

## INTRODUCTION: SYMPOSIUM ON FREE SPEECH, THE INTERNET, AND THE MEDIA

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On June 3–4, 2019, the Free Speech Discussion Forum brought prominent free speech scholars from around the world to Budapest, Hungary, to discuss contemporary free speech issues. Participants were asked to submit papers on one of two topics: “Free Speech in an Internet Era,” and “The Media in the Twenty-First Century.” The papers published here were prepared for that forum.

The subject of this forum, the internet, is both important and timely. Not only has the internet transformed communication by enabling ordinary people to widely disseminate their ideas, free of the constraints imposed by the traditional “gatekeepers” of communication (e.g., newspaper editors),<sup>1</sup> it has simultaneously destabilized traditional media organizations, leading to the collapse or consolidation of numerous media outlets.<sup>2</sup> While these changes have had a profound impact on the political process,<sup>3</sup> by enabling people to directly communicate with each other and thereby organize and direct political movements,<sup>4</sup> the internet also has a seamy underbelly which has allowed individuals to perpetuate scams and spread disinformation.<sup>5</sup> Thus, at the same time that editorial control over the flow of information has diminished, more and more people are able to communicate freely and to disseminate their ideas widely even if those ideas involve disinformation.<sup>6</sup> A level of chaos has resulted.<sup>7</sup>

Weighing in on this brave new world, Prof. Dr. Udo Fink and Dr. Ines Gillich wrote *Fake News as a Challenge for Journalistic Standards in Modern Democracy*, which examines the problem of “fake news” and the emergence of technological devices like “bots” (essentially, robotic speech) which can widely disseminate disinformation. While noting the societal

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<sup>1</sup> See RUSSELL L. WEAVER, FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY AND THE IMPLICATIONS FOR DEMOCRACY 21–38 (2d ed., 2019).

<sup>2</sup> *Id.* at 171–212.

<sup>3</sup> *Id.* at 67–114.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 139–70.

<sup>6</sup> *Id.* at 67–212.

<sup>7</sup> *Id.*

benefits of free expression, the authors express concern that disinformation can distort the political process and democratic debate. They then analyze potential solutions to the problem by examining the role of the traditional media in curbing disinformation, as well as the European Union's effort to track and deal with disinformation, and the European Convention on Human Rights' call for responsible journalism. However, recent communications developments have outstripped societal controls because they have allowed everyone to freely communicate with each other, thereby creating risks for democracy, privacy, and even free speech. As a result, the authors argue that there is an "urgent need" for solutions that protect "the free flow of information," as well as provide for "transparent and trustworthy news-reporting on the basis of accepted rules of professional journalism, and the protection of privacy and democratic decision-making." However, the authors suggest that it will be difficult to find the proper balance in an internet era.

Professor Kevin Saunder's contribution to the forum, *Non-Disclosure Agreements, Catch and Kill, and Political Speech*, analyzes non-disclosure agreements (NDAs). While he argues that such agreements are quite appropriate in some situations (e.g., when a company sells or licenses a product or technology, or when employees are given access to confidential and proprietary information), he expresses concern about the use of NDAs in "catch and kill" situations. Catch and Kill NDAs arise when an individual or company purchases the exclusive rights to an individual's story, including an agreement that the subject will not publish the story in the near term, but the agreement is sought because the purchaser wants to "kill" or bury the story. Although these agreements may be valuable to the purchaser, and sometimes to the seller, Professor Saunders argues that "the practice does not serve any public interest." Indeed, when a media outlet engages in "catch and kill," instead of "informing the public," as free speech is designed to do, the NDA has the opposite impact because it suppresses information, thereby keeping information from the public.

Professor Jennifer Kinsley's article, *Private Free Speech*, examines what she argues is the First Amendment's implicit "right of privacy" which has been used to strike down laws criminalizing the private possession of obscenity, to establish a right of anonymous communication, and to protect the identities of those who participate in political parties and organizations. She argues that privacy principles can be "speech enhancing" when they are applied in the context of private relationships (e.g., as between attorneys and clients, therapists and patients, or police and confidential informants). As a result, she concludes by arguing that "the First Amendment free speech clause ought to be considered alongside the Second, Fourth, and Fourteenth

Amendments as a source of privacy protection, particularly where speech and expressive conduct are at issue.”

My contribution to the forum, *Free Speech in an Internet Era*, notes that some have argued that the internet constitutes “a realization of that ideal that Adams and Jefferson and Paine and before him Voltaire and Plato had [—] that ideal of having everybody have a shot at participating in this discussion.”<sup>8</sup> Of course, the great strength of the internet—the fact that it is accessible to everyone—is also its greatest weakness. Just as individuals can easily use the internet to engage in political activism, they can also use it to disseminate disinformation, meddle in foreign elections, engage in online criminality, and create a “wild west” of free expression. However, it is not clear that society has an effective remedy. In the United States, the government is generally not allowed to censor speech, and is not allowed to impose prior restraints (e.g., injunctions or licensing) on speech. While civil defamation suits are possible, they often involve much higher burden of proof standards, and the nature of the internet can make it difficult to identify and gain jurisdiction over potential defendants. Social media platforms have attempted to deal with fake news by removing such information from their web sites, but there is a fear that the operators of these platforms may try to suppress ideas or political perspectives that they do not like, or may favor certain ideas or perspectives over others. Moreover, their efforts have not necessarily been effectual because the internet is a remarkably resilient medium. Even though social media platforms may attempt to ban certain individuals or organizations from their platforms, such individuals frequently remain on the internet. The one area where internet mischief can be controlled is regarding foreign interference in U.S. elections. While such interference can be criminalized, the United States often encounters great difficulty bringing those who interfere to justice.

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<sup>8</sup> See Liane Hansen & Davar Iran Ardalan, *Looking at the Future of “E-Politics,”* NPR (June 29, 2008), <http://www.npr.org/templates/story/story.php?storyId=91963952>.

