Free Speech and Media Law in the 21st Century

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Edited by
Russell L. Weaver and Steven I. Friedland

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Series Note

The Global Papers Series involves publications of papers by nationally and internationally prominent legal scholars on a variety of important legal topics, including administrative law, freedom of expression, defamation and criminal law. The books in this series present the work of scholars from different nations who bring diverse perspectives to the issues under discussion.

Russell L. Weaver* and András Koltay**

Introduction

Modern commentators have debated the role of free speech in modern democratic societies, and have offered various justifications for according free speech a preferred position in the constitutional hierarchy. However, there has been little agreement. While some courts and commentators advance the so-called "marketplace of ideas" theory, others focus on the "democratic process" theory, the "safety valve" theory, or the "liberty/self-fulfillment" theory. A few argue in favor of all four theories. There have been similar debates regarding the role of the media in a free society. While some have argued that the press is entitled to a privileged position, because of its role as a "watchdog of democracy," others disagree, arguing that citizen free speech rights are co-extensive with media rights.

In June, 2017, the Free Speech Discussion Forum was hosted at Pázmány Péter Catholic University Faculty of Law in Budapest, Hungary.[1] The purpose of this forum was to bring together prominent free speech scholars from around the world to discuss matters of common interest. The Budapest forum was specifically focused on two topics: "The Foundations and Limits of Free Expression," and "The Media in the Twenty-First Century." The papers presented here are discussion drafts which were submitted by authors in advance of the forum and formed the basis for discussions at the forum.

A number of papers focused on the foundations of free expression. Included in this group of papers is Professor András Koltay's which is entitled *Internet Intermediaries and Article 10 of the European Convention on Human Rights: The New Subjects of Media Freedom*. He observes that Internet service providers, search engines and social media are unavoidable participants in the

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1. The event was co-sponsored by the Luxembourg University Faculty of Law, the University of Paris I (Sorbonne) and IMODEV (France), the University of Alabama School of Law, the Elon University School of Law, and the University of Louisville's Louis D. Brandeis School of Law.

communication process, and are able to affect and control individual access to Internet information. However, he is concerned about how the principles of freedom of expression, and how the activities of these powerful intermediaries" can be aligned with the legal doctrines of fundamental rights. As Professor Koltay notes, these competing issues present massive issues for legal regulation "and thus for the practice of the ECtHR." Professor Koltay examines Article 10 of the Convention as applied to these intermediaries, and suggests that change is needed to deal with the evolving digital situation.

Professor William Gilles's article, *The Administrative Blocking of Internet Sites, Freedom of Expression and Net Neutrality*, focuses on the tension between the societal interest in security against terrorists and cyber-criminals, and the individual interest in freedom of expression. He notes that the tension between these interests is heightened by the development of the Internet: in addition to giving the citizenry a fuller opportunity to obtain information, as well as to speak, the Internet has enabled cyber-criminals and terrorists by providing them with a communications platform. He goes on to examine how the concept of Net Neutrality impacts individual free speech rights, and also examines the extensive French administrative procedures that have been implemented for blocking, deindexing, or otherwise controlling web sites that propagate terrorism or exhibit pedophilic content. Given the breadth of powers accorded to French administrative officials, Professor Gilles concludes by encouraging the citizenry to be alert and observant of potential abuses.

Associate Professor Paul Wragg explores Social Responsibility Theory (SRT) as applied to the media in his article, *The Limits of Press Accountability*. He explains that SRT provides that the press has a *duty* to enable informed democratic participation and to keep (political) power in check. SRT suggests that the media should receive special protections in exchange for helping society pursue the social goal of producing an informed and civilly-minded citizenry. In other words, the media is expected to perform more of a fiduciary function that helps produce an informed citizenry. However, Professor Wragg rejects the idea that the media has some "duty" or "responsibility" to pursue societal goals, and he expresses concern that the democratic and societal need for a "responsible" press "have transitioned from plea to demand to 'right' with little critical resistance." He rejects SRT, noting that the "obligation is on the state to protect press freedom or else it can hardly be called a democracy." He goes on to argue that, although the "press *may* benefit society," "it cannot be said that it *must*." He argues that "paternalistic press regulation cannot *ensure* the press benefits society." That is society's responsibility. He concludes: "What society *needs* is a press regulator, independent from government and the press, which holds the press accountable for the wrongs it does. Account-

ability, though is an analysis of harm, not moral goodness. It cannot be that the press has a *purpose*; it can exercise its right to freedom of expression in any manner it pleases, so long as undue harm does not follow."

Dr. Ines Gillich's article, *Satire under the European Convention of Human Rights—Is the "Böhmermann Poem" protected by Article 10?*, examines how the European Convention of Human Rights handles free speech that involves satire. The article examines the *Böhmermann-Erdoğan-Affair* that is currently being litigated in German courts. The case involves Jan Böhmermann who has a late night television show, "Neo Magazin Royal," who did a satirical performance that poked fun at Turkish President Recep Tayyip Erdoğan. Böhmermann's performance was preceded by a video on a German satirical show which portrayed Erdoğan as an authoritarian ruler who oppresses journalists and political opponents. After applauding the makers of the video, Böhmermann talked about satirical criticism, which he regarded as legal and protected, he also referred to "abusive criticism" which he acknowledged was not protected. He then sought to illustrate what unprotected "abusive criticism" might look like, and he did so by reference to Erdoğan, referring even to his private parts. Afterwards, Erdoğan summoned the German ambassador and demanded that the video be removed from the Internet. Dr. Gillich notes that the ECtHR provides broad protection for the to free expression under Article 10 of the ECHR, especially when the speech involves critical media comments on politicians. She goes on to note that the Court has suggested that it may prohibit satirical expression which involves "wanton denigration." She ultimately concludes that the Böhmermann situation may require the ECtHR to further clarify its position on abusive satire.

Professor David Capper's article, *Free Speech is Not a Piece of Cake*, examines, from a Northern Irish perspective, the conflict between free speech and the rights of gays and lesbians not to be discriminated against in the provision of goods, services and employment opportunities. He does so in the context of the *Ashers* case in which bakery owners refused a gay rights' activist's request for a cake he ordered to be endorsed with the message "Support Gay Marriage." The owners based their refusal on their religious convictions, including their belief that gay marriage is sinful. The customer prevailed in the lower courts and the case is presently on appeal to the United Kingdom Supreme Court. Analyzing the case under Article 10 of the ECHR, Professor Capper concludes that "there is a negative right to freedom of expression in Article 10" which prevents the government from compelling individuals to make statements to the contrary of what they believe. In his view, this negative right protects the owners of the Ashers bakery: "the view expressed here is that in the context of a small retail business that is asked to bake and ice a cake with a

message that runs contrary to a deeply held belief of the owners of the business, in the context of a raging political controversy in the community where the cake is to be baked, this constitutes an infringement of the business owners' rights under Article 10 of the European Convention on Human Rights."

Professor William Funk's contribution is entitled *I'm Listening! Free Speech and Surveillance*. In his article, Professor Funk attempts to come to grips with the question of whether individuals may be subjected to surveillance *because* of the exercise of their speech rights. In answering this question, he analyzes the Fourth Amendment, and federal surveillance statutes, including FISA. In addition, he notes that historically the First Amendment has been used to limit the power of government to restrict, prohibit or sanction individual speech rather than to protect individuals against governmental surveillance that might chill individuals in their attempts to exercise free speech rights. Nevertheless, he notes that some U.S. Supreme Court decisions have protected individuals against the chilling impact of damage awards imposed in relation to the exercise of their free speech rights. He ultimately concludes that "neither Fourth Amendment nor First Amendment case law provides a clear answer to whether it is constitutional to target electronic surveillance against someone based solely on that person's protected speech, albeit protected speech that may raise suspicions about the person's likelihood of being involved with international terrorism." However, he believes that "the extent of that chill is likely to be significantly less than that involved in the Court's cases in which the chilling effect led the Court to find the government activity in violation of the First Amendment and probably more akin to the chill involved in cases in which the courts have found no First Amendment violation." As a result, he argues "that a warrant targeting electronic surveillance against a person solely on the basis of his protected speech would not violate either the First or Fourth Amendments, if that protected speech would lead a reasonable person to suspect that the person may be involved in international terrorism or engaged in clandestine intelligence activities on behalf of a foreign power."

Professor Robert Kahn's contribution, *Fake News, Safe Spaces and Democratic Discontent: Three Challenges for Free Speech Theory in the Social Media Age*, suggests that "the rise of the internet and social media … have changed the nature of our world by increasing the global flow of information across national, regional, social, political and cultural lines," as well as by weakening the power and authority of the traditional media. In addition, by increasing the quantity of information available, and the sociology of how people acquire it, social media and the Internet have given rise to the development of "fake" news, an increased amount exposure to "unpleasant" and "offensive information," and has led to "a sense of disillusionment about future of democratic in-

stitutions." In light of these changes, he examines how these things affect how society justifies the special place accorded to free speech, and the justifications for protecting speech.

Professor Kevin Saunders' article, *Money, Politics and Democracy*, claims that the U.S. is no longer a "fully functioning democracy," and he cites various indices which he claims demonstrate that the U.S. has slipped in worldwide democratic rankings. He partially attributes this slippage to the U.S. Supreme Court's campaign finance decisions. Professor Saunders appears to be a proponent of the school of thought which believes that Congress should have the power to "level the playing field" among participants in the electoral system. He criticizes precedent that strikes down such leveling provisions: "Leveling provisions would simply ensure that there is adequate funding on both sides of the issue so that voters could be informed and cast intelligent votes. As the dissents in United States cases have said, the impact is not a penalty on speaking, it is more speech." In addition, he believes that Congress should be able to limit large expenditures in favor of candidates even if those expenditures do not involve direct campaign donations.

Professor Russell Weaver's article is entitled *The Philosophical Foundations of Free Expression*. That article examines the various justifications for giving free speech a preferred position in the U.S. constitutional scheme, including the marketplace of ideas theory, the democratic process theory, the safety valve theory, and the liberty/self-fulfillment theory. The article notes that the marketplace of ideas theory, while cited often by both courts and commentators, has been debunked in the sense that there is an assurance that the competition of ideas in the marketplace will lead to discovery of the "truth." The marketplace of ideas theory makes sense only as an anti-repression theory: government should not have the power to ban ideas from the marketplace. He does note that the "democratic process" theory has been repeatedly invoked by the U.S. Supreme Court in recent decades, and it comes with an "anti-repression" rationale which requires courts to generally apply strict scrutiny to both content-based and viewpoint-based restrictions on speech. He places less emphasis on the "liberty" and "self-fulfillment" theories when the speech has no relationship to the democratic process.

The final article is Vincenzo Zeno Zencovich's *What Do We Mean by "Media" Today?* He wanders into the Pandora's box of trying to define the term "media" in the modern digital world, and he correctly notes that attempts to define the term are difficult in a digital age. He notes that it may not be appropriate to extend the tradition definition of media to cover all new technologies, and argues that a different model should be built on a new structure. He urges free speech scholars to work on creating that structure.