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Keeping the demos out of liberal democracy? – participatory politics, ‘fake news’ and the online speaker

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Introduction

How have liberal democracies accommodated the shift in communicative patterns that the Web 2.0 era has ushered in? At a time when the business models of national and regional newspapers have seen reductions in the breadth and depth of news reporting,¹ a new set of online speakers have emerged, many of whom lack both formal qualifications in journalism and editorial support. Nonetheless these new speakers are publishing stories and commenting about events that they believe others will be interested in receiving. Ought they to be able to claim the same level of constitutional protection as that enjoyed by their professional counterparts? Should they be subject to the ‘duties and responsibilities’ referenced in Article 10 of the European Convention on Human Rights (including requirements objectivity, accuracy and civility) and typically held out as standard practice among mainstream reputable media outlets? The House of Commons Select Committee on Digital Culture, Media and Sport (DCMS) has recently expressed concerns about the online dissemination of disinformation and the consequent dangers to democracy posed by a contaminated public sphere. Might the strict application of Article 10 obligations to new speakers carry risks to political pluralism at the same time of a narrowed range of viewpoints as non-professional speakers are excluded from public discourse? How open should the channels of political communication be in a liberal democracy? And what do the answers tell us about the form of constitutional democracy that we experience? Baker usefully reminds

*The author wishes to acknowledge the helpful criticisms of Professor Aurora Plomer and the anonymous referee on an earlier draft. The usual disclaimer applies.

¹ The Cairncross Review *A Sustainable Future for Journalism* (February 12, 2019) available electronically at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf (last accessed September 2019)

us that all accounts of media freedom and free speech necessarily entail deeper level commitments to specific versions of democracy.² The discussion which follows below frames current debates within a broader account that explores constitutive tensions in liberal democracies, the rise of 'populist' politics and public reason. The present discussion argues that the institutions of the Council of Europe (including the Strasbourg Court) and official analyses of online expression put forward by the DCMS Select Committee at home offer restricted conceptions of plural political communication that reflect strands of liberal elite and deliberative democratic accounts of political pluralism. The outline and implications of a more radical, agonistic model of political pluralism then follows. Agonist accounts situate freedom of political communication within a non-deliberative vision of politics where conflict occurs as an ongoing and ineradicable feature, capable only of temporary and contingent resolutions.

Making reference to recent (i) Council of Europe free speech jurisprudence and policy statements and (ii) the House of Commons Select Committee on Digital Culture, Media and Sport Report on Disinformation, the remainder of the discussion falls into three parts. The first section of materials seeks to show that commitments to both liberal elite and deliberative accounts of democracy are prominent in our constitutional culture. The limited conceptions of citizen involvement in public discourse respectively offered by each of the two accounts are outlined and traced in the second part to current perceptions of a 'threat to democracy' posed by online disinformation and misinformation. I argue that the prevalent, somewhat fearful account of democratised speech fails to acknowledge valid arguments of constitutional principle for permitting false expression whether deliberately or unintentionally misleading. The discussion examines some constitutional anxieties about allocating to governments, public agencies or corporate bodies the task of determining truths and falsehoods in political expression. The final section of materials critiques the narrow pluralism of rational, civilised discourse, making the case for non-deliberative, agitational participation in public discourse. I suggest that agonistic approaches to political pluralism

² C E Baker, *Media, Markets and Democracy* (2002, CUP, New York) ch.6.

capture more fully the democratic aspiration for self-authorship of the laws. The question ultimately for agonists is what, if any speech limitations, are to be placed on imperfect citizens' contributions to public discourse.

The liberal and the democratic polity

There is a constitutive tension at the heart of liberal democratic polities between the *liberal* tradition which has at its core commitments to the rule of law, separation of powers and individual rights on the one hand and the *democratic* tradition whose central animating precepts comprise the equal status of all citizens and the claim that ultimate political authority vests in the people on the other. Grounded in a 'long established tradition of elite suspicion of the masses'³ the liberal tradition stands for rule-based 'checks and balances' upon the constitutive powers of the people. The tendency towards unruliness and disorder in the *polis* is required to be 'slowed down' – a demand that is facilitated by the rule of law and individual rights (including rights to property and to enter contractual relations) operating alongside the institutional checks offered by a representative assembly. Within this tradition is Madison's famous denunciation of what he labelled 'pure democracies' in *Federalist Paper No 10*. These, he declared, were 'ever spectacles of turbulence and contention; ...incompatible with personal security, or the right of property...'⁴ His defence of representative forms of democracy invokes the idea of institutional mediation of the crudeness and short-termism/narrowness of popular opinion. The true public good could best be ascertained by the election of educated and disinterested persons capable of reflective and civilised debate in a representative assembly. This essentially elitist account of liberal pluralism emphasises the primary role of political parties and organised interests in framing policy debates. It posits a minimal role for the citizen in political decision-making that does not extend beyond receiving the speech of political elites and voting periodically at election time.⁵ Elitist accounts are grounded upon negative assessments of voter

³ R Eatwell & M Goodwin, *National Populism: The Revolt Against Liberal Democracy* (2018, Pelican Books, London) at p.270.

⁴ *Federalist Papers* No.10.

⁵ For an overview see J McCormick, *Machiavellian Democracy* (2011, CUP, Cambridge) at p.66.

attentiveness and understanding of political issues and were developed in the early part of the 20th century. Classic analyses by Joseph Schumpeter in *Capitalism, Socialism and Democracy*⁶ and Walter Lippmann in *The Phantom Public*⁷ defended the dominant role of organised political elites. Fears of Bolshevism and the mass rallies of the Nazis in the 1930s doubtless influenced this lowly estimation of participative politics.⁸ For Schumpeter, most citizens are not capable of discerning a shared interest with their fellow citizens.⁹ More recently Jonathan Sumption's *Reith Lectures* defends the mediating role of political parties in the face of fractured popular opinion.¹⁰ Referenda and other direct forms of expression of public opinion are in his view unsuited to determining nuanced questions of public policy.

The democratic tradition speaks on the other hand for the ongoing right of all the people as the constituent power to redesign their laws and institutions. The liberal component of constitutionalism is faulted for limiting the people to occasional 'moments' of constitutional action. For the most part liberalism closes off opportunities for active and contestatory popular participation in the determination of laws and policies. In some constitutions closure is achieved via the mechanism of judicial review of primary legislation. In the political sphere it occurs through representative forms of government which allow merely periodic forms of unmediated political decision-making by the people such as occurs at referendums (rarely) and general elections.¹¹ Individuals and groups remain free of course to raise political grievances and organise on social media to the extent permitted by the law and the 'acceptable use' policies of social media platforms.

Scholars whose normative position locates them more squarely within the democratic tradition criticise the liberal constitution's limited set of opportunities for popular expressions of political will. Wolin for example notes that an emphasis upon the settled laws and

⁶ (1942, Harper and Brothers, New York).

⁷ (1925, Transaction Publishers, New York).

⁸ D Held, *Models of Democracy* (2005, Polity Press, Cambridge) at 178 .

⁹ L Sanders, 'Against deliberation' (1997) 25 *Pol. Theory* 347, 351.

¹⁰ J Sumption *Trials of the State - Law and the Decline of Politics* (2019, Profile Books, London).

¹¹ An obvious exception is Switzerland see T Fleiner, 'Participation of citizens in constitution-making: Assets and challenges – the Swiss experience' in (ed. X Contiades & A Fotiadou) *Participatory Constitutional Change – The People as Amenders of the Constitution* (2017, Routledge, Abingdon).

institutions of liberal democracy tames the creative power of the demos to refashion the polity.¹² It reduces democracy to various representations of democracy; episodic contests among representative political parties for votes; to E-petitions; opinion polls; and public debates between leaders. In short, the liberal constitution closely regulates the amount and form of political contestation that is 'let in.'¹³ The democratic tradition by contrast insists upon the political primacy of citizens who enjoy equal status and from whom all authority to govern flows. It is an emancipatory republican project that draws on the potential of citizens to be the active and regular authors of the political structures and rules that govern their lives. A dramatic exposition is found in Thomas Jefferson's idea of finite constitutions that endure for one generation only. Jefferson considered it self-evident 'that the earth belongs in usufruct to the living; that the dead have neither powers nor rights over it.'¹⁴ More commonly, the democratic element of liberal democracy maintains that questions of constitutional meaning must ultimately be determined by the people directly or, at the very least, by their elected representatives, rather than the courts.¹⁵ Heavily implicated in this view of the primacy of political openness among equal citizens is the idea of maximum liberty of political expression. Without an extensive measure of freedom to engage in political discourse, ordinary citizens are inhibited from participating fully in the political life of their communities.

Situated within the democratic tradition, the 'deliberative turn' in political theory was a response to the challenge of voter apathy evident across a number of liberal democracies. It signals a shift away from the limited, vote-centric accounts of citizen participation in politics

¹² S Wolin *Fugitive Democracy and Other Essays* (2016, Princeton Uni Press, New Jersey) ch.5

¹³ *Ibid.*, at p.102.

¹⁴ Jefferson's insistence upon constitutional remaking by successive generations was premised on a view that, left to themselves, citizens would devote themselves to private affairs and neglect matters pertaining to the public good. *Thomas Jefferson Writings* (ed M D Peterson) (1984, Library of America, New York). See for helpful discussion P Onuf, 'Who are "We The People"?' Bruce Ackerman, Thomas Jefferson and the Problem of Revolutionary Reform' (1999) 10 *Constit. Pol. Econ.* 397.

¹⁵ L Kramer, *The People Themselves - Popular Constitutionalism and Judicial Review* (2004, OUP, New York). For a powerful declaration in favour of the democratic politics of constitutional redesign by an inclusive notion of 'the people' see the speech of F Douglass 'What to the Slave is the Fourth of July' at https://corematerials.homestead.com/files/Douglass_July_4_1852.pdf (last accessed September 2019) and discussed by J Frank 'Staging Dissensus' in A Schapp, *Law and Agonistic Politics* (2016, Routledge, London) at p.95.

found in Schumpeter and Lippmann. Deliberative theory wants the many to be at the centre of political decision-making. It aims to institutionalize enhanced levels of citizen participation in political decision-making. Whilst not dismissing the role played by representative institutions of government, it draws upon accounts of participatory political decision-making in the 1960s and 1970s¹⁶ to make the case for popular involvement in framing societal laws and policies beyond periodic turnouts at the ballot box. A central function is assigned to 'the discussing of reasons' among citizens who, as political equals, become the authors of the laws under which they live.¹⁷ Whether in citizen assemblies or other fora (including online discussion spaces), deliberative democracy tasks participants with different world views to give reasons for their preferred policies in ways that are comprehensible and acceptable to others. They are encouraged to reflect upon and revise if necessary their earlier positions in the face of 'better' arguments put forward by others.¹⁸ The perfectionist component to deliberative democratic accounts stresses the improving effect on the quality of citizens' reason-giving and interlocution in public affairs. The deliberative citizen can expect to be cured of his/her short-term and self-interested outlook on politics and be re-oriented towards the common good via the use of public reason.¹⁹ Discursive qualities of empathy, mutual respect and reciprocity are to be fostered among the participants. For participation to be productive the speaker must be responsible, seek common ground with others and develop thoughtful, cooperative strategies to realise shared goals. Inclusivity without the side restraints of public reason, civility and commonality results only in a 'cacophony of special

¹⁶ See thus C Pateman, *Participation and Political Theory* (1970, CUP, Cambridge).

¹⁷ R Goodin, *Innovating Democracy: Democratic Theory and Practice after the Deliberative Turn* (2008, OUP, New York) at p.38. See also among the vast literature on the topic classic works by A Gutmann & D Thompson, *Democracy and Disagreement* (1998, Harv Uni Press, Mass); J Elster (ed) *Deliberative Democracy* (1998, CUP, Cambridge); S Macedo (ed) *Deliberative Politics - Essay son Democracy and Disagreement* (1999, OUP, Oxford). J Parkinson & J Mansbridge, *Deliberative Systems – Deliberative Democracy at the Large Scale* (2012, CUP, Cambridge). Goodin arguably tacks back towards an elitist conception of democratic government when he insists that national political parties are needed to give coherence to citizens' otherwise disparate intentions, see *Innovating Democracy* at ch.10.

¹⁸ J Cohen, 'Democracy and Liberty' in J Elster (ed) *Deliberative Democracy* *ibid.*

¹⁹ Sanders makes the valuable point that the features of caution (non-hastiness), thoughtfulness and order in deliberative decision-making also offers a solution to the defects in citizen reasoning identified by elitist theorists such as Schumpeter, L Sanders, 'Against deliberation' (1997) 25 *Pol. Theory* 347, 352.

pleadings'.²⁰ The presence of these restraints means that short sighted, mob-rule incarnations of popular participation can be avoided.²¹ The republican credentials of deliberative democracy are evident in the stress upon decision-making structures of non-domination.²² Differences of status, education and wealth are required to be 'bracketed off' so that speakers interact as social peers.

Agonistic theories of democracy offer an alternative republican account of political pluralism, one based in the idea of unavoidable, ineradicable contestation among differently situated individuals and groups. Like deliberative accounts, agonist theories criticise two related features in liberal elitist accounts namely their (i) cynicism about levels of political apathy among citizens and (ii) lack of concern about the exclusion of poorly organised/articulated interests from decision-making fora.²³ Similarly, the elitist model's conceptualisation of persons' values and norms as being formed and fixed in pre-political settings is at odds with agonist and deliberative democratic accounts who each point to the development and transformation of persons in the political sphere. The perfectionist strand of deliberative democratic thinking is absent however in agonist versions. The latter are not concerned to improve the quality of citizens' reasoning and encouraging their empathetic, other-regarding characteristics. Drawing on Greek antiquity, agonists hold out a tragic view of human life where conflict and suffering are unalterable features of an individual's existence. The deliberative democratic idea that political differences among citizens are surmountable and reconcilable given the right communicative framework is rejected. Agonists claim that differences are not capable of being progressively overcome by transcendent principles of rationality (public reason) deployed in institutional settings characterised by mutually respectful exchanges. Conflict between persons holding different

²⁰ B Barber, 'The Discourse of Civility' in S Elkin & K Soltan (ed) *Citizen Competence and Democratic Institutions* (1999, Penn State Uni. Press, Pennsylvania) at p.42. See also B Barber *Strong Democracy: Participatory Politics for a New Age* (2003, Uni. of California Press, London).

²¹ Sanders at n.18 above who notes that an appeal to rational, slow-paced and communally oriented' political discourse among citizens is also to be found surprisingly in the work of arch-conservative thinker Edmund Burke.

²² In contrast to liberalism's focus on the avoidance of actual instances of arbitrary interference.

²³ For good overviews of agonist theories of democracy see M Wenham, *Agonistic Democracy* (2013, CUP, Cambridge); A Schaap (ed) *Law and Agonist Politics* (2008, Ashgate, Abingdon).

worldviews is an ontological given. Deliberative democrats' emphasis upon commonality and shared interests is insufficiently attentive to the particular interests of differently situated individuals and groups. Human life for agonists is marked by struggle and disharmony. Any moments of accord and consensus in politics are mere contingent stabilisations which must sooner or later revert back to disharmony and conflict.

Post democracy and populism

In recent times, the popular (participative) sovereignty component in liberal democracy has become marginalised. Colin Crouch's *Post Democracy* in 2004 pointed to a diminished role for nationally elected political institutions and loss of national sovereignty in the face of powerful corporate interests, a trend that has accelerated since the global financial crisis in 2008.²⁴ Today, global groupings of institutional shareholders exert major political influence over national governments. Neoliberal norms of global free markets and possessive individualism constitute the dominant orthodox.²⁵ The idea of democracy is still invoked in political discourse but it has been hollowed out to signify merely a commitment to free, periodic elections in which citizens are conceived of primarily as passive recipients of professional communications from politicians, financial institutions and a corporate media commentariat. Following the collapse of communist states in Eastern Europe, citizens in liberal democracies have been told that there is no sensible alternative to free markets, neoliberalism and globalisation.²⁶ Giving the Leader's speech at the Labour Party conference in 2005, Prime Minister Tony Blair thus observed, 'I hear people say we have to

²⁴ (2004, Polity Press, Cambridge). Crouch wrote, 'The fundamental cause of democratic decline in contemporary politics is the major imbalance now developing between the role of corporate interests and those of virtually all other groups. Taken alongside the inevitable entropy of democracy, this is leading to politics once again becoming an affair of closed elites, as it was in pre-democratic times.' at p.104.

²⁵ S Hall, 'The neo-liberal revolution' at https://www.lwbooks.co.uk/sites/default/files/s48_02hall.pdf (last accessed September 2019).

²⁶ F Fukuyama, *The End of History and the Last Man* (1992, Penguin, London).

stop and debate globalization. You might as well debate whether autumn follows summer.²⁷ Blair was a devotee of 'Third Way' politics whose intellectual underpinnings were set out by Anthony Giddens in *The Third Way – The Renewal of Social Democracy*.²⁸ There the case for an *ad hoc* mixture of markets and social responsibility (as well as rights) in a 'radical centre' of politics is made out where opposing classes and social division can be overcome through dialogue, negotiation and compromise. The stress upon decision-making structures that bracket off actual inequalities among citizens and promote consensual, market-friendly decision-making outcomes suggests some degree of alignment between 'third-way' centrist politics and deliberative structures of rule-making.

The electoral dominance of centrist political parties in Europe in recent times has meant that voters are typically offered a limited choice between parties of the centre-right or the centre-left. Each offer rival technocratic-expert solutions to the question of how best to manage the global, free market economy.²⁹ At the supranational level of European governance, centrist orthodoxies are imposed on sometimes recalcitrant national governments. In the wake of the 2007-8 global financial crisis for example, the experience of euro zone debtor countries such as Greece, Italy, Spain and Portugal was to have drastic austerity packages imposed by the European Commission, the European Central Bank and the International Monetary Fund. The eventual ratification of these rescue packages by national parliaments provided the necessary 'democratic' cover for what in truth were bargains whose terms always favoured the rescuers and cut welfare and incomes among the poorest of Europe's citizens.³⁰ Then, as now, the contrary notion that there might be an

²⁷ Quoted in S Wood, 'How the mantra of centrism give populism its big break' (2017) *New Statesman* January 18.

²⁸ (1998, Polity Press, Cambridge).

²⁹ C Mouffe, *For a Left Populism* (2018, Verso, London) ch.1 citing Tony Blair's remark 'The choice is not between a left-wing economic policy and a right-wing one but between a good economic policy and a bad one.' p.4. For commentary on New Labour see the analysis of the Blair/Brown Government's preference for technocratic, business-led management of the economy in C Dillow, 'Why Tony Blair and his critics are both partly right on inequality' *New Statesman* (2019) June 17 at <https://www.newstatesman.com/politics/uk/2019/06/why-tony-blair-and-his-critics-are-both-partly-right-inequality> (last accessed September 2019).

³⁰ C Crouch, 'The March Towards Post-Democracy, Ten Years On' (2016) 87 *Political Quarterly* 71,72.

alternative to the logic of financial capitalism was regularly dismissed in mainstream corporately-owned media outlets as the fantasy of 'extremists' and 'populists'.³¹

The tendency to label all opponents of the dominant neo-liberal economics pejoratively as 'populist' obscures however the fact that they comprise diverse and sometimes opposing groupings.³² In its generic sense 'populist' can be said to refer to political movements and parties that claim to express grievances of 'the people' and mobilize the same against what is said to be the self-interested rule of 'remote elites' holding public office and/or wielding substantial economic/cultural influence.³³ Stated thus, the term is plainly broad enough to encompass a variety of political viewpoints.³⁴ On closer inspection however, distinct sub-varieties of the 'populism' species on the left and right do become apparent - even if they do sometimes express overlapping anxieties about austerity, growing inequality and distrust of an elite political class.³⁵ Looking more closely at the phenomenon in Europe for example, it can be seen that one variant of the 'populist' party is the ethno-nationalist, anti-immigrant socially-conservative type as exemplified in *Fidesz* (Hungary) and *Lega Nord* (Italy). When these parties have held public office, stresses have been put on elements of *both* the liberal and democratic traditions. Executive interference in judicial appointments has compromised commitments to the rule of law and the separation of

³¹ C Mouffe, *For a Left Populism* (2018, Verso, London) ch.1 See further *The Guardian* newspaper's series on populism at <https://www.theguardian.com/world/series/the-new-populism> which seeks to define this nuanced phenomenon as the enemy of decent liberal politics. For insightful criticism of *The Guardian* in this regard see R Burtenshaw & A Jager, 'The Guardian's populism panic' at <https://jacobinmag.com/2018/12/guardian-populism-europe-cas-mudde-hillary-clinton-immigration-tony-blair> (both last accessed September 2019).

³² For criticism of the treatment of populism as pathological, see M Canovan, 'Trust the People! Populism and the Two Faces of Democracy' (1999) 47 *Pol Sts* 2

³³ On the large and growing volume of academic discussion of populism see *inter alia* R Eatwell and M Goodwin, *National Populism: The Revolt Against Liberal Democracy* (2018, Pelican Books, London); for a liberal critique see C Mudde and C Kaltwasser *Populism – A Very Short Introduction* (2017, OUP, Oxford), J Werner Muller *What is Populism* (2017, Penguin Books, London). For more sympathetic accounts of forms of popular engagement in politics see C Mouffe *For a Left Populism* (2018, Verso, London) and M Canovan *ibid.*.

³⁴ The victory of President Macron in the French Presidential elections of 2017 could be said to represent a victory of one version of populism - from the centre - against the old guard of established centre right centre left parties each of whom had alternated in power.

³⁵ It is interesting to note for example how in the French Presidential elections of 2017 that Marine Le Pen was able to pose as the anti-capitalist candidate.

powers.³⁶ At the same time, the rights of minority groups (such as those held by migrants) have been made less secure. An authoritarian dimension of this variety of populism is evident in the way that political pluralism and dissenting opinion have also been targeted.³⁷ In Hungary for example legal reforms to the regulation of broadcasting passed by the *Fidesz* controlled legislature in 2010 ensured greater executive control over appointments to television and radio regulatory authorities.³⁸ An analysis of Italian politics in the period 2001-2011 when an alliance between Silvio Berlusconi's *Forza Italia* and the Northern League held national office, cites several significant interferences in the running of public service broadcasters to ensure favourable (and suppress unfavourable) coverage for the governing alliance.³⁹ In extreme cases, once it is accepted that 'the people' have a unified set of goals and that the party of 'the people' perfectly understands and reflects these goals, the rationale for opposing ideologies and rival political parties is removed.⁴⁰

Other populist movements with a focus on resistance to austerity and corruption among political elites are to be found on the radical left in countries such as Greece and Spain (e.g. *Syriza* and *Podemos*). These movements are a long way removed from the ethno-nationalist, anti-immigrant or social conservatism of *Fidesz* or *Lega Nord/Lega*. There is little evidence to suggest that these movements threaten core political freedoms such as the freedom of political dissent. In truth, the communicative power of these anti-austerity groupings is situated within a political/economic framework that favours their centrist /neoliberal opponents. Wealthy elites' control over the flow of information now facilitates the

³⁶ D Kosar and K Sipolova, 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law' (2018) 10 *Hague Jo. on the Rule of Law* 83 discussing a successful challenge to the reforms made to the system of judicial appointments in Hungary by *Fidesz*.

³⁷ See for example J Kornai, 'Hungary's U-Turn: Retreating from Democracy' (2015) 26 *Jo of Democracy* 34.

³⁸ P Bajomi-Lazar, 'The Party Colonisation of the Media - The Case of Hungary' (2013) 27 *East European Politics and Societies and Cultures* 69.

³⁹ D Albertazzi & S Mueller, 'Populism and Liberal Democracy: Populists in Government in Austria, Italy, Poland and Switzerland' (2013) 48 *Government and Opposition* 343, 355.

⁴⁰ D Plotke, 'Representation is Democracy' (1997) 4 *Constellations* 28. Beyond Europe, the case of forced consensus in Ecuador is instructive here. Within rural communities for example, Torre observed in 2007 those who opposed indigenous leaders' version of the common good can be coerced into actively supporting the leaders' vision under the threat of social ostracism, fines or even denial of basic services and utilities, see C de la Torre, 'The Resurgence of Radical Populism in Latin America' (2007) 14 *Constellations* 384, 387-388.

framing of the terms of public discussion.⁴¹ In such circumstances, a broadly-conceived freedom to challenge dominant orthodoxies is crucial to informed self-government.

The next section of materials explores how the Council of Europe in its various guises - the Strasbourg Human Rights Court and various advisory bodies such as the Venice Commission for Democracy through Law, the European Audiovisual Observatory - and our own House of Commons Digital Culture, Media and Sport Select Committee have advanced narrowed conceptions of political pluralism under Article 10 ECHR. The narrowed conceptions correspond with ideas of socially responsible expression where care is taken to verify factual assertions, to evidence and corroborate claims and provide criticised parties with an opportunity to respond.⁴² Specifically, it is claimed that the privileging of a model of journalism usually associated with professional media organisations limits popular participation in public discourse. Whilst erroneous statements do undoubtedly distort public debate, requiring non-professional producers of content to match the editorial processes and fact-checking of their professional counterparts may stifle the expression of ideas and viewpoints not frequently represented in mainstream news coverage. As such, the case for protecting false (including deliberately false speech) might be worth exploring. Principled arguments for the constitutional protection for inaccurate, non-professionally produced speech do exist. Though associated with First Amendment jurisprudence, the argument for a treating content regulation of speech with scepticism is arguably of more general application across democratic states.

The Council of Europe - privileging responsible media

(i) The Venice Commission

The Venice Commission is an advisory body set up in that reports to the Council of Europe on 'issues of constitutional law including the functioning of democratic institutions and

⁴¹ As noted by Machiavelli in *The Discourses Book 1 Ch 4*, see further J McCormick, *Machiavellian Democracy* (2011, CUP, Cambridge) at pp.179-80.

⁴² The 'social responsibility' model of journalism is discussed inter alia by P Coe, '(Re)embracing Social Responsibility Theory as a Basis for Media Speech: Shifting the Normal Paradigm for a Modern Media' (2018) 69 *NILQ* 403.

fundamental rights, electoral law and constitutional justice'. In 2016, the Commission published a compilation of opinions and reports concerning freedom of expression and media.⁴³ This stated:

1.4 LIMITATIONS ON THE FREEDOM OF EXPRESSION AND THE MARGIN OF APPRECIATION OF THE STATE

{T}he Venice Commission does not support absolute liberalism. While there is no doubt that in a democracy all ideas, even though shocking or disturbing, should in principle be protected [...], it is equally true that not all ideas deserve to be circulated. Since the exercise of freedom of expression carries duties and responsibilities, it is legitimate to expect from every member of a democratic society to avoid as far as possible expressions that express scorn or are gratuitously offensive to others and infringe their rights.⁴⁴

Taking the meaning of 'gratuitous' to comprise 'unnecessary' and 'without cause or reason' the Venice Commission's understanding of protected expression under Article 10 of the Convention can be restated. Speakers should limit themselves to non-scornful expression of ideas that *deserve* to be circulated. In respect of such ideas, their articulation must not offend others in ways that are unjustified or lacking in reason. As will be shown in the section on Convention jurisprudence below, the 'as far as possible' check on permissible speech limits does not significantly extend the range of permitted viewpoints or modes of expression. The angry speaker for example is expected to tone down his/her invective. The 'unreasonable' poster of online comments may still expect to have the post removed by a host platform.

(ii) The European Audiovisual Observatory

The *European Audiovisual Observatory* likewise operates under the aegis of the Council of Europe and provides 'a comparative European overview of the audiovisual industry in 41 different countries as well as detailed analysis of national and even regional industries.'⁴⁵ It

⁴³ European Commission for Democracy through Law: Compilation of Venice Commission Opinions and Reports concerning Freedom of Expression and Media (2016) available electronically at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2016\)011-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2016)011-e)

⁴⁴ *Ibid* at p.8.

⁴⁵ <https://www.obs.coe.int/en/web/observatoire/what-we-do> (last accessed September 2019).

has a Department of Legal Information that 'analyses key legal issues linked to the audiovisual sector and reports on major legal developments and ground breaking cases which affect media legislation in Europe.'⁴⁶

In a 2017 report the *Observatory* argues that the proper function of journalism is neutral (i.e. non-partisan) observation and laying before public 'new and correct information.'⁴⁷ This is contrasted with 'partisan' or 'opinion journalism' which is stated to bear its share of responsibility for 'the failure of the Weimar Republic and dominated until the end of National Socialism'. The same section of materials approves developments in US journalism at the end of the nineteenth century when the new business models of newspaper proprietors moved away from what is labelled 'opinion journalism' and party affiliation. Gaining mass markets through street sales and accompanying advertising revenues, the report argues, freed up proprietors to institute a form of journalism that served no one political party 'but the people (and be) the organ of truth.'⁴⁸

(iii) The European Court of Human Rights and democratised speech

Confronted in recent times with legal disputes arising from online expression, the Strasbourg Court has articulated a set of standards that require online, non-professional speech to be produced in accordance with ethical codes developed by professional news organisations. The Grand Chamber in *Stoll v Switzerland* for example advanced a conditional notion of journalistic freedom that requires speakers 'act in good faith and on an accurate factual basis and provide 'reliable and precise information.'⁴⁹ When the individual is faced with the volume of information from multiple sources including the electronic media, 'monitoring compliance with journalistic ethics takes on added importance.'⁵⁰ Aside from the Court's

⁴⁶ *Ibid.*

⁴⁷ K Renner 'The historical development of norms of journalism' in *Journalism and media privilege IRIS Special* European Audiovisual Observatory (Council of Europe) Strasbourg 2017 p.4 available electronically at [https://www.coe.int/en/web/freedom-expression/-/new-report-on-journalism-and-media-privilege-by-the-european-audiovisual-observatory-](https://www.coe.int/en/web/freedom-expression/-/new-report-on-journalism-and-media-privilege-by-the-european-audiovisual-observatory)

⁴⁸ *Ibid.*

⁴⁹ (App No 69698/01 Judgment 10/12/2007) at para.103.

⁵⁰ *Ibid.* at para.104.

rather narrow conception of the citizen as merely the recipient of others' speech, it is apparent that professional codes' emphasis upon the verification and corroboration of published claims (and accompanying editorial processes) will usually be beyond the practical capacities of many bloggers and non-professional speakers.

In the case of user-generated content hosted on professional commercial news media sites on matters of undoubted public interest, the Court's fixing of legal duties and responsibilities on commercially run news portals in cases such as *Delfi As v Estonia* and *MTE & Index HU.ZRT v Hungary* is intended to avoid the contamination of public discourse.⁵¹ In *MTE* 'heated discussions' and 'vulgar' comments from members of the public about the quality of estate agents' services from were adjudged to make no worthwhile contribution to an informed public sphere.⁵² Placing the obligation on host sites to censor the intemperate and uncivil opinions expressed in online comments, naturally invites commercially-run platforms to prioritise shareholder interests in avoiding any legal penalties.⁵³ Eight months previously, the Grand Chamber in *Delfi As v Estonia* had declined to find a violation of a commercial news portal's Article 10 rights.⁵⁴ The national courts had previously held that a series of anonymous posts from members of the public in the comments section of the news portal's website were threatening, abusive and/or defamatory and had violated the personality rights of L, a board member of a ferry company. These posts had been made in response to a story published by *Delfi* about damage to ice bridges caused by the ferry company. The posts had not been caught by a software filter used by *Delfi* despite the fact that the posts complained of were in breach of *Delfi's* own rules that did not permit threatening/abusive/obscene or otherwise illegal posts. The offending statements were only removed after a number of weeks. By a majority of 15-2 the Grand Chamber

⁵¹ *MTE & Index HU.ZRT v Hungary* (2016) App No 22947/13 (Judgment February 2).

⁵² *Ibid.* at para.72 (concurring judgment of Judge Kuris).

⁵³ Although the Court did note the limited adverse impact upon the criticised estate agents that followed from the fact that the comments were expressed online. 'For the Court, the expressions used in the comments, albeit belonging to a low register of style, are common in communication on many Internet portals – a consideration that reduces the impact that can be attributed to those expressions.' At para.77.

⁵⁴ App No 64569/09 (Judgment June 16, 2015).

found that fines imposed by the national courts did not breach Article 10. *Delfi* as an active publisher ought to have removed each post the moment it was uploaded, regardless of whether it had actual knowledge of the posts. The latitude given to national authorities by the Grand Chamber to regulate non-professional, invective-laden speech is striking. The Court was unwilling to revisit the questionable classification by national authorities of problematic 'hate' and 'abusive' speech forms, even when they concerned user comments on a matter of undoubted public interest. This can be troubling where, as in *Delfi*, the publisher's liability arises in national law the instant a comment is uploaded.⁵⁵

These various assertions about the functions and duties of journalists and freedom of expression appear better fitted to an earlier, pre-digital era when just a few broadcast media outlets existed in each of the signatory states and controlled the dissemination of news and opinion about public affairs.⁵⁶ Even then, print outlets across Europe have never been subject to the impartial and balanced coverage requirements typically imposed on the broadcast news/current affairs sector. The proprietors of print media and the journalists working for them have been free to advocate political viewpoints without facing legal liability for partisan coverage. Today those who receive content from online sources have some awareness that sources of news stories sent to their smart phones and tablets is partly a product of personal digital profiles created through past web usage.

The account of 'responsible journalism' offered by the Court in *MTE* and *Delfi* can be considered in its normative dimension. Rather than seeing the emancipatory and democratizing possibilities for digital speech in which channels of political participation and change are opened up to non-elites, the citizen as 'speaker' is conceived largely as a threat to democracy, especially if he/she speaks intemperately. If he/she must speak at all, the various readings of Article 10 by the Venice Commission, the European Audiovisual

⁵⁵ I do not comment here on the distaste for anonymous speakers expressed in *Delfi* by Judge Zupancic but his views seem to neglect the positive value of anonymous speech in certain situations for unpopular viewpoints in the workplace, neighbourhood or community, especially in matters of public interest. For general discussion, see E Barendt, *Anonymous Speech* (2016, Hart, Oxford).

⁵⁶ See in a similar vein J Rowbottom, 'To rant, vent and converse: protecting low level digital speech' (2012) 71 CLJ 355.

Observatory and the Court cohere around the stance that the speech of citizens must be deserving of dissemination and comport largely with professional broadcast journalist production values and etiquette. Crudely produced partisan comment on the other hand must be discouraged since it hinders informed self-government. Whilst the desire for impartial, fact-driven, carefully edited journalism is understandable, it is not (as was noted previously) a standard that is required of professional print journalists. More fundamentally, it can be asked whether these standards ought to be applied in the first place if the *sine qua non* of an informed democracy is diversity of political viewpoint. The denial of constitutional protection under a free speech principle to those who fall short of these standards (via the imposition of civil/criminal liability upon the online platforms) is likely discourage content from non-professional speakers who are less frequently and less widely heard than their professional counterparts.

Disinformation and misinformation - 'threats to democracy' from new speakers

Unsubstantiated rumour, factually inaccurate and misleading 'news' stories are an undoubted feature of online speech.⁵⁷ The ease moreover with which false content may be spread is relevant to any assessment of the consequent adverse consequences both for the public interest and private interests in reputation etc.⁵⁸ In July 2019 the Director General of the BBC Lord Hall warned against 'an assault on truth' from online sources. Likening the spread of 'fake news' to the propaganda used by the Nazis in the 1930's, he stated

We need to reassert the core principles of good journalism like never before. In a sea of disinformation and partisan reporting, we need to stand up for independence, impartiality, and reporting without fear or favour.⁵⁹

⁵⁷ See for a good example in the US of a spoof anti-liberal site created to inflame Republican leaning supporters https://www.bbc.co.uk/news/resources/idt-sh/the_godfather_of_fake_news (last accessed September 2019). See further P Bernal, 'Facebook: why Facebook makes the fake news problem inevitable' (2018) 69 NILQ 513; T McGonagle, "'Fake News' - False fears or real concerns' (2017) 35 NQHR 203.

⁵⁸ When elected politicians and leaders use the term 'fake news' to describe content they disapprove of, it can foster a climate of public distrust in which citizens become less certain about all sources of information, see McGonagle *ibid*.

⁵⁹ <https://www.bbc.co.uk/news/entertainment-arts-48948591> (11 July 2019) last accessed September 2019.

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expressed concern in February 2019 that social media platforms allowed people to

give credence to information that ...(was) distorted and inaccurate. This has a polarising effect and reduces the common ground on which reasoned debate, based upon objective facts, can take place. Much has been said about the coarsening of public debate, but when these factors are brought to bear directly in election campaigns then the very fabric of democracy is threatened.⁶⁰

There is cross party agreement on the need to place new responsibilities on the social media platforms to regulate ‘manipulated information that is intended to deceive and mislead audiences’.⁶¹ In the judicial sphere Lord Hobhouse put the principled objection to protecting false information in *Reynolds v Times Newspapers* under the right to freedom of expression thus:

No public interest is served by publishing false or communicating misinformation. The working of a democratic society depends on members of that society being informed not misinformed.⁶²

The quote refers specifically to ‘misinformation’, understood here to mean false, inaccurate information that unintentionally misleads the audience. Some arguments for the constitutional protection of misinformation are considered shortly. For the time being however, some issues of principle raised by the phenomenon of ‘disinformation’ - whereby untruths are deliberately and knowingly disseminated - are explored.

An instinctive response to the problem of knowing dissemination of falsehood is to deny legal protection *tout court*. Putting informed public debate at risk, deliberate assertions

⁶⁰ House of Commons Digital Culture Media and Sports Select Committee Final Report (February 2019) *Disinformation and ‘fake news’* para 12 available electronically at <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmums/1791/1791.pdf> and see Government response at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf

⁶¹ House of Commons Digital Culture Media and Sports Select Committee Final Report (February 2019) *Disinformation and ‘fake news’* para 12 available electronically at <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmums/1791/1791.pdf> and see Government response at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf

⁶² [2001] 2 AC 127, 238.

of factually false information about politics and societal affairs appear to lack any serious claim to free speech protection whatsoever. Yet, UK law does recognise limited occasions where a speaker is absolutely privileged, regardless of whether he/she is motivated by the desire to spread malicious falsehoods. The democracy-based rationale for allowing complete immunity for words said in parliamentary proceedings or statements made in official reports is to encourage the fearless performance of legislators' scrutiny function. There are additionally arguments for conferring some 'breathing space' on deliberately misleading political expression where it occurs outside the legislature. These are their strongest where it is recognised that (i) censoring deliberate falsehoods in matters of politics inevitably induces a degree of self-censorship among partisan speakers who might consider themselves unable to satisfy a legal requirement to prove the truth of their claims; and (ii) courts are ill-equipped assessors of politically contentious claims, including allegations of deliberate misleading,⁶³ and (iii) counter speech opportunities are available to redress the 'damage' to a digitised public sphere.⁶⁴

For a constitutional approach to limitations on political expression that is intended to keep open channels of political communication consider *Alvarez v United States*. Here a federal law (The Stolen Valor Act) criminalizing the making of false claims about military service honours was struck down when a majority of US Supreme Court applied strict scrutiny to this contents-based prohibition.⁶⁵ The Act had failed to specify the distinct harms that flowed from allowing persons to make deliberately false claims about their military

⁶³ 'Brexit: Boris Johnson £350m claim case thrown out by judges' <https://www.bbc.co.uk/news/uk-politics-48554853> (2019) June

⁶⁴ In their separate concurrences in *New York Times v Sullivan*, Justices Black, Douglas and Goldberg were prepared to read the First Amendment as conferring the broadest immunity for *all* discussion and criticism of (including the spreading of deliberate lies about) public officials for reasons of democratic self-government 376 US 254 ('We would, I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the people and press free to criticize officials and discuss public affairs with immunity', Black J at 296); ('in a democratic society, one who assumes to act for the citizens in an executive, legislative or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot be muzzled or deterred by the courts at the instance of public officials under the label of libel.' Goldberg J at 299.

⁶⁵ 567 US 709 (2012).

records.⁶⁶ Nor, on the facts in *Alvarez*, could the Government point to any lessening among the public of the esteem in which recipients of the *Medal of Honor* were held as a result of Alvarez's lies. Even if *Medal* holders experienced anger and frustration, these feelings did not by themselves evidence a loss of integrity in the military honours system. In any event, the latter interest could have been advanced through counterspeech and refutation of Alvarez's lies.⁶⁷ The underlying principle behind the Court's hostility to the Stolen Valor Act was put thus by Justice Kennedy for the four justice plurality.

Permitting the government to decree this speech to be a criminal offense ... would endorse government authority to compile a list of subjects about which false statements are punishable...Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition.⁶⁸

The problem of propaganda and disinformation is not new. Office holders have long used their control/influence over the production and dissemination of news to shape certain preferred narratives. To take just one example, in the final war of the Roman Republic between Octavian and Marc Antony in 32-30 BC, coinage was minted in Rome that described Octavian as republican, virtuous and traditional, whilst his adversary Marc Antony was condemned as a monarchist, philanderer and drunk. In the modern era, professional journalists and their news outlets have not always been the impartial carriers of truthful news or acted with professional integrity in the manner expected of 'responsible media'. Some working in leading media organisations have been found to have fabricated material.⁶⁹ Others have had to leave their positions after accusations of plagiarism⁷⁰ or have admitted

⁶⁶ It was not for example limited to cases where the deliberate falsehood was made to secure financial gain or an offer of employment.

⁶⁷ For the contrasting argument that some forms of counter speech (bots and 'troll armies') threaten public discourse see T Wu, 'Is the First Amendment Obsolete?' (2018) 117 *Mich. L. Rev.* 547.

⁶⁸ 567 US 709 (2012) at 723. For discussion see D Beschle, 'Fake News, Deliberate Lies, and the First Amendment' (2019) 44 *U..Dayton L. Rev.* 209.

⁶⁹ <https://www.vanityfair.com/style/2004/12/nytimes200412?verso=true> (Jayson Blair in the New York Times)

⁷⁰ <https://www.theguardian.com/media/2012/jan/20/johann-hari-quits-the-independent> (Johann Hari, *The Independent*).

using misleading readers about an interviewee's opinions.⁷¹ More troublingly than instances of individual journalists' failings, the notorious *Zinoviev Letter* in 1924 revealed collaboration between the Conservative Party MI5, MI6 and *The Daily Mail* to discredit the Labour Party and its leader Ramsay MacDonald during the 1924 General Election campaign.⁷² During the General Election campaign of 1945, *The Daily Express* warned of a Gestapo-style assault on personal freedoms if the Labour Party led by Clement Attlee was elected.⁷³

Unprofessional conduct extends to the unedited reproduction of official government press releases that are passed off as the journalistic endeavour of a reporter. Writing in 2009 Nick Davies observed how some journalists lazily recycled press releases issued by Government departments without filtering or adding context or subjecting official accounts to any critical examination.⁷⁴ Today, with greater resource constraints on investigative journalism, scrutiny of governmental conduct has become, if anything, more endangered.⁷⁵

In the case of 'misinformation', most would question whether 'objectivity' in news production so highly prized by the Council of Europe and journalists' codes of ethics is ever achievable. Despite high ideals, professional journalists cannot avoid forms of unconscious bias to which all of us are prone and deploy to navigate the world around us. In deciding which facts to include and which to deem peripheral or irrelevant to the story being covered, the published story cannot avoid saying something about the political viewpoint of the narrator. Institutional biases derived from dominant organisational cultures will also be present. Tone and emphases in reporting can convey in more or less subtle ways the perspective of the writer/editor. Although subject to statutory duties of impartiality and

⁷¹ <https://www.newstatesman.com/politics/uk/2019/05/scruton-affair> (George Eaton, *New Statesman*).

⁷² G Bennett, *The Conspiracy that Never Dies - The Zinoviev Letter* (2018, OUP, Oxford)

⁷³ J Thomas, *Popular Newspapers, the Labour Party and British Politics* (2005, Routledge, London) at p.15. The paper had repeated Churchill's infamous radio attack (made on 4TH June 1945) on his erstwhile government colleagues under the headline 'GESTAPO IN BRITAIN IF SOCIALISTS WIN'.

⁷⁴ N Davies *Flat Earth News* (2009, Vintage, London) pp.88-90.

⁷⁵ The Cairncross Review makes the point that '(i)nvestigative journalism and democracy reporting are the areas of journalism most worthy and most under threat.' at *Executive Summary* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf (last accessed September 2019).

accuracy,⁷⁶ academic analyses of the BBC's output for example has provided evidence of particular biases in terms of favourable/unfavourable coverage of specific topics including, but not limited to, the UK Government's austerity proposals in 2009⁷⁷ the Scottish Independence Referendum in 2014⁷⁸ and the Arab-Israeli conflict.⁷⁹ One study of the ideological range of think tanks informing BBC programming recorded references to these bodies in two years 2009 (during a Labour Government) and 2015 (during the Conservative-led coalition).⁸⁰ The study revealed that there was a 'broad balance' between left and right-leaning think tanks in 2009. By 2015 however, right-leaning think tanks (e.g. Royal United Services Institute, Centre for Social Justice, Institute for Economic Affairs) were almost twice as likely to be referenced in news and current affairs programmes as left-leaning think tanks (e.g. Electoral Reform Society, Fabian Society, Institute for Public Policy Research).⁸¹

Failure to publish news stories can also mislead. Sometimes, by virtue of the very close proximity inhabited by national politicians and professional media, mainstream journalists can risk the loss of valued sources if they publish stories that annoy and/or embarrass politicians. It is not far-fetched to suppose that fears of upsetting highly-placed sources and losing future exclusives can lead in some instances to acts of self-censorship and a consequently misinformed public sphere.⁸²

⁷⁶ Communications Act 2003, ss.319-21 and OFCOM Broadcasting Code section 5. For comment see J Rowbottom *Media Law* (2018, Hart, Oxford) pp.280-288 noting at 282 the general point that 'it is difficult for any political coverage to be truly impartial'.

⁷⁷ M Berry, 'No alternative to austerity: how the BBC broadcast news reported the deficit debate' (2016) 38 *Media Culture and Society* 844 revealing BBC journalists' repeated and unchallenged expression of the view that Britain was about to be abandoned by its international creditors unless austerity measures adopted.

⁷⁸ A Grieg, 'Sentiment Analysis of the BBC's Digital Content during the 2014 Scottish Independence Referendum Campaign' (2016) 25 *Scottish Affairs* 419 - finding evidence of more favourable treatment of the 'No' campaign.

⁷⁹ I Gaber, E Seymour & L Thomas, 'Review Commentary: Is the BBC biased?: The Corporation and the coverage of the 2006 Israeli-Hezbollah war' (2009) *Journalism* 239 - disclosing bias in coverage of Arab-Israeli conflict towards Israel);

⁸⁰ J Lewis & S Cushion, 'Think Tanks, Television News and Impartiality' (2019) 20 *Journalism Studies* 480.

⁸¹ *Ibid.*, at pp.490-92. According to the authors the preference for right-leaning think tanks was most pronounced in two current affairs programmes *The Daily Politics* and *Newsnight* - each with a ratio six to one in favour of right-leaning think tanks..

⁸² N Davies, *Flat Earth News* (2009, Vintage, London) recalls a threat made by Peter Mandelson to *Financial Times* journalist Ivo Downey at p.121 after Mandelson read something that he did not approve.

Over 50 years ago, the US Supreme Court in *New York Times v Sullivan* ruled on the issue of whether speakers on matters of public interest could be denied constitutional protection where they were unable to establish the truth of their factual claims.⁸³ False statements were held by the Court to be entitled to First Amendment protection from state defamation laws in the absence of actual malice (or disinformation), that is where the speaker knowingly publishes a false statement or has serious doubts about its veracity but publishes nonetheless. Writing the opinion of the Court, Justice Brennan approvingly cited the Court's earlier observation in *Cantwell v Connecticut*,⁸⁴

In the realm of religious belief, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have long ordained in the light of history, that in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of citizens of a democracy.

To which he added his own codicil.

That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need .. to survive'.⁸⁵

Justice Brennan's opinion is a defence of a conflicted public sphere, one exhibiting non-deliberative features of participative pluralism. Judicial reluctance to become fact-triers in contested political disputes is not confined to US First Amendment jurisprudence however. Domestically, the decision of the High Court to dismiss a private prosecution against prominent Brexit campaigner Boris Johnson (then simply) MP for misconduct in a public office suggests that UK courts have no appetite to arbitrate on factual matters either, at least

⁸³ 376 US 254 (1964). For analysis among many see *inter alia* H Kalven, 'The New York Times Case: A Note on "The Central Meaning of the First Amendment"' [1964] *Sup Ct Rev* 191. For background on the case see A Lewis, *Make No Law – The Sullivan Case and the First Amendment* (1991, Vintage Books, New York).

⁸⁴ 310 US 296, 310.

⁸⁵ 376 US 271-2.

in the context of highly contested election/referendum campaigns.⁸⁶ Initially Westminster Magistrates Court had granted a summons to an applicant, Marcus Ball, who alleged that Johnson had

repeatedly lied and misled the British public as to the cost of EU membership, expressly stating, endorsing or inferring that the cost of EU membership was £350 million per week.⁸⁷

At the time of writing, details of the High Court's reasons have yet to be published.

To its critics, the notion of a 'breathing space' for speech about politics and public affairs promotes irresponsible, negligent forms of journalism in which allegations are lazily reported without adequate verification and editorial checks. When speakers are thus overprotected, an informed democracy becomes threatened. Brennan anticipated this criticism in footnote 19 of his opinion by referring to Mill's defence of false statements. Mill believed that the clash between falsehood and truth produced a 'clearer perception and livelier impression of truth.'⁸⁸ His defence however is usually understood to refer to assertions of opinion, rather than false statements of fact.⁸⁹ Might nonetheless a case exist for including false statements of fact within a free speech principle? The starting point of any analysis is to acknowledge that where the state is permitted by law to proscribe 'false statements', the door is opened for political uses of the power. Consider for example the use of the power to ban false statements about historical events. How might we be certain that banning power was not used to advance the interests of incumbent office holders? Schauer has pointed out a separate basis for querying a power to exclude false statements from public discourse, namely the effect of inducing self-censorship in respect of some statements that will later turn out to have been true.⁹⁰ Self-censorship occurs because of the uncertainties that attach to establishing the truth of a particular claim to a standard that

⁸⁶ *Johnson v Westminster Magistrates' Court* (2019) dismissing summons issued by Westminster Magistrates Court, see report at <https://www.lawgazette.co.uk/news/johnson-prosecution-quashed-by-high-court/5070539.article>

⁸⁷ *Ibid.*

⁸⁸ *On Liberty* (1947, Blackwell, Oxford) at p.15.

⁸⁹ See E Barendt, *Freedom of Speech* (1985, Clarendon Press, Oxford) at p.12, cf K Greenawalt, *Speech, Crime and the Uses of Language* (1989, OUP, New York) at p.17.

⁹⁰ F Schauer, *Social Foundations of the Law of Defamation – A Comparative Analysis* (1980) 1 *J Media L & Practice* 3,11.

would satisfy a court. Professional journalists aided by significant organisational resources sometimes struggle to reach this degree of certainty about a statement's truthfulness. The lone blogger is plainly at an even greater disadvantage in this regard. As is widely known, in domestic law *Reynolds* did fashion a degree of generic (i.e. not confined to cases of political expression) protection for false speech under the qualified privilege defence in defamation claims where the publisher could satisfy a complex, multi-factored (and non-exhaustive) test of 'responsible journalism'. The test is generally considered to have been reproduced in s.4 of the Defamation Act 2013. It is more likely today however that public figure claimants in defamation cases will demand that website operators remove posts alleged to be libellous. In respect of online posts from persons whom the website operator is able to contact, the complexities of the timed procedural steps a website operator must comply with in order to retain the benefit of the s.5, 2013 Act have the ironic effect of making it more likely for website operators to prefer posters to remain anonymous. Under paragraph 3 of the accompanying regulations, the posts of anonymous speakers may be taken down upon complaint from a claimant without the need for the operator to engage further with the poster.⁹¹

The republican precept that the people give (and re-give) themselves the laws requires rejection of imposition of liability for factually inaccurate accounts of public officials' conduct. To hold otherwise is to curtail severely the freedom of citizens to criticise those in power. Official designations of, and consequent privileges for, 'trusted' news sources and content carry clear risks for a vibrant version of political pluralism. Such a system is akin to a system of media licensing where government officials or a body appointed by government confer approved status according to the content and tone of expression. How could we be

⁹¹ Defamation (Operators of Websites) Regulations 2013. See for comment A Bedat, 'Defamation Act 2013: The Section 5 Regulations, cumbersome and of questionable benefit?' (2014) March 7 at <https://inform.org/2014/03/07/defamation-act-2013-the-section-5-regulations-cumbersome-and-of-questionable-benefit-alexia-bedat/#more-25635> (last accessed September 2019).

sure that a 'trusted' news provider reported freely on matters that embarrassed the Executive?⁹²

The present inclination on the part of bodies like the House of Commons DCMS Select Committee to entrust corporately-owned for profit social media platforms with the task of determining truths and falsehoods, disinformation and misinformation raises acute issues of democratic accountability. These have not been adequately addressed in the UK to date and yet throw up even less accountable forms of regulation than those posed by a system of state licensing. At least state licensors (or the officials appointing them) still have to submit themselves periodically to the people for re-election. Most of course would not object to the decision by *Facebook* in late 2016 to remove deliberately false statements made at the time of the US Presidential Election including the claim that Pope Francis had indicated his support for Donald Trump.⁹³ We might also agree that false statements on Election Day about the closure of a polling station or lengthy queues of voters pose immediate and clearly identifiable risks to the integrity of the electoral process. Can corporate gatekeepers always be trusted to safeguard legitimate interests in freedom of expression however? What of statements that are critical of business practices/privacy violations of social media corporations? Might digital platforms be tempted to make these less visible to users on their news feeds? Attempts to crack down on 'false' news might even catch spoof stories or satirical/ironical content intended to mock certain orthodox/mainstream political positions. For its part, the Commons Digital Culture Media and Sports Select Committee concluded that social media companies should be required to develop tools that enable users to

⁹² See in this regard Burger CJ's comments in *National Bank v Bellotti* 435 US 765 (1978) at 801. 'The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England... The officials undertaking that task would be required to distinguish the protected from the unprotected on the basis of such variables as content of expression, frequency or fervor of expression, or ownership of the technological means of dissemination.' By contrast Singapore has now introduced a 'fake news' law that requires online media platforms to take down content the government considers to be false, see <https://www.reuters.com/article/us-singapore-fakenews/singapore-fake-news-law-set-to-come-into-force-on-wednesday-idUSKBN1WG3ND> (last accessed October 2019).

⁹³ N Wingfield, M Isaac & K Benner, 'Google and Facebook Take Aim at Fake News Sites' *New York Times* (2016) November 15.

help them distinguish between quality journalism, and stories coming from organisations that have been linked to disinformation or are regarded as being unreliable sources... The requirement for social media companies to introduce these measures could form part of a new system of content regulation, based on a statutory code, and overseen by an independent regulator⁹⁴

Though unacknowledged by the Committee, this would seem to carry certain risks of official/corporate privileging of mainstream, professional content and viewpoints to the detriment of other speech.

An acknowledgement of the potential role to be played by speech-friendly solutions to perceived problems of disinformation and misinformation is tucked away towards the end of the Digital Culture Media and Sports Committee's *Interim Report* in chapter 7 entitled 'Digital Literacy'. This short section of the Report advocates making digital literacy the fourth pillar of education (after reading, writing and numeracy) so that new generations of users understand more effectively how algorithms used by *Facebook* and *Google* are created based on users' online behaviours and profiles. The Committee urges the teaching of skills of critical thinking in order to evaluate content. The suggestion that online political advertisements be made more transparent via a searchable repository that reveals who has paid for/sponsored the advertisement may help recipients figure out who is behind digital content.⁹⁵ These 'more speech' solutions to the problems of disinformation and misinformation appear much less objectionable from a perspective that values the on-going right of citizens to participate in the making of the laws.

The narrow pluralism of 'rational discourse' and the agonist response

Then - this is all what you say - new economic relations will be established, all ready-made and worked out with mathematical exactitude, so that every possible question will vanish in the twinkling of an eye ...everything will be extraordinarily rational... (Yet) man everywhere

⁹⁴ *Disinformation and 'Fake News': Final Report* (8th Report 2017-19) February 2019 at <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1791/1791.pdf> (last accessed September 2019) at para.314.

⁹⁵ See the Committee's Recommendation at para.215, *Disinformation and 'Fake News': Final Report* (8th Report 2017-19) February 2019 at <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1791/1791.pdf> (last accessed September 2019).

and at all times has preferred to act as he chose and not in the least as his reason and advantage dictated. And one may choose what is contrary to one's own interests, and sometimes one *positively ought*... How do these wisecracks know that man wants a normal, virtuous choice? What has made them conceive that man must want a rationally advantageous choice?

- F Dostoyevsky *Notes from the Underground*

In the previous section, the fears of the Digital Culture Media and Sport Select Committee concerning a reduction in reasoned, civil debate and its adverse impact on the 'very fabric of democracy' were noted.⁹⁶ The argument made here is that official support for 'rational' 'truthful' and 'civil' forms of public discourse has the downside of narrowing political pluralism. The ways in which political conflicts are tamed by appeals to reason and civility can now be set down. Initially however the connection between deliberative democracy and rationalism can be briefly restated.

Liberal pluralism in its deliberative democracy variant associated with Rawls and Habermas sets out to overcome different political viewpoints and the conflicts they provoke through an appeal to abstract, rational and respectful discourse. Even though holding different conceptions of the good life, the deliberative citizen stripped of class, gender, race, culture is held out as being able to reach agreement with fellow citizens on substantive outcomes that advance the common good under certain discursive conditions. For Rawls in *A Theory of Justice* this occurs behind a veil of ignorance about one's social position⁹⁷; for Habermas in his *Theory of Communicative Action* it is secured via ideal speech conditions that allow the better arguments to come to the fore.⁹⁸ Human progress towards universalizable truths is thus attained via objective facts, public reason giving, reciprocity and inclusivity. Speakers learn how to interrogate and argue respectfully with each other as they move towards an unforced consensus. They are made more virtuous interlocutors.⁹⁹

⁹⁶ House of Commons Digital Culture Media and Sports Select Committee Final Report (February 2019) *Disinformation and 'fake news'* Summary available electronically at <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmums/1791/1791.pdf>

⁹⁷ *A Theory of Justice* (1971, Harv Uni Press, Mass).

⁹⁸ *Theory of Communicative Action* (1984, Polity Press, Cambridge).

⁹⁹ Deliberate democrats are unwilling to make more extensive claims about *human* perfectibility (as opposed to the perfectibility of *citizens*). They share with liberalism a pluralist objection to comprehensive accounts of human flourishing and excellence found in Aristotelian republican

The element of 'rational' discourse' in deliberative democracy is problematic on a number of fronts. At a philosophical level, rationalism is open to the existentialist objection that it fails to capture fully the reality of human existence. In literary form this failure is best captured by Dostoyevsky's *Underground Man* who criticises ideas of rational progress and utopianism. Ascertaining via scientific rational principles what people needed or wanted would ultimately fail to satisfy. For Dostoyevsky, the desire to act perversely, to choose chaos, disorder and personal suffering could never be taken out of people. The freedom to express and implement irrational choices is a part of the flawed human character.¹⁰⁰

In political terms, an emphasis upon the 'rational' in political expression functions to usher in a depoliticised or 'post-politics' era of managerialism or technocratic policy-making dominated typically by experts and elite groups of opinion-formers in 'think tanks' and the professional media. As Breen notes 'every invocation of the rational or 'reasonable' presumes a delimitation of the 'unreasonable' '.¹⁰¹ A displacement of ordinary citizens from the centre of political decision-making thus occurs as 'neutral' experts frame and lead the evaluation of policy options. The demos is conceived largely in Schumpeterian terms as recipients of elite speech and only dimly capable of understanding political argument. An emphasis upon 'rational' debate serves in a complementary manner to exclude potentially valuable, though speculative assertion from ordinary speakers when constitutional protection is preconditioned on establishing the truth of a claim or the factual premises which underpin it.

From an agonist perspective, the deliberative democrat's search for common good solutions in order to *conclude* political debates denies the authentically tragic vision of

theories. This leaves deliberative democracy accounts vulnerable to doubts concerning how the character traits needed in deliberative settings can be developed without also being cultivated more deeply in non-political spheres of human life. To believe that citizens who are otherwise self-interested in non-public spaces can be transformed in public deliberative spaces into virtuous seekers of the common good may be unduly sanguine. See P Weithman, 'Political Republicanism and Perfectionist Republicanism' (2004) 66 *The Review of Politics* 285. See also R Dagger, *Civic Virtues: Rights Citizenship and Republican Liberalism* (1997, OUP, Oxford).

¹⁰⁰ Among other commentaries, see W Barrett, *Irrational Man - A Study in Existential Philosophy* (1990, Anchor Books, New York) at pp.138-9.

¹⁰¹ K Breen, 'Agonism, Antagonism and the Necessity of Care' in A Schaap (ed) *Law and Agonistic Politics* (2016 Routledge, London) at p.136.

democratic self-government in which conflict and dispute are intrinsic, ongoing/unending features of life in the political sphere. When deliberative democrats insist that we assume the role of 'rational' interlocutors with others in political debate, they deny lived experiences of hierarchical power relations. The US abolitionist and escaped slave Frederick Douglass' *Fourth of July Address* (1852) imagined a member of his audience criticising Douglass for failing to 'argue more' and 'denounce less'. Were he to do so, his cause would likely gain new support. Douglass' response was that the appalling situation of the slaves required urgent, non-deliberative, impassioned articulation.

At a time like this, scorching irony, not convincing argument, is needed. O! had I the ability, and could reach the nation's ear, I would to-day, pour out a fiery stream of biting ridicule, blasting reproach, withering sarcasm, and stern rebuke. For it is not light that is needed, but fire.¹⁰²

The idea of political discourse as comprising ineradicable, on-going disagreement between differently situated groups and individuals can be traced back to European thinking in Renaissance times. Machiavelli in *The Discourses* broke significant new ground when he talked up the liberty-enhancing potential of discord and disharmony in his analysis of Ancient Rome.¹⁰³ Post Enlightenment, Max Weber accepted Nietzsche's assertion about the end of an objective order of Christian values. In the modern era of disenchantment, men and women would be destined to struggle endlessly over values and ethics. Our highest ideals, Weber argued, 'are always formed in the struggle with other ideals which are equally sacred to others as ours are to us.'¹⁰⁴ For agonists, no reconciliation between conflicting worldviews is possible nor should it be attempted. Taking pluralism seriously means abandoning the

¹⁰² *What to the Slave is the Fourth of July?* Available electronically at https://alexu.asian.lsa.umich.edu/courses/readings/Douglass_What%20to%20the%20Slave%20is%20the%20Fourth%20of%20July%3F.pdf (last accessed September 2019). see further J Frank, 'Staging Dissensus: Frederick Douglass and "We, the People"' in A Schaap (ed) *Law and Agonist Politics* (2008, Ashgate, Abingdon).

¹⁰³ *Discourses on Livy* (1997, OUP, Oxford) Book 1 ch.4.

¹⁰⁴ M Weber *The Methodology of the Social Sciences* (1949, New York, Free Press) at p.57. See also P Lassman, 'Political Theory in an Age of Disenchantment: The Problem of Value Pluralism: Weber, Berlin, Rawls' (2004) 4 *Max Weber Studies* 253. Lassman comments that unlike Machiavelli and Nietzsche who both saw the creative possibilities of political conflict, Weber is considered as having shown a 'resigned acceptance' of the idea of such on-going conflict at 261.

search for a rational consensus.¹⁰⁵ On this view, the democratic life ‘presupposes incompleteness, uncertainty and openness’.¹⁰⁶ Conceived thus, the function of constitutional guarantees of expression in liberal democracies is to facilitate the on-going expression of these conflicting views whilst preventing the disintegration of democratic politics and political association into forms that threaten the immediate survival of the democratic institutions or the active involvement of citizens in their on-going design.¹⁰⁷ The law’s denial of free speech protection to disaffected groups and individuals considered to communicate in ‘hateful’, ‘abusive’ ‘indecent’ or ‘grossly offensive’ ways silences political expression in imprecise, unpredictable ways. Exclusion from the political arena can occur directly as where the state penalizes a range of controversial and dissenting viewpoints via the criminal law or indirectly by powerful non-state actors such as Google and Facebook who enforce ‘acceptable use’ policies to keep out certain viewpoints in democratically unaccountable ways. In the case of Twitter for example under the section of *Hateful conduct policy* users are warned

Repeated and/or non-consensual slurs, epithets, racist and sexist tropes, or other content that degrades someone. We prohibit targeting individuals with repeated slurs, tropes or other content that intends to dehumanize, degrade or reinforce negative or harmful stereotypes about a protected category. This includes targeted misgendering or deadnaming of transgender individuals.¹⁰⁸

The terminological inexactitude of the above policy (replicated elsewhere in the document¹⁰⁹) potentially cuts against a range of disfavoured political viewpoints on important societal

¹⁰⁵ C Mouffe, *The Democratic Paradox* (2005, Verso, London) ch.4

¹⁰⁶ P Tambakaki, ‘The Tasks of Agonism and Agonism to the Task’ (2014) 20 *Parallax* 1, 2.

¹⁰⁷ Where it can be causally established that some speech silences others who might wish to contribute to public discourse, an argument may be made for regulating the speech that silences on the basis that all the citizens must be free to participate in the design of laws and institutions. Caution is needed here however. The agonist’s acceptance of conflict and discord among the people as an ontological given demands some level of fortitude and resilience among citizens if they are to participate in public discourse. Online subaltern publics where like-minded citizens can offer mutual support provide one means by which fortitude may be nurtured to enable participation in wider public forums. In republican political theory the state has a substantial role in inculcating among citizens the sorts of virtues that enable them to withstand the vicissitudes of public life.

¹⁰⁸ <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> (last accessed September 2019).

¹⁰⁹ See for example the section dealing with ‘Abusive behaviour’ which states ‘In order to facilitate healthy dialogue on the platform, and empower individuals to express diverse opinions and beliefs, we prohibit behavior that harasses or intimidates, or is otherwise intended to shame or degrade others.’ at <https://help.twitter.com/en/rules-and-policies/abusive-behavior> (last accessed September 2019). For a different example from Facebook of conceptual confusion see <https://newsroom.fb.com/news/2017/06/hard-questions-hate-speech/> which includes the statement:

matters.¹¹⁰ Exclusion on such loosely-formulated grounds goes more fundamentally to the relationship between the citizen and the polity. It risks the citizens' capacity to identify with the state and its decision-making processes and hence diminishes the democratic legitimacy of policy outcomes.¹¹¹ This likely overbreadth is compounded by the fact that it is overseen by an unelected *Twitter* staff whose primary duty is to add value for shareholders rather than protect robust exchanges between rival viewpoints on matters of public interest. The policy statement's reference to 'slurs' and 'epithets' extends corporate regulation to safeguarding the civility or tone of expression where the state via criminal law already plays a significant role.¹¹²

Civility constraints on political pluralism

Civility appears as a neutral demand in public discourse. In truth however, the deliberative public sphere is a construct favouring certain agents and disfavouring others. Those unable or unwilling to adapt to prevailing communicative norms find themselves shut out.¹¹³ Feminist scholars in the US have rightly been critical of attempts to enforce civility rules in public discourse, noting how it preconditions entry into the political sphere. When a speaker is classed as 'uncivil' this reflects a set of social assumptions about how a particular speaker ought to address his/her audience.¹¹⁴ The successful campaigns of emancipatory politics - the ending of slavery, the enfranchisement of women and African Americans - might not

'Sometimes, it's obvious that something is hate speech and should be removed – because it includes the direct incitement of violence against protected characteristics...' (last accessed September 2019)

¹¹⁰ It must be doubtful for example whether *Twitter* policy would allow a speaker to argue that a portion of taxpayers' monies should be diverted away from funding transgender surgery towards cancer or coronary disease treatments.

¹¹¹ In Robert Post's view these constraints on public discourse would strike at the conviction that the state is responsive to the concerns and values of each of its citizens and that each of us has the potential to influence the outcome of public discourse, see R Post, 'Democracy and Equality' (2006) *ANNALS of the American Academy* 24.

¹¹² For the argument that penal laws prohibiting communications considered 'grossly offensive or of an indecent ...character' under s.127 of the Communications Act 2003 strikes excessively at robust contestation in political debates see I Cram, *Citizen Journalists: Newer Media, Republican Moments and the Constitution* (2015, Elgar, Cheltenham) and U Kohl, 'Islamophobia, 'gross offensiveness' and the Internet' (2018) 27 *ICTL* 111.

¹¹³ G Eley, 'Nations, Publics and Political Cultures: Placing Habermas in the Nineteenth Century' (ed C Calhoun) *Habermas and the Public Sphere* (1992, MIT Mass); M Ryan, *Women in Public: Between Banners and Ballots 1825-1880* (1990, Johns Hopkins, Baltimore).

¹¹⁴ B Tomlinson, *Feminism and Affect at the Scene of Argument: Beyond the Trope of the Angry Feminist* (2010, Temple Uni. Press, Pennsylvania).

have succeeded when they did if liberalism's duty of civility had been practiced by those campaigners.¹¹⁵ Sometimes civility will not suffice to focus public officials' attention on a deeply held grievance. Frederick Douglass' deliberate refusal to address his audience in respectful, non-emotional terms in his *Fourth of July address* was referred to above. The atrocities of slavery demanded words that discomfited his audience. Douglass' resort to uncivil speech could be said to point up a failure on the part of power holders to address the claims of inferiorly situated others.¹¹⁶

Concluding thoughts – containing the risk of constituent power

Liberal democratic constitutions could of course welcome the participative potential offered by digital speech. They might cheer the fact that user-generated content marks a democratisation of speech that holds out the possibility of holding elites to account and the opening up of public discourse to multiple, conflicting accounts and opinions in what Nancy Fraser has called 'subaltern counter-publics'. Subaltern public spaces open up in response to the fact of exclusion in 'dominant publics'. They enable citizens on the margins of mainstream forums are able to regroup and prepare for 'agitational activities directed to wider publics'.¹¹⁷ These spaces need not be necessarily virtuous but what they do allow for is contestation of assumptions that were hitherto unchallenged in the dominant publics. In this way, Fraser argues, the subaltern expands discursive spaces.¹¹⁸

¹¹⁵ L Zerilli, 'Against Civility: A Feminist Perspective' in (ed A Sarat) *Civility, Legality and Justice in America* (2014, CUP, New York)

¹¹⁶ Barbara Tomlinson, *Feminism and Affect at the Scene of Argument: Beyond the Trope of the Arrogant Feminist* (2010, Temple Univ Press, Pennsylvania) observes that what is described as an 'uncivil' voice 'is presented through conventional social assumptions derived racial, class or gender stereotypes about how certain individuals should speak. A feminist who makes the case for equal pay will thus sometimes be cast as a 'strident' speaker.

¹¹⁷ N Fraser, 'Rethinking the Public Sphere' in (ed C Calhoun) *Habermas and the Public Sphere* (1992, MIT Mass) 109 at 124. Taking arguments to 'wider publics' is however vital if these subaltern counter-publics are not simply to function as 'echo chambers' to the disadvantage of both speakers and the vast majority of citizens beyond the subaltern space. For a deliberative democratic take on the debilitating effects of 'echo chambers' on democratic self-government see C Sunstein, *#republic – Divided Democracy in the Age of Social Media* (2017, Princeton Uni Press, New Jersey).

¹¹⁸ *Ibid.*

The agonistic model of political pluralism set out in this article resists the closure of channels of political participation effected by rival versions of pluralism. The discussion has shown how prevailing accounts of political communication (in both their liberal elite and deliberative versions) privilege a narrowed political pluralism that tames the demos by closing down opportunities for popular speech and slowing down politics. The concern for orderly, rational and respectful public discourse is intended to avoid 'the spectacle of turbulence and contention' of constituent power. The liberal elite account seeks to shore up representative forms of indirect, mediated democracy in the face of threats from 'populism' and 'fake news'. At times, as shown *inter alia* by the Strasbourg Court and other Council of Europe organs such as European Audiovisual Observatory, the paradigm communicative shift in favour of democratised speech that has occurred in the 21st century is simply overlooked. Deliberative democratic accounts at least acknowledge and seek to address the problem of ordinary citizen engagement in political decision-making. But by excluding all but the rational, consensus-seeking, civilised speaker, deliberative accounts of political pluralism impede the creative power of the demos. In consequence, very little contestatory discourse is let in.

I have argued here that conflict, contestation and contingent stabilisations of political struggles are the essence of the democratic tradition in which the people author the laws under which they live. This position is grounded upon a healthy scepticism about official (and corporate) categorisations of 'fake news'. It accepts the partisan nature of much, if not all, discussion about politics by imperfect citizens (as well as by imperfect professional journalists/outlets). It does not dispute the existence of factual error and weak reasoning in political debate but, in discounting arguments for legal sanction upon inaccuracy and deliberate falsehood in matters of political expression, it rejects official/corporate reinforcement of 'rational' and 'civil' forms of discourse. The failure in current official thinking to explore more fully the effectiveness of counter/more speech solutions to the problem of disinformation and misinformation is regrettable.

At the same time, the broad account of political pluralism defended here accepts that constituent power cannot be allowed to descend into arbitrary and autocratic forms of government that close off avenues of citizens' political participation. The very idea of democratic openness that animates agonism rules out the possibility that the constituent power could ever be used to deny future exercises of the constituent power. Thus the freedom to engage in political expression could not be invoked to cause immediate and direct damage to the integrity of the electoral process as might occur in cases of false claims on election day about the closure of a polling station. Neither could it be invoked by speakers whose effect is to alienate all other citizens from entering the realm of public discourse. The rights and institutions necessary to facilitate the constituent power of all citizens are required to be preserved at all times.¹¹⁹

¹¹⁹ J Colon Rios, *Weak Constitutionalism* (2012, Routledge, Abingdon) ch.3.