point out that there are curbs required by law in many countries. It is generally the case in European countries and in many other parts of the world that the law criminalizes the defamation of groups of persons on the basis of race, nationality, ethnic origin or religion. In a few European countries, defamation on the basis of sexual orientation is also prohibited. In order to be criminal such defamation usually has to take the form of incitement to discrimination or violence. This accords with Article 20 of the International Covenant on Civil and Political Rights which requires that "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." It also reflects the central place given to the protection of dignity in continental Europe that is expressed most succinctly and forcefully in the opening words of Article I of the German Basic Law of 1949: "Human dignity is inviolable." Group defamation is regarded as an assault on the dignity of the members of the group. In the United States, where free speech generally enjoys an especially high level of protection, incitement, by itself, is not sufficient to justify sanctions and both the United States and the United Kingdom entered reservations about Article 20 before ratifying the Covenant because of their concern that it does not adequately protect freedom of expression. In the United States, hate speech may only be punished in circumstances where "it is directed to inciting or producing imminent lawless action and it is likely to incite or produce such action." (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)). In contrast, the European Court of Human Rights has held that hate

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speech is unworthy of protection. In 2009, it said that it is necessary "to prohibit all types of expression which advocate, incite, and promote hate based on intolerance." (*Feret v. Belgium*, Eur. Ct. H. R. 64 (July 16, 2009)). Though I condemn hate-mongering, as a partisan of the view that curbs on speech should be restricted to time, place and manner rather than content, I prefer the approach of the United States Supreme Court.

Of course, legal restrictions on hate speech do not seem to be very effective. In Europe, restrictive laws and court decisions seem to be mocked by the rise of extremist political parties in a number of countries and by the frequency with which football games are marred by racist slurs. In my view, a reason for the apparent ineffectuality of laws against hate speech is the multitude of ways that such views can be expressed. This is an inherent weakness of laws that attempt to punish speech. Although the United States is a country of deep racial divisions where hate speech - like all other forms of speech - enjoys strong legal protections, the actual prevalence of hate speech in public discourse in our time has not seemed as great as in Europe where the law allows criminal prosecutions of a great range of expressions. Factors other than legal prohibitions seem to account for the differences between Europe and the United States.

Some of those who wish to prohibit or punish what they take to be derogatory portrayals of Muhammad equate blasphemy with hate speech. In fact, they are quite different. Hate speech involves the incitement of discrimination or violence against others. On such grounds, it can be legitimate to punish the speaker even under American law if the circumstances are conducive to imminent violence. In contrast, such violence as may result from blasphemy tends to be perpetrated by those who take offense against the speaker and against those they associate with the speaker. To the extent that punishment is appropriate, it should not be against the speaker. It should be against those who engage in violence. Of course, there may be circumstances in which blasphemy takes place in circumstances that provoke immediate violence because of a direct confrontation before any contrary view may be expressed. That has not been the case, however, in the blasphemy cases that have aroused controversy in recent years. Violence or the threat of violence has taken place at times and places chosen by the authors of violence.

Since the Ayatollah Khomeini's fatwah against Salman Rushdie nearly a quarter of a century ago for his novel, *The Satanic Verses*, the frequency with which threats of violence and actual violence have taken place against those accused of blasphemy against Muhammad and against Islam seems to have increased greatly. Following the publication of the Danish cartoons of the Prophet Muhammad in 2005, there were riots in many countries and a great many persons were killed in different countries. An American organization, Human Rights First, published a report last March documenting well over a hundred recent blasphemy cases ("*Blasphemy Laws Exposed: The Consequences of Criminalizing Defamation of Religions*", March 2012).

Many of these cases involved extreme violence that included killings. The report divides them into four categories: those that stifle discussion and dissent in the public sphere; those that spark outbreaks of mob violence; those that violate freedom of religion, thought or belief; and those that

are used as a weapon to settle private disputes. Some of the cases belong in more than one of these categories.

I am not aware of reliable information on the frequency of blasphemy cases in the era that preceded the Ayatollah Khomeini's fatwah against Salman Rushdie and his novel, *The Satanic Verses*. Hence, I am only guessing when I say that I think that episode contributed to the frequency with which such cases have arisen during the past quarter of a century. The fatwah against Rushdie was issued by Khomeini at the end of the disastrous eight year war between Iraq and Iran in which Iran tried in vain to prevail by sheer numbers, resulting in the deaths of hundreds of thousands of its young men who became cannon fodder. Focusing attention on an allegation of blasphemy seemed a politically opportune way of changing the subject. Many more recent episodes of alleged blasphemy seem also to reflect political opportunism on the part of those who whip up public sentiment against those who are the targets of their accusations.

Unquestionably, the advent of the internet is a factor we must consider as we think about free speech today and tomorrow. Every technological development that has enhanced our capacity to communicate has had important consequences for free speech. The invention of the printing press was crucial in the emergence of dissenting religious and political movements and in the enactment of laws to punish the dissenters. The invention of the telegraph quickly led to the creation of a new profession of war correspondents and also produced attempts to limit their reporting by means of military censorship. The advent of motion pictures greatly enhanced our ability to see the world about us. It also was followed quickly by the establishment of film censorship. And so on. The internet is clearly as significant an innovation (many would argue that it is even more significant) as these earlier technological breakthroughs. As it is still early in the history of the internet, it seems likely that we cannot yet estimate all the changes that it will bring about, including its impact on free speech.

Even so, it seems to me that a proponent of free speech who believes that the content of speech should not be regulated by the state is justified in maintaining that position. Indeed, the case for insisting that content should be protected is heightened by the capacity of the internet to disseminate information and ideas instantaneously and universally. That is because placing limits on content would often mean the application of a lowest common denominator approach to all communications. It would be difficult to anticipate what might be inflammatory or objectionable any place in the world. In some cases, as in objections in Turkey to what was perceived to be derogatory comment on Ataturk, the country's national hero, it was not only its circulation in Turkey that was said to be offensive. It was its dissemination anywhere. A lot of content would have to be suppressed if offensiveness some place in the world were a criterion for what may not be circulated on the internet.

Another approach favored by some seeking to limit the dissemination of offensive material through the internet is to focus on service providers rather than the authors. That is because the authors may be beyond their reach, A Supreme Court Justice of New South Wales in Australia recently

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gave an address espousing this way of curbing hate speech as a way of circumventing the protections for free speech in the United States (Justice Stephen Rothman, Berlin, November 2011). As is obvious, if Australia punishes service providers for allowing hate speech to circulate on the internet, many other governments could use the same approach to punish service providers for allowing the dissemination of materials that they find offensive for a variety of reasons. The effect would be to require service providers to become censors, ensuring their own safety by prohibiting the circulation of content that they think might cause them difficulty. Inevitably, because it is impossible to specify precisely what speech should be banned, they would have to use a broad brush to sweep away content that might be interpreted to cross a very blurred line that may shift from time to time.

Though the service provider Twitter has had a commendable policy of not interfering with content, the company recently deferred to protests from Germany by banning access to the site of a neo-Nazi organization; and also bowed to protests from France by removing anti-semitic postings. In and of themselves, these may seem laudable attempts to curb the spread of hateful messages and they hardly seem to be significant limitations on the circulation on the internet of information and ideas. Yet it makes one wonder how Twitter will respond if and when Saudi Arabia demands that the company should crack down on the proliferation of messages in the kingdom criticizing corruption, human rights abuses and social neglect. (See Robert Worth, "Insurgent emotions turned loose," *International Herald Tribune*, "October 22, 2012.") Having accepted the principle that it should defer to government objections about what may be circulated, Twitter may have weakened its capacity to reject those like the Saudi regime when they want to block criticism.

Of course, we know that in some circumstances speech has played a part in terrible events. The best known example in contemporary times is the role that hate radio played in the 1994 Genocide in Rwanda. Radio broadcasts were employed by those who carried out the Genocide to incite hate (as by describing Tutsis as cockroaches who had to be wiped out) and to organize the Genocide (as by identifying places where Tutsis were taking shelter). I would not defend either kind of broadcast as free speech

So far as the broadcasts are concerned that organized the Genocide, they seem to me to be inextricably tied to the act of killing. In this respect, they are in the same category as the order by a commander to his troops to open fire. The fact that the commander may not fire his own weapon does not diminish his responsibility for casualties that may be caused by the shooting. The fact that the order was conveyed verbally does not separate it from the action that followed.

The situation with respect to the broadcasts that incited hate seems to me to be different. If Rwanda in 1994 had been a place where free speech prevailed and many radio stations were broadcasting different and conflicting messages, it might be possible to defend the hateful messages that were broadcast as free speech. That was not the case, however. No contrary point of view was expressed or could be expressed on Rwandan radio and television at that time. Only those messages could be expressed that served the purposes of the Rwandan government in

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whipping up hate against the Tutsis. It is not appropriate to defend as free speech those things that are said by those given the exclusive power to communicate. The concept of free speech requires that it should be possible also to communicate every other point of view. Also it seems likely that the powerful impact in Rwanda of those broadcasts that incited hate is attributable in some measure to the fact that this was the only message that could be heard.

The anti-semitic hate messages of Julius Streicher or of Joseph Goebbels during Nazi rule in Germany could hardly be defended as free speech at a time and place where no one was permitted publicly to denounce those views. On the other hand, when a small group of Americans calling themselves Nazis attempted to march through Skokie, Illinois thirty five years ago in uniforms that evoked the views of Goebbels, the circumstances were entirely different. Freedom of speech prevailed in Skokie and the Nazi march, if it had taken place (though the right to march was upheld by the courts, the small group of American neo-Nazis did not show up on the day they were supposed to march) it would have been greeted by derision and contempt. The circumstances were exactly contrary to those required for the incitement to violence to cause imminent violence. The only danger of violence was that spectators might assault the Nazis. It was up to the authorities to prevent such violence. As they had adequate notice of the proposed march, they were well prepared to meet this responsibility.

Though the issues on which I have focused up to now currently seem to be the most troublesome where free speech is concerned, it is not difficult to envision other threats that could arise in the period ahead. When the terrible events of September 11, 2001 took place, I had feared that among the consequences would be attacks on freedom of speech in the form of laws and criminal prosecutions of those seeming to express sympathy for terrorists or to oppose measures against terrorism. Though there have been such developments in other parts of the world, by and large western countries, including those that have been particular targets of terrorist attacks, have not experienced major restrictions on freedom of speech. In the United States, for example, where there were extensive assaults on free speech during previous periods when national security concerns loomed large such as World War I, the post-World War I red scare, World War II, the post-World War II red scare and the Vietnam War period, we have not experienced comparable restrictions on speech during the past eleven years. The major exception is a United States Supreme Court decision in 2010 that upheld federal legislation that permits the imprisonment of Americans for up to fifteen years if they provide material support to a terrorist organization, even if that support is not in the form of weapons or finances, but in the form of speech, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). We do not yet know the consequences of that decision.

Of course, there have been a great many other kinds of violations of civil liberties in the United States since September 11, 2001 - prolonged detentions without charges or trial, abusive interrogations, denials of due process of law, invocations of state secrecy and unlawful electronic surveillance - among them. Generally to a much lesser extent, such abridgments of civil liberties have also taken place in other western countries. The fact that freedom of speech has been

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relatively exempt from attack in matters related to terrorism may have something to do with awareness that a concern for freedom of expression is among our sharpest differences with the terrorists. It may also be attributable in part to the reverence for freedom of speech in the United States that developed as a result of intense debates over a long period, including in connection with such episodes as the Skokie case.

Returning to the issues of hate speech, blasphemy and the role that the internet may play in extending and exacerbating the harm and the offensiveness of these forms of speech, it seems safe to predict that proponents of free speech will have a difficult time in various parts of the world in the period ahead. Much of the time, we will be called upon to defend the circulation of speech that we abhor. It is a lot easier and much pleasanter, of course, to defend free speech when we are making it possible for great thoughts to be expressed and when we admire those whose rights we are defending. Ultimately, however, it is the principles of free speech that are admirable and that are worth defending even when those who take advantage of them inspire our loathing.

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