

Interred with Its Bones: The Death of “Internet Freedom”

SHANTHI KALATHIL

INTRODUCTION

Let us come to praise Internet freedom, and to bury it.

Few would dispute the value of the *concept* of an open, interconnected Internet that facilitates the spread of information and ideas across borders while safeguarding civil liberties. As the environment surrounding the expansion and governance of the Internet evolves, however, it is useful to examine what particular value this term brings to the conversation, particularly from the standpoint of U.S. foreign policy discourse.

Full disclosure: I have used the term “Internet freedom” in many a panel discussion. It has proven useful shorthand, particularly within U.S.-centric circles, for “all of the good stuff, none of the bad stuff.” And, yet, partly because the term is deliberately fuzzy while the issues involved are complex, it seems more closely affiliated with an earlier time when the idea of a “Declaration of the Independence of Cyberspace” seemed relevant. As the next billion users come online, the majority from developing countries, it may be time to drop this ambiguity in favor of focusing on specific concepts that will better preserve what has come to be a crucial global resource.

This may be seen as quibbling over semantics, but framing does matter. Simplified terms can often beget simplified solutions. In particular, the term “Internet freedom” has historically pointed toward a reductive policy path: Leave everything alone, except for the deployment of tools that foster “Internet freedom,” i.e., anti-censorship technology. Moreover, the cover created by the strategic ambiguity of the term allows the U.S., which has long championed the concept and has spearheaded numerous related initiatives, to gloss

over troublesome issues such as the thorny nexus between national security, surveillance, strong encryption, civil liberties, and so on.

Internet freedom, however, is much more than just the specific technological tools that combat censorship and surveillance. Sustaining the complex, interdependent ecosystem that enables the free exchange of ideas requires careful thought about infrastructure, policies, and enabling environment, including basic political freedoms. This ecosystem can certainly be affected by multilateral or multi-stakeholder action (where much rhetoric about Internet freedom abounds), but is primarily driven at the national level in the countries where user growth is expanding. “Internet freedom,” then, would benefit from more specifics, both at the level of policy rhetoric among those that support it and in the assistance policies that flow from it. Moreover, its supporters (chief among these being U.S. policymakers) must not shy away from a public global airing of the tough discussions and, yes, tradeoffs inherent in protecting and preserving an Internet that underpins the free exchange of ideas. This would actually bolster the United States’ credibility and allow it to advocate more effectively.

DEFINING CHARACTERISTICS

The term “Internet freedom” has been bandied around in a U.S. foreign policy context since at least the early 2000s, when Internet access around the world really began to take off, including in a number of authoritarian regimes that restricted the free flow of information. Efforts to address this issue typically employed language such as that found in a bill introduced in the 108th U.S. Congress in 2003. H.R. 48 was known as the “Global Internet Freedom Act,” designed to “develop and deploy technologies to defeat Internet jamming and censorship.”²

By 2010, while access, use, and regulation of the Internet had evolved considerably in both democratic and non-democratic states, the rhetoric had not budged much. U.S. Secretary of State Hillary Clinton’s groundbreaking “Remarks on Internet Freedom,” delivered at the Newseum in Washington D.C. in 2010, highlighted the increasing importance of online freedom of expression to U.S. democracy promotion policies. In her speech, in addition to noting that Internet freedom would be included as a component in the first

¹ H.R. 48, 108th Cong. (2003), *available at* <https://www.govtrack.us/congress/bills/108/hr48/text>.

resolution introduced by the U.S. after it returned to the United Nations Human Rights Council, she explained that:

We are also supporting the development of new tools that enable citizens to exercise their rights of free expression by circumventing politically motivated censorship. We are providing funds to groups around the world to make sure that those tools get to the people who need them in local languages, and with the training they need to access the internet safely. The United States has been assisting in these efforts for some time, with a focus on implementing these programs as efficiently and effectively as possible. Both the American people and nations that censor the internet should understand that our government is committed to helping promote internet freedom.³

In the meantime, various other groups attempted to carve out a more specific definition for the term. This was usually accomplished most easily by defining a negative space (i.e., this is what Internet freedom is not). Particularly in the mainstream press, Internet freedom was understood, without any accompanying definition, to be “under attack” in China, North Korea, and in other (usually extreme) cases where Internet use was blocked or censored. Yet, news about some of the most interesting and vexing online expression questions were typically not treated as “Internet freedom” stories. For instance: Should platforms for user-generated content be held liable for user speech? Should private companies use terms of service to restrict expression? For the most part, conventional wisdom seemed content to delineate Internet freedom along the lines of Justice Potter Stewart’s famed definition of pornography: “I know it when I see it.”³

Freedom House took a significant step toward defining metrics in establishing its “Freedom on the Net” report (published annually since 2011), laying out three broad categories against which countries would be defined as “free,” “partly free,” or “not free,” following its standard methodology and terminology. These categories currently include

² Hillary Rodham Clinton, Secretary of State, U.S. Department of State, Remarks on Internet Freedom (Jan. 21, 2010), *available at* <http://www.state.gov/secretary/20092013clinton/rm/2010/01/135519.htm>.

³ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

obstacles to access (both infrastructural and economic, and encompassing issues such as legal and regulatory control over access providers), limits on content (including filtering, blocking, and diversity of online content), and violations of user rights (including legal protections/restrictions on activity, surveillance, and privacy).⁴ While some have critiqued Freedom House's methodology in its various indices, the Freedom on the Net report remains the most comprehensive attempt to define metrics on a global scale, against which individual countries (including the U.S. and other western industrialized democracies) can be measured.⁵

Other initiatives, rather than just measuring aspects of Internet freedom, set out to establish self-defined global norms, particularly during 2011 and 2012. For instance, the OECD's "Principles for Internet Policy Making," while not explicitly tackling the definition of Internet freedom, established several components of "good policy for Internet governance and practice" that advanced the ball toward a more codified recognition of some widely accepted sub-principles of Internet freedom, endorsed by all thirty-four member countries.⁶ These principles include crucial components, such as promoting and protecting the global free flow of information, fostering voluntarily developed codes of conduct, ensuring transparency, fair process and accountability, and limiting Internet intermediary liability.⁷

While the enthusiasm for multilateral principles has subsided, the actual work of defining and supporting Internet freedom at a more granular level has continued at the level of advocacy and scholarship, with civil society groups around the world increasingly orienting their work around a number of sub-issues, including intermediary liability, privacy, net neutrality, and surveillance. The Global Network Initiative, a corporate social responsibility initiative that counts

⁴ *Freedom of the Internet 2014*, Freedom House, https://freedomhouse.org/sites/default/files/FOTN_2014_Full_Report_compressedv2_0.pdf (last visited June 17, 2015).

⁵ For examples of such criticism, see Diego Giannone, *Political and Ideological Aspects in the Measurement of Democracy: The Freedom House Case*, 17 *DEMOCRATIZATION* 68, 68-69 (2010). See also Lisa Brooten, *The Problem with Human Rights Discourse and Freedom Indices: The Case of Burma/Myanmar Media*, 7 *INTERNATIONAL JOURNAL OF COMMUNICATION* 681, 695 (2013).

⁶ *OECD Principles for Internet Policy Making*, OECD, <http://www.oecd.org/sti/ieconomy/oecd-principles-for-internet-policy-making.pdf> (last visited June 5, 2015).

⁷ *Id.*

Google and Yahoo among its founding members, defines its mission as “protecting and advancing freedom of expression and privacy in information and communications technologies,” encouraging companies to hew to jointly developed principles on freedom of expression, privacy, multi-stakeholder collaboration, and responsible company decision making.⁸ The Center for Internet and Society in India focuses on, inter alia, accessibility, access to knowledge, and “openness,” under which they include open government data, open access, and open education resources.⁹

It is because of this profusion of concerns, some in tension with others, that the use of the phrase “Internet freedom” in policy rhetoric seems increasingly anachronistic, not to mention out of touch with a burgeoning and skeptical population of Internet users.

GLOBAL CONTEXT: A DECLINING ENVIRONMENT

The current global context for governance of the Internet is in flux. Developing countries are no longer content to let others lead the conversation about what the future of the Internet will look like, not least because their citizens will make up the majority of users for the foreseeable future. Ongoing, multifaceted conversations are taking place about national sovereignty, the role of the private sector, security, privacy, and the concept of universal digital rights for Internet users. Increasingly, the catchall phrase of “Internet freedom” does not do justice to the current complexity.

In addition, these conversations now take place in the wake of the Snowden revelations and, thus, against a backdrop of pervasive, deep-seated mistrust of the surveillance policies enacted by the U.S. and other industrialized democracies. On the positive side, this has catalyzed debate about the limits of national and international surveillance and ways to enact appropriate oversight and transparency. At the same time, many countries resent perceived lecturing by the U.S. about “Internet freedom,” while simultaneously being watched by its intelligence agencies. This, in turn, weakens the effectiveness of the U.S. in making the case for the sub-components of Internet freedom in the international arena.

⁸ *Principles*, GLOBAL NETWORK INITIATIVE, <http://globalnetworkinitiative.org/principles/index.php> (last visited June 19, 2015).

⁹ *Openness*, THE CENTER FOR INTERNET & SOCIETY, <http://cis-india.org/openness> (last visited June 19, 2015).

This is unfortunate because that case needs to be made. Freedom House's latest report shows that thirty-six out of sixty-five countries assessed in the report experienced a negative trajectory during the coverage period.²¹ Legal measures at the national level are increasingly being used to stifle online expression: Freedom House emphasizes that between May of 2013 and May of 2014, forty-one countries passed or proposed legislation to penalize legitimate forms of online speech, increase government powers to control content, or expand government surveillance capabilities.²² In many cases, civil society in these countries lacks the capacity to advocate effectively, and absent international pressure to the contrary, there is likely to be little pushback against such measures.

GETTING SPECIFIC

Does the phrase "Internet freedom" still have utility? Sure. As Internet observer and optimist Cory Doctorow notes, phrasing things in stark terms can help focus discussion. So-called Internet utopians "create a normative discussion about the dangers of an 'evil' internet and the power of a good one, in Silicon Valley and its many global offshoots."¹² He goes on to note that this is necessary but insufficient: "That's why [Internet utopians] campaign for legal reform; that's why they liberate data; that's why they form mass movements to stop the drive to kill net neutrality or impose mass surveillance."¹³

To be sure, ditching a phrase or two does not necessarily lead to practical policy solutions. Evgeny Morozov, an extreme critic of techno-utopianism, has advocated against using even the phrase "the Internet," much less "Internet freedom."¹⁴ Such suggestions are impractical in everyday life, much less policy advocacy.¹⁵ This essay

¹⁰ *Freedom of the Internet 2014*, *supra* note 4.

¹¹ *Id.*

¹² Cory Doctorow, *The Internet is the Answer to All the Questions of Our Time*, THE GUARDIAN, June 15, 2015, <http://www.theguardian.com/technology/2015/jun/15/internet-answer-questions-of-our-time>.

¹³ *Id.*

¹⁴ EVGENY MOROZOV, *TO SAVE EVERYTHING, CLICK HERE* (1st ed. 2013).

¹⁵ Tim Wu, *Book Review: To Save Everything, Click Here*, THE WASH. POST, Apr. 12, 2013, <http://www.washingtonpost.com/opinions/book-review-to-save-everything-click-here-by->

stops short of calling for extremely precise definitions in everyday speech and writing; if one wants to initiate an actual conversation as opposed to a long negotiation over terms, then some degree of fuzziness is necessary and inevitable.

That being said, it appears the term “Internet freedom” has convinced some U.S. policymakers that they can champion digital rights, while avoiding the specifics. Adopting this position, however, does not shield the U.S. from criticism regarding surveillance and other policies; it merely hamstring the ability to have a coherent discussion about the very real tradeoffs and complexities inherent in defining Internet freedom—even in the United States.

The fact is that all democratic governments, and even some authoritarian governments, struggle with how much they can and will control, and also monitor or shape Internet communications. Addressing those complexities head on and wrestling with the, sometimes, competing demands of security and liberty lies at the heart of democracy. This is a global conversation the U.S. should lead, rather than avoid.

By doing this, the U.S. can begin to restore its credibility and legitimacy on these issues. Why does this matter? It matters because the ambitions embodied in the concept of Internet freedom are indeed important to ensuring the preservation of an open, globally accessible Internet that can serve as a cornerstone of economic development and free expression. The U.S. is uniquely positioned to maintain focus and bring constructive pressure to bear on these issues.

The U.S. can, for example, include specific measures to boost civil society advocacy capacity on these issues in those countries where civil society is weak and online speech is threatened. It does not need to stop there: Since so much international assistance is government-focused, the U.S. can also use its influence among international donors to make sure that capacity building for governments on issues relating to Internet policy are weighted and funded accordingly, rather than being treated as an afterthought. These types of commitments, embedded and normed within traditional development assistance, will help create an enabling environment at the national level within developing countries where Internet use is growing the fastest. Such commitments will go farther than small-scale funds distributed to anti-censorship or other technological solutions to attempt to allow civil society and dissidents to communicate. These latter efforts should not go away—because they also serve a useful purpose—but

they should exist alongside a much broader and deeper international assistance framework. Only through such comprehensive efforts can Internet freedom, in all its many dimensions, flourish on a global scale.