Free Speech vs. Hate Speech and What about that Internet?
Rosh Hashanah 5781
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Perhaps you'll recall that we studied these verses about Cain and Abel last year. This year, I want to call our attention to one particular verse, v. 8: "Cain said to his brother, Abel . . . and when they were in the field, Cain set upon his brother Abel and killed him." Yes, that is what is written in Torah. "Cain said to his brother, Abel, ..." *What*? *What* did Cain say to Abel? Torah doesn't tell us. And so we're left to wonder, *what* did Cain say to Abel? And what's more, these missing words directly precede the killing of Abel by Cain. And so we ask, did his words have anything to do with the first murder? Did Cain threaten Abel? Did he in any way announce the cruel act that would next take place? Or was the killing completely unrelated? Even an accident? We can't be sure. What we are sure of is Cain's words were omitted.

To this day, we research and question and debate the power that words have to inspire and to destroy, to persuade, comfort, or threaten. Hate speech is a particularly challenging reality for free societies like ours to address. With hate speech on the rise and the internet in particular being recognized as the largest disseminator of hate speech today, is the French philosopher Voltaire's proclamation, "I disapprove of what you say, but I will defend to the death your right to say it," spoken in the eighteenth century still relevant?

Whether and how to regulate hate speech is a question that is currently high on the agendas of school administrators, free speech scholars and human rights activists. It is an issue before Congress, the Department of Justice, the American Bar Association, and before the CEOs of the largest media tech companies that manage global internet platforms. It's the question I'd like to explore with you this morning. And I'd like to do so, so that as we participate in the public and private conversations on this topic, we can do so in a way that is more Jewishly informed, more Constitutionally-informed, and at the least, more thoughtfully and considered

than had we not spent this time in a communal discussion—each of us bringing to the subject our particular priorities, questions, expertise or lack thereof, and experience.

Let's begin by approaching the broader topic of unethical speech from a Jewish perspective. Hate speech undoubtedly fits there though Jewish tradition doesn't use that term per se. And I'll begin with a well-known folktale:

In an eastern European village, a man went through the community slandering his neighbor. On Rosh Hashanah that year, feeling remorseful, he begged his neighbor for forgiveness and offered to undergo any penance to make amends. On the advice of her rabbi, the neighbor whose reputation had been unfairly tarnished told the offender to take a feather pillow from his home, cut it open, scatter the feathers to the wind, and then return to see her. The man did as he was told, then returned to his neighbor on Yom Kippur and asked, 'Am I forgiven now?' "Almost," was the response. "You just need to do one more thing." "Anything. I'm just so sorry." "Well, go and gather all those feathers."

"But that's impossible," the man protested. "There's no way to know how far and wide the wind has scattered them."

"Precisely," said the neighbor. "And although you truly wish to correct the evil you have done, it is as impossible to repair the damage done by your words as it is to recover the feathers."

This story is told to convey the outsized power that our words have. It's a moral tale that cautions us to be considerate when we speak and to choose our words carefully. It especially warns us that insults, gossip, slander, personal attacks, thoughtless and hurtful words have ramifications that like a wildfire can go far beyond our control and, most heartbreakingly, beyond even our intentions. Unlike the schoolyard ditty: "sticks and stones may break my bones but names will never hurt me," Jewish tradition acknowledges the power of words to hurt us, and sometimes irreparably.

On the ladder of unethical speech, slander sits at the top, the worst kind of unethical speech. In Hebrew we call this: *motzi shem ra*—to bring someone a bad name through malicious falsehoods. By way of example, Rabbi Joseph Telushkin in his book *Words that Hurt, Words that Heal* cites an instance of a nine year old girl who, out of spite for having been scolded, falsely accused her substitute teacher of sexual impropriety and bribed ten other kids to do the same. An investigation exposed the lies and the teacher was ultimately cleared. But in the meantime, the teacher reported that "a lot of people were willing to crucify" him.[1]

Another example comes from our own Jewish history. In the fourteenth century, during the Black Plague, Jews were accused of having caused the plague by poisoning the wells. "Within a few months, enraged mobs had murdered tens of thousands of Jews".[2] This example sadly has its analogy today. Amidst the global pandemic, guess which rumor has caught fire again: the one that accuses the Jews or alternately the Israelis of having purposefully caused the spread of Covid-19.[3]

Telushkin adds that in the past century "similar rumormongering provoked the lynching murders of Black Americans." A little later we'll address racist and anti-semitic hate speech as it exists on social media today. We'll note also that here Telushkin does not question the link between this form of hate speech and violent action. There is no question that the rumors left unchecked led to the pogroms and to the lynchings. Yet questioning this connection between cause and effect also becomes part of the conversation.

As we travel down the ladder of unethical speech in Judaism, one rung lower and only slightly less egregious is *unintentionally* spreading negative untruths, otherwise known as rumors, "*rechilut*" in Hebrew. This is where we believe but have not verified that the stories are

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[1] Telushkin, 32.

[2] Ibid

[3] "Jews Control Chinese Labs that Created Corona virus': white supremacists' Dangerous New Conspiracy Theory," *Haaretz*, Flora Cassen, 3/5/20. See also ADL Blog, March 25, 2020.

true. That is, you willingly defame someone because you think you're reporting a truth, but then you learn that what you thought was true, is not. The damage, however, is done.

Then there is what we call in Judaism: *lashon ha'rah*. *Lashon ha'rah*, literally: "the evil tongue," is the telling of negative truths. Most people seem to think there is nothing morally wrong in spreading defamatory information about people if the information is true.[4] But according to Jewish tradition—this *is* morally wrong. It is morally wrong to purposefully mar the reputation of a person, to lower someone's status or esteem in other people's eyes. Jonathan Lavater, a Swiss theologian, has said, "Never tell evil of a man if you do not know it for a certainty, and if you know it for a certainty, then ask yourself, "Why tell it?"[5]

Yes, there are occasions when it is permissible and perhaps even necessary to share a negative truth. These situations include: when you're thinking to hire someone or enter into a business deal with them; when a romantic partner of someone you know is hiding information that a partner should know before committing to marriage; inappropriate behavior by an elected official related to their performance or corruption, or inappropriate behavior by a medical professional who is regularly abusing their authority. But even in these cases, the *lashon ha'ra* should remain specific, limited to the infraction or issue at hand, and not be turned into whole scale character assassination. The guiding principle in Jewish law for this kind of negative truth-telling is: keep a lid on it unless doing so presents a clear and present danger.[6]

So on our ladder of Jewish speech that is unethical so far we have slander (*motzi shem ra),* unintentional slander or rumormongering (*retzilut),* and negative truth-telling (*lashon ha'rah).*

The fourth category of unethical speech in Jewish tradition are the statements that are positive and true. Yes, even statements that are positive and true such as commenting on how

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[4] Telushkin, 21.
[5] Cited in Telushkin, 22.
[6] Telushkin, 49.

wonderful or *brilliant* someone is, is discouraged. How can such well-meaning statements be wrong? It depends on the audience. If you're praising someone before people who would not necessarily receive the good news in the way you mean it, perhaps you're among their social competitors or social "enemies" (frenemies), people who aren't likely to receive the news in the way it was intended, then a positive statement might lead to finding ways to bring that person down. "Oh, yeah, she was really *brilliant* that night she backed into the tree." Negative reactions may stem from resentment, jealousy or skepticism. So, if you comment on how flashy so-and-so's new car is or how someone's new eye glass frames make them look hip, the response may be, "What business does that person have buying a new car, when so many can barely pay their mortgage?" Or, "That person's planning on dating younger women and is just hiding his age." These responses may sound petty, but being mindful of such possible reactions is a way to ethically maneuver within diverse social groups so as to avoid giving occasion for negativity. If our intention is to share a blessing or support a person's good name, we should think twice before sharing.

And even if we can't escape talking about others 100%, the wisdom of our tradition encourages us to minimize such speech, to be mindful of the unintended outcomes, and before we speak about another to ask ourselves, "Is it true? Is it necessary? Is it fair?"[7] Going around facebook is a meme with a similar message. Before reposting, ask yourself: Is it kind? Is it fair? Is it true?

Poll 1[8]

Jewish tradition acknowledges the power of words to hurt others, and sometimes irreparably. And so does American law—to a degree. Certain kinds of hate speech, that rise to

[7] Ibid, 34.

[8] The examples were taken from Nadine Strossen's, *Hate: Why we should resist it with free speech not censorship*, 54.

the level of a "true threat," which of course is defined by a set of certain criteria, are in fact punishable.[9]

So if we review the answers to the first question: Within Jewish tradition, yes, each of these examples could fall into a category of unethical speech.

1. because others may become jealous or wonder why they weren't invited to see the new kitchen.

2. Judgment may be made because the amount is judged to be too little.

3. Eye rolling is an example of *avak lashon harah*—the dust of lashon hara—signs, gestures like eye rolling that convey negative judgment; speech without words.

4. Bringing up the past or any detail that serves to lower someone's esteem—unnecessarily.

Turning to American law in question two, of these examples, only the Nazi salute is considered protected speech, or free speech protected by the First Amendment. The other actions listed here violate the free speech protections, which means there's a law against them. What is the dividing line between protected free speech and speech that is punishable? The "emergency principle." It's also called, constituting a "true threat", or an imminent threat." "The emergency principle states that speech can be suppressed by governments if it is deemed that the speech threatens imminent harm, puts the targeted audience in fear, threatens violence *and* the violence is deemed likely to happen—such as targeted bullying or harassment."[10]

This is to say that some hate speech *is* already considered illegal and can be prosecuted. But other hateful acts continue to challenge our sense of civility—and freedom. Let's consider a current example of weekly anti-Israel protests outside a conservative synagogue in Ann Arbor, Michigan. **Poll 2**.

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[9] Strossen, 36, 60.

[10] See "Hate Crime Threat Guide," U.S. Dept. of Justice, Federal Bureau of Investigation Civil Rights Unit. See also https://constitutioncenter.org/interactive-constition/amendments/amendment-i for First Amendment Resources.

The federal judge ruled in favor of the protestors. She wrote, "Peaceful protest speech such as this—on sidewalks and streets—is entitled to the highest level of constitutional protection even if it disturbs, is offensive, and causes emotional distress. . . . Plaintiffs aren't prevented from attending services, the signs don't block paths to the property and they don't affect services inside. Plaintiffs only claim that it causes them distress and 'interferes' with their enjoyment of services"[11] Measured by the "emergency principle," psychic and emotional distress of the target is not in and of itself sufficient to curb the freedom of the perpetrator.

This recent ruling may remind some of you of the famous case in 1977 of the Neo-Nazi party organizing a demonstration in the streets of Skokie, IL, an area largely populated by Jews, many of whom were Holocaust survivors. Local residents pushed back, and a hate-speech ordinance *was* enacted into law to prohibit that demonstration. But the ACLU joined with the NAACP in opposing that legislation. They won a Supreme Court decision on the basis that the same kind of ordinance "could have been used to stop Martin Luther King Jr's confrontational march into Cicero, Ill, in 1968."[12] The Supreme Court decision acknowledged that the psychic toll that this demonstration would likely have on at least some of Skokie's residents, would indeed be serious, but it also found that "this kind of disturbing speech is indistinguishable in principle" from other political speech that in seeking reforms, also disturbs, incites, or angers certain people. Preserving that principle is "among the high purposes of the First Amendment."[13] Think of Black Lives Matter. The First Amendment bars government from punishing any political speech on the grounds that it causes psychic or emotional harm to some while not to others.[14]

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[11] https://www.jns.org, "Protesting outside synagogue: Federal Judge rules weekly anti-Israel protests outside Michigan synagogue protected by First Amendment," 8/25/20.

[12] Strossen, 16.

[13] Strossen, 46-7.

[14] Strossen, 47.

Here we can see the precedent on which the federal judge made her recent ruling about the Ann Arbor, Michigan synagogue. And yet, at the time of the Skokie trial many ACLU members resigned from the organization in protest over that decision. Voltaire states, "I *disapprove* of what you say, but I will defend to the death your right to say it." But what, if anything, changes when disapproval morphs into something deeper, something like moral certainty or even moral consensus? The ACLU lawyers who quit after the Skokie trial drew a red line at the expression of tolerance for such a brutal and barbaric worldview as that espoused by the Nazis and neo-Nazis.

In our day, as the Michigan synagogue lawsuit illustrates various groups and individuals are challenging those moral redlines again. Here the fundamental place that Israel holds in Jewish history and identity is being made illegitimate, the Jewish people's right to self-determination is denied, and the safety of Israel and Israelis, not all of whom are Jewish, is in the crosshairs. Must the targets of this hate speech tolerate this?

In a Shalom Hartman lecture called "*Civic discourse: How to answer a Fool,*" Prof. Christine Hayes of Princeton University asks, "Do we expect the capacity to tolerate hate speech to be the same for the targets of that speech and for the bystanders? Or is it acceptable for differently situated people to respond differently, to play different roles depending on the extent to which it touches on their core identity…? We often hear that free speech has a price, we have to sacrifice a little of our comfort and safety and allow things to be said that make us uncomfortable, and perhaps that's true. But consider this: the price of the free and unchecked speech of the slanderer . . . like the price of the free and unchecked speech of the white nationalist …or the homophobe or the misogynist in our own day is rarely paid by the speaker. It is paid by the targets of that speech. It's paid by those who haven't generated the speech, but who are harmed and victimized by the speech. . . . The price of the fool's hateful words is imposed on people who have done nothing wrong and said nothing hateful. Is that a price that

anyone has the right to impose on another in the name of their right to free speech? Does such speech and do such speakers deserve the courtesy of tolerance from everyone? Even their victims?"

American free speech scholars like Nadine Strossen say "yes." We must protect even this hateful speech. Strossen was the president of the ACLU for 17 years (1991-2008) and is the John Marshall Harlan II Professor of Law, Emerita, of NYU Law school. As long as the speech doesn't threaten imminent harm, every speaker deserves this tolerance. Why? Because everyone has their own redlines of what is beyond the pale. "Everyone has his or her Skokie."[15] For precisely this reason, for this range of tolerances, Strossen argues, there can be no exceptions beyond what is already deemed hate speech. Otherwise, all she sees is a slippery slope that will lead to intolerable government interference and censorship.

Well if the government cannot prohibit constitutionally-protected hate speech, can private corporations like Facebook and Google? And should they? Jonathan Greenblatt, the CEO of the Anti-Defamation League believes so.

Greenblatt is clear about his redlines. He doesn't believe that the "alt-right" and other white supremacists "represent any reasonable rendition of the political spectrum." To any objection that he is starting the slide down a slippery slope that would whittle away at fundamental freedoms, he shakes his head. "Slander is not a slippery slope. Freedom of expression was not intended to be the freedom to express hateful views that would inspire violence against Black people or Jewish people or other individuals from marginalized communities."[16] In other words, Holocaust denial or a Nazi salute doesn't necessarily threaten imminent violence, but they are premised on hateful lies. Like the rumors that led to pogroms in the fourteenth century, the claims white supremacists make about certain groups of people are slanderous, malicious untruths, that are then marshaled toward violent action against these

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[15] Strossen, 50.

[16] "Why FB is the Frontline in fighting hate today" by Shirin Ghaffary and Rebecca Heilweil, *Vox*, July 15, 2020.

groups. Within the past three years we remember those murdered in the Tree of Life Synagogue in Pittsburgh, Chabad of Poway, CA; AME church in Charlestown, SC; Charlottesville, VA.

Greenblatt's conviction is influenced by his own stint at Google. He argues computer engineers, or their higher-ups, can choose to design "anti-hate" into their algorithms in lieu of the current practices that exacerbate hate, and so he sees that corporate priorities lie at the center of the problem. He also sees that the pace of private innovation far outstrips the ability of government regulatory bodies to keep up.

Greenblatt seems to share an approach to hate speech with Dan Shefet, a French Jurist, and the President of the Association for Accountability and Internet Democracy. Both leaders are willing to impose greater limits on speech for the sake of accountability. Dan Shefet debated Nadine Strossen at the AJC's (the American Jewish Congress's) virtual Global Forum this past June. The question was whether free speech should be limited on the internet. Shefet, the French lawyer, says yes. Strossen, the American lawyer and free speech scholar, says no.[17]

Shefet's argument centers around the question of accountability, a basic Jewish and western value. He goes beyond the Emergency principle and seeks to widen the types of speech that should be limited. Anyone who is harassed relentlessly on line, for example, while perhaps not suffering imminent threat to one's life, should not have to bear the psychic and economic consequences that an ongoing, reckless and devastating assault to one's reputation can engender. All actors on the internet should be held accountable for their speech, and to the extent that accountability means that limits will be placed on certain speech acts, so be it. Free speech is a foundational right but it's not *more* foundational than other rights like: dignity and freedom from harassment.

Strossen too wants accountability but she feels that more censorship is neither effective nor appropriate. She argues it's a waste of time to go after rhetoric that doesn't meet the

[17] The following arguments are taken from "The Hate Speech Debate: Should Free Speech be Limited," AJC Virtual Global Forum 2020, June 14, 2020.

emergency standard and points out that by the lesser standard that Shefet is proposing and that many countries operate on, the Bible and Koran would be censored for their ability to incite violence. Social media have become the most important platforms for the free exchange of ideas, which is all the more reason not to censor them—for how else, she asks, can "we the people" discuss ideas and hold those we elect accountable to us? **Poll 3**

Case Study—Breakout rooms

Conclusion: Cain said something to Abel. Something that was omitted, perhaps censored. And then Cain killed Abel. What did he say? Were these two acts related?

Speech is eminently important in Judaism. The power of our words to raise up or bring down often goes unappreciated. Speech is equally important to American civic life. James Madison called free speech "one of the great bulwarks of liberty."[18] Yet hate speech on the streets, in the schools, on college campuses, and primarily on line, challenges us to revisit what is meant by free speech.

In her recent book, *Dare to Speak: Defending Free Speech for All*, scholar Suzanne Nossel acknowledges that, "[T]he First Amendment is silent on many of the free speech conflicts of our time." She says "[it has no] answer to the censorious power of online mobs," "the detrimental effects of hateful speech," or advice on how to know when "content is too vitriolic, bigoted, deceitful, or misleading to be shared online." Jewish tradition, however, does have something to say about our speech, and we are fortunate to have our tradition to help guide us in our own lives.

Motzi shem rah (slander), *rechilut* (false rumors), *lashon ha'rah*, the telling of negative truths and even positive truth-telling in improper settings are the basic laws that govern speech within Judaism. *Lashon ha'rah*, the telling of negative truths, stands out as particularly vexing because the fact of its being truthful masks its immorality. On this, the Chofetz Chaim says,

[18] James Madison, Speech to the House of Representatives on Amendments to the Constitution," June 8, 1789.

"Because people speak many times a day. . . and most of what's said appears to create no discernible consequences, it becomes easy to perceive speech as a relatively benign force. . . . [But…] a common thread running through every kind of *lashon ha'rah* is its capacity to cause division and separation"[19] That's the expected outcome of telling negative truths.

As the battle over hate speech on the internet is waged, I hope you have greater perspective on the issues at stake. And in the more immediate context of our family, friends, coworkers and community members, that you have the tools to think Jewishly about the way you speak about others. And as we strive towards more ethical speech in our own lives, we can expect to bring more ethical speech into our world. It's a new year. We can do better.

Shana tovah tikateivu v'tichateimu.

May you be inscribed and sealed for a good life.

[19] Finkelman, Rabbi Shimon and Rabbi Yitzchak Berkowitz, *Chofetz Chaim: A Lesson a Day. The concepts and laws of proper speech arranged for daily study*, Mesorah Publications, Ltd: Brooklyn, NY, 1995; 2005, xxxi.