

Speech, Media and Ethics

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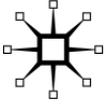
Speech, Media and Ethics

The Limits of Free Expression

Critical Studies on Freedom of Expression, Freedom of the Press and the Public's Right to Know

Raphael Cohen-Almagor

palgrave



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Foreword

The principle of free communication is probably the most complex and controversial of all constitutional guarantees. Traditionally it has been spoken of as the Free Speech Principle. But that expression conceals the fact that the principle it enunciates is both narrower and wider than its language suggests. The principle does not protect many things that are in a literal sense speech. On the other hand it does protect many things that are not speech. Defamation, obscenity, and fraud may be perpetrated through speech acts but are unprotected. Marching, picketing, and voting are non-speech activities but the free speech guarantee may in certain circumstances protect them.

In 1994, in *The Boundaries of Liberty and Tolerance*, Raphael Cohen-Almagor published a pioneering study of the challenge to liberal principles of toleration posed by extremist political parties in Israel. In *Speech, Media and Ethics: the Limits of Free Expression*, the examination of the limits of tolerance is extended to embrace the problem of maintaining a free press in the face of challenges from forces that, if left unrestrained, would destroy the institutions of a free society. This is the classic dilemma of liberal toleration. To the extent that liberal theory can distinguish between what John Stuart Mill – the founding father of free speech theory – called discussion, and expressive activities that go beyond discussion, the classic question whether we should tolerate the intolerant has a simple answer. The toleration of discussion or advocacy extends to the advocacy of violent or extremist policies since ex hypothesi it extends to the advocacy or discussion (if that is what it is) of anything. But the application of that principle and the analysis of what it is that carries communicative activities beyond advocacy are complex. It is also best explored, as here, in relation to concrete instances and experiences.

Though much of this study focuses on the necessary limitation of the communicative and journalistic function, it is written from a liberal rather than a communitarian standpoint. Communitarian critics of liberal ideology sometimes write as if liberal theory in its nature were incapable of entertaining societal considerations or limitations on individual aspiration. Liberals are sometimes said to be committed to a metaphysics of the atomic individual. But – unless it is definitionally so

arranged – there is nothing in the concept of being an atomic, molecular, or just plain individual that determines how such individuals should behave in relation to each other. Separate identity is not inconsistent with mutual restraint. Individual personalities may wish to limit their activities for good reasons for the sake of other individual personalities – in other words, society. In relation to expression, liberal theory is neither in principle nor in practice incapable of accepting limitations on freedom. It is true that some few American constitutionalists have spoken energetically and unreflectively of the First Amendment's free speech guarantee as being absolute within the boundaries of political speech. But that has not been the general consensus, and everywhere courts and commentators in the liberal tradition operate on the assumption that there are principled limitations on expression that may be imposed in a free society and on a free press and, in the latter case, that some of them are best when self-imposed.

It is even possible that defenders of liberal and democratic principles may be too modest in expounding them. Raphael Cohen-Almagor presents his conclusions as principles that are fitted for democratic societies rather than doctrines having universal application. It is of course true that non-democratic and non-liberal societies would reject them. Nevertheless, if such principles are advanced as moral propositions they must be universalisable. That is only to say that they will apply in all societies unless there are good reasons for making exceptions and modifications to them.

Whether there are such reasons and how the relevant principles should be formulated are matters for close argument. But denial of their relevance or validity by non-democratic societies should not persuade democrats to refrain from proclaiming them as universal moral principles. This does not of course mean that they apply absolutely or in uniform fashion in all places and circumstances. But the same is equally true within one society.

Of all the dilemmas in the operation of free governments, the dilemma of free discussion and the delimitation of press freedom are the most intractable. In this book Raphael Cohen-Almagor tackles the dilemma at the points where its complexities are most apparent. Political theorists, politicians, and philosophical journalists (if such there be) will have good reason to ponder what he has to say.

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Introduction

This volume deals with limits on freedom of expression, defined broadly as including the right to demonstrate and to picket, the right to compete in elections, and the right to communicate views via the written and electronic media. Throughout the book moral principles are applied to analyse questions that deal with liberty and its limits.

In the liberal framework, the concept of 'rights' is understood in terms of a need that is perceived by those who demand it as legitimate and, therefore, the state has the responsibility to provide it for each and every citizen. Rights are primary moral entitlements for every human being. In this context one could differentiate between rights that guarantee certain goods and services, like the right to welfare and to healthcare, and rights that protect against certain harm or guarantee certain liberties, like the right to freedom of expression and to exercise choice. This book concentrates attention on the latter.

Another pertinent distinction is between an individual's rights with regard to the state or government and an individual's rights with regard to his or her fellow citizens. Rights, conceived to be legitimate, that must be met by the state (for example, the right to life, to shelter, and to associate), justify taking political actions to fulfil them. Rights regarding other individuals who act illegitimately justify the use of coercive measures against those individuals either by concerned citizens (right to self-defence or to protect one's property) or by the state.

Furthermore, the claim that citizens have rights that the state or the government is obligated to fulfil does not mean that the state may not, under certain circumstances, override these rights. Citizens have a right to freedom of expression, but the state can limit that right in order to prevent a threat to public order, the security of the state, or third parties in need of protection (such as children).¹

The right to freedom of expression, including freedom of the media, lies at the centre of this volume. Liberals are quite happy to speak of rights but do not elaborate on the limits of these rights. In the United States, where the tradition of the First Amendment is well established, American scholars often describe free speech and free journalism in absolute terms.² Obviously there needs to be very convincing justification to interfere with this essential right and freedom. The debate on the proper boundaries of free speech and communication is still lively,³

and many argue that the essence of the First Amendment is to guarantee a free and uncontrolled marketplace of ideas. This book will address the question of proper boundaries.

The boundaries are designed to promote the values of respect for others, and not harming others. Liberal ideology places the individual at the centre: all liberal reasoning derives from seeing the individual as the focus of analysis, and all its reasoning is aimed at the advancement and development of the individual which, in turn, would result in the progress of society. The tradition evolving from the philosophical thought of John Locke (1632–1704), Thomas Paine (1737–1809), Alexis de Tocqueville (1805–59), John Stuart Mill (1806–73) and, in our time, John Rawls and Ronald Dworkin, places the individual, in contrast to the collective, at the centre of analysis, viewing the state as a mere instrument to serve the interests of the individual. The liberal state is conceptualized as a means of protecting society from external attacks, a framework regulating the implementation of the law for the prosperity of the citizens, a sophisticated tool to ensure individual rights.

One assumption of the liberal ideology that this book contests is the assumption of universalism. The hypotheses advanced in this book and the conclusions reached are limited to modern democracies emerging during the last one hundred years or so. I believe that there are some basic universal needs that all people wish to secure such as food, raiment, and shelter. I believe that sexual drives are universal and that people need to have some sleep to be able continue functioning. I also believe that we should strive to universalise moral principles. But sociologically speaking we cannot ignore the fact that universal values do not underlie all societies. Some societies reject the moral notions of liberty, tolerance, equity, and justice that liberal democracies promote. Thus my concern is with liberal democracies which perceive human beings as ends and which respect autonomy and variety. The arguments are relevant to other countries, but because non-democratic countries do not accept the basic liberal principles, because their principles do not encourage autonomy, individualism, pluralism, and openness, and their behaviour is alien to the concepts of human dignity and caring, one can assume that the discussion will fall on deaf ears. Non-liberal societies, based on authoritative conceptions and principles, deserve a separate analysis.

That said, one of the problems of any political system is that the principles which underlie and characterize it might also, through their application, endanger it and bring about its destruction. This contention is obvious when totalitarian/authoritarian regimes are

considered. A well-known dictum holds that you can do many things with bayonets, except one: to sit on them. Given the opportunity, people will rebel against the flagrant denial of their basic liberties. What seems to be obvious for totalitarian countries is conceived as less obvious where democracies are concerned. Because the democratic system of ruling is designed for the people, by the people, employing the positive mechanisms of liberty, tolerance, participation, and representation (in contrast to the coercive mechanisms utilized by authoritative systems), democracy is deemed immune to the above contention that the very principles that underlie the system might bring about its destruction. I would argue that democracy, in its liberal form, is no exception. Moreover, because democracy is a relatively young phenomenon, it lacks experience in dealing with pitfalls involved in the working of the system. This is what I call the 'catch' of democracy.⁴

Part I deals with recent controversies over freedom of expression. The first chapter discusses free expression and its confines when dealing with hate speech. It formulates principles conducive to safeguarding fundamental civil rights, and further employs the theory to analyse the Skokie affair. The focus is on the ethical question of the constraints on speech. I advance two arguments relating to the 'Harm Principle' and the 'Offence Principle'. Under the 'Harm Principle', restrictions on liberty may be prescribed when there are sheer threats of immediate violence against some individuals or groups. Under the 'Offence Principle', expressions which intend to inflict psychological offence are morally on a par with physical harm, so there are grounds for abridging them. Moving from theory to practice, in the light of the formulated principles, the ruling of the Illinois Supreme Court which permitted the Nazis to hold a hateful demonstration in Skokie is argued to be flawed.

While the first essay deals with the right to demonstrate with the aim to harm a target group that cannot avoid being exposed to the demonstration, the second addresses the question of picketing private homes of public officials. Immediately after Prime Minister Rabin's assassination a proposal was raised to ban demonstrations outside private houses of politicians. I object to this proposal because of its sweeping language. This chapter reviews the American, English, and Israeli stances with regard to the subject matter, arguing that the Israeli stance is more akin to the American, and that the right to picket cannot be flatly prohibited. Democracy may set regulations of time, place, and manner but it should not proscribe pickets and demonstrations at private places. Democracy has an interest in furthering and promoting

free flow of opinion between the public and its representatives. Sometimes the direct communication between the public and its representatives near private homes of public figures is much more effective both for the public and its representatives. The government and its powers, that is, the police, may require satisfying some procedural measures but they should not set prior restraints on such direct communications.

In deciding whether to grant permission to carry out such a protest we need to weigh the right to picket or to demonstrate, derived from the right to freedom of expression, against the right to privacy. It is asserted that the degree to which interference in a public official's privacy may be tolerated should be a function of his or her political, social, or economic position in society. The more prominent the position, the greater latitude we have for interference with the public official's privacy. We need to strike a balance between the right to communicate and the right to be let alone.

The third chapter discusses the limits of parliamentary representation as it has been tackled in Israel (the rationale, however, is made in principled terms and could be applicable to every liberal democracy). It reviews the decisions of the Central Elections Committee and of the Supreme Court regarding disqualification of lists in Israel. The discussion revolves around the question of what constraints on the right to be elected to parliament should be introduced in order to safeguard democracy. It is argued that democracy does not have to permit a violent list propounding the destruction of democracy to act in order to fulfil its aim. It is neither morally obligatory, nor morally coherent, to expect democracy to place the means for its own destruction in the hands of those who either wish to bring about the physical annihilation of the state, or to undermine democracy. These two are the only cases in which democracy has to introduce self-defensive measures and to deny representation in parliament to violent lists which convey such ideas, and which act to realize them.

Hence, the three chapters that open the volume deal with fundamental liberties, and their limits. They are concerned with different aspects of the tension between the basic inclination to allow as much freedom as possible, and the employment of self-defence mechanisms to safeguard and protect democracy. Together they provide a systematic analysis of some of the most troubling issues confronting modern democracies, and aim to offer moral reasoning that coincides with basic moral principles of justice and humanism.

Part II focuses attention on freedom of communication and media ethics, a very timely concern in the western world. For the past few

years I have been engaged in a comparative study of the main problems of the media in liberal democracies. I examine what issues trouble the minds of media scholars and decisionmakers with regard to the work of the media in their respective countries. In my study I reviewed the relevant literature and, in addition, conducted many dozens of interviews and discussions with judges and academics, media scholars and ethicists, senior media administrators as well as reporters, in Britain, the United States, Canada, and Israel. The lessons and conclusions arising from this comparative study provide food for thought about the relationships between media and democracy as we enter the new millennium.

The four essays analyse some of the basic principles, and fallacies, of the media. All these essays formulate ethical limits on the working of the media, emphasizing that these should be self-imposed rather than imposed on the media from above by the legislature or the courts. Like the three previous essays, they combine theory and practice, and try to set boundaries to free expression. Here the concern lies with the concept of 'the public's right to know' and its ethical constraints.

The concept of media ethics is conceived to be an oxymoron. Sadly, many segments of the modern media are stripped of almost all ethical concerns. In a reality of competition, ratings, and economic considerations, ethics becomes a secondary, sometimes irritating issue. The idea, so to speak, is: 'Let me do my job of reporting and don't trouble me with your morals.' Many people in the media industry portray their work as a hack, a trade, and not as a profession, in order to legitimize their moral-free conduct. This moral-free conception should be changed. Ethics, in a nutshell, means taking responsibility for the consequences of one's conduct. People working in the media should be concerned with the consequences of their reports. The second part of the book speaks of the ethical mechanisms that need to be employed in the pursuit of the public's right to know.

The first essay of this part scrutinizes the assumption that objective reporting is good reporting, is ethical reporting. It does so by reflecting on different dimensions that are associated with the concept of objectivity: (1) accuracy; (2) fairness and balance; (3) truthfulness; and (4) moral neutrality. Evidence shows that most media people believe that they are objective. It is asserted that in most cases journalists are not objective in their reporting either because they consciously prefer not to be or because they are being manipulated by their sources. I proceed by an examination of the concept of 'good journalism', which encompasses the requirement of objective reporting. The chapter contends that in

cases of conflict between 'good journalism' and the effort of getting 'good stories' often the latter will enjoy precedence. I close by asserting that the values of not harming others and respecting others should play a prominent part in the considerations of journalists. These are basic ethical standards that sometimes require *normative* reporting. The ethical journalist must be allowed to transcend objectivity by not remaining morally neutral on some issues. Consequently, morally neutral coverage of hate speech, racism, slavery, genocide, or terrorism is a bad idea. It is a false and wrong conception.

The concern of the second chapter is with the limitations that should be placed upon freedom of the written and electronic press. The tragic death of Princess Diana and her lover in August 1997 and the subsequent extensive discussions on the role of the media and the limits on 'the public's right to know' prompted the writing of this essay. Freedom of speech in the media is the guiding rule, one of the foundations of democracy, but at the same time freedom does not imply anarchism, and the right to exercise free expression does not include the right to harm others.

This chapter consists of five parts. I commence by reflecting on ethics in the media, and then the responsibility of journalists to their audience and profession is discussed. Next consideration is given to categorizing events, outlining the boundaries of media coverage. I close with suggestions for media self-regulatory mechanisms and controls that could improve their working.⁵

The third chapter supplements the preceding by devoting attention to the troubling issue of media coverage of suicide. It examines how the media in Canada, Great Britain, and Israel report suicide stories, arguing for caution in reporting both for reasons of sensitivity towards the individuals involved, the suicides and their families, and for ethical reasons: caring for the consequences of reporting. The means by which the suicide was committed should not, generally speaking, be reported. Suicide should not be romanticized. Instead, the media should speak of the emergency signals that people in distress emit, and how to help them through by reassurance and referral to the appropriate agencies where mentally unbalanced people can get help and support. In addition, responsibility requires that teenage and celebrity suicides be viewed as special cases that demand extra caution. This is because teenagers are attracted to sensational headlines about suicide, and they are susceptible to imitation, and because celebrity suicides are the most often imitated.⁶ It is maintained that, in any event, suicide should not be reported in real time.

The fourth chapter is concerned with the powers of the press councils in Great Britain, Canada, and Israel. It shows the inherent deficiencies of the councils and proposes some fundamental changes. It is impossible to have voluntary councils, with limited budgets, and yet to expect from them serious work. It is also not feasible to hope that the councils, sponsored by the media, could effectively criticize their sponsors without fear that they might be harmed if their adjudication is not to the liking of editors and publishers. And it is quite pointless to speak of the desired idea and practice of self-regulation without equipping the relevant organization, the press council, with significant powers of sanction. Here I compare the press councils in the three democracies and outline practical recommendations for modifications.

These chapters propose recommendations for better, more ethical media. To paraphrase the words of Tom Kent, who headed the Canadian Royal Commission on Newspapers in 1980, the necessary motto for reformers, in this as in other matters, is: Be prepared for the day when some conjunction of circumstances creates a will for change. Then practical ideas will be handy. If this is understood by some of the people who recognize democracy's need for a better information service from the press, the working principles offered here will be of use.⁷

The Appendix, co-authored with Itzhak Yanovitzky, is also concerned with media ethics and the limits of freedom of expression. However, this chapter differs from all the others in two important respects: (1) it is an empirical study based on short telephone interviews with a relatively large sample of people; (2) because it describes and analyses a public poll that was conducted in Israel, it is difficult to suggest generalizations that will be true for other countries.

The essay examines public attitudes regarding the conduct of the media. Emphasis is given to the difference between the 'ought' and the 'is'; that is, in the eyes of the Jewish public,⁸ what should the roles of the media be? How do the media behave in reality? What are the main factors that motivate the conduct of the media? The article also probes the effect of different sociodemographic characteristics (gender, education, religiousness, ethnic origins, and economic status) on public attitudes in Israel.

A public poll was conducted among Israeli-Jews ($N=501$). It showed that most people accept the premise of the *public's right to know* as the general principle that should guide the media and that does guide the media in practice. The findings reveal that the only issue in which the 'ought' received a lower score than the 'is' was the *publication of scoops*. In other words, the public thought that the media were paying

too much attention to this factor in their conduct, and that the drive for scoops should be less prominent in their reporting. The most important factor that should guide the conduct of the media in the eyes of the public was *observing state security*. The second most important factor that should guide the conduct of the media was *objectivity*. The Israeli-Jewish public sampled here thought that the media should invest more effort in trying to be objective in their reporting. The only guiding factor for the media in which the difference between the 'ought' and the 'is' was relatively small was *the public's right to know*. In other words, the public thought that the media more or less operate in the name of the public's right to know, as they should in theory. In addition, the Israeli-Jewish public believed that the media should invest more effort in safeguarding individual privacy and social responsibility.

The data further show that education and religiousness have moderate effects on the perception of the media. The more educated have higher expectations from the media than the less educated, and religious Jews tend to be more disenchanted with regard to the conduct of the media than secular Jews.

In sum, all the chapters discuss basic human rights and the limits of free expression in liberal democratic societies. Specifically they address the issue of democratic constraints and limits, which has not been treated adequately by the literature.

This book is the result of work that started a decade ago. I would like to express gratitude to friends and colleagues who conversed with me on pertinent questions, who read parts, or all of my writings, and who supported this project in various ways. Isaiah Berlin was a kind supporter. I greatly miss his friendship, advice, and the intellectual aspiration he offered me when we used to meet in his room at All Souls College, Oxford. I am deeply thankful to Geoffrey Marshall, Wilfrid Knapp, Bob O'Neill, David Heyd, Eric Barendt, Ed Lambeth, Jim Weinstein, Jack Pole, Dave Boeyink, Ken Karst, Rick Abel, and Sam Lehman-Wilzig. I am also indebted to Wayne Sumner, Ronald Dworkin, David Feldman, Yitzhak Zamir, Haim Zadok, Aharon Barak, Zelman Cowen, Adam Roberts, Dick Moon, Valerie Alia, Georg Nolte, Eike-Henner Kluge, David Lepofsky, Ron Robin, Gabriel Weimann, Jonathan Cohen, Rivki Ribak, Cliff Christians, Hugh Stephenson, David Allen, Art Hobson, David Goldberg, Ejan Mackaay, Godfrey Hodgson, Jan Sieckmann, and Conrad Winn for their thoughtful

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