3

Democratic Freedom of Expression and Disinformation

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3.1 INTRODUCTION

When analysing disinformation, commentators often focus on major platforms and their influence on content circulation.[1] Some also examine institutional media, especially broadcasting. Platforms and media are both relevant; both are important in the communicative infrastructure underlying public speech. Whatever the focus, there is an almost endless examination of issues and suggestions regarding what to do about disinformation. Commentary defines false or misleading information in different ways,[2] compares it with historic practices of propaganda and persuasion, considers the emergence of large language models and content they could generate, documents varied legal responses, and considers what should be done. Here, I examine something that is relevant to that work but often not considered directly.

My interest is how democratic freedom of expression can be understood in quite different ways, and how this can affect legal responses to disinformation. This point

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[1] There are three points of terminology to note: (1) Freedom of expression, expressive freedom, free speech, etc. are used interchangeably here; (2) 'Disinformation' is used expansively, encompassing false and misleading content. For a useful overview of its meanings in current EU approaches, see, e.g., Alexander Peukert, *The Regulation of Disinformation in the EU – Overview and Open Questions*. Research Paper of the Faculty of Law of Goethe University Frankfurt, 2023, https://ssrn.com/abstract=4496691; (3) While referring simply to 'platforms', multiple entities are involved in infrastructures underlying public speech, such as social media, search, data brokers, advertising intermediaries.

[2] See, e.g., Claire Wardle and Hossein Derakhshan, Information Disorder: Toward an Interdisciplinary Framework for Research and Policymaking. Council of Europe report DGI (2017)09; Edson C. Tandoc, Jr., Zheng Wei Lim and Richard Ling, 'Defining "Fake News": A Typology of Scholarly Definitions' (2017) 6 *Digital Journalism* 137–53.

may be recognised more outside the United States than within, in part because of the particular US understanding of freedom of expression. The currently dominant approach to the First Amendment limits what is possible when responding to disinformation. As communicative structures change, that is increasingly significant. Freedom of expression is arguably better protected in Europe than in the USA,[3] in ways that are becoming increasingly important for democratic opinion formation and a communicatively legitimate democracy. Freedom of expression is not a complete response to democracy's communicative needs, but it is important in supporting an infrastructure of communication sufficient for self-government. Alternatively, if the freedom is poorly understood it can obstruct that infrastructure. (Even in conditions that can be called post-democratic, freedom of expression can have a similar role supporting something closer to democratic opinion formation.[4])

This chapter considers some differences in how freedom of expression is understood in US and European law and scholarship.[5] The differences in understanding align with different responses to disinformation and help to clarify changes that will be needed for greater US responses to disinformation. It is not that European understandings of expressive freedom are ideal. As is common in Europe, there are multiple, overlapping and somewhat inconsistent ideas about free expression across the many settings involved, and at least parts of the European Union response are framed too closely to economic interests to meet the needs of democratic freedom of expression. Rather, the EU response can tend to protect 'market freedom against national democratic contestation' and enable platform business models.[6] However, the approach shows more of what may be useful overall and offers an interesting model. As all this suggests, my interest is less in the details of legal responses to disinformation than the conceptualisations of communicative freedom that frame them. That said, the analysis of communicative freedom that follows goes further than any existing legal position within Europe, whether in EU provisions, the European Convention of Human Rights (ECHR), or national laws. Rather, it draws from all these sources to suggest an approach to freedom of expression that is more than nascent in the existing European ideas and could be useful when considering disinformation or public speech more generally.

Section 3.2 below briefly examines the changed context of public speech. Structures underlying public communication have changed, they are no longer

[3] Thomas Hochmann, 'Why Freedom of Expression Is Better Protected in Europe than in the United States' (2022) 2 *Journal of Free Speech Law* 63–85.

[4] See, e.g., the role suggested for public media in Colin Crouch, *Post-Democracy* (Cambridge: Polity, 2004) pp. 46–51.

[5] One could also look to international material; e.g., United Nations Special Rapporteur et al., Joint Declaration on Media Freedom and Democracy (2023), www.ohchr.org/sites/default/files/documents/issues/expression/activities/2023-JD-Media-Freedom-and-Democracy.pdf, setting out positive obligations for states including online news and commentary.

[6] Rachel Griffin, 'Public and Private Power in Social Media Governance' (2023) 14 *Transnational Legal Theory* 46–89, 64.

dominated by mass media in the way they were in the twentieth century, and a broader range of actors is relevant. Distribution of expression is particularly important in the changes, along with the revenues that used to accompany it. Social media and search use commercially driven distribution very differently to what was imagined for past media distribution and commercial media financing. Section 3.3 moves to expressive freedom, focusing initially on US law and commentary. Debates about legal responses to disinformation resemble other content debates, such as whether vilification can be regulated in a communicatively legitimate democracy. The overlap is only partial, but examining the issue is instructive. It highlights differences in understanding freedom of expression and, perhaps especially, what freedom means within it. This helps to clarify what interpretations of expressive freedom support what legal approaches to regulation, including regulation relevant to disinformation. Section 3.4 draws out differences in European ideas of communicative freedom and takes their implications further. Then Section 3.5 examines some current EU measures relevant to disinformation, which have interest as a general model more than in the precise wording of their provisions or how they may operate in the short term. There are significant differences in how expressive freedom is understood which, as the chapter concludes, underline the value in reformulating the US understanding and in supporting a more comprehensive European interpretation of the freedom.

There are two further matters of introduction. First, while disinformation understandably receives attention, the term can clearly be misused. Johan Farkas and Jannick Schou have noted that post-truth is often 'a discourse crafted by those who benefit from the status quo'.[7] As they suggest, debates about disinformation can reduce the demos in democracy and focus on rational governance by experts over people's voices and agency.[8] The arguments can obscure a tension between democracy as representation and expertise on the one hand, and democracy as popular sovereignty on the other. That is not my intention. Those with political, financial and other power are always likely to have conflicts of interest about freedom of speech; that applies equally for disinformation. Even so, I think there *are* now differences in the way speech can reach and form publics and influence opinion formation that mean something is at stake beyond other longer-term changes in democratic practices.

Second, it is useful to consider at least two aspects of legal responses to disinformation. One concerns direct state *restrictions on expression* and whether accountability can be implemented for at least some disinformation. Another concerns

[7] Johan Farkas and Jannick Schou, *Post-Truth, Fake News and Democracy* (New York: Routledge, 2020) p. 157.

[8] See also, e.g., Ian Cram, 'Keeping the Demos out of Liberal Democracy? Participatory Politics, "Fake News" and the Online Speaker' (2019) 11 *Journal of Media Law* 113–41; Irini Katsirea, '"Fake News": Reconsidering the Value of Untruthful Expression in the Face of Regulatory Uncertainty' (2018) 10 *Journal of Media Law* 159–88.

structural or systemic responses to disinformation or *responses relevant to public debate* more widely. These might include state obligations to regulate private actors that affect public speech, support for communicative infrastructures more generally, and intervention in relevant actors' financial models. Particular structural or systemic responses might be hampered by freedom of expression, allowed by it, or required by it, depending on how communicative freedom is understood. And the responses can encompass institutional media as well as platforms. Both aspects – restrictions and structural or systemic responses – can be understood as falling within the freedom in freedom of expression. In simple terms, US law often says no both to restrictions and to structural interventions, while European law says yes, partly at least. In addition, beyond freedom of expression law, and beyond law more generally, a wide range of social practices is clearly significant. For news and commentary, the practice of journalism is one obvious example.[9] Public discourse has never required only law. Freedom of expression arises within social relations; it is nonsense to say the freedom only involves the absence of restraint or that law has no relevance to, and no effect on, those social relations.[10]

Current judicial interpretation of the First Amendment allows hardly any restriction of falsehoods in public discourse. Even deliberate lies are protected unless they fall into certain long-established categories. In addition, US free speech law does not require various state actions related to the infrastructures underlying public speech, such as actions supporting media pluralism and democratic opinion formation. On some analyses, the First Amendment does not even allow such structural or systemic action. At a minimum, it should. In Europe, things are different. Concerns exist about laws directly regulating disinformation, but more is possible than under US law. The second aspect, about state action, has clearer differences. For example, ECHR member states have positive obligations to make Convention rights effective.[11] This means states have obligations to regulate private actors where they threaten enjoyment of Convention rights, including expressive freedom for both speakers and recipients. And states may need to act in support of pluralism – they are its ultimate guarantors. This helps to explain why it can be said that freedom of expression is better protected than under the First Amendment. In Europe, positive dimensions of the freedom are legally recognised, not only negative ones.

[9] I examine some implication of journalism's changed role in Andrew T. Kenyon, 'Regulating Opinion Power: Journalism, Platforms and Public Speech' in Martin Senftleben, Kristina Irion, Tarlach McGonagle and Joost Poort (eds.), *Cambridge Handbook of Media Law and Policy in Europe* (Cambridge: Cambridge University Press, forthcoming).

[10] E.g., Thomas Streeter, 'Beyond Freedom of Speech and the Public Interest: The Relevance of Critical Legal Studies to Communications Policy' (1990) 40 *Journal of Communication* 43–63.

[11] See, e.g., Andrew T. Kenyon, 'Sustained Plural Public Speech: Positive Obligations, Freedom of Expression and the European Court of Human Rights' in Charles Girard, Pierre Auriel and Andrew T. Kenyon (eds.), *The Cambridge Handbook of Freedom of Expression and Democracy: European Perspectives* (Cambridge: Cambridge University Press, forthcoming).

3.2 INFRASTRUCTURES OF PUBLIC SPEECH

That the infrastructures underlying public speech have changed is obvious. As one aspect, consider an individual's ability to reach a large audience when they believe an extreme political scandal has occurred that is not being publicly addressed. The belief is an 'outlandish fiction' in the example. It is false. Six decades ago, the possibilities for reaching people were limited:

> The only way to reach a large audience in 1965 would have been through one of the major metropolitan newspapers or the three [US] broadcast networks. But these prided themselves on practicing serious journalism. They ... all were by and large determinedly centrist in orientation [in US terms], with high professional standards, and none would have aired this outlandish fiction.[12]

In the example, Larry Kramer notes US supermarket tabloids did publish outlandish fictions, but suggests they were not taken seriously by almost any readers so they did not change the overall possibilities for influencing public speech. The general situation was similar in other democratic jurisdictions, although often commercial broadcasting was far less dominant and public broadcasting more prominent than in the USA, newspaper–political party relations varied in multiple ways, and there were different habits of media reception and use.[13] But the basic point applied generally across established democracies. Reaching an audience required media.

Many challenges that are now raised about platform-distributed speech – the treatment of problematic content, where to focus attention, what to remove from circulation or limit in reach, questions of tone, and so forth – were formerly left to journalism or what can be called a journalistic-editorial function. This function was understood to have substantial, but not total, influence on content. Such an understanding was highly idealised, but it was the model at least. Journalists and editors made decisions about news and commentary (and broadly equivalent roles existed for entertainment and other genres). Of course, reality never matched the model, with media practices often including discrimination, elitism, or being subject to commercial or state domination.[14] 'Marginalized communities have long been "reduced" by the centrism and conservatism of traditional media.'[15]

Law attempted to deal with those challenges, again imperfectly. One set of legal responses was not focused on institutional media but was relevant to it. These were

[12] Larry Kramer, 'A Deliberate Leap in the Opposite Direction: The Need to Rethink Free Speech' in Geoffrey R. Stone and Lee C. Bollinger (eds.), *Social Media, Freedom of Speech, and the Future of our Democracy* (New York: Oxford University Press, 2022) pp. 17–39.

[13] See, e.g., Daniel C. Hallin and Paolo Mancini, *Comparing Media Systems: Three Models of Media and Politics* (Cambridge: Cambridge University Press, 2004); Jonathan Hardy, *Western Media Systems* (Abingdon: Routledge, 2008).

[14] See, e.g., John Charney, *The Illusion of the Free Press* (Oxford: Hart, 2018) ch. 1.

[15] Tarleton Gillespie, 'Do Not Recommend? Reduction as a Form of Content Moderation' (2022) 8(3) *Social Media and Society* 1–13, 9.

laws that limited certain content, such as defamation and copyright. Another set of responses involved structural measures aimed at promoting pluralism and independence across and within media organisations. (There were also content-related obligations in some jurisdictions – less so in the USA – about matters such as local content, children's content and election material.) The extent and style of the structural measures varied enormously across jurisdictions, but some responses at least aimed to lessen the marginalisation and centrism noted above.[16] Thus, some legal responses involved restrictions on expression; others were structural or systemic measures. Those responses still left a lot of room. Decisions about which issues received focus, which were ignored, what tone was used, and more were decisions for journalists and editors. The decisions were supposedly independent of financial and political domination. The media was responsible for publication and made choices about content that substantially influenced public speech. While law addressed issues related to content and structures, especially under some understandings of expressive freedom,[17] it also left a lot to journalism. Many challenges around content were left to speakers, and in a mass media context that meant they were left to a journalistic-editorial function.

To return to Kramer's example, things have changed. Today people and organisations can create professional-looking content (perhaps with explicit financial, political or geopolitical aims), promote its prominence in search results, and social media can 'spread the story' for its own commercial ends. Sufficient platform prominence can then 'make the story newsworthy in a way the fragmented, competitive world of mainstream media could not or would not ignore'.[18] As he states, '[current] technologies may not have created the problem, and they are not solely responsible for it, but they have *enabled* it – providing a necessary (indeed, indispensable) accelerant and catalyst for a change in degree so extreme as to amount to a change in kind'.[19] The greatly increased ability to find an audience helps socially beneficial speech too; the indispensable accelerant magnifies speech of many kinds. But if more speech was always to the good – as US law so often states and wider free speech analyses frequently suggest – many of the current challenges would not be emerging.[20]

[16] See Andrew T. Kenyon, *Democracy of Expression: Positive Free Speech and Law* (Cambridge: Cambridge University Press, 2021) for examples of more 'active' measures in some national laws and discussion of their implications.

[17] Including the US historically with measures such as the Fairness Doctrine and the decision in *Red Lion Broadcasting* v. *FCC*, 395 US 367 (1969).

[18] Kramer, 'Deliberate Leap' (n 12) 18.

[19] Ibid. 19 (emphasis in original).

[20] For another analysis that 'more speech is not always better', see Robert Post, 'The Unfortunate Consequences of a Misguided Free Speech Principle', *Daedalus* (special issue, 'The Future of Free Speech', in press) https://ssrn.com/abstract=4255938. Post focuses on social practices relevant to public discourse, leaving freedom of expression as a substantially negative freedom. See also Vincent Blasi's chapter in this book (Chapter 16).

To varying degrees, distribution of news and commentary is now separated from its producers, media are dependent on platform distribution, and commercial media have lost influence within advertising markets.[21] The degree of change varies globally and partly depends on people's habits of media and platform use but, overall, the change seems substantial. Even so, it is not that one form of distribution has replaced the other. Institutional media still produces content and makes it available directly to audiences, often doing so with less money and reshaping content for better reach in the varied distribution methods now used. If once media was imagined as a particularly dominant influence on public discourse, it now operates within wider infrastructures of public speech. And platform distribution's commercially driven moderation and amplification are far removed from journalism's public interest goals – even if those goals are highly idealised, never fully met, and have evolved across decades.[22] In simplified terms, the communicative structure underlying public speech has changed from a situation of journalistic-editorial gatekeepers and curators with distribution largely under media control. Now platforms have important roles in distribution. In some ways, platforms are like both (or lie between) content providers and conduits. They have similarities to both institutional media and telecommunications from decades past.[23] But platforms also have resources and powers that exceed those examples.

It is useful to think about two elements in the contemporary situation. First, there are complex interactions between institutional media and other speakers on the one hand, and platforms on the other. Content moderation and amplification overwhelmingly follow platform interests and problematic speech has gained far greater prominence – disinformation, vilification, trolling and more. Platform 'data harvesting and data-driven, programmatic advertising are astonishingly effective mechanisms for propagating disinformation, hate, and conspiracism'.[24] Second, institutional media continue to have influence, more successfully at national or transnational scales than for local news in many established democracies, although in notable

[21] See, e.g., James Meese, *Digital Platforms and the Press* (Bristol: Intellect, 2023); Tomás Dodds et al., 'Popularity-Driven Metrics: Audience Analytics and Shifting Opinion Power to Digital Platforms' (2023) 24 *Journalism Studies* 403–21.

[22] See, e.g., Michael Schudson, 'What Does "Trust in the Media" Mean?' (2022) 151(4) *Daedalus* 144–60, recounting two waves of change in twentieth-century journalism, the first in the 1970s and 1980s accompanied by a reduction in public trust: society became more questioning, journalism became more interpretive, and democracy became 'monitorial' or 'continuous'.

[23] Gregory P. Magarian, 'The Internet and Social Media' in Adrienne Stone and Frederick Schauer (eds.), *The Oxford Handbook of Freedom of Speech* (Oxford: Oxford University Press, 2021) pp. 350–68.

[24] Julie E. Cohen, 'Infrastructuring the Digital Public Sphere' (2023) 25 (special issue) *Yale Journal of Law and Technology* 1–40, 26.

instances institutional media also appear to promote disinformation due to the changes.[25]

All this means journalism does less in terms of public opinion formation and platforms do more. The degree of influence varies across different audiences and locations, but platforms now 'shape public communication and distribute attention' through their 'architectures, algorithmic amplification, and content moderation',[26] using very different values than the model of journalism. Platform interests have no clear relation to – they do not correspond with – the public opinion formation that is imagined as necessary in a communicatively legitimate democracy. Rather, platforms moderate content 'in order to sustain themselves',[27] and further their own position, not to create democratically legitimate structures of public communication.[28] Platforms' aims, along with changes to the scale and speed of expression, are fundamental challenges to past models of public discourse and democratic opinion formation. Automation at platform scale fits uneasily with those models.[29] The structural changes raise challenges about content, including disinformation. While not completely new, the challenges' form, distribution and effects are different with platform-based public speech. This means the understanding of freedom of expression has more significance and, particularly, the state's obligations regarding communicative freedom are more important. But how those obligations are understood is quite different in US and European contexts.

Before addressing that point, I want to clarify my use of journalism. The aim is not to recall some golden past – journalism's weaknesses have long been evident. Rather, the aim is to point out that a journalistic-editorial function was assumed, and relied on, in the public discourse imagined within law. Even the US First Amendment assumes 'a thriving press system'.[30] This has allowed law to defer many decisions about the content of public discourse to journalism. That role has been partially sidelined – it is less dominant but not completely removed – which makes it unsurprising that questions emerge about the content and curation of public speech. As Robert Post has suggested, a 'potential crisis is brewing insofar as democracy depends upon speech, and insofar as speech is controlled by politically

[25] See, e.g., Yochai Benkler, Robert Faris and Hal Roberts, *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics* (New York: Oxford University Press, 2018).

[26] Seth Lazar, *Communicative Justice and the Distribution of Attention*. Tanner Lecture on AI and Human Values, University of Stanford, January 2023 (copy on file).

[27] Eugenia Siapera, 'Platform Governance and the "Infodemic"' (2022) 29 *Javnost – The Public* 197–214, 210.

[28] E.g. Martin Moore, 'Creating New Electoral Public Spheres' in Martin Moore and Damian Tambini (eds.), *Regulating Big Tech: Policy Responses to Digital Dominance* (Oxford: Oxford University Press, 2022) pp. 221–34.

[29] See, e.g., Mark Andrejevic, *Automated Media* (New York: Routledge, 2020).

[30] Victor Pickard, *Democracy without Journalism? Confronting the Misinformation Society* (New York: Oxford University Press, 2020) p. 175.

unaccountable algorithms'.[31] I agree that democracy depends in part on speech – a legitimate democracy *is* a democracy of expression, even if that is not its only requirement.[32] Further, the content of public spheres may well have always needed curation. Tarleton Gillespie states that 'it may not sit well with idealized notions' of free expression (I would say *some* idealised notions of free expression) but 'it may nevertheless be true that healthy public spheres actually require their information landscapes be curated'.[33] The need for curation is the interesting point here, rather than a deference to negative freedom under the First Amendment. In important ways, past curation of public debate was journalistic. 'Well before the digital age, institutions that curated content and made judgments about quality and civility were important elements of the public sphere.'[34] In the future, that sort of role could be supported by some approaches to freedom of expression.

3.3 EXPRESSIVE FREEDOM, ASCRIPTIONS AND FEAR

What is legally allowed or required by freedom of expression in established democracies differs enormously. In the US context, there is an argument that restricting objectionable expression would control the boundaries of public discourse in a manner that breaches the First Amendment. It is a well-rehearsed analysis, especially for hate speech.[35] As is also well known, the issues are understood differently in European law. Admittedly, some European writers take a broadly US-style approach – for example, against anti-vilification laws[36] – and some US scholarship has long called for a more active interpretation of the First Amendment.[37] But the basic position is that US law on freedom of expression forbids the control of hate speech within public discourse while European law requires it, at least for some forms of vilification. That characterisation might mislead in specific instances, but at a general level captures what freedom of expression means and the state's role. The issues are not identical in vilification and disinformation, but the point is significant

[31] Robert Post, 'Democracy and the Internet' (28 January 2023), https://balkin.blogspot.com/2023/01/democracy-and-internet.html.

[32] See Kenyon, *Democracy of Expression* (n 16).

[33] Gillespie, 'Do Not Recommend' (n 15) 7.

[34] Jack M. Balkin, 'To Reform Social Media, Reform Informational Capitalism' in Stone and Bollinger, *Future of Our Democracy*, pp. 233–54, at p. 240.

[35] E.g., Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009).

[36] E.g., Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford: Oxford University Press, 2016).

[37] E.g., Kenyon, *Democracy of Expression* (n 16) ch. 5; Pickard, *Democracy without Journalism* (n 30); Martha Minow, *Saving the News: Why the Constitution Calls for Government Action to Preserve Freedom of Speech* (New York: Oxford University Press, 2021); and in a somewhat similar vein focusing on diversity and dissent, Gregory P. Magarian, *Managed Speech: The Roberts Court's First Amendment* (New York: Oxford University Press, 2017).

for how the obligations on a democratic state arising from fundamental or constitutional rights are understood.

Arguments against vilification laws often emphasise that democratic legitimacy is lost where states regulate public discourse. It is said that, if states control speech about matters of public concern, citizens are not free to participate in self-government as they should be able to do. For example, Ash Bhagwat and James Weinstein write that, 'unless justified by extremely weighty reasons, rules forbidding the expression of particular viewpoints or perspectives on matters of public concern violate the basic democratic commitment to formal equality by selectively denying citizens their fundamental interest in equal political participation'.[38] The approach requires that public discourse, which includes much hate speech, is almost completely unrestricted. Greater restriction might be allowed within the 'election domain' of speech,[39] and is possible outside public discourse.[40]

In a key US decision for disinformation, *Alvarez*, the Supreme Court struck down a law against falsely claiming to have received military honours.[41] Lying about a miliary honour could not be penalised. The plurality opinion said the First Amendment means government has no general power 'to restrict expression because of its message, its ideas, its subject matter, or its content'. Instead, content-based restrictions are possible 'only when confined to the few historic and traditional categories of expression long familiar to the bar'.[42] The categories include defamation, obscenity, fraud and expression that is intended and likely to cause 'imminent lawless action'. Within those categories, false information can be controlled although there are still hurdles to meet, such as US defamation law's requirement of knowing or reckless falsity in speech about public officials or public figures.[43] Even those who support the general US approach can criticise the plurality's wording. For example, Weinstein would allow restriction of more falsehoods than the categories literally provide. He argues that knowing falsehoods outside public discourse should be open to restriction, and subject to less than strict scrutiny by courts. However, knowing falsehoods about 'government, science, and history'[44]

[38] Ashutosh Bhagwat and James Weinstein, 'Freedom of Expression and Democracy' in Stone and Schauer, *Oxford Handbook* (n 23) pp. 82–105, at p. 93.

[39] E.g., James Weinstein, 'Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibition of Lies in Political Campaigns' (2018) 71 *Oklahoma Law Review* 167–236.

[40] E.g., Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge, MA: Harvard University Press, 1995).

[41] *United States* v. *Alvarez*, 567 US 709 (2012).

[42] Ibid. at 716 and 717.

[43] See, e.g., *New York Times* v. *Sullivan*, 376 US 254 (1964); *Gertz* v. *Robert Welch*, 418 US 323 (1974).

[44] See James Weinstein, 'What Lies Ahead? The Marketplace of Ideas, *Alvarez v United States*, and First Amendment Protection of Knowing Falsehoods' (2020) 51 *Seton Hall Law Review* 135–67, 148 citing 'Brief of Eugene Volokh and James Weinstein as Amici Curiae in Support of Petitioner', 567 US 709 (2012) (No 11-210), 2011 WL 6179424, p. 2.

– lies within public discourse – would remain protected from general restriction. Public discourse, including much disinformation, would remain highly protected. For Weinstein, the plurality opinion did not match the public discourse focus that the First Amendment has or should have.

On this view, people have freedom to speak, judge public speech and form opinions relevant to their democratic role without (almost) any legal restrictions on public speech. Only restrictions within the few historic categories are possible, and then only if applicable tests are met. Similar to Post, Weinstein explains that the US constitution involves an ascription of rationality within public speech – an ascription of autonomy in Post's words – which prevents state control of public discourse.[45] In addition, there is a more empirical concern that 'government officials cannot be trusted to fairly and accurately identify and prosecute knowingly false statements in the often highly ideological context of public discourse'.[46] These two elements – constitutional ascription and fear of government action – explain a lot about US law relevant to public speech.[47]

I want to draw out something that can underly such analyses. At times, the ascribed rationality or autonomy amounts to, or at least suggests, a belief that democratic freedom exists without state action. Or it amounts to a belief that state action would only make matters worse. The analysis means government cannot set the boundaries of public discourse – the speech thought most relevant to self-government – because that would prejudge the domain of public discourse itself. Thus, government cannot limit hate speech unless it also falls into one of the historic categories. And, as Weinstein and all the Supreme Court explain in *Alvarez*, government cannot limit disinformation about matters of public discourse, again unless it falls into one of those historic categories.[48] Outside those categories, the agenda for public debate can only be set by its participants. Public discourse's boundaries – what is acceptable speech and what is not – should be formed through public discourse.

Various points might be raised about this understanding of democratic citizenship. I note two here. The first is whether vilification should be a category the First Amendment allows to be restricted, as allowed by free expression in Europe. The second point is slightly different, asking whether it is plausible to ascribe the autonomy needed for democratic opinion formation as existing without state action

[45] Weinstein, 'What Lies Ahead?' (n 44) 166.

[46] James Weinstein, 'Climate Change Disinformation, Citizen Competence and the First Amendment' (2018) 89 *University of Colorado Law Review* 341–76, 360.

[47] US fear of government action limiting speech has probably increased over decades, but also become better recognised; e.g., cf. the two editions of Eric Barendt, *Freedom of Speech* (Oxford: Oxford University Press, 1985 and 2005). In 1985 (pp. 8–23) free speech rationales related to knowledge, self-fulfilment and democracy are examined. Twenty years later, the second edition adds a fourth rationale (pp. 21–23) – suspicion of government – and gives it substantive treatment.

[48] See Weinstein, 'What Lies Ahead?' (n 44)

affecting speech. The action might involve limitations on speech, as in the first point, but it might also involve action against non-state entities that affect expression, and various structural or systemic supports for expression. This suggests several types of potential response *as part of* protecting free expression: content-related laws restricting some speech; state action against non-state entities that affect speech – here, think of platform regulation; and wider structural or systemic measures that affect the communicative environment. (There could also be positive content laws.[49]) The US approach is narrower: expressive freedom generally means freedom from state action that directly restricts speech. It is not that European approaches do not believe in autonomy or self-government, but there is a different understanding of what that needs. And the difference includes how expressive freedom is understood.

As all this suggests, freedom of expression can be understood in different ways. For example, if communicative freedom is interpreted in terms of non-domination – in any of the popular versions in the neo-republican literature[50] – then state action may be required in communicative environments that overwise involve domination.[51] Sufficient autonomy and freedom would not exist where there is only the absence of express state action. And if freedom is understood to have both negative and positive dimensions – to concern limitations on state interference with expression, and requirements for enablement and the effective protection and support of communicative rights – then again state action may be needed.[52] Such action is certainly not prohibited. European examples show freedom of expression can be understood that way, to entail limited direct restrictions on speech *and* enablement to make it a more effective freedom rather than only a formal one.[53]

First Amendment analyses often focus on the freedom's negative dimensions in line with much US law. But that focus can suggest, or be taken to mean, that the

[49] See text near n 16.

[50] See, e.g., Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (New York: Norton, 2014); Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford: Oxford University Press, 2008); Cécile Laborde, 'Republicanism' in Michael Freeden and Marc Stears (eds.), *The Oxford Handbook of Political Ideologies* (Oxford: Oxford University Press, 2013) pp. 513–35.

[51] E.g., Linnet Taylor, 'Public Actors without Public Values: Legitimacy, Domination and the Regulation of the Technology Sector' (2021) 34 *Philosophy and Technology* 897–922; Charney, *Illusion* (n 14).

[52] Note this approach to communicative freedom's positive dimensions does not involve adopting Isaiah Berlin's ideas of monist perfection or self-mastery in positive freedom. His analysis is not relevant to speech and is distinct from much political philosophy on positive freedom which focuses on enablement. See Kenyon, *Democracy of Expression* (n 16) pp. 95–103.

[53] I focus on positive dimensions rather than non-domination for broader reasons, although both approaches can lead to similar outcomes for free expression. E.g., John Charney in *Illusion* (n 14) uses a republican approach to make points very like the German Federal Constitutional Court, saying that 'Media regulation should prevent the possibility of *arbitrary interference* (or domination) from both government and markets' (p. 144, emphasis in original) and 'When the law is the expression of a self-governing society, it may interfere in the structure and functioning of media markets in order to reduce domination' (p. 150).

freedom has no important positive dimensions relevant to public discourse. Not even US law goes quite that far in relation to speech per se.[54] But it substantially does that for the structures underlying public debate. Thus, US writing commonly suggests a legitimate democratic state cannot restrict public discourse (outside the historic categories and the tests imposed within them) *and* that freedom of expression does not require the state to do anything supportive in relation to public discourse, such as regulating private entities or making wider structural or systemic interventions. I note again the continuing US scholarship that takes a fuller approach to what freedom in free speech requires, as well as work that allows a more active state as a political choice rather than a matter of free speech law.[55] While important, that work does not (yet) reflect much US law.

If communicative freedom has positive as well as negative dimensions, more is involved in democratically legitimate freedom of expression than the First Amendment currently provides. Rather, the approach should examine what environment of public speech is needed for people's democratic autonomy and what that entails for law. This is the point at which US law on free speech is highly atypical. If communicative freedom only concerns the absence of direct state interference with public speech, then much disinformation will not be responded to legally whether through restrictions or wider structural or systemic responses. Responses will be left to industry, which theoretically could do all that law might require, although history suggests it will not. Instead, people are said to be sufficiently free to participate, form opinions and act as democratic citizens where the state does not regulate the content and boundaries of public discourse. On this analysis, the overall communicative infrastructures that underlie public speech do not raise matters of free speech. Communicative structures are removed from questions of communicative freedom. As Thomas Streeter stated three decades ago, under a formalist approach to the First Amendment, 'free speech has come to mean freedom for private communicating entities (in practice, usually media businesses) against any sort of unwanted political interference, and *questions of media structure have become almost entirely disassociated from matters of free speech*'.[56] The approach is widely criticised. Perhaps increasingly so[57] because the 'communicating entities' now extend well beyond media organisations, and the commercial interests now involved appear far less suited to structuring a democratically legitimate public discourse.

[54] US law has included (or still does) positive dimensions of free speech, see, e.g., Minow, *Saving the News* (n. 37), pp. 5–6; and cases such as *Hague* v. *Committee for Industrial Organization*, 307 US 496 (1939).

[55] See n 37.

[56] Thomas Streeter, *Selling the Air* (Chicago: University of Chicago Press, 1996) p. 192.

[57] E.g., Minow, *Saving the News* (n. 37); Philip M. Napoli, *Social Media and the Public Interest* (New York: Columbia University Press, 2019).

3.4 EXPRESSIVE FREEDOM, STRUCTURES AND STATES

Things are different in Europe. There, the freedom's positive dimensions have many legal consequences.[58] Here I highlight two obligations they impose on states, which flow from a different understanding of what freedom involves in freedom of expression. The first is the indirect horizontal effect of rights. This justifies – and sometimes requires – that states regulate private parties who impede the effective enjoyment of rights,[59] including freedom of expression.[60] The approach encompasses the interests in expression of both speakers and audiences, or what are sometimes called the active and passive sides of free expression.

The second obligation is pluralism. While differing aspects are seen in different European jurisdictions, overall, democratic freedom of expression should aim for a situation of sustained plural public speech. This requires structural diversity, independence and transparency, all in support of individual and collective opinion formation. It should involve media with:

- *structural diversity* of organisations, people, funding and content, with
- *independence* from domination by political and economic interests, and
- *transparency* regarding ownership, control and content.[61]

As well as news and commentary, this pluralism would cover entertainment and wider cultural material.[62] Aspects of the approach are seen in German and French constitutional decisions, European Court of Human Rights (ECtHR) cases, and decades of academic scholarship, among other places. The case law and scholarship together suggest this sort of model for diversity, independence and transparency underlying public speech. Positive dimensions of communicative freedom involve choices; there is not only one way to meet positive rights. This differs from the freedom's negative dimensions where, in simple terms, the injunction is 'do not restrict expression' unless relevant legal tests are met. Here, it is whether the state has acted to support a sufficiently effective right, within the state's real but limited range of choice.

[58] E.g., Andrew T. Kenyon and Andrew Scott (eds.), *Positive Free Speech: Rationales, Methods and Implications* (Oxford: Hart, 2020).

[59] E.g., Jean-François Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2007); Rory O'Connell, 'Realising Political Equality: The European Court of Human Rights and Positive Obligations in a Democracy' (2010) 61 *Northern Ireland Legal Quarterly* 263–79; Bruce Dickson, 'Positive Obligations and the European Court of Human Rights' (2010) 61 *Northern Ireland Legal Quarterly* 203–8.

[60] Thomas Hochmann in 'Better Protected in Europe' (n 3) provides a useful overview. See also Kenyon, 'Sustained Plural Public Speech' (n 11).

[61] See Kenyon, 'Regulating Opinion Power' (n 9); Kenyon, *Democracy of Expression* (n 16).

[62] E.g., Georgina Born et al., *Artificial Intelligence, Music Recommendation, and the Curation of Culture. White Paper* (Toronto: Schwartz Reisman Institute for Technology and Society, University of Toronto, 2021) https://srinstitute.utoronto.ca/s/Born-Morris-etal-AI_Music_Recommendation_Culture.pdf.

Both these aspects of communicative freedom – state regulation of private parties and structural or systemic actions, such as those aimed at supporting pluralism – can be seen in European initiatives relevant to disinformation, which I consider in the next section. Before doing that, it is worth noting these positive obligations align with calls to focus on infrastructures rather than instances of speech when considering disinformation. For example, Clare Wardle, who has been influential in recent disinformation scholarship, has argued against focusing on the truth or falsity of each item of speech.[63] She emphasises the issue is systemic and concerns the narratives that platforms enable. Similarly, Alicia Wanless draws on research into information conflicts and influence operations to suggest that focusing on disinformation 'is not useful' and leads 'democratic societies to miss larger problems'. It is not disinformation that needs regulating as much as 'the ecology of the information environment more generally'.[64] Moving attention to the wider context in this way can also be linked to greater recognition of the collective or institutional aspects of free expression (or recognition of the greater impact those aspects now have). It is not only a concern with particular items of speech that affect individuals or organisations; rather, the approach involves recognising free speech as 'a public good or value in a pluralist society'[65] and acting in support of it.

3.5 SOME EU MEASURES RELEVANT TO DISINFORMATION

The general understanding of free expression outlined above is relevant to many European actions about disinformation. As András Koltay shows in his chapter, there are multiple and partially overlapping initiatives at state and EU levels.[66] Some are directly relevant to disinformation; others encompass it in part while being aimed elsewhere. The measures include national laws against certain categories of speech, such as defamation and racist hate speech. The categories that can be regulated are wider than under US law, and the hurdles to limitation are lower. In addition, there is greater recourse to criminal penalties for some categories of speech, and more scope for states to extend the categories if social harm can be seen. But for these measures there is a family resemblance to the US approach. Speech within certain categories – none of which concern disinformation as such but can include disinformation – can be subject to legal control.

[63] Claire Wardle, 'Misunderstanding Misinformation' (2023) 39(3) *Issues in Science and Technology* 38–40, https://doi.org/10.58875/ZAUD1691.

[64] Alicia Wanless, 'There Is No Getting Ahead of Disinformation without Moving Past It', Lawfare Blog, 8 May 2023, www.lawfareblog.com/there-no-getting-ahead-disinformation-without-moving-past-it. For other systemic-related analyses, see, e.g., Evelyn Douek, 'Content Moderation as Systems Thinking' (2022) 136 *Harvard Law Review* 526–607; Kate Klonick, 'Of Systems Thinking and Straw Men' (2023) 136 *Harvard Law Review Forum* 339–62.

[65] Barendt, *Freedom of Speech* (2nd ed.) (n 47) p. 35.

[66] András Koltay, 'Freedom of Expression and the Regulation of Disinformation in the European Union' (Chapter 6 in this book).

As Koltay details, the EU is also developing multiple other measures.[67] For present purposes, this can be illustrated by the Strengthened Code of Practice on Disinformation,[68] the Digital Services Act (DSA)[69] and the proposed European Media Freedom Act (EMFA).[70] The measures together reflect positive and negative dimensions of democratic free speech, and they do things consistent with the positive dimensions of free expression in a way that is harder to imagine in the USA. The measures include indirect horizontal requirements on private actors, such as DSA obligations on platforms, and positive state actions, such as those supporting media pluralism in the EMFA. The emergence of this approach makes more sense 'when one recognises the broad European understanding of free expression. Together, the Code, the DSA and the EMFA suggest some ways in which freedom of expression may evolve in situations where control and curation are not dominated by a journalistic-editorial role.

How each of the three measures concerns disinformation could be analysed at length. Each is substantial; for example, the Code runs to 20,000 words and includes 44 commitments and more than 100 measures about how commitments will be met and reported. But outlining just some aspects suffices here. My interest is not so much the requirements' strengths and weaknesses – there are substantial doubts about how effective this iteration of measures will be. Rather, it is to understand the responses as a model that may well be consistent with freedom of expression, arguably one better suited to the current context than an overwhelming focus on negative dimensions of expressive freedom.

Some things needed for sustained plural public speech remain similar with changed communications. At the level of media organisations, this includes having multiple organisations with varied financial bases and missions, varied staffing, management and participation, independence from political and commercial domination, and transparency of ownership, control and content. The EMFA aims to support some of these needs uniformly across the EU. Among other things, the proposal addresses the rights and duties of media services and recipients, including 'the right to receive a plurality of news and current affairs content, produced with

[67] Ibid., also noting general aspects of media regulation, such as the Audio-Visual Media Services Directive and other measures left aside here.

[68] 2022 Strengthened Code of Practice on Disinformation, https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation.

[69] DSA: Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC, OJ 2022 No. L277, 27 October 2022, p. 1.

[70] Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU, 16 September 2022, COM(2022) 457 final, 2022/0277 (COD). The DSA and proposed EMFA are EU regulations, which have direct application within member states as national legislation would. Other relevant measures include the Digital Markets Act, proposed Artificial Intelligence (AI) Act, the Democracy Action Plan, and multiple national provisions and statements of the Council of Europe.

respect for editorial freedom'.[71] It aims to safeguard the independence of public service media.[72] And it structures some interactions between very large online platforms and media services, including a requirement for good faith 'meaningful and effective dialogue' when an editorially independent media service considers a platform is frequently restricting or suspending its content.[73]

At the time of writing, the EMFA faces ongoing debate within the European legislative process,[74] and some strong criticism.[75] Here, I leave aside concerns about some aspects' plausibility and suitability,[76] and significant questions about its legal basis – the EMFA arguably covers matters within the powers of member states not the EU.[77] In addition, while trying to do more to support democratic needs the EMFA has a market focus. This is unsurprising given EU powers, but it is awkward given the aims for media freedom and does not sit easily with some member state approaches. Consider, for example, French and German judicial statements that the freedom should not be 'made the object of a market' and that 'Market opportunities may be a question of economic freedom, but not of freedom of opinion'.[78] However, whether taken at EU or member state level, my interest is the types of action and how they are understood as being consistent with freedom of expression. The EMFA illustrates a desire to reinforce important aspects of plural and independent media in the contemporary communications context as one part of protecting democratic freedom of expression, within a broader set of responses affecting disinformation.

Unlike the EMFA, the DSA has passed. It includes a range of obligations for platforms, and further requirements for very large online platforms and very large

[71] EMFA proposal, Art. 3.

[72] EMFA proposal, Art. 5.

[73] EMFA proposal, Art. 17; see also Art. 18.

[74] A European Parliament committee issued a draft report on EMFA in March 2023: see Sabine Verheyen, Draft Report on the proposal for a regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU (COM(2022)0457 – C9–0309/2022 – 2022/0277(COD)). See also, e.g., Mark D. Cole and Christina Etteldorf, Research for CULT Committee – European Media Freedom Act: Policy Recommendations (May 2023), www.europarl.europa.eu/supporting-analyses; Molly Killeen, 'EU Council Advances on Source Protection, Fund Transparency in Media Law', Euractiv, 26 May 2023.

[75] E.g., Joan Barata, 'Problematic Aspects of the European Media Freedom Act – Old and New' (LSE, 2 may 2023), https://blogs.lse.ac.uk/medialse/2023/05/02/problematic-aspects-of-the-european-media-freedom-act-old-and-new.

[76] E.g. Theresa Seipp, Ronan Ó Fathaigh and Max van Drunen, 'Defining the "Media" in Europe: Pitfalls of the Proposed European Media Freedom Act' (2023) 15 *Journal of Media Law* 39–51, examining EMFA's narrow approach to 'media' and challenges in assessing whether media is 'editorially independent'.

[77] E.g., Cole and Etteldorf, Research for CULT Committee; Christina Holtz-Bacha, 'Freedom of the Media, Pluralism, and Transparency: European Media Policy on New Paths?' (2023) 39(1) *European Journal of Communication*, online first, https://doi.org/10.1177/02673231231176966.

[78] Conseil constitutionnel 84-181 DC, 10–11 October 1984, *considérant* 38; 74 BVerfGE 297 (1987) (Fifth Broadcasting/Baden-Württemberg case).

online search engines (often labelled VLOPs and VLOSEs).[79] Among other things, these very large actors need to assess and mitigate systemic risks posed by their systems. The DSA does not explicitly mention disinformation in its Articles – the term appears repeatedly in the Recitals – but disinformation is clearly intended to come within systemic risks. Under Article 34, risk assessment needs to be proportionate to the severity and probability of systemic risks, and include these systemic risks:

> (a) the *dissemination of illegal content* through their services;
> (b) *any actual or foreseeable negative effects for the exercise of fundamental rights*, in particular the fundamental rights to human dignity, … to respect for private and family life … to the protection of personal data, … *to freedom of expression and information, including the freedom and pluralism of the media* …
> (c) any *actual or foreseeable negative effects on civic discourse and electoral processes*, and *public security*;
> (d) any *actual or foreseeable negative effects* in relation to *gender-based violence*, the *protection of public health and minors* and serious negative consequences to the person's *physical and mental well-being*.[80]

So systemic risks related to illegal content, fundamental rights, civic discourse and electoral processes, public security, gender-based violence, public health and more need to be assessed. Assessments need to consider the effects of services' recommender systems (and other algorithmic systems), content moderation systems, advertising systems, data practices, and terms and conditions.[81] Article 34's wording was strengthened during the legislative process so media pluralism is now explicitly mentioned, and negative effects on civic discourse and electoral processes need not be linked to intentional manipulation of services.[82] While the words look powerful in some ways, there are many doubts about their application in practice.[83]

[79] The DSA also contains measures applicable to platforms more generally, separate provisions empowering the European Commission in 'crisis' situations, and provisions providing liability for specific items of content after notification and failure to remove the content. See, e.g., Martin Husovec, *Principles of the Digital Services Act* (Oxford: Oxford University Press, in press); Antje von Ungern-Sternberg (ed.), *Content Regulation in the European Union: The Digital Services Act* (Trier: Verein für Recht und Digitalisierung – Institute for Digital Law Trier, 2023); Peukert, 'The Regulation of Disinformation in the EU' (n 1).

[80] DSA, Art. 34(1) (emphasis added).

[81] DSA, Art. 34(2).

[82] In the initial DSA proposal, 'pluralism' appeared only once in relation to the Charter of Fundamental Rights in proposed Recital 105. The proposed Article 26 (which became Article 34 in the enacted DSA) had the following paragraph (c): 'intentional manipulation of their service, including by means of inauthentic use or automated exploitation of the service, with an actual or foreseeable negative effect on the protection of public health, minors, civic discourse, or actual or foreseeable effects related to electoral processes and public security'.

[83] E.g., Cohen, 'Infrastructuring' (n 24) 34–35, expected limited success of DSA; Rachel Griffin, 'Rethinking Rights in Social Media Governance: Human Rights, Ideology and Inequality' (2023) 2 *European Law Open* 30–56, 44–46, offering useful overview of expected weaknesses in

As well as assessing systemic risks, very large actors need to mitigate them by putting 'in place *reasonable, proportionate and effective mitigation measures*, tailored to the specific systemic risks identified … *with particular consideration to the impacts of such measures on fundamental rights*'.[84] Article 35 sets out a large list of possible mitigations, including making changes to services' design, features or functioning, terms and conditions and their enforcement, content moderation, recommender systems and advertising systems. Very large actors are also subject to regular independent audit (which may end up focusing on compliance with obligations to conduct assessments rather than assessments' validity).[85]

Direct state action against disinformation is not being taken here. Rather, influential private entities need to assess and mitigate systemic risks posed by their systems. The requirements go beyond illegal content.[86] They seek to regulate aspects of content curation. Of course, very large actors are likely to use restricted interpretations of risks and mitigation, subject to regulators, courts or legislatures demanding more.[87] But my point is that the model appears broadly consistent with European ideas of free expression. Or, at least, it is seeking to find a way to deal with harmful but legal content that furthers the multiple interests of multiple actors in freedom of expression. Clearly, many of the challenges linked to communicative freedom are hidden within Article 35's brief reference to mitigating systemic risks while also considering the effects on fundamental rights. Multiple parties are affected in terms of freedom of expression, and it is far from clear how 'particular consideration' will occur. That is just one reason to expect future legal disputes drawing on free speech arguments about exactly what the provisions mean, how platforms apply them, how regulators enforce them, and whether regulators are sufficiently independent. There are also challenges posed by individual entities assessing and mitigating risks which may be broader than the risks seen by any one very large actor. And the approach does not challenge platform business models.

implementation, even if the provisions' aim is understood to include the collective, structural aspects that should be significant parts of free expression. Also note that the proposed AI Act may make very large online platforms' recommender systems high-risk and subject them to various requirements in support of the DSA; see, e.g., Draft Compromise Amendments on the Draft Report, Proposal for a Regulation of the European Parliament and of the Council on Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts (COM(2021)0206 – C9 0146/2021 – 2021/0106(COD)) (9 May 2023) Recital 40b and Annex III (8(ab)) which proposes to add as high-risk: 'AI systems intended to be used by social media platforms that have been designated as very large online platforms within the meaning of [the DSA], in their recommender systems to recommend to the recipient of the service user-generated content available on the platform.'

[84] DSA, Art. 35(1) (emphasis added).

[85] DSA, Art. 37; see, e.g., Anna-Katharina Meßmer and Martin Degeling, *Auditing Recommender Systems: Putting the DSA into Practice with a Risk-Scenario-Based Approach* (Berlin: Stiftung Neue Verantwortung, 2023) pp. 1–60, p. 21.

[86] Peukert, 'The Regulation of Disinformation in the EU' (n 1), at 25.

[87] E.g., Griffin, 'Rethinking Rights' (n 83), at 45; Martin Husovec, 'The Digital Services Act's Red Line' (2024) 16 Journal of Media Law, in press.

This is unsurprising given the EU's internal market powers, but the problematic effects of platforms' data-based business models have been raised repeatedly in commentary. If freedom of expression includes freedom from market domination of public expression – a clear element of European approaches in general – it is not obvious how that is possible if commercially driven platforms come to dominate public speech. Indeed, this appears to be a central weakness in the approach in terms of democratic freedom of expression.[88] I would agree with Rachel Griffin that European traditions of public service media are based on the judgment that 'wholly privatised broadcast media systems cannot serve the public interest even if they are well-regulated', which makes it 'inherently problematic that online media are governed by profit-driven conglomerates, even if they are subject to human rights obligations'.[89] However, the general idea of requiring private actors to do things related to the content they distribute is important. In some ways, it is seeking to model the curation of public speech once provided, in theory at least, by a diverse media environment and its journalistic-editorial function. Doing something like that – even if doing it better than this initial attempt – appears to be part of the future of democratic freedom of expression.

The Code is a more detailed catalogue of what platforms (and others such as advertising brokers) might do about disinformation, particularly electoral and issue-based political advertising. A handful of commitments illustrate the Code's approach. These include:

- defunding the dissemination of disinformation and improving policies, systems and controls over content monetisation;
- preventing the use of advertising systems to disseminate disinformation in the form of advertisements; and
- adopting a common definition of 'political and issue advertising', clearly labelling it as paid content and providing 'clear, comprehensible, comprehensive information about why' it is shown to users.[90]

There are also system design commitments to minimise the viral spread of disinformation, which might include recommender systems improving 'the prominence of authoritative information' and reducing disinformation's prominence 'based on clear and transparent methods and approaches for defining the criteria for authoritative information'.[91] The Code does not specify those criteria, although it includes

[88] E.g., Mattias Wendel, 'Taking or Escaping Legislative Responsibility? EU Fundamental Rights and Content Regulation under the DSA' in Ungern-Sternberg, *Content Regulation* (n 79) p. 82, 'the DSA effectively amounts to an escape from legislative responsibility as far as the protection of EU fundamental rights is concerned'.

[89] Griffin, 'Rethinking Rights' (n 83), at 55–56.

[90] See Code, commitments 1–9.

[91] Code, commitment 18 and measure 18.1.

commitments to work with fact-checking organisations.[92] The Code is intended to be recognised under the DSA, so complying with it could be relevant for very large actors showing they have made appropriate mitigation efforts. While the Code is sometimes seen as a form of co-regulation or partially enforced self-regulation – with the European Commission influencing its development and revision[93] – membership is entirely voluntary, and the Code is not directly enforceable. For example, when Twitter since renamed X) withdrew from the Code in 2023 reports suggested this could end 'a headache for the Commission, given the platform's lack of compliance' with the Code and the Commission's lack of power to 'force them out'.[94] Overall, the Code sets varied objectives, with their meaning and implementation substantially left to platforms, alongside continuing involvement of various EU-linked organisations, and undertakings about reporting and research. In comparison, the DSA could have greater influence if it is strongly applied, but all three initiatives are useful to understand the multifaceted EU approach.

A related matter is how truth is determined in these measures. The Code and DSA leave platforms to determine what amounts to disinformation, in the first instance at least. DSA powers of regulators and courts may lead to those determinations being overruled. But what was once deferred to journalism is now in part deferred to platforms and fact-checkers (suggesting the value in examining the fact-checking organisations).[95] Of course, platforms cannot perform that public speech role in the same way as journalism, whether journalism's actual practice or its idealised role. As well as platforms' data- and attention-centred commercial focus, the speed and scale of platform-distributed speech means content decisions cannot be made as they are for journalistic content in institutional media.

Paolo Cavaliere has examined legal standards used to assess truth,[96] comparing ECtHR decisions involving journalism and EU advertising rules. While the ECtHR is not an arbiter of truth in general, it distinguishes truth and opinion in journalism cases. When assessing public interest expression, it uses a journalistic or process-based understanding of truth. It is not that a particular fact has necessarily been proved true; rather, appropriate journalistic practices provided sufficient certainty about the material before publication. In effect, the ECtHR relies on a journalistic-editorial function for truth. In contrast, advertising laws focus on a publication's misleading quality, which need not necessarily involve falsity. While 'respect for

[92] See Code, Part VII.

[93] E.g., Paolo Cavaliere, 'The Truth in Fake News: How Disinformation Laws Are Reframing the Concepts of Truth and Accuracy on Digital Platforms' (2022) 3 *European Convention on Human Rights Law Review* 481–523; Koltay, 'Regulation of Disinformation' (n 66).

[94] Luca Bertuzzi, 'Twitter Set to Exit EU Code of Practice on Disinformation, Sources Say', Euractiv, 26 May 2023, www.euractiv.com/section/digital/news/twitter-set-to-exit-eu-code-of-practice-on-disinformation-sources-say.

[95] E.g., Paolo Cavaliere, 'From Journalistic Ethics to Fact-Checking Practices' (2020) 12 *Journal of Media Law* 133–65.

[96] Cavaliere, 'Truth in Fake News' (n 93).

appropriate procedures can exonerate even factually false statements' in journalism, the CJEU 'has ruled out ... a professional diligence defence for misleading advertising'.[97] Cavaliere suggests the DSA and the Code lean more towards an advertising standard, but the ECtHR requires political and public interest content (whether paid or unpaid) to be assessed on a journalistic standard.[98] Perhaps the outcome of this apparent conflict will depend on the approaches of fact-checking organisations, which might mirror traditional journalistic aims in some ways at least. If so, that would lessen a conflict between the EU provisions and ECHR protections for freedom of expression (with which European Charter provisions should be consistent). If not, EU aims could be frustrated because platform 'content moderation decisions will ... be assessed for their compliance with the level of protection of freedom of expression required by the ECHR'.[99]

3.6 DISCUSSION AND CONCLUSION

Analyses of the First Amendment and disinformation can emphasise two points – a constitutional ascription of autonomy existing without state action and a fear of state action. Other approaches to democratic free speech do not follow the first point in the same way. To me, they are more attuned to the reality of democratic choice. They see state action as ubiquitous – the state is always involved in one way or another in ordering, enforcing or tolerating private actors that affect speech.[100] And this links to the state's positive obligations to protect freedom of expression, to attempt to make the freedom real and effective.

However, the second point about fearing government action is relevant beyond the USA. In Europe, there is clearly not the *same* fear of government action as in US law. That would be impossible given the understanding of freedom of expression, but at the same time there is understandably no great appetite for state determinations of truth. This can be seen in the reluctance of the ECtHR to support limits on false speech, and the way in which measures like the DSA and the Code mean that states – whether executives, parliaments or courts – are not determining truth directly. The EU responses to disinformation involve legislating 'for more societal responsibility for very large online platforms' while leaving platforms to decide 'if and how to deal with any systemic risks to freedom of expression'.[101] The European measures do not outlaw false facts as such. For example, only Holocaust denial is clearly established as a false fact that receives judicial protection in ECtHR decisions.[102] Other historical debates are allowed. This leads Irina Katsirea to suggest the

[97] Ibid. 510.
[98] Ibid. 521.
[99] Ibid. 522.
[100] E.g., discussion in Hochmann, 'Better Protected in Europe' (n 3) 77–81.
[101] Koltay, 'Regulation of Disinformation' (n 66).
[102] Katsirea, 'Fake News' (n 8).

ECtHR would not act as arbiter of truth in general, and criminalising disinformation in news appears problematic under Article 10 of the ECHR.[103]

In a mass media context, there were important ways in which the legal approach to freedom of expression relied on journalism. The journalistic-editorial function decided much about the content of public speech, and where and how public attention would be focused. Those decisions were made at a particular scale and speed, with the relevant actors considering individual pieces of content. Now, legal and regulatory approaches seek to deal with significant changes, and freedom of expression is highly relevant to what can and should be done. Admittedly, the versions of freedom of expression outlined above are somewhat exaggerated, and the European model goes further than existing law. However, the law and ideas about expressive freedom seen in Europe suggest the model that I have sketched. The idea of positive obligations flowing from fundamental rights is clearly established and it suggests how current European initiatives have consistencies with important aspects of free expression. The EU measures are not as explicit as they should be in relation to the multifaceted quality of freedom of expression – ways in which interests are held individually and collectively across speakers and recipients. And much of the complexity is submerged in the current approaches, such as the DSA's requirements for very large actors to mitigate systemic risks with due regard to fundamental rights. How to do both those things at once – mitigate risks and pay regard to fundamental rights – involves subtle evaluations. Whether platforms can do that is questionable, perhaps especially for platforms imbued with US ideas of rights and the broader scope that is needed here for rights moving beyond individual interests. It may mean that very little is done. As well as the very large actors, the European Commission, with 'relatively little institutional experience in freedom of expression principles',[104] faces regulatory challenges.

However, the *models* of communicative freedom and the *illustrative responses* to disinformation in Europe suggest how different dimensions of freedom of expression might be supported in a changed context of public communication. Details of the Code, the DSA and the proposed EMFA are less significant than the ideas they illustrate. US analysis, in comparison, is left looking for technical arguments to adapt earlier regulatory approaches, such as cable access provisions or telecommunications regulation, or sidestep the First Amendment, or remain reliant on platforms' leeway under US law to moderate content almost without restraint.

That free speech law has long relied on journalism reflects longstanding practices of who decided about content and the scale and speed of decision-making. Platform moderation is not the same. It applies complex, networked decision processes at a scale and speed far removed from what has often been imagined for rights such as expression. It is systemic, and so are many current legal responses. But in being

[103] Ibid.
[104] Seipp et al., 'Defining the "Media" in Europe' (n 76).

systemic, measures like the DSA still leave a lot of discretion to platforms. They face challenges in mass moderation,[105] including how, if at all, public values can be included in recommender systems.[106] As Gillespie has observed, 'platforms now function at a scale and under a set of expectations that increasingly demands automation. Yet the kinds of decisions that platforms must make, especially in content moderation, are precisely the kinds of decisions that should not be automated'.[107] While that raises conceptual questions for freedom of expression, a fuller approach to freedom – one that understands its positive as well as negative dimensions – can go some way towards accommodating the changes.

My aim has been to explain something about why US approaches take the form they often do, and to highlight how different approaches to freedom of expression are possible. Much comes down to an understanding of freedom, which in turn relates to the state's role. The differences are not minor. The 'conceptual and normative differences between a US-oriented, First Amendment tradition and a positive rights, European and international human rights perspective'[108] should not be underestimated, with 'differences in underlying expectations on governmental involvement in speech regulation' being 'fundamental'.[109] While some past commentators have found the differences problematic, they now appear increasingly problematic for democratic freedom of expression. Communicative freedom has positive and not only negative dimensions. This means there are obligations on states, which can include measures to tackle disinformation, though not necessarily by direct prohibition. The state obligations are challenging to implement and may be abused. But believing in a purely negative freedom without support or enablement seems at least as problematic or, given current infrastructures of public speech, more so.

[105] See Robert Post's chapter in this book (Chapter 2).
[106] E.g., Jonathan Stray et al., 'Building Human Values into Recommender Systems: An Interdisciplinary Synthesis' (2022) arXiv:2207.10192 [cs.IR].
[107] Tarleton Gillespie, *Custodians of the Internet* (New Haven, CT: Yale University Press, 2018) p. 206.
[108] Damian Tambini, 'Reconceptualizing Media Freedom' in Moore and Tambini, *Regulating Big Tech* (n 28) pp. 299–322, p. 300.
[109] Jan Oster, 'Which Limits on Freedom of Expression Are Legitimate? Divergence of Free Speech Values in Europe and the United States' in Uta Kohl (ed.), *The Net and the Nation State* (Cambridge: Cambridge University Press, 2017) pp. 39–47, p. 39.