

ONLINE SPEECH, RESTRICTIONS ON

Speech is commonly defined as the communication of ideas. Online speech is the Internet-enabled version, broadening the audience at little cost to the speaker. In the early days of the Internet this was seen as strengthening the public sphere. Though the promise of an Internet-enabled democratic revival lingers on, so do types of speech that many fear and detest: pornography, hate speech, and threats. Beyond the uncontested realms of human trafficking and the production of child pornography, however, speech that is targeted by legislation or social sanction as impermissible differs by jurisdiction owing to cultural factors and the needs of the state. Though jurisdiction is not always easy to determine in matters of electronic bits rather than matter, efforts to restrict are made in various ways—including users restricting themselves.

Disagreement among Democracies over Restrictions

As the United States is an outlier in its having often valued individual freedom over public good, the permissive pole of the argument over restrictions on speech can be understood by means of US jurisprudential tradition. The strong constitutional guarantee of freedom of speech has led to the following concepts: if a law does not properly describe the kind of speech to be prohibited, it is “void for vagueness.” If a law makes difficult substantially more speech than necessary, it is “overbroad.” Government restrictions on speech must be “content neutral” and leave other opportunities for speech to take place. However, in equally democratic societies based on the tradition of social responsibility, freedom of speech is weighed against other rights and considered a relative virtue. Democracy is seen in this tradition as something to be defended

against those who put its basic institutions in question—meeting the intolerant (for example, purveyors of hate speech) with intolerance, lest the tolerant be destroyed, and tolerance along with them.

Goals of Freedom and Restriction

Restrictions on online speech are the result of a balancing act—nurturing the benefits of freedom while minimizing threats. The benefits include economic ones, such as those accrued by smooth information transfer; however, non-material benefits—such as a supposed cure for voter apathy due to more direct engagement with candidates and a broadening of political debate—remain dreams that idealistic legislators would rather not squelch. Although there are opposing voices who decry the Internet as corroding a nation’s shared political culture, resulting in a polarized society that enables an avoidance of engagement with opposing views, it is difficult to imagine anything short of severe restrictions on speech easily solving the latter problem, while they would potentially destroy the former solution.

The threats posed by total freedom of speech fall into three broad categories: threats to society as a whole, threats to individuals, and threats to property. Threats to society may be best exemplified by time-limited cases such as wartime censorship, designed to thwart spies. The most common perceived threat online is likely pornography, which, though an individual accesses it of their own free will, is restricted because society as a whole is intolerant of obscenity. Child pornography represents a special case of obscenity in which the exploitation of—and thus threat to—a vulnerable individual is the primary concern. Hate speech similarly threatens both society and the individual—a society that cannot tolerate the intolerant lest the

society be fundamentally changed, and the individuals who constitute the group it targets. Clear threats to individuals largely involve defamation or threats of personal violence. Threats to property are exemplified by the unauthorized dissemination of copyrighted works without permission or benefit to the licensed copyright holder, thus allowing for illegal reproduction. This is seen by the proponents of copyright protection as decreasing the incentive to innovate and is thus outlawed.

Determination of Threat Differs by Country

While there are regimes that can easily be categorized as speech-restrictive (for example, North Korea) and speech-protective (the United States, which largely allows what some countries would consider illegal hate speech), the intermediate points cannot be plotted on a straight line. Each type of threat—and particular forms of speech determined to be threatening—finds itself restricted differently based on local conditions.

Threats to Society

In Japan, until 2013, there was a ban on Internet election campaigning as a consequence of restrictions put into place to minimize the cost of running a campaign. In the United States, where freedom of speech, without special cause, trumps all other considerations, the cost of an individual election campaign (to win a constituency seat at the national level) averages approximately ten times as much, largely due to the concept of money as speech. Although Internet campaigning is now legal in Japan after concerns over rising costs were determined to be disingenuous considering the abundance of inexpensive political advocacy tools available online, the restriction represented an attempt to balance the demands of freedom with the threat

to society posed by possible vote buying.

Pornography, another threat to society—perhaps more universally acknowledged than Internet political campaigns—is illegal if found to be obscene, which is determined in at least the archetypal case of the liberal end of the speech spectrum (the United States) by whether the average person, applying contemporary community standards, would find that the work appeals to prurient interest; depicts or describes, in a patently offensive way, sexual conduct specifically defined by law; and lacks another source of value—as art or teaching tool or political statement. The Internet, however, problematizes the concept of contemporary community standards, since material published from a web server in one place can easily be accessed almost anywhere else. Some say that the creation of some sort of national standard would solve this problem at the domestic level, but an emerging international standard is unlikely due to both legal and cultural differences.

Child pornography is generally banned as it threatens the welfare of children. However, the boundaries of the category are contested, with Japan, until 2014, not banning mere possession, as the harm was seen to consist in the content’s creation and distribution. The practice of sexting, whereby teenagers exchange sexually explicit images, elucidates the heightened conflict created by the Internet’s ease of distribution particularly well—criminalizing the practice would obviously infringe on self-expression, but the images are also clearly child pornography, and the practice would not be pervasive if not for its ease.

Online hate speech is countered in speech-protective countries largely by intermediaries, by means of invoking violations of terms of service. For example, a social network may simply remove offensive content—private companies having no duty to uphold free speech. More explicitly constructive approaches are sometimes favored, such as the facilitation of counter-

speech—exposing hate to debate—and promoting adherence to tolerant community standards. Those democracies with a more benign view of the state and its protective role, such as many European countries, have chosen to adopt stringent regulation to counter incitement of racial and ethnic hatred. There are worries, however, about the proscription of attacks on values and the resultant stifling of ideological disagreement. When religion, for example, largely coincides with ethnicity, those societies with protective states can find themselves facing tough choices about the definition of hate speech.

Threats to Individuals

Defamatory statements may be prohibited and, as can be seen by the phenomenon of US citizens preferring to sue for libel in England, are subject to very different standards even among countries with similar cultures. Mass adoption of the Internet has seen novel attempts at curbing the problem colored by local conditions.

Cyberbullying, for instance, has become a subject of concern, with instances of suicides having been reported following incidents of online harassment. However, the difficulty of implementing restrictions remains, as countries not legally recognizing insults to honor have trouble articulating the principle behind criminalization of insults beyond an overbroad application of the “fighting words” doctrine.

Even if it were criminalized, it is difficult to seek justice for online defamation for two main reasons: anonymity and ease of information proliferation. South Korea, with its publicly supported law on the verification of identity (put into place after several high-profile defamation incidents), attempts to solve the former problem, making it much easier to identify Internet forum posters; the European Commission’s right to be forgotten—making, for example, Google

liable for the proliferation of an individual's embarrassing photos—the latter. Both promise a clash between differing conceptions of the proper balance between privacy and free speech.

Threats to Property

Although governments continue to push for the adoption of laws such as the United States' *Protect Intellectual Property Act*, they have been criticized for both their potential to further corrode the original internationally uniform nature of available information on the Internet as well as their assumption of jurisdiction over both speaker and receiver of speech when they may reside in vastly different places. Laws such as the *Digital Millennium Copyright Act* have also been criticized for their tendency to chill speech that the law does not intend to target, on the basis that the speaker may fear an expensive lawsuit.

Implementation of Restrictions

Restrictions are implemented in three ways. The first is at the level of the network architecture: by, for example, removing the ability to connect with blacklisted websites or redirecting search requests for censored material. This is most common in authoritarian regimes, though democratic regimes such as Australia's have flirted with attempts to implement similar technology. The second is at the intermediary level: online service providers may decide to delete a blog post or deny services altogether, deleting the user's account if they persist in posting material deemed incendiary or in violation of copyright law. The third is by means of user self-restriction, whereby a user may choose not to speak (or, e.g., to post drunken photos on social media) for fear of adverse consequences. There is also the rare step of simply shutting down internet access

entirely. In China's western province of Xinjiang, the Internet was shut down for ten months following riots in 2009. However, such emergency tactics are sometimes spectacularly unsuccessful, as in Egypt where the denial of an online forum seemed only to accelerate the downfall of the Mubarak regime by pushing protesters to take to the streets.

Joshua Cader

See also Cyberbullying; Defamation and Libel Laws; Dissemination of Ideas; Freedom of Information; Pornography.

FURTHER READINGS

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