Free Speech, Privacy and Media

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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
Steven I. Friedland**

Introduction

The papers published here are "discussion papers" that were submitted at one of three discussion fora held in 2018. The papers, written by prominent scholars from three different continents, offer unique perspectives on free speech and privacy issues.

One forum, the Free Speech Discussion Forum, was held in Luxembourg in June, 2018.[1] This forum focused on two topics: "Free Speech and Democracies" and "The Media's Role and Relevance in the Internet Era." The second forum, the Privacy Discussion Forum, was held in Paris, France, but also in June, 2018.[2] This forum involved an examination of privacy issues from multidisciplinary perspectives. Participants were given the freedom to look at such diverse topics as the *Google Spain* decision on the right to be forgotten, the Snowden revelations, the WikiLeaks disclosures, the Panama Papers and the Paradise Papers. Participating scholars could also choose to look at media intrusions on individual autonomy, as well as governmental and private uses of

* Professor of Law & Distinguished University Scholar, University of Louisville, Louis D. Brandeis School of Law. Professor Weaver wishes to thank the University of Louisville's Distinguished University Scholar program for its general support of his research agenda, and he wishes to specifically thank Dean Colin Crawford for providing support for this forum from his research support program.

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1. Particular thanks for this forum is due to the University of Luxembourg Faculty of Law. However, the authors also wish to thank Pázmány Péter Catholic University Faculty of Law (Hungary), the University of Windsor 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, Louis D. Brandeis School of Law.

2. Particular thanks for this forum is due to Université Paris Dauphine PSL Research University, but thanks are also due to the University of Windsor (Canada) Faculty of Law, the Emory University School of Law, the University of Alabama School of Law, the University of Florida, Frederic G. Levin College of Law, and the University of Louisville's Louis D. Brandeis School of Law.

information (not only collection issues, but also distribution and use issues). They could also look at the challenges (and benefits) to privacy created by the internet. The third forum, the Free Speech/Criminal Law Discussion Forum was held in Louisville, Kentucky, in December, 2018.[3] That forum focused on two topics: recent controversies regarding free speech and criminal law and the intersection free speech and crime.

Professor Arnold Loewy's article, submitted to the Louisville forum, was entitled *When Bad Guys March*. In his article, he deals with the difficult question of whether universities should be free to prohibit "hateful" speech (*e.g.*, racist, bigoted or intolerant speech). On a gut level, one can understand why universities might seek to ban hateful speech, and one might even argue that such speech has no "value" for First Amendment purposes. However, U.S. free speech law is to the contrary and suggests that even hateful speech deserves protection except when faced with a palpable and immediate harm (*e.g.*, the Brandenburg incitement test is satisfied). Professor Loewy thoroughly examines these issues, contrasting the traditional U.S. approach (free speech should generally be protected even when it is hateful) with the European approach (which is geared towards protecting human dignity) and allows speech repression. Professor Loewy concludes that, as a general rule, even hateful speech should not be banned.

Professor Robert Kahn's article, *Denial, Memory Bans and Social Media*, was submitted to the Luxembourg forum, and deals with the difficult question of whether societies should be allowed to ban statements denying that the Holocaust occurred. He traces the history of Holocaust denial laws, details the harms that can flow from Holocaust denial, and analyzes the difficulties and benefits that flow from Holocaust denial bans. He expresses doubt regarding the ability of social media platforms to effectively ban all speech denying the Holocaust from the internet, and he analyzes other possible societal approaches to denialism. However, ultimately, he concludes that the "best we can do is 'tolerate' these denialists in our (virtual) midst and hope that Lee Bollinger is right that this toleration will make us stronger."

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3. For this latter forum, the authors give particular thanks to Dean Colin Crawford, University of Louisville, Louis D. Brandeis School of Law, who provided financial support for this forum from his decanal research development fund. Thanks are also due to the Luxembourg University Faculty of Law, the University of Windsor Faculty of Law (Canada), the Emory University School of Law (U.S.), the University of Paris I (Sorbonne) and IMODEV (France), the University of Alabama School of Law (U.S.), the Pázmány Péter Catholic University Faculty of Law (Hungary), the Elon University School of Law (U.S.), the Université Paris Dauphine PSL Research University (France).

Professor Carlo Pedrioli's article, also submitted to the Luxembourg forum, is entitled *Is Incitement on the Internet Easier to Punish than Incitement on Television? A Case Study of the Koran-Burning of Florida Pastor Terry Jones.* The article looks at Terry Jones, the controversial Florida pastor who threatened to burn, and eventually did burn, copies of the Koran, the holy book of Muslims. Pedrioli analyzes Jones' actions under "incitement" theory, and concludes that internet-based incitement may be somewhat easier to punish than TV-based incitement. He reaches that conclusion after analyzing how different media (internet and television) affect the impact of the message, and he suggests that the "likelihood of inciting or producing lawless action probably is higher because accessing the Internet to send messages is so easy for so many people, and a very large potential audience can receive those messages whenever convenient."

Professor Vincenzo Zeno-Zencovich's paper, also submitted to the Luxembourg forum, is entitled *Social Media and Fair Trial.* In his article, he notes that social media can impact criminal trials in many different ways: they can serve as a surrogate to the judicial inquiry, they can provide a way to support victims, they can provide a mechanism for organizing and supporting the defense, and they can serve as an investigative tool. He notes that social media platforms are potentially problematic because they are open to everyone, and are generally not subject to editorial control. As a result, he expresses concern regarding the effective functioning of the judicial system in a social media era, but concludes with a quote from Aristotle: "The demagogues make the decrees of the people override the laws, by referring all things to the popular assembly. And therefore they grow great, because the people have things in their hands, and they hold in their hands the votes of the people, who are too ready to listen to them. Further, those who have any complaint to bring against the magistrates say, 'Let the people be judges'; the people are too happy to accept the invitation; and so the authority of every office is undermined. Such a democracy is fairly open to the objection that it is not a constitution at all; for where the laws have no authority, there is no constitution. The law ought to be supreme over all, and the magistracies should judge of particulars, and only this should be considered a constitution."[4]

Professor William Gilles' article, submitted at the Louisville forum, is entitled *Making the Right to be Delisted Effective After Google Spain.* He begins by noting that 2018 is a special year for data protection because it marks the anniversary of the French data protection law, as well as the inauguration of the European Union's General Data Protection Regulation (GDPR). Of course, the

4. Aristotle, Politics, Book IV, Ch. 4.

GDPR was enacted in light of the backdrop of the *Google Spain* decision which gives individuals the right to be "delisted" from internet search results. In his article, Professor Gilles explores the meaning of the right to be de-listed, as well as how different categories of information should be handled. However, he suggests that some issues must await resolution by the courts.

Professor Christopher J. Roederer submitted his paper, entitled *First Amendment Free Speech Rights Against Giant Media Platforms? Slim Chance: Why There Is No Slippery Slope from New York's Public Access Cable Stations to Other Media Platforms (Even If I Wished There Was)*, at the Louisville forum. He deals with the problem of speech censorship on platforms like Facebook, Twitter, Google and YouTube, and he notes that those platforms have become so "central" to free speech that "censorship here may have a larger impact on free speech than government censorship in some instances." In looking at these issues, he focuses on *Halleck v. Manhattan Community Access Corporation*,[5] which raises the question of whether public access channels can be subject to suit when they censor or limit speech. Professor Roederer explores the ins and outs of the case, focusing in particular on the question of whether public access stations should be treated as public fora for First Amendment purposes.

Professor Michael Losavio's article, entitled *Pensées: Speech, Inference and the Information Panopticon*, was also submitted to the Louisville forum. His focus is on the interplay between privacy and free expression, and the technologies for both expression and the monitoring of that expression. He posits a future where these issues will "have a profound impact, both good and bad." He concludes by arguing that we "need to weigh the balance … of security and liberty, transparency and privacy, and begin discussion of how we do so."

The final article submitted to the Louisville forum is Professor Russell Weaver's *Gatekeepers in the Internet Era*. He notes that, throughout history, speech technologies have been subject to "gatekeepers"—individuals who were able to exercise control over particular communications technologies, especially regarding who could access and use those technologies. Gatekeepers controlled the Gutenberg printing press, developed in the fifteenth century, and they also controlled each subsequently developed technology. Many of the more sophisticated technologies such as radio, television and satellite communications, required substantial capital investments, and sometimes governmental licenses, and few people had access to both. Those who controlled the technologies could decide who could access them. Professor Weaver notes that the internet represents an entirely new form of technology in the sense that it

5. 882 F.3d 300 (2d Cir. 2018), *cert. granted*, 586 U.S. ___, 139 S.Ct. 360 (2018).

is accessible by everyone. Internet connections are relatively cheap and are available at many places (*e.g.*, Starbucks and McDonalds) free of charge. The technology required to access the internet can involve nothing more than a smart phone which can be relatively inexpensively obtained. As a result, ordinary people are readily accessing the internet to communicate their ideas and thoughts. However, many people use social media platforms to communicate, and the owners of those platforms have emerged as a new form of "gatekeeper" who can limit and control the use of their platforms. In this article, Professor Weaver analyzes how social media platforms censor speech, but ultimately suggests that the internet is such a flexible and adaptable medium that individuals can usually find a way to communicate their ideas even if their ideas are censored on particular platforms.

In the Luxembourg forum, the paper submitted by professors Russell L. Weaver and Andras Koltay was entitled *Fake News and Democratic Discourse*, includes U.S., German and European perspectives. Professor Weaver notes that "fake news" is troubling in a democracy where the "power to govern derives from the consent of the governed," and where the people are expected to vote upon and make decisions regarding candidates and sometimes regarding issues. Why? Because fake news has the capacity to mislead the citizenry with misinformation. Nevertheless, as the article notes, the U.S. government has only limited authority to limit or restrict information or ideas, and therefore has little capacity to control the flow of fake news.

Professor Koltay contributes to the article with an analysis of European law as applied to fake news. While he notes that fake news has always been present in societies, European law imposes an obligation of "editorial responsibility" on social media platforms, internet service providers, and others, to take action against fake news. This obligation is imposed pursuant to the AVMS Directive. The responsible intermediaries can do so through the use of internet search algorithims, or by individual decisions to take down content. The Recommendation on Internet Freedom (2016) underlines the extremely important role private actors and platforms play in the communication system. That Recommendation, not only asks social media platforms and ISPs to comply with Article 10, but to comply with the requirements of legality, legitimacy and proportionality when they are blocking, filtering and removing content. Gatekeepers may be held liable if they refuse to remove offending material after becoming aware of objectionable material.

The remaining papers deal with privacy issues. Professor Moira Paterson's contribution, submitted to the Paris forum, is entitled *Open Government and Privacy in an Era of Big Data Analytics*. This article explores the sometimes

contradictory relationship between privacy and transparency. She notes that there is a growing view that both privacy and transparency should be treated as basic human rights, but she also notes that those rights can conflict, especially in an era of big data analytics. She observes that the modern era is propelled by the development of radio frequency identification, global positioning systems, and advances in imaging algorithims coupled with sophisticated analytical tools. As she notes, these developments have led to "new, and often unexpected, insights into trends, patterns and associations" because of the possibility of analyzing large data sets. At the same time, the possibility of dealing with individuals anonymously is potentially lost.

Professor Margaret Allars' article, also submitted to the Paris forum, is entitled *The Privacy of Personal Information Under Australian Privacy Legislation*. Professor Allars also focuses on the interplay between privacy and transparency, but does so in the context of Australian legislation, in particular the Australian Privacy Act and the Australian Privacy Principles (issued along with the Privacy Act). She also examines the Telecommunications Act 1979, the Cybercrime Legislation Amendment Act 2012 and the Privacy Amendment Act 2017. In the process, she examines the definitions used in those acts, and explores the effectiveness of those acts, including judicial decisions applying the acts. She ultimately concludes that it is difficult to define the term "personal information" and to determine what can be accessed or protected from access by others, but she notes that the scope of privacy cannot "cannot be understood or implemented without an appreciation and promotion of transparency."

The final contribution, also submitted to the Paris forum, was written by professors Russell Weaver, Duncan Fairgrieve, Andras Koltay and Arnaud Raynouard, and is entitled *Privacy: A Post-Snowden Analysis: Comparative Perspectives*. This piece examines how the U.S. and Europe have responded to the dramatic revelations by Edward Snowden that the U.S. National Security Agency (NSA) was engaged in a massive cybersurveillance operation. Those revelations touched off a fire storm of controversy around the world and led to calls to rein in governmental cybersurveillance operations. As the article indicates, the U.S. Congress did place some limitations on the NSA's authority, and the NSA chose to place some limitations on itself. Nevertheless, the basic regulatory structure was re-enacted by subsequent Congresses. However, the article also examines how Hungary, France, and England have responded to the revelations. While there have been some changes in the U.S. and England, France seems to have accepted the cybersurveillance program and Hungary seems to have shifted its focus to the private sector.