

New Media and Freedom of Expression

*Rethinking the Constitutional
Foundations of the Public Sphere*

András Koltay

• H A R T •

OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2019

Copyright © András Koltay, 2019

András Koltay has asserted his right under the Copyright, Designs and Patents Act 1988 to be identified as Author of this work.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers.

While every care has been taken to ensure the accuracy of this work, no responsibility for loss or damage occasioned to any person acting or refraining from action as a result of any statement in it can be accepted by the authors, editors or publishers.

All UK Government legislation and other public sector information used in the work is Crown Copyright ©.

All House of Lords and House of Commons information used in the work is Parliamentary Copyright ©.

This information is reused under the terms of the Open Government Licence v3.0 (<http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3>) except where otherwise stated.

All Eur-lex material used in the work is © European Union,
<http://eur-lex.europa.eu/>, 1998–2019.

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Koltay, András, 1978-

Title: New media and freedom of expression : rethinking the constitutional foundations of the public sphere / András Koltay.

Description: Oxford, UK ; Chicago, Illinois : Hart Publishing, 2019. | Series: Hart studies in comparative public law ; volume 25 | Includes bibliographical references and index.

Identifiers: LCCN 2019007723 (print) | LCCN 2019009138 (ebook) | ISBN 9781509916504 (EPub) | ISBN 9781509916481 (hardback : alk. paper)

Subjects: LCSH: Digital media—Law and legislation. | Freedom of expression—Law and legislation. | Social media—Law and legislation. | Electronic information resource searching—Law and legislation. | Internet service providers—Law and legislation.

Classification: LCC K4240 (ebook) | LCC K4240 .K654 2019 (print) | DDC 342.08/53—dc23

LC record available at <https://lcn.loc.gov/2019007723>

ISBN: HB: 978-1-50991-648-1
ePDF: 978-1-50991-649-8
ePub: 978-1-50991-650-4

Typeset by Compuscript Ltd, Shannon

Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY



To find out more about our authors and books visit www.hartpublishing.co.uk. Here you will find extracts, author information, details of forthcoming events and the option to sign up for our newsletters.

Introduction

IN *FROM HELL*, a graphic novel written by Alan Moore, Victorian serial killer Jack the Ripper states, as a kind of explanation for his actions, that ‘One day, men will look back and say that I gave birth to the twentieth century.’¹ Even though this sentence does not appear in any letter written by Jack the Ripper to Scotland Yard (assuming that those letters were indeed written by him), and it is an obvious and deliberate exaggeration used for rhetorical effect, it is noticeable because Jack was the first serial killer who became a media phenomenon in the modern sense of the term; he committed his crimes in an era of explosive developments in tabloid journalism, thereby providing suitable material for the masses, who craved sensational stories,² and his story still has business potential some 150 years later. His terrible crimes and their media coverage were intertwined and, in a sense, the killer showed the way to the next era of tabloid journalism.

When Steve Stephens broadcast a live Facebook video feed of himself mercilessly shooting a random and innocent pedestrian in April 2017, it seemed clear that we have arrived at a new era of tabloid ‘journalism’, when we can watch murders being committed in real time and killers can satisfy their craving for attention.³ Even though the murder committed by Stephens is not attributable to social media, just as the crimes of Jack the Ripper were not caused by the hunger of contemporary media for sensation, it is a sure sign that the public sphere of this day and age has a different quality than the one created by traditional media (printed press, radio and television). In the twenty-first century, most public debates are conducted online, and major platforms and businesses have user numbers and economic power, including the power to shape public opinions, unprecedented in media history. As a paraphrase of the statement made by the Victorian killer in Moore’s novel, one might almost say that Google and Facebook gave birth to (the public sphere of) the twenty-first century.

The rise of the Internet since the 1990s reaffirms Marshall McLuhan’s thesis from the 1960s (commonplace during the last decades but which has never been disproved) that the ‘Medium is the message’.⁴ In light of the earlier means of public discourse, the above statement seems especially applicable to online communication, as it has an impact on the operation of the public sphere not only through the content of communications, but also through the particular methods, structure and architecture of online communication; this equally applies to private correspondence (e-mail), friendly conversations (chat services, social media platforms), looking at pictures and watching videos

¹ Alan Moore and Eddie Campbell, *From Hell* (London, Knockabout Comics, 1999). This sentence is also used in a movie based on the comics (*From Hell*, Albert Hughes (the movie), 20th Century Fox, 2001).

² See L Perry Curtis, Jr, *Jack the Ripper and the London Press* (New Haven, CT, Yale University Press, 2001).

³ Daniel Kreps, ‘Alleged Facebook Killer: What We Know So Far’ *Rolling Stone* (11 April 2017) at <https://www.rollingstone.com/culture/culture-news/alleged-facebook-killer-what-we-know-so-far-121260/>.

⁴ Marshall McLuhan, *Understanding Media: The Extensions of Man* (New York, McGraw-Hill, 1964).

2 Introduction

(video-sharing portals), the means of accessing information (search engines), discussions of public affairs, and the nature and use of information. People speak much more in public, or at least somewhat publicly, and access much more information than ever before – but we use entirely different means than before to do so. McLuhan’s main thesis is that while we focus on the content (message) conveyed by the media, the media (technology) itself slowly and unnoticeably transforms social norms, values, our rules of coexistence and the ways we manage our affairs. This is the real content of the ‘media’. Everyday life has been changed by new online services (including search engines and the social media) considerably and certainly not in a subtle way; such changes also have had an impact on the nature of public discourse, as well as on the meaning of terms such as ‘knowledge’ and ‘information’. Some even argue that the functioning of the human brain has changed to adapt to the new means of communication.⁵

It seems somewhat ironic that the Internet was heralded in the beginning as the domain of unlimited freedom and free speech without government interference,⁶ even though its development was commissioned by the US Government for use by US defence forces, because the Internet was seen by the Government as a suitable means of monitoring citizens, and it was opened for non-military use only decades after its creation, through the privatisation of the existing infrastructure.⁷ The idea of a ‘free Internet without a government’ was utopian from the very beginning – either a naive dream or the product of a sinister scheme to mislead people.

Freedom of speech is a cornerstone of democracy and western civilisation. Its fundamental principles and doctrines were elaborated over the course of centuries and take their time to change. The emergence of the Internet posed new challenges to those fundamental principles. Some two decades ago, the Internet gave rise to wild and romantic hopes and ideas that the emergence of the new medium would democratise the public sphere and culture without any legal interference, simply through the nature of technology itself.⁸ Such early expectations have been replaced by a general sense of disappointment, as people have realised that many of the offline media’s problems apply to the Internet as well (see, eg, the issue of ownership concentration), while it is also affected by new and Internet-specific challenges that hinder the functioning of a democratic public sphere. As Lawrence Lessig, a pioneer in scholarly theories on the function of the Internet, put it when he recognised this disillusionment, ‘The Net was not in Kansas anymore’.⁹ Nonetheless, we must not forget that online communication has brought about revolutionary developments in several fields, and it has widened the public sphere. However, while these achievements form part of the everyday life of many people, they cannot let us forget the difficulties we have to face concerning this new medium. There seems to be

⁵ Nicholas Carr, *The Shallows: What the Internet Is Doing to Our Brains* (New York, WW Norton, 2011).

⁶ John Perry Barlow, ‘A Declaration of the Independence of Cyberspace’ *Electronic Frontier Foundation* (8 February 1996) at www.eff.org/cyberspace-independence.

⁷ Yasha Levine, *Surveillance Valley: The Secret Military History of the Internet* (New York, Public Affairs, 2018).

⁸ Jack Balkin, ‘Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society’ (2004) 79 *New York University Law Review* 1.

⁹ Reference to a line of Dorothy in the 1939 movie *The Wizard of Oz*, when she realises that she and Toto have left their safe home. See Lawrence Lessig’s ‘Foreword’ in Jonathan Zittrain, *Future of the Internet – And How to Stop It* (New Haven, CT, Yale University Press & Penguin UK, 2008) viii.

a strange duality here: even though people have more opportunities to address the public and access information than ever before, the digitisation of everyday life implies a danger for many people that human culture and communication may become shallower than it was before.¹⁰

A particular and worrying phenomenon in online communication is that gatekeepers have an increased influence on the operation of the public sphere. This is a bizarre turn indeed, considering that the initial promise of the public Internet was to make traditional gatekeepers (press houses, newspaper stands, post offices, cable service providers, etc) less important and influential. Instead, the Internet created new gatekeepers with greater influence over the public than ever before (in addition to creating a radical expansion of the public sphere).

Just like in the offline world, services that produce content and services that transmit content to the audience both play an important role in online communication. Internet service providers, search engines and video-sharing and social media platforms (ie gatekeepers or intermediaries) are indispensable parts of the system, and they all can influence the public sphere. They are capable of rendering pieces of content unavailable or of raising considerable obstacles to accessing content, while they can push other content in front of the general public. While they challenge numerous aspects of the existing legal framework (data protection, privacy, defamation, hate speech), they have also become dominant actors in the public sphere.

Both major online platform providers and governments, the latter being in charge of regulating such providers, suffer from mutual schizophrenia. On the one hand, governments try to force service providers to remove certain pieces of content (eg hate speech, user-generated content that may jeopardise children or violate personality rights) from their services; on the other hand, service providers are trusted to judge the legal status of such pieces of content, meaning that governments essentially ‘outsource’ the courts’ monopoly to apply the law. At the same time, the service providers concerned also select content according to their own policies, deciding on what to delete, who to silence and what items to feature for their users. This means the enforcement of a ‘pseudo legal system’, with its own code, case law, sanctions and fundamental approach to the matter of the pluralism of opinions – all this taking place in a privately-owned virtual space.

Even though the Internet promised unlimited access to opinions some 20 years ago, the emergence of a monopoly of opinion is much more likely today than it was ever before; while nation states are helplessly watching the erosion of their legal system and the fall of their constitutional guarantees protecting the public sphere, they are (at least in part) voluntarily delegating important chunks of their law enforcement tasks to tech giants. Earlier in history, the freedom of individuals needed and was afforded protection against the government by restricting government powers. Today, the human rights rules and principles, developed and elaborated through hundreds of years, need to be applied and enforced with regard to the trilateral relationships between governments, citizens and service providers.

This book covers issues relating to the regulation of a democratic public sphere, with due regard to the activities of online gatekeepers. For our purposes, ‘public sphere’

¹⁰ Jonathan Franzen, ‘What’s Wrong with the Modern World’ *The Guardian* (13 September 2013); Andrew Keen, *The Cult of the Amateur: How Today’s Internet Is Killing Our Culture* (New York, Currency, 2007).

4 Introduction

means Jürgen Habermas' ideal of debate and discussion on public affairs,¹¹ in which far more people participate today than at the time Habermas wrote his book, thanks to the general public access to the Internet. This public sphere is a counterbalance to excessive political power, acts as a guarantee of social balance, and provides protection against both government and excessive private power. For our purposes, an online gatekeeper is defined as a person or entity whose activity is necessary for publishing the opinion of another person or entity on the Web, and which include Internet and blog service providers, social media, search engine providers, entities selling apps, webstores, news portals, news aggregating sites and the content providers of websites who can decide on the publication of comments to individual posts.

This book reviews how gatekeepers respond to the speech of their users (ie citizens expressing their opinions on public affairs) and how and why they restrict such discussions. It also considers the legal status of 'speech' by gatekeepers, namely if and when their activities can be considered 'speech' and what kind of protection it should be afforded (if any), as well as the issue of whether or not gatekeepers can be held liable for their users' unlawful speech.¹²

A fundamental question raised in this book is whether or not online gatekeepers must be regarded as media, considering that they do not produce or publish their own content but merely host content produced by their users and make it available. A conclusion is that the activities of some gatekeepers may be regarded as a kind of editing, as they include the organisation and sorting of user-generated content, which in turn implies making decisions on presenting individual pieces of content to users, thereby influencing their chances of being included in a public debate. Furthermore, intermediaries have no way of escaping the need to judge the legality of content generated by their users – either to serve their own purposes, or because they are coerced into to doing so by government agencies. This means that gatekeepers can and are sometimes even obliged to remove pieces of content from their systems, and they are free to decide to 'hide' (render quasi-invisible) otherwise non-infringing content or push (display in a featured location) whatever content they wish to the general public. In this context, it seems to be the inevitable conclusion that gatekeepers are in fact editors, even if they are somewhat different from the editors of traditional media outlets.

This complex set of relationships necessitates the examination of the various issues from multiple aspects. One must consider: (i) the relationship between a speaker and government, including the duties (if any) a gatekeeper must perform with regard to speech crossing the limits of the freedom of speech; (ii) the relationship between government and gatekeepers, which also raises various questions, such as the issue of gatekeepers' liability for infringing user-generated content and the matter of legal obligations to take action against infringing content; (iii) the relationship between gatekeepers and speakers – in addition to the removal of infringing content, various questions arise from the discretionary power of gatekeepers to remove or hide certain opinions from their platform.

¹¹ Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, Polity, 1989 [1962]).

¹² Jack Balkin, 'Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation' (2018) 51 *University of California Davis Law Review* 1149, 1152, 1157–58.

The questions pertaining to such powers of gatekeepers seem to have a new quality, as gatekeepers ‘edit’ content, both pursuant to government instructions and on their own initiative and discretion, and their decision-making powers are not limited by the traditional principles, standards, laws and legal practices concerning the freedom of speech. This is why, from a constitutional perspective, we cannot say that gatekeepers restrict the freedom of speech, but in effect that is exactly what happens. Even though a content deleted or suppressed by a gatekeeper can be published in another way or on another site, some influential gatekeepers are capable of exerting considerable influence over the public in and of themselves.

The privatisation of the freedom of speech is a main issue discussed in this book, meaning that the limits of that freedom are drawn by private actors, that is major platform and infrastructure providers. It is argued that this process brings about a paradigm shift in the constitutional protection of speech, as well as the role of government in maintaining and preserving the democratic public sphere. As Damian Tambini and his co-authors put it, we are living in an era of the ‘deconstitutionalisation of freedom of speech’.¹³ This process gave birth to new ways and means of restricting speech, either because the courts apply traditional legal doctrines to new circumstances in lawsuits between users, or because online gatekeepers restrict their users’ freedom of speech and right of access to information.

Data protection and privacy-related issues are mentioned but not covered thoroughly in this book. Some readers might want to set this book aside right here and now, and they might be right, considering that the business model of major online gatekeepers is based on the surveillance of users (even prospective users) and on the exploitation of the data collected on them; not to mention that government surveillance of citizens is also supported now by market actors. The Internet, as a phenomenon, may not be understood without addressing the issue of surveillance, which makes privacy and data protection one of the most important legal fields in the context of the Internet. The issue of privacy and data protection is also relevant to the questions raised by content-related interference, as most gatekeepers (social media platforms, search engines and webstores) determine what to show to and hide from users on the basis of data collected on their users. Facebook’s news feed or Google’s search results may not be understood properly without the information each gatekeeper has on each user of their services. If a news feed or a search ranking is considered an ‘opinion’ that is eligible for constitutional protection, the collection of data serving as a basis for such an opinion should also be assessed from a legal perspective.¹⁴

Similarly, copyright and trademark issues, as well as the problem of and possible ways of managing media ownership concentration, are of great importance in the context of the Internet, but they are mentioned only incidentally in this book. The main focus is on the direct impact of gatekeepers on content, as well as the impact of the gatekeepers’ services on the public sphere. Issues that affect content regulation only indirectly (such as data protection, copyright and ownership restrictions) are not covered here.

¹³Damian Tambini, Danilo Leonardi and Christopher T Marsden, *Codifying Cyberspace: Communications Self-Regulation in the Age of Internet Convergence* (London, Routledge, 2007) 275.

¹⁴Lisa M Austin, ‘Technological Tattletales and Constitutional Black Holes: Communications Intermediaries and Constitutional Constraints’ (2016) 17 *Theoretical Inquiries in Law* 451.

6 Introduction

The actors not covered here also include gatekeepers who have only a limited impact on public discourse and freedom of speech due to their size or nature, such as blogs and websites managed by a single content provider (which may still be involved in public discourse; see chapter 6 on online comments), as well as webstores. It seems safe to say that, for example, the book selection offered by (ie the list of books marketed by and removed from the selection of) Amazon does have an impact on the freedom of speech, but that impact is only indirect and far more limited than the impact of other gatekeepers mentioned in this book, the activities of which sometimes make it outright necessary to interfere with the public sphere.

In general, this book attempts to tackle the issues covered with due care and diligence. Even though our intuition may suggest otherwise, most of the problems raised by online gatekeepers are not entirely new but were also present in the traditional media sector. In the early 1960s, Habermas himself warned of the end of the public sphere, as he was worried that public discourse and debate pertaining to public affairs was prevented by the commercialisation and consumerisation of mass media. The argument that democracy is weakened by new online services (eg the matter of fake news) is not entirely new either. It is not argued here that all problems could be solved by adapting existing solutions to the new circumstances, as not all components of the new media order are analogous to a phenomenon that was already known in the context of traditional media. It seems doubtful that the limitation of speech by private actors could be tackled within the centuries-old framework of fundamental rights.

It also seems that the meaning of ‘regulation’ has become somewhat elastic. Governments can (or at least can attempt to) regulate the activities of both gatekeepers and users, including matters pertaining to the freedom of speech. However, gatekeepers also act as ‘regulators’ in the sense that they adopt their own quasi-law in the form of public policies and other internal (ie not public) guidelines and regulations, and this latter form of ‘regulation’ (which is not even regulation in the legal sense of the word) is far more effective than government legislation and is enforced by gatekeepers every day. Legal systems somehow need to come to terms with this duality.

The first chapter of this book covers the foundations and primary limitations of the freedom of speech and the press, to serve as a background to the subsequent analysis of the relationship between such traditional rules, on the one hand, and the activities of gatekeepers and the interactions between users, on the other hand. Thus, chapter 1 lays down the starting point and constitutional framework for assessing the impact of new services and new gatekeepers on the freedom of speech. Chapter 2 discusses general questions raised by the Internet, as a medium and a public forum, with regard to the freedom of speech. Chapters 3, 4 and 5 offer legal analysis of various matters that are relevant to the freedom of speech, and which arise regarding the activities of three major gatekeepers with a profound impact on the public sphere (including Internet service providers that provide the infrastructure, search engines that help users find relevant information in vast amounts of data, and social media platforms that are the primary means of public individual expression). Chapter 6 reviews a number of issues raised by anonymous comments in the context of free speech, while chapter 7 provides an overview of possible regulatory and media policy directions and assesses proposals that have been raised so far.

A book discussing various aspects of the online public sphere is necessarily limited to the examination of a snapshot of reality, as its field of enquiry keeps changing on a daily basis. However, the fundamental principles and doctrines of free speech are centuries old and take a long time to change, meaning that they are fortunately better able to resist the great speed of technological advancement. Consequently, it seems quite likely that tackling the questions raised by online gatekeepers will take some time for legal scholars and practitioners. For this reason, there is hope that the legal framework and theoretical approaches presented in this book will remain relevant and useful for a while, despite the rapid changes that might be brought about by codified laws and the increasing number of court cases, or the decisions of different authorities.