

‘Misinformation in a Digital Age: A Comparative Analysis of how Legislation in the UK,
Ireland, Australia, Hungary and the USA is Dealing with False Online Information’

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Candidate Declaration

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I certify that the dissertation entitled: 'Misinformation in a Digital Age: A Comparative Analysis of how Legislation in the UK, Ireland, Australia, Hungary and the USA is Dealing with False Online Information' submitted for the degree of: LLM in International Human Rights is the result of my own work and that where reference is made to the work of others, due acknowledgment is given.

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Abstract

In this dissertation it was shown how damaging online misinformation can be and the different jurisdictional legal instruments employed examine misinformation in a digital age – what misinformation is; the different legal and policy instruments used to reduce misinformation in the EU, the UK and America; the difficulties in identifying and tackling misinformation, and potential solutions to tackle misinformation on social media and on the internet. This dissertation examined the strengths and weaknesses of each piece of legislation and the difficulties in tackling misinformation. Issues identified included the violation of human rights in any censorship model, the problems of appointing a censor, including bias, incorrect censoring and abuse of power. The author acknowledges that disinformation and misinformation has hugely negative implications but emphasises the need for academic freedom and dissenting views for the sake of innovation and scientific breakthroughs. The author also identified many examples of dismissing or censoring statements that subsequently turned out to be true. The conclusions drawn from this dissertation were that there were many methods available for the tech giants to reduce online misinformation, but that these methods should be used only when statements are obviously and objectively untrue and harmful, rather than enforcing a draconian regime that ultimately restricts truth.

Introduction

This dissertation is titled ‘Misinformation in a Digital Age: A Comparative Analysis of how Legislation in the UK, Ireland, Australia, Hungary and the USA is Dealing with False Online Information’. Misinformation is not a new or modern concept, but social media and the prevalence of misinformation on digital platforms have accelerated and amplified the speed of misinformation and the subsequent consequences.

In *Cyber Security: Law and Guidance*, Helen Wong¹ states:

A paper published in *Science* in March 2018² found fake news is spread faster, farther and more deeply than the truth, in some cases by several orders of magnitude. While this was true across all categories of information, the phenomenon was most noticeable when it came to political information. This latter point confirms research already done on political thinking, which shows that people attribute greater weight to ‘facts’ which confirm their pre-existing prejudices than to those which challenge them. The paper also found that people were more likely to share false news than true news, possibly because it is more novel, and hence more interesting³.

Misinformation spreading more rapidly than accurate content is alarming. Informed choices are centred on truth. If the public is misinformed, this can have a knock-on effect on voting, healthcare, dietary and travel choices to name a few.

There are many philosophical ways to define truth, including the correspondence theory, the coherence theory and pragmatist theories. The correspondence theory refers to when people believe or say things that correspond to the way things actually

¹ Helen Wong, *Cyber Security: Law and Guidance* (1st edn, Bloomsbury 2018) 11.24.

² Vosoughi Deb Roy Sinan Aral, ‘The Spread of True and False News Online Soroush’ [2018] *Science* 1146.

³ Helen Wong, *Cyber Security: Law and Guidance* (1st edn, Bloomsbury 2018) 11.24.

are – to the facts.⁴ The Stanford Encyclopaedia of Philosophy centres personal belief to truth in the coherence theory - ‘A belief is true if and only if it is part of a coherent system of beliefs.’⁵ Charles Sanders Peirce was credited with the pragmatist belief that ‘Truth is the end of inquiry.’⁶ This is an overly simplified definition of truth. Just because something is accepted or is no longer challenged doesn’t make it true. Another pragmatist theory is ‘Truth is satisfactory to believe’.⁷ This is also an over simplified definition. Just because something is satisfying to believe doesn’t make it true. All these theories are unsatisfactory from a policy or legal perspective in that there are no clear lines on how a court, moderator or a regulatory body would incorporate these into guidelines on allowing truth and removing misinformation.

This dissertation will touch on the difficulties in measuring truth but will focus primarily on the legislative attempts to preserve truth in reducing online misinformation. As well as identifying the strengths and weaknesses of each legislative instrument to tackle online misinformation, this dissertation will suggest ways to address any legislative limitations. It will also identify the difficulty in determining what is true and what is false, and the consequences of censorship.

This dissertation is broken into three chapters – Chapter One will explore freedom of speech and restricting falsities; Chapter Two will explore the problems in separating truths and falsities; and Chapter Three will explore the practicalities of the different pieces of legislation including the UK’s Online Safety Bill⁸, Hungary’s Act XII of 2020 on the Containment of the Coronavirus⁹, America’s Health Misinformation Act of 2021¹⁰, Ireland’s Online Safety and Media Regulation Bill 2022, Ireland’s Consumer Protection Act 2007 and Australia’s Therapeutic Goods and Advertising

⁴ ‘Truth’ *The Stanford Encyclopaedia of Philosophy*, <<https://plato.stanford.edu/entries/truth/>> accessed 6 August 2022, 1.1.1.

⁵ Ibid, 1.2.

⁶ Ibid, 1.3.

⁷ Ibid.

⁸ Online Safety Bill (121) <<https://publications.parliament.uk/pa/bills/cbill/58-03/0121/220121.pdf>> accessed 4 August 2022.

⁹ Act XII of 2020 on the Containment of Coronavirus, <<https://perma.cc/9LMR-YS3L>> accessed 27 July 2022.

¹⁰ Health Misinformation Act of 2021 <<https://www.congress.gov/bill/117th-congress/senate-bill/2448/text>> accessed 26 December 2021.

Code. Some issues examined may not have relevant legislation with an aim to mitigate this problem, in which case, guidelines, policies or ethics will be referred to instead.

The Methodology used in this dissertation will be doctrinal, comparative and socio legal analysis.

Chapter 1: Freedom of speech and restricting falsities

This chapter will briefly outline the legislation that relates to freedom of expression; what some philosophers think about the importance of freedom of speech; the irony of the Streisand Effect in attempting to restrict freedom of expression; the issue of freedom of expression in the media; freedom of expression and social media; the prioritisation of freedom of expression; and finally, freedom of speech in government.

Freedom of expression is outlined in Article 40.6.1 of the Irish Constitution – ‘The State guarantees liberty for the exercise of the following rights, subject to public order and morality – (i) The right of the citizens to express freely their convictions and opinions’.

Freedom of the press is a vital element of democracy guaranteed under the First Amendment of the American Constitution and other international instruments including Article 19 of the Universal Declaration of Human Rights, and Article 19 of the UN International Covenant on Civil and Political Rights. Article 10 of the European Convention on Human Rights (ECHR) provides for freedom of expression. Article 10(1) of the ECHR outlines the guarantee of freedom of expression and Article 10(2) lists the scenarios where the freedom may be curtailed or regulated:

Article 10 (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

Article 10 (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The Greek philosopher Aristotle said, “To say of what is that it is not, or of what is not that it is, is false, while to say of what is that it is, and of what is not that it is not, is true.¹¹” This is a rather long-winded process of elimination which links the recollection of an event to its reality. Aristotle is effectively saying that truth exists when the description of something matches its actual being. Hendrikvan Der Breggen paraphrased Aristotle in his article ‘Truth isn’t dead, the pursuit of it is dying’, when he said, ‘Truth is a condition or state of affairs that exists when a statement of what is the case, is the case. That a claim or proposition is true means it corresponds with or accurately represents what is the case in reality¹².’ Aristotle also suggests that the opposite of truth is false. This is a limited and restricted definition of both truth and falsities because it doesn’t take account of what someone perceives to be true, or an individual’s unique experience being true to them.

Different people experience different truths based on their own experiences. Two people can experience something at the same time but have different experiences. For example, a man and a woman can be sitting in a room at the same time. The woman might report that she is feeling cold, while the man might report that he is feeling warm. Both can be telling the truth about their experiences, although they are totally opposite experiences. It isn’t a false statement, although the experiences are completely different. Researchers at Tel Aviv University's School of Zoology suggest that men and women experience different temperatures because of the “built-in evolutionary difference between the heat-sensing systems of the two sexes, which is related, among other things, to the reproduction process and caring for offspring.¹³”

Just because something isn’t true for one person doesn’t mean it is false. For example, in the above scenario, the woman wouldn’t believe that the room is warm, but it is not correct to label ‘the room is warm’ as false statement, it’s just not true for the woman. Her subjective experience is that the room is cold. However, if the temperature in the room was at zero degrees Celsius, that room would be objectively at freezing point. In this scenario, it would be objectively false to say the room was warm.

¹¹ Metaphysics, (1011b25).

¹² Hendrikvan Der Breggen, ‘Truth isn’t dead, the pursuit of it is dying’ *Winnipeg Sun* (29 April 2021)

¹³ Tel-Aviv University, ‘New study reveals the evolutionary reason why women feel colder than men’ (*Phys.org*, 7 October 2021) <<https://phys.org/news/2021-10-reveals-evolutionary-women-colder-men.html>> accessed 12 June 2022.

Charles S. Peirce stated:

Truth is that concordance of an abstract statement with the ideal limit towards which endless investigation would tend to bring scientific belief, which concordance the abstract statement may possess by virtue of the confession of its inaccuracy and one-sidedness, and this confession is an essential ingredient of truth.¹⁴

This suggests that the search for truth is never-ending and open-ended, liable to change based on new evidence brought to light. Peirce's stance presumably relates to science and economic development. If it related to political views, it would entail a lot of flip-flopping. There is a restlessness to this theory and an instability to the notion of never fully accepting something as fact until all criticisms have been exhausted.

John Dewey believed that all inquiry, including technological, cultural, sociological, scientific, philosophical and medicinal, eventually becomes a self-corrective process if continually tested by people to refine or rebut proposed truths¹⁵. This concept of truth is somewhat clinical and, like most searches for truth, is academic in nature, and leaves little room for what religions propose as 'truths'.

Religious texts refer to 'truth' in a circular fashion. The Catholic Church deems something to be truth if the Bible says it is. In the Bible, Jesus claimed to be the embodiment of truth when he said, "I am the Way and the Truth and the Life; no one comes to the Father but through me."¹⁶ The Catholic Church has historically been known to clash with science. In the 17th century, the Italian astronomer, Galileo Galilei, published what he believed to be the truth of the geocentric system. In 1616, Galileo was warned by the Church not to promote his belief that the earth orbits the sun, because it contradicted the Church's teachings. After an inquisition, Galileo's book was banned by the Catholic church, and he was sentenced to one day in prison¹⁷.

¹⁴ J. M. Baldwin, 'Truth and Falsity and Error' *Dictionary of Philosophy and Psychology*, vol 2 (1901) para 5.565–573.

¹⁵ Richard J. Bernstein, *Encyclopedia of Philosophy* vol 2 (Macmillan, 1969) 383.

¹⁶ Bible: John 14:6.

¹⁷ Jessica Wolf, 'The truth about Galileo and his conflict with the Catholic Church' (UCLA, 22 December 2016) <<https://newsroom.ucla.edu/releases/the-truth-about-galileo-and-his-conflict-with-the-catholic-church>> accessed 12 June 2022, 12.

Galileo's theory turned out to be true. In 2000, Pope John Paul II apologised for how the church treated Galileo¹⁸.

In her article 'The truth about Galileo and his conflict with the Catholic Church', Jessica Wolf refers to other scientific texts on the universe which the church banned -

Also in 1616, the church banned Nicholas Copernicus' book "On the Revolutions of the Celestial Spheres," published in 1543, which contained the theory that the Earth revolved around the sun. After a few minor edits, making sure that the sun theory was presented as purely hypothetical, it was allowed again in 1620 with the blessing of the church.

Charles Darwin's book *On the Origin of Species* was never banned by the Christian churches, but its detail of how humans are descended from ape-like ancestors and the promotion of the theory of evolution was in direct contradiction to the church's teachings that all people are descended from Adam and Eve¹⁹ (which effectively suggests that humanity is an extremely large, inbred family). In 2008, the Vatican declared that the theory of evolution was compatible with the Bible, but it didn't apologise to Charles Darwin for how they treatment him²⁰.

Religions opposed the search for truth when that search contradict its teachings. What was known as "double truth" was a way of allowing the discussion of Aristotle's work in the thirteen century, despite the church branding it as heresy²¹. Double truths were used to consider a fact that is proven by reason and evidence, and considering what the church proposes as fact, which may contradict the former.

The relationship between truth and freedom of speech can bring with it many positives and negatives. While a person should be entitled to voice what is true *to them*, this could lead to the sharing of misinformation.

Referencing John Stuart Mill's argument in favour of free speech, Eric Barendt states - 'truth may be suppressed because it is objectively false. It is wrong to take this step

¹⁸ Tanya Lewis, 'The Catholic Church and science: a turbulent history' (*Livescience*, 11 March 2013) <<https://www.livescience.com/27790-catholic-church-and-science-history.html>> accessed 12 June 2022.

¹⁹ The Bible, Genesis 2:4-3:24.

²⁰ 'Vatican says it does not owe Darwin an apology' (*NewScientist*, 17 September 2008) <<https://www.newscientist.com/article/dn14751-vatican-says-it-does-not-owe-darwin-an-apology/>> accessed 12 June 2022.

since people holding true beliefs will no longer be challenged and forced to defend their views²².’

This statement suggests that reasoned debate is a guaranteed follow-up when someone makes a false statement. Secondly, it assumes that those who heard the initial incorrect statements will also hear the second correct rebuttal and, having weighed up both claims, believed the true one. Thirdly, it assumes that everyone someone tells a lie, someone will be there to rebut it with the truth, instead of another lie. Finally, it assumes that the general public have critical minds capable of weighing up two arguments using reasonable levels of logic.

Dawn Carla Nunziato’s article ‘Misinformation Mayhem: Social Media Platforms’ Efforts to Combat Medical and Political Misinformation’ outlines the dangers of rapidly spreading misinformation when it goes viral. She refers to a study done by the human rights group, Avaaz:

Avaaz examined the dissemination of "over 100 pieces of misinformation . . . about the virus that were rated false and/or misleading by reputable, independent fact-checkers and that could cause public harm." Avaaz's review found that "millions of the platform's users are still being put at risk," and that "the pieces of [false and/or misleading] content [sampled by Avaaz] . . . were shared over 1.7 million times on Facebook, and viewed an estimated 117 million times²³.

This study outlines the damage done by social media misinformation. There is no learned fact-checker correcting these misstatements and steering the general public to the path of truth, as Mill hypothesises. Usually these pieces of content, if reported to social media platforms are eventually deleted, but by that stage, the damage is done, and the die is cast. Mill’s statement isn’t modern enough to consider mass misinformation going viral and misleading millions on social media channels. Rebuttal truths are sometimes not made at all, or not considered correctly, or don’t reach the same audience that heard the initial falsity.

²² Eric Barendt, Freedom of Speech, *Why Protect Free Speech?* (Oxford: Clarendon Press 1985) 9.

²³ Dawn Carla Nunziato, ‘Misinformation Mayhem: Social Media Platforms’ Efforts to Combat Medical and Political Misinformation’ (2020) *First Amendment Law Review* 14.

The recent Storming of the Capitol²⁴ outlined perfectly the dangers of disinformation and misinformation. This riot began when Republican supporters believed false claims made by the Trump family that the election was rigged. Trump's tweets sharing false information had dire consequences²⁵, including extensive damage to governmental property and the deaths of five people²⁶.

Mill's belief statement that objectively false information should not be suppressed because it will 'no longer be challenged'²⁷ implies the facilitation of A) reasoned debate, and B) a reasonable audience. This clearly didn't happen during the Storming of the Capitol. Although it can be argued that the tech giants were too slow to censor Trump's tweets, censorship can be problematic in the search for truth.

In October 2020, *The New York Post* published an article titled 'Smoking-gun email reveals how Hunter Biden introduced Ukrainian businessman to VP dad'²⁸. The article alleged that emails found on Hunter Biden's laptop was seized by the FBI and these emails revealed that Hunter was asked to use his "influence" on the company's behalf²⁹. Both Facebook and Twitter restricted the sharing of this article on their platforms³⁰, labelling the article as "potentially harmful³¹" and a form of misinformation³². The allegations in *The New York Post* article turned out to be substantially true. Comedian Bill Maher criticised this censorship on HBO and said

²⁴ Dan Barry, Mike McIntire and Matthew Rosenbery, 'Our President Wants Us Here: the Mob That Stormed The Capital' *The New York Times* (9 January 2021) <<https://www.nytimes.com/2021/01/09/us/capitol-rioters.html>> accessed 18 November 2021.

²⁵ Ibid.

²⁶ Jack Healy, 'These are the five people who died in the capitol riot' *The New York Times* (11 January 2021) <<https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html>> accessed 13 June 2022.

²⁷ Eric Barendt, Freedom of Speech, *Why Protect Free Speech?* (Oxford: Clarendon Press 1985) 9 para 2.

²⁸ Emma-Jo Morris and Gabrielle Fonrouge, 'Smoking-gun email reveals how Hunter Biden introduced Ukrainian businessman to VP dad' *The New York Post* (14 October 2020) <<https://nypost.com/2020/10/14/email-reveals-how-hunter-biden-introduced-ukrainian-biz-man-to-dad/>> accessed 15 August 2022.

²⁹ Ibid, paragraph 4.

³⁰ Kari Paul, 'Facebook and Twitter restrict controversial New York Post story on Joe Biden' *The Guardian* (15 October 2020) <<https://www.theguardian.com/technology/2020/oct/14/facebook-twitter-new-york-post-hunter-biden>> accessed 16 August 2022.

³¹ Ibid, para 2.

³² Ibid, para 5.

“The argument to me is, has Twitter failed in setting themselves up in the past as the judge of what can go out there? And I would say yes, you have.³³”

The fact that both Twitter and Facebook censored content they believed was misinformation, but which subsequently turned out to be true, highlights their inability to adjudicate. The Hunter Biden laptop controversy proves that the tech giants cannot judge the accuracy of content and that censorship always carries the risk of decision makers being swayed by their political biases. No censor is free from bias and no censor is omniscient.

Instead of censorship, a less drastic consequence of spreading misinformation could be fines. Instead of censoring, the tech giants could issue fines to outlets that publish objectively false information. This approach may incentivise media outlets to fact-check their articles prior to publishing. Instead of restricting freedom of expression by suspending a digital account or restricting the shareability of the content, it would simply penalise the publication of misinformation. This counterfactual would be like the consequences of defamation. Defamation doesn't restrict freedom of speech, but it does penalise people who express defamatory comments. People are free to defame each other, should they wish, but there can be consequences in the form of damages. In a similar way, if there is no censorship from the tech giants but there are penalties in the form of fines for spreading misinformation, this may act as a fairer deterrent without violating freedom of expression rights. On the other hand, misinformation fines may cause such a financial strain on the publisher that it becomes a barrier to publication, and the fear of penalisation may deter someone from sharing a correct hypothesis. This counterfactual may still result in permanently suppressing truths. This scenario still requires an enlightened person who can differentiate between all truths and falsities and decide who to fine.

For allegations that may be true, or that hold an element of truth, debate is the vessel to discovering its truth or dismissing it. This concept of employing debate to discover truth was echoed by U.S. Supreme Court Justice Louis D. Brandeis in *Whitney v*

³³ Patrick Reilly, ‘‘You failed’’: Bill Maher blasts Twitter for censoring Post after bombshell report on Hunter Biden’s laptop’ *The New York Post* (30 April 2022) <<https://nypost.com/2022/04/30/bill-maher-says-twitter-failed-for-censoring-posts-report-on-hunter-biden-laptop/>> accessed 16 August 2022.

*California*³⁴ - “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.” He also spoke about the historical fear factor in suppressing speech, which lead to hysteria and paranoia - “Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.”

Like John Stuart Mill’s argument in favour of free speech, the weakness in Brandeis’ argument is that it assumes that A) people will respond to falsities with the beacon of truth and utmost clarity and, B) the general public will be able to tell the difference between the falsity and the truth and be won over by the truthful argument. This doesn’t always happen. One needs to simply look at the Storming of the Capitol or the comment section under online articles to see how quickly disagreements can descend into chaos, with disinformation, misinformation and inaccuracies.

Whitney was overturned by *Brandenburg v. Ohio*³⁵ in 1969. In *Brandenburg* the Supreme Court found that the First Amendment protects free speech unless that speech is likely to incite “imminent lawless action³⁶”. The suppression of free speech should be considered if the speech incites violence or criminal behaviour because it is the lesser of two evils.

The Streisand Effect

Ironically, trying to ban the publication of literature has, historically, whipped up more interest in it. Oftentimes, the ‘Streisand Effect’ can derail the pursuit of justice, particularly if the trial involves injunctions, privacy or censorship. The term ‘Streisand Effect’ came about when the actress and singer Barbara Streisand sued five different media outlets when her home was featured in a published photograph a Malibu cliff line. The photos were captured for a Coastal Records Project. She claimed the publication violated her right to privacy. Before the case, these photos had been

³⁴ *Whitney v. California*, 274 U. S. 357 [1927].

³⁵ *Brandenburg v Ohio* 395 U.S. 444 [1969].

³⁶ John R. Vile, ‘Incitement to Imminent Lawless Action’, *The First Amendment Encyclopaedia*, <<https://mtsu.edu/first-amendment/article/970/incitement-to-imminent-lawless-action>> accessed 14 June 2022.

downloaded six times³⁷. By the time the case was dismissed by the courts, it was covered extensively by the press, and the photos were viewed millions of times. Barbara Streisand's case attempted to improve her privacy, but it had exactly the opposite effect because the litigation drew more attention to the photos of her property. This spectacular 'back-firing' became known as the 'Streisand Effect'.

Margaret Thatcher experienced a similar backfiring when she sought an injunction against the publication of 'Spycatcher', a novel written by former M15 agent, Peter Wright. Tony Wright described the backlash this had on Thatcher in 'Politicians, beware the Streisand effect' - 'If Thatcher hadn't been so fast on the draw, Spycatcher might have sold a handful of copies. Instead, it sold 2 million.'³⁸

The *Country Girls* trilogy by Edna O'Brien was described by then-government Minister Charles Haughey as a "smear on Irish womanhood" and were the subject of book burnings, rosary recitations³⁹ and a ban in Ireland. In her article 'Girl Trouble', Maureen O'Connor suggests 'The notoriety may have helped promote O'Brien's career initially'⁴⁰

In *A-G for England and Wales v Brandon Book Publishers*⁴¹ the English Attorney General sought an interlocutory injunction in Ireland, to restrict the publishing of a Memoir of a deceased member of the British Secret Service. The English Attorney General didn't submit the argument that the book publication would threaten national security in Britain. It was argued that confidentiality of information should be used to restrict the publication. Carroll J declined the granting of this injunction as the public interest that the Irish courts would take into consideration was the Irish public interest, which wouldn't be affected by the Memoirs' publication. The plaintiff also had a right to freedom of expression which trumped the interests of the British government.

³⁷ Tony Wright, 'Politicians, beware the Streisand effect' *The Age (Melbourne, Australia)* (26 March 2022).

³⁸ Ibid.

³⁹ 'Quiz: How much do you know about books that have been banned' *The Journal* (12 June 2021) <<https://www.thejournal.ie/banned-books-quiz-5121041-Jun2020/>> accessed 1 May 2022.

⁴⁰ Maureen O'Connor, 'Girl Trouble' *Dublin Review of Books* (May 2014), <<https://drb.ie/articles/girl-trouble/>> accessed 1 May 2022, para 6.

⁴¹ *A-G for England and Wales v Brandon Book Publishers* [1987] ILRM 135.

Mario Costeja González⁴² was also a victim of the Streisand Effect. He sought to erase his personal data on Google, including his personal history relating to Social Security Debt. The media covered the case with the grabbing angle of ‘the man who sued Google and won’. The irony was immense – the man who brought Google to court in an attempt to erase negative online personal information inadvertently brought international attention to the very same information via the case.

The same backfiring has happened in art. The Irish artist, Maser, created a mural of the word ‘Repeal’ in a heart symbol, outside the Protect Arts Centre, before the Referendum on the Eighth Amendment in 2018. Following a complaint from the Charities Regulator that the mural was a form of “political activity” and therefore the Project Arts Centre was in breach of the Charities Act 2009, the Director of the Project Arts Centre was forced to paint over the mural, at which point the mural and its covering-up became the subject of media attention⁴³. Ironically, although Maser’s ‘Repeal’ was covered up, the protest of this covering up and the media attention it attracted ensured that this mural artwork becoming one of the best-known symbols of the referendum. Maser’s mural cover-up followed by the image being one of the most recognised symbols of the referendum outline perfectly the backfiring that can result from both public outrage in censorship or suppression of freedom of expression, and human curiosity in the subject that is being covered up.

In 1990, McDonald’s sued volunteers of the London Greenpeace for publishing a document entitled ‘What’s Wrong With McDonald’s⁴⁴’. The trial, which the British press labelled ‘McLibel⁴⁵’ and described as a ‘David and Goliath’ battle, was the

⁴² Miquel Peguera, ‘No More Right-To-BeForgotten For Mr Costeja, Says Spanish Data Protection Authority’ (*The Center for Internet and Society*, 3 October 2015) <<http://cyberlaw.stanford.edu/blog/2015/10/no-more-right-be-forgotten-mr-costeja-says-spanish-data-protection-authority>> accessed 13 June 2022.

⁴³ Kirsty Blake Knox, ‘“We are disappointed” – protesters gather as Repeal the Eighth mural painted over’ *The Irish Independent* (23 April 2018) <<https://www.independent.ie/irish-news/abortion-referendum/we-are-disappointed-protesters-gather-as-repeal-the-eight-mural-painted-over-36834639.html>> accessed 12 June 2022.

⁴⁴ ‘What’s wrong with McDonald’s?’ McSpotlight.org, <<https://www.mcspotlight.org/case/pretrial/factsheet.html>> accessed 13 June 2022.

⁴⁵ Catherine Baski, ‘Landmarks in law: McLibel and the longest running trial in British legal history’ *The Guardian* (8 July 2019) <<https://www.theguardian.com/law/2019/jul/08/landmarks-in-law-mclibel-and-the-longest-trial-in-british-legal-history>> accessed 13 June 2022.

longest running civil trial in British history. McDonald's sued the volunteers for the material they were sharing via leaflets, which were handed out to members of the public, which McDonald's claimed were libellous. The negative publicity from the court case drew more public attention to the fast-food chain's unhealthy food, exploitative salaries and unethical advertising.

Fox News also experienced the Streisand Effect in 2003 when the Rupert Murdoch-owned media outlet sued Al Franken who, at the time, was a comedian, for copyright infringement relating to his book "Lies and the Lying Liars Who Tell Them: A Fair and Balanced Look at the Right." Fox News argued that the phrase "Fair and Balanced" was its intellectual property (apparently their legal advisors had read a limited number of judgements, if they believed this). The court disagreed, refused Fox News' request for an injunction to block Franken from using the phrase "fair and balanced" on his book cover, and Fox News lost their case. The judge's description of the motion being "wholly without merit, both factually and legally,"⁴⁶ was included in *The New York Times*' coverage of the case. The nonsensical and bizarre nature of the case seemed to feed public interest and media attention. At moments, the case was a source of entertainment for members of the public in the court room, which was included in the media coverage – reporting for *The New York Times*, Susan Saulny wrote that Fox News claimed a photo of one of their anchors, Bill O'Reilly, on the front cover of Franken's book may be incorrectly interpreted as an endorsement – '[A] round of laughter was prompted when Judge Chin asked, "Do you think that the reasonable consumer, seeing the word 'lies' over Mr. O'Reilly's face would believe Mr. O'Reilly is endorsing this book?"⁴⁷ The media coverage on the court case no doubt equated to free, positive publicity for the author, as his book topped the Amazon and *New York Times* bestseller list⁴⁸.

Denis Kelleher suggests in *Privacy and Data Protection Law in Ireland*⁴⁹ that *McKeogh v John Doe* is an Irish example of the Streisand Effect. The plaintiff was the recipient of what Peart J labelled the "most appalling stream of vile, nasty, cruel, foul,

⁴⁶ Susan Saulny, 'In Courtroom, Laughter at Fox and a Victory for Al Franken' *The New York Times* (23 August 2003) <<https://www.nytimes.com/2003/08/23/nyregion/in-courtroom-laughter-at-fox-and-a-victory-for-al-franken.html>> accessed 13 June 2022.

⁴⁷ Ibid, para 12.

⁴⁸ Ibid, para 8.

⁴⁹ Denis Kelleher, *Privacy and Data Protection Law in Ireland* (2nd edn, Bloomsbury 2015)

and vituperative internet chatter and comment on YouTube and on Facebook directed against this entirely innocent plaintiff”. Attempting to restrain the publication of reports of this ‘chatter’ backfired when they were reported in the press. Kelleher notes the irony in trying to obtain privacy through the courts as Justice by litigation ‘shall be administered in public’ and is open to the attendance of court reporters, and by default, the media, and by default, their readership – the general public⁵⁰.

In the process of litigation, particularly in the superior courts, which generally receive more media attention, there is a risk of drawing more attention onto the issue you’re trying to conceal via injunctions, because unless cases are held in-camera, they are open to the public and the media. Article 34.1 of The Irish Constitution states, ‘Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.’

In *Re v Sussex Justices*⁵¹, the then Lord Chief Justice of England said, “Justice must not only be done, but must also be seen to be done”⁵². Cases being carried out in public increase public trust in the system and reduce the likelihood of corruption. It also increases the public understanding of the justice system if they have immediate and open access to cases.

The then Lord Chief Justice of England and Wales delivered a speech to the Commonwealth Judges’ and Magistrates’ Association Symposium, held at the University of Hertfordshire on the 15th of April 1996, where he said that ‘Courts remain properly reluctant to accede to any request that proceedings should be heard in private, but the problem now is to prevent media coverage from not merely reporting proceedings but adversely influencing them⁵³’.

This can lead to a delicate balancing act where judges must consider allowing witnesses to give evidence behind a curtain and potentially to restrict the media from reporting on certain details to preserve a victims’ anonymity. Oftentimes, instructions

⁵⁰ Ibid, Para 9.20.

⁵¹ *Rex v. Sussex Justices*, [1924] 1 KB 256.

⁵² Arvind Datar, ‘The origins of “Justice must be seen to be done”’ (*Barandbench.com*, 18 April 2020) <<https://www.barandbench.com/columns/the-origins-of-justice-must-be-seen-to-be-done>> accessed 12 June 2022.

⁵³ Lord Taylor, ‘Justice in the Media age’ (1996) *Arbitration Journal* 62, para 4

to jury members to ignore any media coverage about a trial can be a futile direction if they are active on social media, where they may be influenced by posts about the trial online.

Human curiosity in a subject is sparked when it is forbidden. Censoring expression, be it expression through art, photo publishing, writing or speech, can risk drawing greater attention to it than it would have gotten had it been the subject of a balanced debate.

However, while there are many cases of the Streisand Effect, where attempted censorship not only didn't work, but it also backfired spectacularly; it is important to note that many censorship efforts do work very well – so well, that the media and the public never hear about them. This can be achieved through injunctions, super injunctions or the threat of legal actions over defamation, breach of contract or breaking a non-disclosure agreement.

In conclusion, there are many ironic and amusing examples of the Streisand effect. The risk of the Streisand effect is something parties should consider when attempting to restrict something with an injunction. The fear of the Streisand effect may also be something that deters people from taking legal action. However, successful censorships are the ones we never hear about.

Freedom of speech in the media

John Stuart Mill has spoken about the importance of freedom of expression in the media –

The time, it is to be hoped, is gone by when any defence would be necessary of the “liberty of the press” as one of the securities against corrupt or tyrannical government. No argument, we may suppose, can now be needed, against permitting a legislature or an executive, not identified in interest with the people, to prescribe opinions to them, and determine what doctrines or what arguments they shall be allowed to hear.⁵⁴

One of the arguments in favour of freedom of expression in the press is that any restriction of the press has echoes of propaganda used by dictatorships or controlling

⁵⁴ John Stuart Mill, *On Liberty* (1859), Ch II.

regimes. A free media separate to governmental influence is vital so that it can fulfil its core purpose – to act as a public watchdog and expose government scandals. If the media was influenced by the government, it is unlikely that it would publish unflattering articles about politicians, departments or senior civil servants. There must be a separation of these two functions for them to function correctly. Those in positions of authority cannot be held to account if they are, by default and influence, holding themselves to account.

The European Court of Human Rights has consistently affirmed the critical importance of media expression to democracy. In *Jersild v Denmark*⁵⁵ the court explained that:

[Freedom of] expression constitutes one of the essential foundations of a democratic society and ... the safeguards to be afforded to the press are of particular importance ... it is ... incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog”⁵⁶.

The Organisation for Co-operation and Security in Europe publishes reports on freedom of expression in the media⁵⁷ as well as statements on restrictions of media freedoms. It is a watchdog for the watchdogs, reporting on and publishing about the levels of reporting and publishing the media can carry out.

The argument of press freedom, particularly reporting on something that is in the public interest is one that the courts have deemed to be more important than, for example, a corporation’s profit margins or privacy.

In *Keane on Company Law*, Brian Hutchinson outlines that unlawful disclosure of inside information is an offence, but a defence to this is ‘to prove that the disclosure was for the purpose of journalism or other form of expression in the media, and the disclosure was justified in accordance with the need to protect the freedom of the press

⁵⁵ *Jersild v Denmark* (1995) 19 EHRR 1.

⁵⁶ *Ibid*, para 31.

⁵⁷ Osce.org, < <https://www.osce.org/fom/127656>> accessed 11 June 2022.

and the freedom of expression⁵⁸. This hypothetical example reflects the court's acknowledgment that there is a high value placed on freedom of the media's expression, for purposes such as revealing fraudulent activities, insider trading, and topics that ought to be in the public eye because they are in the public interest.

In *The Sunday Times v UK*⁵⁹ the European Court of Human Rights considered the use of injunctions to restrict media publishing stories relating to issues that were in the public interest. The court found that the injunction prohibiting *The Sunday Times* from publishing an article which criticised UK manufacturers of thalidomide⁶⁰ violation its freedom of expression and was disproportionate, stating 'That restraint [of the injunction] proves not to be proportionate to the legitimate aim pursued⁶¹'.

In *Observer and Guardian v UK*⁶², the court found:

[T]he dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest⁶³.

Time is an important aspect of media lifecycles because media outlets are competing with one another, and some stories are time sensitive. The granting of even an interim injunction can dilute its importance and worth. Something published after another journalist already covered it isn't 'breaking' or an initial 'exclusive'. Similarly, if an article in the public interest revealed fraudulent activity about an individual running for public office wouldn't fulfil its public interest value if it was published after the election as a result of an interim injunction.

In *Roache v News Group Newspapers*⁶⁴, the court found that an award of damages was more desirable than a permanent injunction. Damages can be a good solution to the

⁵⁸ Brian Hutchinson, *Keane on Company Law* (5th edn, Bloomsbury 2016)

⁵⁹ *The Sunday Times v United Kingdom* [1979] 2 EHRR 245.

⁶⁰ Mark de Blacam, *Judicial Review* (3rd edn, Bloomsbury 2017) para 22.05.

⁶¹ *The Sunday Times v United Kingdom* [1979] 2 EHRR 245, para 67.

⁶² *Observer and Guardian v UK* (1991) 14 EHRR 153.

⁶³ *Ibid*, para 60.

⁶⁴ *Roache v News Group Newspapers* [1998] 1 I.L.R.M. 161.

seeking of an injunction because it doesn't restrict the media from fulfilling their duty of acting as a public watchdog in publishing content that is in the public interest, and it also offers a potential solution to injured parties.

*MM v Drury*⁶⁵ cited, with approval, *R v Central Independent Television*⁶⁶ in the High Court and emphasised that the court should only restrict media freedom in an extreme event, where the judge thinks it is in the public interest – 'Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which right-thinking people regard as dangerous or irresponsible⁶⁷.'

In Ireland, the court considered the balance of the public interest against the granting of an injunction in *Cogley v RTÉ*⁶⁸ where the plaintiffs sought an injunction that would block the broadcasting of a programme they claimed would violate their privacy, which is protected under Article 40.3(1) of the Constitution and Article 8(1) ECHR. Clarke J found the issues raised in the programme were 'of the highest public interest' and 'a very significant weight indeed needs to be attached to those matters in weighing the rights and values involved at this stage.'

The use of an injunction to prevent defamation is set out in Section 33(1) of the Defamation Act 2009, which provides:

The High Court, or where a defamation action has been brought, the court in which it was brought, may, upon the application of the plaintiff, make an order prohibiting the publication or further publication of the statement in respect of which the application was made if in its opinion:

- (a) The statement is defamatory, and
- (b) The defendant has no defence to the action that is reasonably likely to succeed.

In *Equity and the Law of Trusts in Ireland*, Ronan Keane outlines the court's reluctance to grant injunctions to restrict defamation occurring, as it would require the case to decide if the content is defamatory before it is published - 'this is regarded as

⁶⁵ *MM v Drury* [1994] 2 IR 8.

⁶⁶ *R v Central Independent Television* [1994] 3 WLR 20.

⁶⁷ *MM v Drury* [1994] 2 IR 8, para 16.

⁶⁸ *Cogley v RTÉ* [2005] 4 IR 79, 94.

so pre-eminently a matter for the jury in the ultimate trial that the court is reluctant to pre-empt their decision in any way⁶⁹. The decision-makers as to whether something is or is not defamatory is the ‘exclusive province⁷⁰’ of the jury. The case of *Barrett v Independent Newspapers Ltd*⁷¹ confirmed that it is only a jury that can decide whether something is defamatory or not. Therefore, it is almost impossible to decide this at a pre-trial stage.

Keane refers⁷² to the English case of *Bonnard v Perryman*⁷³ which found that an injunction restricting freedom of expression would only be granted where the content was undeniably defamatory. This view was adapted in Ireland in the case of *Sinclair v Gogarty*⁷⁴.

In *Gilroy v O’Leary*⁷⁵, Allen J said an interlocutory injunction “should only be granted in the clearest cases where any jury would say that the matter complained of was libellous, and where if the jury did not so find the Court would set aside the verdict as unreasonable.” Allen J held that the onus to prove this was on the plaintiff. His judgment also outlined the importance of specificity in the requirements set out in the application for an injunction, and that ‘broad and vague orders’ were impossible for the court to grant⁷⁶.

In *Reynolds v. Malocco*⁷⁷, Kelly J. stated that, relating to the issuing of granting injunctive relief, the court should have “no doubt” that the content restricted is defamatory. This “no doubt” bar set out in Reynolds was cited in *Mercury Engineering v. McCool Controls and Engineering Limited*⁷⁸.

In *Dan Philpott v Irish Examiner*⁷⁹ Barrett J stated that before an injunction curtailing an individual’s freedom of expression is granted, the court must believe the plaintiff

⁶⁹ Ronan Keane, *Equity and the Law of Trusts in Ireland* (3rd edn, Bloomsbury 2017) para 15.87.

⁷⁰ *Ibid.*

⁷¹ *Barrett v Independent Newspapers Ltd* [1986] ILRM 601.

⁷² Ronan Keane, *Equity and the Law of Trusts in Ireland* (3rd edn, Bloomsbury 2017) para 15.88.

⁷³ *Bonnard v Perryman* [1891] 2 Ch 269.

⁷⁴ *Sinclair v Gogarty* [1937] IR 377.

⁷⁵ *Gilroy v O’Leary* [2019] IEHC 52.

⁷⁶ *Ibid.*, para 6.

⁷⁷ *Reynolds v. Malocco* [1999] 2 I.R. 203.

⁷⁸ *Mercury Engineering v. McCool Controls and Engineering Limited* [2011] IEHC 425.

⁷⁹ *Dan Philpott v Irish Examiner* [2016] IEHC 62.

is likely to succeed at trial. The plaintiff couldn't satisfy the court of this. Barrett J refused the injunctive relief sought by the plaintiff for the following grounds: firstly, the statements complained of were not defamatory within the meaning of s.2 of the Defamation Act 2009; secondly, the defendant had a defence of absolute privilege to the claim of defamation; and finally, the defence was likely to succeed at trial stage.

While citizens can apply for an injunction on the grounds that published information will defame them, the granting of an injunction won't necessarily restrict awareness of the topic at hand. The granting of a super-injunction may not even work. A super-injunction is an injunction that the media isn't allowed to mention, and its powers extend to a ban on even the mention of the injunction. On the 22nd of May 2011, the *Scottish Sunday Herald* printed a photo of Ryan Giggs on their front page, with a censor bar across his eyes, above a caption that read, 'Everyone knows that this is the footballer accused of using the courts to keep allegations of a sexual affair secret, but we weren't supposed to tell you that'⁸⁰. The super-injunction was granted in England but wasn't enforceable in Scotland, which is why the Scottish media cheekily printed material which didn't explicitly name Ryan Giggs but had a still-identifiable photo of him (despite the censor bar over his eyes). *The Guardian*, which couldn't identify Ryan Giggs due to the super-injunction, did an article featuring a photo of Imogen Thomas, the woman Giggs was alleged to have an affair with, and started the article with the following paragraph:

The storm over the use of privacy injunctions to suppress publication of celebrity sexual indiscretions has escalated, with a Scottish newspaper revealing the identity of a footballer who allegedly had an affair with the model Imogen Thomas⁸¹.

This creative journalism effectively pointed its readers to their Google search bar, to put in the words 'Scottish newspaper', 'footballer', and 'Imogen Thomas' which would undoubtedly have led them to the *Scottish Sunday Herald* article which identified Ryan Giggs as the footballer.

⁸⁰ Neil Mackey, 'Sunday Herald's Triumph over Ryan Giggs super injunction' *The Herald*, (2 September 2018) <<https://bit.ly/3aWHkiX>> accessed 11 June 2022.

⁸¹ Adam Gabbatt and Matthew Taylor, 'Scottish Newspaper Identifies Injunction Footballer' *The Guardian* (22 May 2011) <<https://bit.ly/3NLspq7>> accessed 11 June 2022.

This case outlines how impractical and ineffective super-injunctions and injunctions can be when content has already gone viral on social media. The use of injunctions for content on social media will be discussed in the next section.

Freedom of speech and social media

The problem with seeking an injunction against publication or further publication, is that the plaintiff needs to know who the publisher is. Irish influencer, Lisa McGowan, was forced to go to the High Court to obtain a Norwich Pharmacal order to find out the identities of the people she alleged were harassing and defaming her on Facebook.⁸²

The rise of social media, citizen journalism, vloggers and bloggers have blurred the lines between ordinary citizens and media outlets. In *Cornec v Morrice & Ors*, Hogan J found that bloggers can come under the classification of ‘an organ of public opinion’ as set out in Article 40.6.1 such as radio and the press, and that since the bloggers ‘activities fall squarely within the education of public opinion, there is a high constitutional value in ensuring that his right to voice these views in relation to the actions of religious cults is protected⁸³’.

The English case of *Smith v Trafford Housing Trust*⁸⁴ found that an employer had acted in breach of contract when it demoted a manager after he made homophobic comments on his Facebook account. The court found that the employee’s comments could not be reasonably considered to bring their employer into disrepute, and that people had a right to freedom of expression which reflected their freedom of belief, if they expressed these religious views lawfully. The court emphasised that these beliefs could be restricted in the workplace, but an employer’s code of conduct didn’t extend to restricting what they said in their personal lives.

⁸² Aodhan O’Faolain and Ray Managh, ‘Social Media Influencer Secures High Court Order Over Online ‘Harassment’’ *The Irish Times* (31 August 2020)

⁸³ *Cornec v Morrice & Ors* [2012] 1 IR 804 at 825.

⁸⁴ *Smith v Trafford Housing Trust* [2012] EWHC 3221.

The English case of *The Author of A Blog v Times Newspapers*⁸⁵ found that although the blogger applicant's functions 'via his blog is closely analogous⁸⁶' to that of a journalist, a journalist would not automatically be entitled to anonymity.

The case of *Animal Defenders International v The United Kingdom* stated that traditional media outlets are still deemed to be more influential than bloggers because bloggers have a lesser impact – '[T]here is no evidence of a sufficiently serious shift in the respective influences of the new and of the broadcast media in the respondent State to undermine the need for special measures for the latter⁸⁷.' This statement, from a 2013 judgment, is outdated. Many influencers and public figures have a higher social media following than many traditional media outlets and have a wider reach. For example, RTE News has over 435,000 followers on Twitter⁸⁸. Influencer Roz Purcell has over 539,000 followers on Instagram⁸⁹. While most people may not turn to Roz Purcell as a source of news updates, her influence could be argued to be greater than RTE's as she has over 104,000 more followers.

Other content publishers have a wider reach than many traditional media outlets, including the podcast host, Joe Rogan. Rogan came under criticism when he promoted inaccuracies about the coronavirus on his podcast, *The Joe Rogan Experience*, which is Spotify's most popular podcast and downloaded a reported 200 million times a month⁹⁰. The BBC reported four of his claims on the podcast were inaccurate including claims that 'A vaccine can alter your genes'; 'Ivermectin can cure Covid'; 'If you get vaccinated after having Covid, you're at greater risk of harmful side effects'; and 'For young people, the health risks from the vaccine are greater than from Covid'⁹¹. Rogan also reportedly said, "I don't think it's true there's an increased risk of

⁸⁵ *The Author of A Blog v Times Newspapers Ltd* [2009] EWHC 1358 (QB).

⁸⁶ *Ibid*, para 10.

⁸⁷ *Animal Defenders International v The United Kingdom* [GC] (App No 48876/08) 22 April 2013, para 119.

⁸⁸ RTE News Instagram, <<https://www.instagram.com/rtenews/?hl=en>> accessed 11 June 2022.

⁸⁹ Roz Purcell Instagram, <<https://www.instagram.com/rozannapurcell/?hl=en>> accessed 11 June 2022.

⁹⁰ 'Joe Rogan: Four claims from his Spotify podcast fact-checked' *BBC News* (31 January 2022) <<https://www.bbc.com/news/60199614>> accessed 12 June 2022.

⁹¹ *Ibid*.

myocarditis from people catching Covid-19 that are young, versus the risk from the vaccine.⁹²"

There are obvious risks associated with people on influential platforms spreading misinformation related to health, because people may follow their advice and have a negative health consequence. There are obvious similar dangers in influencers promoting health products. Without a background or qualification in medicine, medical product design or therapy, they may not understand the health effects of what they're promoting. This could have a detrimental effect on the health of the people who buy these recommended products.

The Australian government has attempted to tackle this issue by introducing the Therapeutic Goods and Advertising Code⁹³, which is the cornerstone of the Australian therapeutic goods advertising regulatory framework, made under section 42BAA of the Therapeutic Goods Act 1989. The Code penalises influencers and people who advertise goods to the public in a manner that does not meet the high ethical standards listed in the Code, namely if they advertise in a manner that is untruthful, imbalanced or misleading, or that is inconsistent with public health guidelines. The Therapeutic Goods and Advertising Code will likely reduce the levels of misleading and inaccurate statements from social media influencers based in Australia, however, residents in Australia can still be targeted by misleading ads which originate from influencers in other jurisdictions. The Code came into effect on the 1st of July 2022⁹⁴. If proven to be effective, other jurisdictions can adopt similar legislation to reduce the levels of health misinformation on social media.

There are problems with people identifying what is fake and what is authentic content on social media. Satire can sometimes be shared as fact. In *Cyber Security: Law and Guidance*, Helen Wong referred to 'Poe's Law', which is a phenomenon 'in which no parody, however extreme, of any viewpoint can be expressed on the internet without someone taking it seriously.'⁹⁵ Interpreting satire as serious fact could lead to people believing that Republicans have actually proposed to arm foetuses in the womb with

⁹² Ibid.

⁹³ The Therapeutic Goods and Advertising Code, Australian Government website, <<https://www.tga.gov.au/therapeutic-goods-advertising-code>> accessed 12 June 2022.

⁹⁴ Ibid.

⁹⁵ Helen Wong, *Cyber Security: Law and Guidance* (1st edn, Bloomsbury 2018) para 11.23.

guns⁹⁶, that almost half of Republicans believe that American has to ‘accept’ mass shootings⁹⁷, or that FIFA actually rolled out a marketing plan to increase revenue that required football players to be tattooed in brand logos⁹⁸. These satirical publications being interpreted as fact outlines a deep lack of critical thinking on the part of the believing reader, but it also points to the fact that, for many, there is gap in identifying the differences between fiction and fact.

Wong also states that fake news ‘often works far better considered as a story, with a strong narrative drive and a clear conclusion, than often messy and inconclusive truths⁹⁹.’ This bleak conclusion aligns well with the phrase ‘a lie can travel halfway around the world while the truth is still putting on its shoes’ – a phrase which is attributed to Mark Twain, but ironically, may have come from the satirist Jonathan Swift¹⁰⁰.

Adding further blurred lines between what is real and what is not is the development of Deepfake video footage. Deepfake videos are made by technology which captures the image of a person, person A, and matches it to video footage of another person, person B. The image of person A can be used like a puppet by technology that mimics the movements of person B, using the image of person A, thereby creating footage of person A which is not real. It essentially has the power to make anyone look like they did or said anything. It blurs the line between real, authentic footage and synthetic, man-made footage. The more sophisticated technology is, the more difficult it is to detect. Someone who is tech-savvy or has higher levels of scepticism or critical thinking may be better at identifying deepfake video footage. Someone who doesn’t know about deepfake is likely to believe what they see as being an authentic video. In his article ‘Anyone with an iPhone can now make deepfakes. We aren’t ready for what

⁹⁶ ‘US Republicans Propose Arming Foetuses in the Womb’ *Waterford Whispers News* (9 June 2022) <<https://waterfordwhispersnews.com/2022/06/09/us-republicans-propose-arming-foetuses-in-the-womb/>> accessed 13 June 2022.

⁹⁷ ‘Poll shows nearly half of Republicans say U.S. has to ‘accept’ mass shootings’ *The Onion* (9 June 2022) <<https://www.theonion.com/poll-shows-nearly-half-of-republicans-say-u-s-has-to-1849041492>> accessed 13 June 2022.

⁹⁸ ‘FIFA increases revenue by requiring brand tattoos for all players’ *The Onion* (6 March 2022) <<https://www.theonion.com/fifa-increases-revenue-by-requiring-brand-tattoos-for-a-1848987265>> accessed 13 June 2022.

⁹⁹ Ien Wong, *Cyber Security: Law and Guidance* (1st edn, Bloomsbury 2018) para 11.26.

¹⁰⁰ Niraj Chokshi, ‘That wasn’t Mark Twain: How a Misquotation is Born’ *The New York Times* (26 April 2017) <<https://www.nytimes.com/2017/04/26/books/famous-misquotations.html>> accessed 13 June 2022.

happens next¹⁰¹, Geoffrey A. Fowler states that Avatarify is a deepfake creation app which, between February 2021 and March 2021, was downloaded over six million times¹⁰².

In September 2019, Facebook created the Deepfake Detection Challenge to ‘accelerate development of new ways to detect deepfake videos¹⁰³’. The associated research paper on The Deepfake Detection Challenge (DFDC) Dataset acknowledges that ‘Deepfake detection is extremely difficult and still an unsolved problem¹⁰⁴’. Although this research paper outlines 5 possible solutions to detecting deepfake videos¹⁰⁵, it proposes no robust solution to stopping mass deepfake content being shared on social media channels.

The prioritisation of freedom of expression

Although misinformation can be extremely harmful, governments must balance the reduction in misinformation and disinformation with an individual’s right to freedom of speech.

In *Ashcroft V. Free Speech Coalition*¹⁰⁶, Supreme Court Justice Anthony M. Kennedy said:

First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

This links the natural correlation between the restriction of speech and the restriction of thought. A potential danger in restricting freedom of speech is the slippery slope of governments becoming dictatorships. Oppressing voices that challenge or oppose the

¹⁰¹ Geoffrey A. Fowler, ‘Anyone with an iPhone can now make deepfakes. We aren’t ready for what happens next’ *The Washington Post* (25 March 2021) <<https://www.washingtonpost.com/technology/2021/03/25/deepfake-video-apps/>> accessed 13 June 2022.

¹⁰² *Ibid*, para 4.

¹⁰³ Deepfake Detection Challenge Dataset, Facebook.com, <<https://ai.facebook.com/datasets/dfdc/>> accessed 13 June 2022.

¹⁰⁴ Brian Dolhansky, Joanna Bitton, Ben Pflaum, Jikuo Lu, Russ Howes, Menglin Wang, Cristian Canton Ferrer, ‘The Deepfake Detection Challenge (DFDC) Dataset’ <<https://arxiv.org/pdf/2006.07397.pdf>> accessed 13 June 2022.

¹⁰⁵ *Ibid*, para 6.2 ‘Analysis of submitted models’.

¹⁰⁶ *Ashcroft V. Free Speech Coalition* (00-795) 535 U.S. 234 (2002).

norm is steeped in intolerance and it blocks the potential of intellectual, cultural and societal growth that explores new, challenging thoughts and theories. Much thought is changed and influenced by public debate, for example, the two divorce referendums in Ireland – the first voted against the legalisation of the divorce, and the second referendum, held nine years later, voted in favour of it¹⁰⁷. Strong public debate can defeat, ridicule and dismiss any false claims by critique, application of logic or clarification. Enquiries are vital in the search for truth. It is, at best, ironic, and at worst, nonsensical, that enquiries or new thought would be discouraged for the sake of preserving truth.

Writing under the pseudonym ‘Silence Dogood’, Benjamin Franklin spoke about the general erosion of liberty starting with the erosion of freedom of speech in a letter he wrote in *The New England Courant* in July 1722 - ‘Whoever would overthrow the Liberty of a Nation, must begin by subduing the Freedom of speech¹⁰⁸’

This concept refers to how the restriction of freedom of speech is both the initial steppingstone in the path towards eroding a country’s liberty and the steppingstone to moving onto the further erosion of other rights. Subduing freedom of speech doesn’t automatically equate to an erosion of other rights. When someone’s freedom of speech is restricted because they are penalised for defaming someone else, their nation isn’t a risk of having their liberty overthrown. Similarly, if someone’s freedom of speech is restrained for the sake of protecting national security, it doesn’t necessarily mean the liberty of their nation will be diminished. On the contrary, in certain situations, the liberty of a nation will require the preservation of national security.

When Julian Assange published classified documents on WikiLeaks, he was condemned by the White House for ‘putting the lives of US, UK and coalition troops in danger and threatening America's national security¹⁰⁹’. WikiLeaks’s ‘information dumps’ included ‘400,000 secret military reports relating to the war in Iraq, and a

¹⁰⁷ Aisling Kenny, ‘Divorce in Ireland – a Controversial history’ *RTE* (6 May 2010) <<https://www.rte.ie/news/politics/2019/0505/1047643-divorce-history/>> accessed 13 June 2022.

¹⁰⁸ ‘Freedom of speech: a letter from Benjamin Franklin’, *The Record (Bergen County, NJ)*, (19 January 2020), para 3

¹⁰⁹ Alexandra Topping, ‘Wikileaks Condemned by White House over war documents’ *The Guardian* (26 July 2010) <<https://www.theguardian.com/world/2010/jul/26/wikileaks-condemned-by-white-house>> accessed 14 June 2022.

further 90,000 on Afghanistan¹¹⁰. Although Assange claimed he leaked the documents to expose unethical and corrupt governmental activities, the publication compromised the positions of double agents and brought military and national security secrets into the public eye, which threatened national security.

Freedom of speech in government

For governments to run effectively, there must be freedom of speech protections in place for the politicians who make speeches or raise questions in their Houses of Parliament, primarily the protection against defamation. If this protection was not in place, politicians would be restricted from advocating on issues or raising queries that are in the public interest, from the fear of having a libel action taken against them from the organisations or individuals who are spoken about in an unflattering manner.

In 2021, Minister for Higher Education, Simon Harris TD, accused Sinn Féin TD, Matt Carthy, of “misusing Dáil privilege” when Carthy accused the Minister of leaking information¹¹¹. Dáil privilege is not unlimited. The Oireachtas website outlines the protection against defamation afforded to Irish politicians speaking in either the Seanad or the Dáil:

TDs and Senators may not be sued for defamation because of any speech in the House. This privilege protects Members both in the Houses and at Committee hearings. If a Member of either Houses acts in a way that amounts to an abuse of a privilege, the Committee on Procedure (Dáil Éireann) or the Committee on Procedure and Privileges (Seanad Éireann) may recommend disciplining the Member.¹¹²

While there should be freedom of speech protected in the Houses of Parliament for the efficient running of the government, this should not be extended to include the

¹¹⁰ Rachael Kennedy, ‘What is WikiLeaks? What did Assange do? Why do the US want to extradite him?’ *Euronews* (10 December 2021) <<https://www.euronews.com/2021/01/04/what-is-wikileaks-what-did-julian-assange-do-why-do-the-us-want-to-extradite-him>> accessed 13 June 2022.

¹¹¹ Jack Horgan-Jones, ‘Simon Harris may lodge complaint over Sinn Féin TD’s allegations’ *The Irish Times* (17 Sept 2021) <<https://www.irishtimes.com/news/politics/simon-harris-may-lodge-complaint-over-sinn-fein-td-s-allegations-1.4676266>> accessed 11 June 2022.

¹¹² Parliamentary Rules, Oireachtas.ie <<https://www.oireachtas.ie/en/visit-and-learn/how-parliament-works/parliamentary-rules/>> para 6

spreading of obscene rumours, gossip or defamation. These types of exchange don't serve the purpose of government and they lower the tone of decorum, intellect and dignity expected in the Dáil and the Seanad.

In conclusion, freedom of speech is important for improving and advancing science, intelligent thought, medicine and society. It is also important to the media so that they can act as a public watchdog and keep the public informed of things that are in the public interest. It is important for the individual, on a person level, to be able to express their own views on matters, to live a fulfilled and authentic life, which includes sharing these thoughts on social media channels. It is also important that politicians have their freedom of expression protected in the Oireachtas or Houses of Parliament, as they are public servants, acting in the public interest on a national level and for the interest of their constituency members. However, the public doesn't benefit from hearing gossip or inflammatory and unsubstantiated allegations. There is a difference between something that interests the public and something that is in the public interest¹¹³.

Freedom of expression is vital for the betterment of society; however, this freedom should not be extended to allow defamatory statements, harassment, or sharing content that is misleading or harmful. Misinformation is harmful because it can make consumers buy goods that are detrimental to their health, it can lead to riots such as the Storming of the Capitol, which ultimately lead to the death of five people, and it doesn't bring us closer to the discovery of truth, in fact, it can cause confusion as to what the truth is, because it is often masked as truth.

However, censoring content needs to be done in a careful and considered way. If we are to censor content, there will be a decision maker appointed to decide what needs to be censored. These enlightened censored presumably A) can differentiate between all truths and all falsities; B) not have prejudices or biases; and C) never abuse their censoring powers.

This type of censorship is impossible. Some truths are only proven to be truths after a process of research and scrutiny. Recent academic commentary relating to the

¹¹³ Brian Cathcart, 'Is there any difference between the public interest and the interest of the public?' (*Inform's blog*, 8 October 2011) < <https://inform.org/2011/10/08/is-there-is-any-difference-between-the-public-interest-and-the-interest-of-the-public-brian-cathcart/>> accessed 17 August 2022

coronavirus pandemic was criticised or censored which was subsequently proven to be true. This will be discussed further in the next chapter.

Chapter 2: The Problem in separating truths and falsities

This chapter will explore the problem in separating truths and falsities; differences in expert opinions and the dangers in censoring dissenting statements; the importance of academic freedom; the gap between a hypothesis and a fact; and solutions to separating truths and falsities online.

There are many problems in separating truths and falsities. One of these problems is in identifying when someone knows what they are saying is false, or when someone believes what they are saying is true, but they are mistaken. This scenario reflects the difference between misinformation and disinformation. Misinformation is misleading or incorrect information. The person sharing this information isn't aware that the information they're sharing is untrue, or they might believe what they're saying is accurate. Disinformation is information which is deliberately deceptive, but shared nonetheless, usually to further a bias, agenda or propaganda¹¹⁴.

Another problem in this separation is the inability to define falsities - we may not currently have enough information to decide if something is true or not. Something unproven, unsupported or inexact isn't necessarily false.

Separating truths and falsities is difficult because it poses the question "Who decides what is true and what is false?". It requires a person who is qualified to classify something as being 'correct' or 'incorrect'. Expertise doesn't necessarily solve this problem. The more expert a person is in a certain area, the more niche their area of knowledge is. Expertise doesn't cover all fields. There is no one expert in everything that the world can turn to, who decides if something is true or false. There is often disagreement among medical experts and indeed among judges. This can be seen every time a judge dissents, outlining their opposing opinion to their fellow judge's.

¹¹⁴ "“Misinformation” vs. “disinformation”: Get informed on the difference" (*Dictionary.com*, 15 May 2020) <<https://www.dictionary.com/e/misinformation-vs-disinformation-get-informed-on-the-difference/>> accessed 26 June 2022.

Differences in expert opinion

Legal opinions are not censored for containing misinformation, although opinions are often overturned by higher courts. This frequent disagreement among experts in the field of law is no different to the frequent disagreement among experts in other fields, such as medicine.

There were many medical bodies, including the World Health Organisation (WHO), that recommended wearing masks and taking the vaccination to mitigate the potential side effects of getting the virus. The WHO's website states that 'Getting vaccinated is one of the most important things you can do to protect yourself against COVID-19, help end the pandemic and stop new variants emerging.'¹¹⁵

The HSE website promotes the safety of the Covid-19 vaccines, stating 'All vaccines are tested to make sure they are safe and work before they can be used. The HSE only uses a vaccine if it meets the required standards of safety and effectiveness.'¹¹⁶ The final sentence in this article states 'This content was fact-checked by vaccine experts working in Ireland'¹¹⁷.

In comparison to these stances in favour of Covid-19 vaccinations, there are many medical professionals and science academics who oppose them, one of whom was Dr. Dolores Cahill. Dr. Cahill made outlandish and unsupported claims about the coronavirus which were rebutted by UCD students in a 33-page letter¹¹⁸ which was published by *The College Tribune*. One of the false claims Cahill made was that a positive Covid-19 diagnosis equates to immunisation for life. Dr. Cahill apparently didn't consider those who contracted Covid-19 twice.

According to Science.org, a reinfection in a short time frame may suggest 'that immunity against COVID-19 may be fragile and wane relatively quickly, with

¹¹⁵ 'Covid-19 advice for the public: Getting vaccinated' (*WHO* website, 13 April 2022) <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/covid-19-vaccines/advice>> accessed 21 June 2022.

¹¹⁶ 'Side effects and safety of Covid-19 vaccines', (*HSE* website, 24 March 2022, <<https://www2.hse.ie/screening-and-vaccinations/covid-19-vaccine/side-effects/>> accessed 21 June 2022.

¹¹⁷ Ibid.

¹¹⁸ 'Claims made by Prof. Cahill', *College Tribune*, <<https://collegetribune.ie/wp-content/uploads/2020/06/Claims-made-by-Prof-Cahill.pdf>> accessed 23 June 2022.

implications not just for the risks facing recovered patients, but also for how long future vaccines might protect people¹¹⁹. Although many reinfections can occur with a variant of the original virus, reinfection is still possible. It is important to state that, according to the Centers for Disease Control and Infections, most people who recover from Covid-19 do have some form of immunity from repeat infections¹²⁰, however, this protection isn't unlimited.

Although Dr. Cahill's comments were widely criticised¹²¹, it is important to emphasise that it wasn't just 'anti-vaccinators' who made inaccurate public statements about the virus. People in favour of vaccination also made false statements. In a Dáil debate on Covid-19, Verona Murphy TD referred to a study on transmission rates and stated, 'A vaccinated person is every bit as likely to transmit this virus as a non-vaccinated person¹²²'. The Minister for Health, Stephen Donnelly, said 'Deputy, that information is false and it's really important that members of parliament do not spread anti-vax information like this in the chamber¹²³' and later called her comments 'false data¹²⁴'.

Verona Murphy TD was referring¹²⁵ to a Lancet study on the delta variant's transmissibility between vaccinated and non-vaccinated individuals. This UK study concluded 'fully vaccinated individuals with breakthrough infections have peak viral load similar to unvaccinated cases and can efficiently transmit infection in household

¹¹⁹ Jop de Vrieze, 'More people are getting Covid-19 twice, suggesting immunity wanes quickly in some' (*Science.org*, 18 November 2020) <<https://www.science.org/content/article/more-people-are-getting-covid-19-twice-suggesting-immunity-wanes-quickly-some>> accessed 23 June 2022, para 4.

¹²⁰ 'Reinfections and Covid-19' (*CDC website*, 20 January 2022) <<https://www.cdc.gov/coronavirus/2019-ncov/your-health/reinfection.html>> accessed 23 June 2022.

¹²¹ Jonathan Jarry M.Sc, 'The Strange case of Dr. Cahill and Ms. Hyde' (*McGill*, 13 August 2021) <<https://www.mcgill.ca/oss/article/covid-19-health/strange-case-dr-cahill-and-ms-hyde>> accessed 14 August 2022; and Colm Kenna, 'UCD school of medicine disassociates itself from professor's views' (*The Irish Times*, 19 June 2020) <<https://www.irishtimes.com/news/education/ucd-school-of-medicine-disassociates-itself-from-professor-s-views-1.4283774>> accessed 14 August 2022.

¹²² 'Stephen Donnelly accuses Verona Murphy of spreading 'anti-vax' information in the Dáil' (*Newstalk Youtube*, 3 November 2021) <<https://www.youtube.com/watch?v=0ApnMnvetg>> accessed 12 August 2022, 51 seconds.

¹²³ *Ibid*, at 1:13.

¹²⁴ *Ibid*, at 1:32.

¹²⁵ Stephen McNeice, 'Verona Murphy: 'Let me be very clear: I am not anti-vax' (*Newstalk*, 3 November 2021) <<https://www.newstalk.com/news/verona-murphy-let-me-be-very-clear-i-am-not-anti-vax-1272391>> accessed 12 August 2022.

settings, including to fully vaccinated contacts¹²⁶. A similar study conducted by the University of Copenhagen on the efficiency of vaccination found that transmissibility between vaccinated and non-vaccinated individuals existed - 'in households where the primary infection was BA.1 [the dominant Omnicron variant], 29% of other household members acquired the virus, while the secondary case rate was 39% for BA.2 [a subvariant of Omnicron]'.¹²⁷

Professor Sunetra Gupta from Oxford University also stated that 'the ability to block infection, even with the vaccine is short-lived'¹²⁸ and emphasised that reinfections are a 'normal and natural dynamic of influenza and coronaviruses'. She said that reinfection from coronaviruses happen every three to four years, but that variability can change this¹²⁹.

Verona Murphy's comments in the Dáil¹³⁰ were partially true, therefore Stephen Donnelly labelling her statements as 'anti-vaccination misinformation' was incorrect.

A preliminary 2020 Pfizer and BioNTech study found that the BNT162b2 vaccine was 95% effective against Covid-19¹³¹. Although this finding may have been accurate at

¹²⁶ Anika Singanayagam, Seran Hakki, Jake Dunning, Kieran J Madon, Michael A Crone, Aleksandra Koycheva et al, 'Community transmission and viral load kinetics of the SARS-CoV-2 delta variant (B.1.617.2) in vaccinated and unvaccinated individuals in the UK: a prospective, longitudinal, cohort study' (*The Lancet*, 29 October 2021) <[https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(21\)00648-4/fulltext](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(21)00648-4/fulltext)> accessed 12 August 2022.

¹²⁷ James Kingsland, '“Stealth” Omnicron is more infectious than Omnicron, but vaccines still protect' (*Medical News Today*, 7 February 2022) <<https://www.medicalnewstoday.com/articles/stealth-omicron-is-more-infectious-than-omicron-but-vaccines-still-protect>> accessed 14 August 2022.

¹²⁸ Swatee Kher, 'Our ability to block Covid-19, even with vaccines, is short-lived: Dr. Sunetra Gupta' (*The Times of India*, 12 December 2021) <<https://timesofindia.indiatimes.com/home/sunday-times/all-that-matters/our-ability-to-block-covid-infections-even-with-vaccines-is-short-lived-dr-sunetra-gupta/articleshow/88228611.cms>> accessed 8 August 2022.

¹²⁹ Annette Ekin, 'We ultimately should be able to make a pan-coronavirus vaccine, says theoretical epidemiologist' (*European Commission website*, 24 September 2020) <<https://ec.europa.eu/research-and-innovation/en/horizon-magazine/we-ultimately-should-be-able-make-pan-coronavirus-vaccine-says-theoretical-epidemiologist>> accessed 8 August 2022, para 11.

¹³⁰ Stephen McNeice, 'Verona Murphy: 'Let me be very clear: I am not anti-vax' (*Newstalk*, 3 November 2021) <<https://www.newstalk.com/news/verona-murphy-let-me-be-very-clear-i-am-not-anti-vax-1272391>> accessed 12 August 2022.

¹³¹ 'Pfizer and BioNTech Conclude Phase 3 Study of COVID-19 Vaccine Candidate, Meeting All Primary Efficacy Endpoints' (*Pfizer website*, 18 November 2020, <

the initial vaccine roll-out phase, the high transmission rates after mass vaccination¹³² suggests that, while the vaccines protected people from the more serious and fatal symptoms, they weren't sufficient long-term protection from contracting the virus. The vaccines didn't live up to the initial belief that they would stop virus transmission in the long-term. The censorship of opposing views was disproportionate because the vaccine rollout didn't reach the hoped results, and the end didn't justify the means.

Dr. Jay Bhattacharya is a Professor of Medicine at Stanford University and is the Director of the Center on the Demography and Economics of Health and Aging. On the 4th October 2020, Dr. Bhattacharya, Dr. Gupta and Dr. Martin Kulldorff, a professor of medicine at Harvard University, a biostatistician, and epidemiologist, wrote 'The Great Barrington Declaration'¹³³, an open letter outlining their concerns about the measures taken to tackle Covid-19, and suggesting an alternative approach called 'Focused Protection', whereby those who have underlying health issues or vulnerabilities could adapt measures which would keep them safe while the rest of society could function normally. The Great Barrington Declaration was criticised by Tedros Adhanom Ghebreyesus, the head of the World Health Organisation (WHO). He called the reliance on herd immunity 'unethical'¹³⁴.

In a 2022 interview with *The Stanford Review*, Dr. Bhattacharya criticised public health agencies for not prioritising research on the virus before determining effective policy – 'Their objective then became to keep the public compliant with a policy they had put in place, rather than to find the best policy for the situation based on the facts'¹³⁵. Many academics who criticised lockdown measures were censored or

<https://www.pfizer.com/news/press-release/press-release-detail/pfizer-and-biontech-conclude-phase-3-study-covid-19-vaccine>> accessed 15 August 2022.

¹³² Hannah Ritchie, Edouard Mathieu, Lucas Rodés-Guirao, Cameron Appel, Charlie Giattino, Esteban Ortiz-Ospina, Joe Hasell, Bobbie Macdonald, Diana Beltekian and Max Roser, 'Ireland: Coronavirus Pandemic Country Profile', *Our World in Data*, <<https://ourworldindata.org/coronavirus/country/ireland>> accessed 15 August 2022.

¹³³ Dr. Martin Kulldorff, Dr. Sunetra Gupta, Dr. Jay Bhattacharya, *The Great Barrington Declaration*, <<https://gbdeclaration.org/>> accessed 15 August 2022.

¹³⁴ 'WHO chief says herd immunity approach to pandemic 'unethical'' (*The Guardian*, 12 October 2020) <<https://www.theguardian.com/world/2020/oct/12/who-chief-says-herd-immunity-approach-to-pandemic-unethical>> accessed 15 August 2022.

¹³⁵ Arman Sharma, *The Stanford Review* (7 June 2022) <<https://stanfordreview.org/the-review-interviews-dr-jay-bhattacharya/>> accessed 15 August 2022, para 21.

publicly criticised¹³⁶. By comparison, there was no restriction on Stephen Donnelly's social media accounts, nor has his employment been terminated, following his false public statements. While it is arguable that anti-vaccination misinformation was very harmful to public health, the Minister for Health's policies also had a significant impact on the public's lives, restricting their civil liberties and disrupting their employment, travel, education and social engagements to name a few. These policies were based on information which was not entirely accurate, such as the belief that vaccination would stop the virus spreading. Because vaccination didn't stop the virus spreading, the policy of vaccination passports or mandatory vaccination for travel or entering certain buildings didn't make sense.

The Great Barrington's suggestion that life should continue as normal (without lockdowns) for those who aren't vulnerable is vindicated in the mortality data analytics done by the John Hopkins Coronavirus Resource Centre¹³⁷. Sweden, a country that didn't impose any lockdown measures had a case-fatality rate of 0.8% and had 193.36 deaths per 100,000 of the population (0.193% of the population). Ireland, a country that imposed lockdowns, had a case-fatality rate of 0.5% and had 156.81 deaths of 100,000 of the population (0.157% of the population)¹³⁸. Despite these countries' vastly different reactions to the pandemic, the outcome was similar in terms of fatalities suffered. This data supports the argument that lockdowns were ineffective in reducing deaths.

It is important to note that this data is based on the reported number of cases and the reported number of Covid-19-related deaths. There may have been under-reporting, under-testing or over-testing for the virus, which would impact this data. Ireland's excess mortality¹³⁹ was around half of Sweden's¹⁴⁰, although the population of Sweden is double the population of Ireland.

¹³⁶ Ibid, para 22.

¹³⁷ Mortality Analysis, John Hopkins, <<https://coronavirus.jhu.edu/data/mortality>> accessed 15 August 2022.

¹³⁸ Ibid.

¹³⁹ Our World in Data, 'Ireland: Coronavirus Pandemic Country Profile', <<https://ourworldindata.org/coronavirus/country/ireland>> accessed 16 August 2022.

¹⁴⁰ Our World in Data, 'Sweden: Coronavirus Pandemic Country Profile', <<https://ourworldindata.org/coronavirus/country/sweden>> accessed 16 August 2022.

In 2021 Dr. Gupta was researching the concept of cross-immunity and if exposure to other forms of coronaviruses give people some sort of protection against Covid-19¹⁴¹. A study published in January 2022, led by Imperial College London researchers, found a cross-reactive immune response to Covid-19 and that people who have higher levels of T-cells from common cold coronaviruses are more resistant to Covid-19¹⁴². While Dr. Gupta was criticised for her views on combatting coronavirus, this is another example of her hypothesis proving to be true.

Another lockdown policy was mask-wearing, which the government said reduced risk of infection¹⁴³. However, a Danish study that assessed the effectiveness of mask-wearing for protection against Covid-19¹⁴⁴ found that the difference 'was not statistically significant¹⁴⁵' between those who wore masks and those who didn't wear masks.

Decisions that influence policies and people's everyday lives must be data driven or they risk falling into nonsensical chaos or disorder. Many studies, including the aforementioned, didn't support the government's policies and approach to tackling the virus, and yet critics of the lockdown were censored or criticised, even when some of these critics were highly qualified. These extreme measures, including the lockdowns, were rolled out before there was scientific understanding of the virus, and before public health bodies had enough data to make informed, adequate decisions based on truth. Although most experts were in favour of the lockdown, justifying censorship on the basis that most experts hold a certain belief would be dangerous and impractical. Experts who held what was considered disruptive and subversive views on the

¹⁴¹ Annette Ekin, 'We ultimately should be able to make a pan-coronavirus vaccine, says theoretical epidemiologist' (European Commission website, 24 September 2020) <<https://ec.europa.eu/research-and-innovation/en/horizon-magazine/we-ultimately-should-be-able-to-make-pan-coronavirus-vaccine-says-theoretical-epidemiologist>> accessed 8 August 2022, para 5.

¹⁴² Kundu, R., Narean, J.S., Wang, L. *et al.*, 'Cross-reactive memory T cells associate with protection against SARS-CoV-2 infection in COVID-19 contacts' <<https://www.nature.com/articles/s41467-021-27674-x#Sec2>> accessed 16 August 2022.

¹⁴³ 'When to wear face masks and how to make them', <<https://www.gov.ie/en/publication/aac74c-guidance-on-safe-use-of-face-coverings/>> accessed 15 August.

¹⁴⁴ Henning Bundgaard, Johan Skov Bundgaard, Daniel Emil Tadeusz Raaschou-Pedersen *et al.*, 'Effectiveness of Adding a Mask Recommendation to Other Public Health Measures to Prevent SARS-CoV-2 Infection in Danish Mask Wearers', *Annals of Internal Medicine*, <<https://www.acpjournals.org/doi/10.7326/m20-6817>> accessed 16 August 2022.

¹⁴⁵ *Ibid*, paragraph 8.

coronavirus were proven to be right. Silencing experts for the sake of preserving the ‘truth’ can ironically risk crushing the truth. Although there were differences of opinion in the medical field on the best approaches to tackling the virus, the appropriate response wasn’t to shut down one argument. The appropriate response was to discuss it, in a reasoned debate, based on evidence and the search for truth.

Differences in opinion in the medical field came to life in caselaw during the global pandemic. The 2021 case of the *Medical Council v Waters*¹⁴⁶ concerned a 71-year-old General Practitioner who refused to administer the Covid-19 vaccination in his clinic. He also didn’t comply with the Covid-19 restrictions, such as mask-wearing, in his clinic. When contacted by the Medical Council, he confirmed that he wouldn’t administer the vaccine to his patients, he stated that the lockdown ‘has caused considerably more damage to patients and the people of the country than the virus’, and claimed it had a ‘pathogenicity and mortality similar to a winter flu’ and further claimed that the lockdown restriction and Covid-19 guidelines were a form of propaganda. He also refused to give the Medical Council the list of his patients that were over the age of 70, who were in the more ‘vulnerable’ category list (and therefore were prioritised in the vaccination roll-out, as set out in the government’s Covid-19 Vaccine Allocation Strategy¹⁴⁷). The Medical Council applied to the court for an order to suspend the defendant from the Register of Medical Practitioners under section 60 of the Medical Practitioners Act 2007 (the 2007 Act) on an interim basis¹⁴⁸.

The Court examined the case law on section 60, and referred to *O’Ceallaigh v An Bord Altranais*¹⁴⁹, where the Supreme Court held that the criteria to be examined in applications under s 60 are:

- (a) the seriousness of the conduct complained of;
- (b) the strength of the case against the practitioner; and
- (c) whether the likely outcome, in terms of sanction, in the event of the misconduct being established would be a strike off either on a definite or permanent basis.

¹⁴⁶ *Medical Council v Waters* [2021] IEHC 252.

¹⁴⁷ *Arthur Cox Employment Law Yearbook* (Bloomsbury 2021) ‘Government Guidance’, para 2.06.

¹⁴⁸ *Ibid*, para 2.30.

¹⁴⁹ *O’Ceallaigh v An Bord Altranais* [2000] 4 IR 54.

The Court found that ‘a suspension, although carrying with it serious negative consequences for the Respondent, is not disproportionate in the circumstances’. It acknowledged the public interest in prioritising the safety of Dr. Waters’ patients and granted the order sought by the Medical Council for an interim suspension of the General Practitioner in question from the Medical Practitioners’ Register.

This case outlines how, if there is a difference in opinion in relation to medical issues, the health guidelines issued by statutory bodies are the ones that ought to be followed. Although some data now suggests that the State’s lockdown measures were ineffective on the fatality rates¹⁵⁰, the State didn’t have adequate data at the time, and were taking precautionary measures in the public health guidelines they issued. However, this is the crux of the issue – their policies weren’t data driven. If they had waited for a better understanding of the virus and considered the opinions of dissenting academics, perhaps the Covid-19 policies may have been different.

Academic Freedom

In the Academic Freedom Index 2022, researchers at the University of Gothenburg and FAU Erlangen-Nürnberg found that academic freedom is on the decline¹⁵¹. Academic freedom is important because its purpose is to push the boundaries of modern knowledge in the pursuit of truth through research. Academic freedom and integrity are vital for building new ideas, creating new works and the roll out of innovations across the globe. Without academic freedom, there would be a lack of medical, scientific and engineering breakthroughs. It would curtail political, philosophical, legal and ethical thinking, jurisprudence development and social progressions. It would also undermine the concept of democracy. History has shown us that oppressed academic freedoms and commentary were a trademark of

¹⁵⁰ Mortality Analysis, *John Hopkins*, <<https://coronavirus.jhu.edu/data/mortality>> accessed 15 August 2022.

¹⁵¹ ‘Academic Freedom on the Decline’, (*FAU website*, 3 March 2022) <<https://www.fau.eu/2022/03/03/news/research/academic-freedom-on-the-decline/>> accessed 15 August 2022.

dictatorships. Academic freedom should be the foundation of university learning, teaching, student expression and education institutions.

However, academic freedom of speech should not be unlimited. It should not be a vehicle for the spreading of misinformation, disinformation, harmful information, hate speech or defamatory comments. Academic freedom should also be restricted because of the weight superior qualifications hold. Qualifications such as a PhD or a Master's lead to public trust, which puts those in academia in a position of responsibility.

There are many reasons why an academic would believe something false. They themselves might not fully understand the topic they are discussing. They could be suffering from a mental fragility. They could have a neural condition that impacts their brain function. They could also have a head injury or an acquired brain injury which impacts their cognitive abilities. Any one of these circumstances could impact their ability to reason and differentiate something true from something false. They may not even know that their comments are inaccurate. However, if their comments are objectively and obviously false, they should be restricted. The problem lies in deciding what is true and what is false. Some academic commentary has been dismissed which subsequently was proven to be true. If veteran experts are dismissed, there are few else who are qualified to make a judgment on the accuracy of their statements, other than other veteran experts. Ultimately, debate among experts should be encouraged to arrive at the truth, rather than shutting one side of a debate down, unless it is obvious and objectively false.

It is important to remember that academic research is often the first link between something being a hypothesis and a fact. Researchers and academics critique, examine and test theories, medicines and equations in the pursuit of truth. Academic freedom is the foundation of the bridge between a theory and an accepted new truth.

The gap between a hypothesis and a fact

Science constantly questions and challenges things. Initial presumptions are usually based on previous practices for similar problems, but can change depending on lab results, new information or changing standards. An example of this is when the WHO

changed their opinion in mask mandates¹⁵² during the coronavirus pandemic. The Centers for Disease Control and Prevention (CDC) also changed its guidelines on mask-wearing in April 2022¹⁵³, when it was presented with new information and new medical best-practices.

Even though the consensus on the effectiveness of mask-wearing and lockdown changed, it is highly problematic that original opposition to these policies was discouraged. Justifying censorship based on the scientific majority opinion is troublesome because the scientific majority isn't necessarily the correct one, as can be seen in the backtracking of some of the public health body policies. The problem isn't the changing public health guidelines. It is normal for these guidelines to change based on new evidence and studies. The problem is that these changing guidelines indicate genuine uncertainties on best practices, and instead of debate and investigation being the path to finding truth and deciding on best practice, opposing voices were dismissed.

Professor Peter Openshaw, theme lead for infection at Imperial College London spoke to *The Guardian* about scientists changing their mind based on evidence presented to them – ‘As a scientist you relish having your view changed by the facts. That’s different from politics where you’ve occupied a citadel, where it’s viewed as a failure if you concede ground¹⁵⁴.’

In the 1930, a lobotomy, a surgical procedure which is extremely traumatic for the brain, was recommended by medical professional as a cure to mental illness, including depression, anxiety and PTSD, and neuro conditions, such as schizophrenia and epilepsy¹⁵⁵. John F Kennedy’s sister, Rosemary, was subjected to a lobotomy to ‘cure’

¹⁵² Ralph Ellis, ‘WHO Changes Stance, says public should wear masks’ (*Web MD*, 08 June 2020) <<https://www.webmd.com/lung/news/20200608/who-changes-stance-says-public-should-wear-masks>> accessed 17 June 2022.

¹⁵³ Kathy Katella ‘Covid-19 Mask Guidelines revised – again’, *Yale Medicine*, 20 April 2022, <<https://www.yalemedicine.org/news/cdc-mask-guidance>> accessed 17 June 2022.

¹⁵⁴ Hannah Devlin and Nicola David, ‘The case for masks became hugely stronger’: scientists admit their Covid mistakes’ *The Guardian* (4 Feb 2022) <<https://www.theguardian.com/world/2022/feb/04/i-didnt-think-vaccines-would-work-scientists-admit-their-covid-mistakes>> accessed 17 June 2022.

¹⁵⁵ Lobotomy Overview, *Healthline.com* <<https://www.healthline.com/health/what-is-a-lobotomy>> accessed 17 June 2022.

her ‘irritable and difficult¹⁵⁶’ moods. The surgery left her ‘permanently incapacitated and unable to care for herself¹⁵⁷’, unable to talk or walk. She required constant care until her death in 2005. Lobotomies were not recommended by doctors after it became obvious how damaging they were for patients, and how many of them were left with lifelong injuries and disabilities because of the procedure. They are no longer recommended as a cure for mental illnesses. This outlines how medical practices and opinions have changed over the years, as better procedures and more advanced technologies breakthrough, and how fringe procedures are sometimes no longer used if they are proven to be unsafe or harmful.

In the 1880s, before anaesthesia was invented, cocaine was ‘marketed as a treatment for toothaches, depression, sinusitis, lethargy, alcoholism, and impotence, cocaine was soon being sold as a tonic, lozenge, powder and even used in cigarettes¹⁵⁸’. Cocaine has since been made illegal in most countries across the world and is not recommended by doctors due to the long list of negative side effects which can include cardiac arrest, death, seizures, anxiety, restlessness, dizziness, extremely low blood pressure, diarrhoea and nausea to name a few¹⁵⁹.

‘Amenorrhoea’ is the term used to refer to the absence of one or more menstrual period cycles. Writing in *The Atlantic*, Marion Renault referred to the physician Nicolas Fontanus, who, in 1652, ‘identified amenorrhoea “as the most universal and most usual cause” for palsy, melancholy, burning fevers, nausea, headaches, and a distaste for meat¹⁶⁰’. A 17th century vegan or vegetarian woman being suspected of having amenorrhoea because of their avoidance of meat is bizarre and almost comically inaccurate. Out of the list of six issues amenorrhoea was believed to cause, the two

¹⁵⁶ Rosemary Kennedy, *JFK Library* <<https://www.jfklibrary.org/learn/about-jfk/the-kennedy-family/rosemary-kennedy>> accessed 17 June 2022, para 2.

¹⁵⁷ Ibid.

¹⁵⁸ 7 of the most outrageous medical treatments in history’ (*History.com*, 5 September 2017) <<https://www.history.com/news/7-of-the-most-outrageous-medical-treatments-in-history>> accessed 17 June 2022, para ‘Cocaine – the wonder drug’.

¹⁵⁹ ‘What happens after using cocaine once?’, *Healthline.com*, <<https://www.healthline.com/health/what-happens-if-you-do-coke-once>> accessed 17 June 2022.

¹⁶⁰ Marion Renault, ‘No one has to get their period anymore’, *The Atlantic*, 17 July 2020, <<https://www.theatlantic.com/science/archive/2020/07/why-menstruate-if-you-dont-have/614350/>> accessed 17 June 2022.

accurate links were nausea and headaches¹⁶¹. Today, amenorrhea is believed to be caused by family history, genetics and lifestyle¹⁶², but is not believed to be linked to palsy, melancholy, burning fevers or a distaste for meat.

In 2005, Barry J. Marshall and J. Robin Warren won the Nobel Prize in Physiology or Medicine for the discovery of ‘the bacterium *Helicobacter pylori* and its role in gastritis and peptic ulcer disease¹⁶³’. Previously, peptic ulcer disease was believed to be caused by stress and lifestyle¹⁶⁴.

The 2013 cholesterol management guidelines also changed previous guidelines to recommend ‘statin therapy based on cardiovascular risk instead of cholesterol levels¹⁶⁵’. Incorrect scientific or medical consensus isn’t something that only happened in the past. It is happening now and will happen in the future. Science is always evolving and changing its views on what ‘fact’ is, based on evidence, clinical trials, lab testing and new medical breakthroughs. Dissenting views on scientific issues are vital in order to make this progress.

The time between when something is a hypothesis and something is considered a fact may be a grey area, particularly if the area of research is a new and relatively unexplored area.

Solutions to separating falsities and truths online

Potential solutions to separating falsities and truths include labelling information that is false or misleading. The second potential solution is removing the content or editing it to exclude the false sections. A third solution is to delete the accounts of serial

¹⁶¹ Amenorrhea, *Family Doctor*, <<https://familydoctor.org/condition/amenorrhea/>> accessed 17 June 2022.

¹⁶² Ibid.

¹⁶³ ‘The Nobel prize in physiology or medicine 2005’, <<https://www.nobelprize.org/prizes/medicine/2005/press-release/>> published 3 October 2005.

¹⁶⁴ Ibid, paragraph 6.

¹⁶⁵ Neda Laiteerapong, Elbert S. Huang, ‘The Pace of Change in Medical Practice and Health Policy: Collision or Coexistence?’ *Journal of General Internal Medicine*, January 2015 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4441682/>> para 4.

misinformation spreaders. A fourth solution would be to edit content to remove the false sections. A fifth solution would be for tech giants to stop promoting content they know or believe to be false. A sixth solution is to reject advertisement submissions that contain false information. These solutions will be discussed below in further detail.

Twitter's article 'How we address misinformation on Twitter' states:

We define misleading content ('misinformation') as claims that have been confirmed to be false by external, subject-matter experts or include information that is shared in a deceptive or confusing manner. Misleading content that falls under any of the policies above may be subject to one or more of the actions below. This content is identified through a combination of human review and technology, and through partnerships with global third-party experts¹⁶⁶.

This article lists a few ways that it informs and contextualises content, including labelling content; prompting people when they engage in a misleading tweet to find additional content and consider whether they want to share the content on their Twitter platform; creating Twitter moments from trusted sources; launching pre-bunks; and opportunities for their online community to share feedback.

The practice of labelling content as being misleading or inaccurate was seen when the tech giant labelled Donald Trump's tweets about the presidential election. Many of the labels about Trump's tweets stated that the content was "disputed and might be misleading about an election or other civic process". *The New York Times* reported that 'one tweet, in which Mr. Trump pre-emptively claimed to have won Pennsylvania, Georgia and North Carolina, was marked with a small reminder that those races had not yet been called¹⁶⁷.'

Although labelling is helpful in curtailing misinformation to those who are reasonable and want to be informed with truthful content, is not an appropriate solution to curtailing the spread of disinformation because the sharer knows what they're saying is untrue, but they don't care. It is also ineffective for those who believe the tech giants

¹⁶⁶ 'How we address misinformation on Twitter', *Twitter*, <<https://help.twitter.com/en/resources/addressing-misleading-info>> accessed 26 June 2022.

¹⁶⁷ Kate Conger, 'Twitter has labelled 38% of Trump's tweets since Tuesday' *The New York Times* (5 November 2020) <<https://www.nytimes.com/2020/11/05/technology/donald-trump-twitter.html>> accessed 26 June 2022, para 4.

are controlled by people with a political agenda, and don't trust them to decide what is fact or fiction, so likely won't be dissuaded by label on a tweet that publicly questions its accuracy. Twitter's labelling of Trump's tweets didn't stop the Storming the Capitol; however, it may have stopped it getting worse. Perhaps most of the damage was done by that stage, or perhaps the labelling was ineffective at clarifying election truths to the masses.

Interestingly, a 2021 study on sharing inaccurate content on social media called 'Shifting attention to accuracy can reduce misinformation online' found that most participants believed it was 'important to share only accurate news'¹⁶⁸. The study found that flagging content on social media with accuracy tags or labels was helpful in reducing the spread of misinformation because 'when deciding what to share on social media, people are often distracted from considering the accuracy of the content. Therefore, shifting attention to the concept of accuracy can cause people to improve the quality of the news that they share'¹⁶⁹. This could be for several reasons. The first reason could be that people don't want to share information that is inaccurate because they may not want to mislead their followers. Secondly, they might be self-conscious about how people perceive them, if they see the inaccuracy label on the content that they shared. Finally, they may not want to further the reach of an organisation that has an agenda which involves deliberately deceiving people on social media channels.

A 2022 paper called 'The psychological drivers of misinformation belief and its resistance to correction'¹⁷⁰ analysed the effectiveness of pre-emptive and reactive interventions to mitigate the effects of misinformation. It stated, 'Most news consumers do not notice or understand content labels forewarning that an article is news, opinion or advertising, more prominent labelling can nudge readers to adjust their comprehension and interpretation accordingly'¹⁷¹. In other words, the more

¹⁶⁸ Pennycook, G., Epstein, Z., Mosleh, M. *et al.* 'Shifting attention to accuracy can reduce misinformation online' *Nature* <<https://www.nature.com/articles/s41586-021-03344-2#citeas>> accessed 27 June 2022, para 1.

¹⁶⁹ *Ibid*, conclusion.

¹⁷⁰ Ecker, U.K.H., Lewandowsky, S., Cook, J. *et al.* 'The psychological drivers of misinformation belief and its resistance to correction'. *Nat Rev Psychol*, (2022), <<https://www.nature.com/articles/s44159-021-00006-y>> accessed 27 June 2022.

¹⁷¹ *Ibid*, 'Practical Implications'.

obvious the label, the more the reader takes note of its disputed status and is therefore more sceptical of the content.

A 2017 study called ‘The Implied truth effect: attaching warnings to a subset of fake news headlines increases perceived accuracy of headlines without warnings’ outlines the flip-side of people distrusting labelled content: there is greater trust in content that is not labelled – ‘While warnings do lead to a modest reduction in perceived accuracy of false headlines relative to a control condition (particularly for politically concordant headlines), we also observed the hypothesized implied truth effect: the presence of warnings caused untagged headlines to be seen as more accurate than in the control¹⁷².’ Given how much content is shared on social media channels (for example, in 2021, it was estimated that 1 billion stories were shared on Facebook daily¹⁷³), it is impossible for tech companies to fact-check every piece of content that is shared. However, it is more reasonable to request that they monitor pages which have a history of sharing reported misinformation or pages that have a high number of followers and are therefore more influential.

The second solution to separating truths and falsities is removing the content which is false and allowing the truthful content to remain. With this approach, there will ultimately be a higher frequency of truths circulating online. The problem with this approach is that it is a form of censorship.

According to the *Economic Times*, ‘Since the start of the pandemic, Spotify has removed 20,000 podcast episodes containing Covid misinformation. It has deleted more than 40 episodes of [Joe] Rogan's podcast - which has an estimated 11 million listeners.¹⁷⁴’ Spotify lists the reasons it will take down content in its platform rules, which include ‘Content that promotes dangerous false or dangerous deceptive medical

¹⁷² Pennycook, G., Bear, A., Collins, E., & Rand, D. G., ‘The implied truth effect: Attaching warnings to a subset of fake news headlines increases perceived accuracy of headlines without warnings’ (*Management Science, Forthcoming*, 14 September 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3035384> accessed 27 June 2022.

¹⁷³ Jimit Bagadiya, ‘430+ Social Media Statistics you must know in 2022’ *Social Pilot* <<https://www.socialpilot.co/blog/social-media-statistics#fb-usage-stats>> accessed 27 June 2022.

¹⁷⁴ ‘‘Needle and the damage done’: the Spotify-Neil Young controversy explained’, *The Economic Times* (29 January 2022) <<https://economictimes.indiatimes.com/tech/tech-bytes/needle-and-the-damage-done-the-spotify-neil-young-controversy-explained/articleshow/89200019.cms?from=mdr>> accessed 26 June 2022.

information that may cause offline harm or poses a direct threat to public health¹⁷⁵. However, it didn't follow its own policy when it came to Joe Rogan's podcast which made many false statements relating to Covid-19 (discussed further in Chapter 1). According to the Centers for Disease Control and Infection's Morbidity and Mortality weekly report which examined the Los Angeles hospitalisation and incidence reports of Covid-19, "Deaths were more likely to occur in unvaccinated people (0.3%) than among fully vaccinated persons with a booster (0.07%) or without a booster (0.08%) ($p < 0.001$)¹⁷⁶." The report also found "As of January 8, 2022, during Omicron predominance, Covid-19 incidence and hospitalization rates in Los Angeles County among unvaccinated persons were 3.6 and 23.0 times, respectively, those of fully vaccinated persons with a booster, and 2.0 and 5.3 times, respectively, those among fully vaccinated persons without a booster¹⁷⁷." Someone being ill to the extent of being hospitalised is obviously a form of harm, as is death. The Joe Rogan episode with Dr. Malone remains on the Spotify platform¹⁷⁸.

There is a lack of transparency in how Spotify executes its own policy. The policy allows it to take down content it deems harmful, but it doesn't outline exceptions to this policy. This lack of transparency reduces public trust in the tech giant. The Santa Clara Principles encourage tech companies to meet basic standards on transparency and accountability in content moderation¹⁷⁹. These include human rights and due process, understandable rules and policies, cultural competence, State involvement in content moderation, and integrity and explainability.

The Santa Clara Principles also suggest that companies employ operational principles including the 'numbers principle' where they 'should publish information about pieces of content and accounts actioned, broken down by country or region, if available, and

¹⁷⁵ 'Spotify Platform Rules', *Spotify*, <<https://www.spotify.com/us/platform-rules/>> accessed 27 June 2022.

¹⁷⁶ Danza P, Koo TH, Haddix M, et al. 'SARS-CoV-2 Infection and Hospitalization Among Adults Aged ≥ 18 Years, by Vaccination Status, Before and During SARS-CoV-2 B.1.1.529 (Omicron) Variant Predominance' 4 February 2022, <https://www.cdc.gov/mmwr/volumes/71/wr/mm7105e1.htm?s_cid=mm7105e1_w> accessed 28 June 2022, para 5.

¹⁷⁷ *Ibid*, summary.

¹⁷⁸ Spotify, The Joe Rogan Experience, episode #1757, Dr. Rovert Malone, <<https://open.spotify.com/episode/3SCsueX2bZdbEzRtKOCEyT?si=552ff05e99dd4f74>> accessed 27 June 2022.

¹⁷⁹ 'The Santa Clara Principles', *santaclaraprinciples.org*, <<https://santaclaraprinciples.org/>> accessed 26 June 2022.

category of rule violated¹⁸⁰; the notice principle where they give ‘notice to each user whose content is removed, whose account is suspended, or when some other action is taken due to non-compliance with the service’s rules and policies, about the reason for the removal, suspension or action’; and the appeal principle which outlines ‘the companies’ obligations to make explanation, review, and appeal processes available to users¹⁸¹. If the Santa Clara Principles were adopted by tech giants in their business development, it would increase public trust from their transparency in their decision-making to monitor and moderate content on its platforms. It would also ensure fairness by uniformity of process, if everyone was subjected to the same rules and consequences. A weakness of the Santa Clara Principles is that they are not legally binding.

A third solution to separating truths and falsities is deleting the profiles or accounts which persistently share misinformation or disinformation. Tech giants have an ethical duty to delete accounts that constantly share wildly inaccurate content, because allowing them to continue is enabling the spread of this harmful, hurtful or hateful content. Tech platforms are the gatekeepers to potentially massive audiences. They are responsible for what is published on their platforms. In extreme cases, such as a continuous violation of platform rules, they should delete some accounts, as they did with conspiracy theorist, Alex Jones¹⁸².

A fourth solution to separating truths and falsities would be editing content. The tech giants could remove sections of content that are factually incorrect. This can be in the form of deleting the objectively false sentence from the paragraph or editing the sentence so that it is factually correct. This is also a form of censorship, but perhaps less of a restriction of an individual’s freedom of expression, in that it allows them to express their views up until the point of expressing objectively false information. This solution is perhaps less extreme than the permanent deleting of an individual’s profile.

A fifth solution to separating truths and falsities would be for the tech giants to stop promoting any content which is inaccurate. Many accounts sharing misinformation

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Jane Coaston, ‘Youtube, Facebook and Apple’s ban on Alex Jones, explained’, *The Vox*, 6 August 2018, <<https://www.vox.com/2018/8/6/17655658/alex-jones-facebook-youtube-conspiracy-theories>> accessed 3 July 2022.

can be linked back to a smaller number of core accounts considered to be “super-spreaders” of misinformation. A review of a sample of anti-vaccine content that was shared or posted on Facebook and Twitter 812,000 times between 1 February and 16 March 2021 found that 65% of this content originated from twelve accounts¹⁸³ known as the “Disinformation Dozen”. Reducing recommendations of videos from accounts which have high reported rates for misleading or false information could be a positive step in reducing misinformation.

YouTube recommends videos to its users, which pop up on a sidebar or at the end of a video, based on previous viewer clicks, views, watch time, likes, dislikes and shares¹⁸⁴. YouTube published a blogpost in 2019 called ‘Continuing our work to improve recommendations on YouTube¹⁸⁵’ which outlines how it will reduce the spread of misinformation by using cookies to recommend other similar videos to viewers which may be of interest to them. One of the ways YouTube said it would do this was by reducing ‘recommendations of borderline content and content that could misinform users in harmful ways—such as videos promoting a phony miracle cure for a serious illness, claiming the earth is flat, or making blatantly false claims about historic events like 9/11¹⁸⁶’.

Social media giants could also reject advertisement submissions for content, which is inaccurate, false or misleading. Current advertisements on social media platforms are created by users, submitted to the social media giant for approval, and can be up and running once approved¹⁸⁷. Because these ads can be targeted to specified audiences, they are quite powerful and influential.

¹⁸³ ‘The Disinformation Dozen’, Center for Countering Digital Hate, <<https://counterhate.com/research/the-disinformation-dozen/>> accessed 4 July 2022.

¹⁸⁴ Cristos Goodrow, ‘On Youtube’s recommendation system’, *Youtube Official Blog*, 15 September 2021, <<https://blog.youtube/inside-youtube/on-youtubes-recommendation-system/#:~:text=A%20focus%20on%20responsible%20recommendations,come%20to%20YouTube%20to%20watch>> accessed 4 July 2022, para ‘a focus on responsible recommendations’.

¹⁸⁵ ‘Continuing our work to improve YouTube recommendations’, *YouTube*, 25 January 2019, <<https://blog.youtube/news-and-events/continuing-our-work-to-improve/>> accessed 28 June 2022.

¹⁸⁶ *Ibid*, para 3.

¹⁸⁷ ‘Facebook ads’, Facebook, <https://www.facebook.com/business/ads?content_id=bLnyDjJ47WHBet&ref=sem_smb&utm_source=GOOGLE&utm_medium=fbsmbsem&utm_campaign=PFX_SEM_G_Business_Ads_IE_EN_Nonbrand_Exact_Desktop&utm_content=Social-Media-

In conclusion, there are many solutions to separating truths and falsities online. The first potential solution is labelling content which is false as being inaccurate, disputed or misleading. The second potential solution is removing the content or editing it to exclude the false sections. A third solution is to delete the accounts of serial misinformation spreaders. A fourth solution would be to edit content to remove the false sections. A fifth solution would be for tech giants to stop promoting content they know or believe to be false. A sixth solution is to reject advertisement submissions that contain false information.

Although things that are objectively false ought to be restricted in various forms, the consequence is denying someone their right to freedom of expression. It also raises the issue of whether we can ever know for certain if something is true or not, and at what stage these restrictions should be enforced. Some truths, such as medical and scientific truths, take time to surface in the search for truth. If clarification is done too long after something is said, it risks not being heard by the same audience, not believed by the same audience or else being ineffective. In some instances, clarification after a prolonged period of misinformation or disinformation would be impractical because the ‘horse has already bolted’.

Having said that, censorship on statements and allegations that have subsequently been proven to be true outline the need for debate on issues that have an element of truth to them, or that may be true, instead of shutting down one side of the argument.

[Advertising Exploring&kenid= k Cj0kccqjw80-VBhCpARIsACMvVLO6tBnv7ST91jtdWVIwQ-H4SXzGjjISQO0Q14snsdWaZMO-ZpmUc9EaAsLZEALw_wcB_k_&utm_term=advertising%20through%20social%20media&utm_ct=EVG&gclid=Cj0kccqjw80-vbhcparisacmvvlo6tbnv7st91jtdwviwq-h4sxzgjjisqo0q14snsdwaZMO-ZpmUc9EaAsLZEALw_wcB](https://www.fox.com/2022/06/29/fox-news-advertising-exploring-kenid-k-cj0kccqjw80-vbhcparisacmvvlo6tbnv7st91jtdwviwq-h4sxzgjjisqo0q14snsdwaZMO-ZpmUc9EaAsLZEALw_wcB_k_&utm_term=advertising%20through%20social%20media&utm_ct=EVG&gclid=Cj0kccqjw80-vbhcparisacmvvlo6tbnv7st91jtdwviwq-h4sxzgjjisqo0q14snsdwaZMO-ZpmUc9EaAsLZEALw_wcB) accessed 29 June 2022.

Chapter 3: The Practicalities of different guidelines and legislation

This chapter will explore the practicalities of different guidelines and legislation; the legal instruments to tackle online misinformation in the UK, Hungary, Ireland, Australia and America; how influencers have fallen through the gap in Irish legislation; and the importance of putting information into context.

Dawn Carla Nunziato's article 'Misinformation Mayhem: Social Media Platforms' efforts to combat medical and political misinformation' outlined the failed efforts to block tech giants from publishing inaccurate political advertisements on social media:

Despite the major problems caused by Russian interference in our 2016 elections, the U.S. has failed to enact regulations prohibiting false or misleading political advertising on social media--whether originating from foreign sources or domestic ones--because of First Amendment, legislative, and political impediments to such regulation¹⁸⁸.

Corporates and social media giants have made attempts to tackle online misinformation. Some of these attempts have been insufficient, futile or have failed.

In May 2020, Facebook announced the names of the members of its 'Oversight Board'¹⁸⁹, including former Circuit Judge on the United States Court of Appeals for the Tenth Circuit, Michael McConnell¹⁹⁰; Professor of Law at Queensland University of Technology, Nicolas Suzor¹⁹¹; Chairholder of the UNESCO Chair on Freedom of Expression, Universidad de Los Andes, Catalina Botero-Marino¹⁹²; and Former Prime Minister of Denmark, Helle Thorning-Schmidt¹⁹³, to name a few. The Oversight Board advises on content policies. Its decisions on content removal are binding but users can

¹⁸⁸ Dawn Carla Nunziato, 'Misinformation Mayhem: Social Media Platforms' Efforts to Combat Medical and Political Misinformation' (2020) *First Amendment Law Review* 14, para 2.

¹⁸⁹ David Cullen, 'Content Moderation: Facebook Oversight Board' *Intellectual Property and IT Law Update* (Bloomsbury, 2021)

¹⁹⁰ Oversight Board website, 'Meet the Board', < <https://oversightboard.com/meet-the-board/michael-mcconnell/>> accessed 3 January 2022.

¹⁹¹ Oversight Board website, <[Meet the Board | Oversight Board](#)> accessed 4 August 2022.

¹⁹² Ibid.

¹⁹³ Ibid.

appeal¹⁹⁴. The skills, backgrounds and qualifications of the Board place them in a good position to balance legal and ethical issues relating to content and what should or should not be removed from the platform.

In *Intellectual Property and IT Law Update*¹⁹⁵, David Cullen suggests that the Oversight Board is part of Facebook's attempts to reduce misinformation on its platform, along with using 'artificial intelligence to proactively identify and remove harmful content and to "down-rank" sensational and provocative 'borderline' content'¹⁹⁶. Cullen also states that 'Success is not guaranteed and implementing the Board's decisions at scale will remain a significant obstacle. Missteps, controversies, or delays in the first months and years may see the Board's role being overtaken by the drive for stricter regulation in Europe and elsewhere¹⁹⁷.' On the 4th of August 2022, the Oversight Board released a quarterly transparency report for the first quarter of 2022¹⁹⁸. The Oversight Board announced that it provided 22 policy recommendations to Meta in 2022¹⁹⁹ and stated in a Tweet that Meta is making 'progress towards implementing [their] recommendations. For example, the company created a new Community Standard on misinformation, which includes health misinformation²⁰⁰.'

The work of the Oversight Board is still in its infancy, and therefore more time will be required to measure its success in reducing online misinformation. However, a group set up by Meta to regulate Meta is an example of a tech giant regulating itself. There are obvious problems with self-regulating including conflicts of interests and corporates under-reporting issues to prioritise profits over increased resources required for rectification.

¹⁹⁴ Meta Transparency Center, <<https://transparency.fb.com/oversight/further-asked-questions/>> accessed 4 August 2022.

¹⁹⁵ David Cullen, 'Content Moderation: Facebook Oversight Board', *Intellectual Property and IT Law Update* (Bloomsbury, 2021) para 10.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid, para 12.

¹⁹⁸ Oversight Board, Twitter, <https://twitter.com/OversightBoard/status/1555161634640842752?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Etweet> accessed 4 August 2022.

¹⁹⁹ Ibid.

²⁰⁰ Oversight Board, Twitter, <<https://twitter.com/OversightBoard/status/1555162646588129280/photo/1>> accessed 4 August 2022.

Real and serious consequences for tech giants who host misinformation are required to keep them motivated to reduce this misinformation. These need to be outlined in pieces of legislation, rather than guidelines, to be taken seriously and complied with. Rather than allowing the tech giants to self-regulate on their progress to reduce online misinformation, the UK's Online Safety Bill proposes to have an independent regulator for online safety, which is discussed in the next section.

The UK's legislation to reduce online misinformation

The UK's attempt to tackle misinformation is outlined in The Online Safety Bill²⁰¹. This Bill proposes to reduce online misinformation with an independent regulator, in the form of Ofcom, the Office for Communications²⁰².

One of the strengths of this Bill is that it puts an onus on the platforms hosting the content to take action against the spreading of harmful content, and the platforms that fail to minimise harmful content 'will need to answer to the regulator [Ofcom], and could face fines of up to ten per cent of their revenues or, in the most serious cases, being blocked.'²⁰³ The Bill also requires tech giants to prevent fraudulent advertising on their platforms²⁰⁴, and gives power to the Secretary of State to direct Ofcom if they have reasonable grounds to believe that content exists which presents a threat to the health or safety or the public, or that presents a threat to national security²⁰⁵.

Another strength of the Bill is that it specifies that the misinformation must be deliberately or recklessly harmful in nature to be fined. One can assume that mere error isn't penalised, compared to something false which is misleading, and intends to mislead. For example, a typo in a train timetable published on a company's website and social media platform could be as a result of human error, and it *is* misleading in

²⁰¹ Online Safety Bill, <<https://publications.parliament.uk/pa/bills/cbill/58-03/0121/220121.pdf>> accessed 4 August 2022.

²⁰² Online Safety Bill factsheet, <<https://www.gov.uk/government/publications/online-safety-bill-supporting-documents/online-safety-bill-factsheet>> accessed 4 August 2022, 'Who oversees and enforces the framework?'

²⁰³ Ibid para 3.

²⁰⁴ Ibid, para 9.

²⁰⁵ Online Safety Bill, <<https://publications.parliament.uk/pa/bills/cbill/58-03/0121/220121.pdf>> s 147(1).

that it has given the incorrect travel information to its followers, but it is not deliberately or recklessly harmful in nature. The intended outcome of this example is to inform the public of train times. The actual outcome was misinforming them. However, it would use up an enormous amount resources if individuals and corporates were to be penalised based on content error alone.

Psychologist Tom Stafford studies typos at the University of Sheffield. In an interview with *Wired* magazine, he stated people already know the meaning they're trying to convey when they're proofreading their own work and the 'reason we don't see our own typos is because what we see on the screen is competing with the version that exists in our heads.'²⁰⁶

Even if people intended to share content that is accurate and proofed their own writing before publishing it, there is still room for error by people unintentionally sharing inaccurate information and people who don't spot their own typos. The requirement to have a harmful element in penalised misinformation, either done deliberately or recklessly, is a practical and vital element of this legislation, to avoid the regulator becoming inundated with misinformation complaints.

There are two separate offences in the Online Safety Bill - the harmful communications offence and the false communications offence. The harmful communications offence specifies an intention to 'cause harm to a likely audience', as outlined in section 151(1)(b)(ii), or a real and substantial risk of causing harm, as outlined in section 151(1)(b)(i). The false communications offence requires that the person knows the information they are sharing to be false, as outlined in section 152(1)(b), and to 'to cause non-trivial psychological or physical harm to a likely audience', as outlined in section 152(1)(c).

The Bill allows for mere error or unintentional sharing of false information (such as inaccurate content accidentally shared as a result of a typo) and aims to penalise those who share information that intentionally or recklessly causes real, psychological or physical harm. This means that the accidental damage caused by mere error will not be penalised by any inaccuracies. The Online Safety Factsheet outlines how the

²⁰⁶ Nick Stockton, 'What's up with that? Why it's so hard to catch your own typos', *Wired* (12 August 2014) < <https://www.wired.com/2014/08/wuwt-typos/> > accessed 2 August 2022, para 4.

legislation aims to be proportionate by not ‘imposing excessive regulation or state removal of content but ensuring that companies have the systems and processes in place to ensure users’ safety.’²⁰⁷

A weakness of this Bill is the links between the Secretary of State and Ofcom, the regulatory body tasked with implementing the act. One of the clauses in the Bill would allow the Secretary of State to edit codes of practice before the House of Parliament considering them. Section 40 of the Bill refers to the Secretary of State’s powers of direction. Section 40 (1) states:

The Secretary of State may direct Ofcom to modify a draft of a code of practice submitted under section 39(1) if the Secretary of State believes that modifications are required— (a) for reasons of public policy, or (b) in the case of a terrorism or CSEA [Child Sexual Exploitation and Abuse] code of practice, for reasons of national security or public safety²⁰⁸.

The Secretary of State must give a reason for this edit request, ‘except in a case where the Secretary of State considers that doing so would be against the interests of national security, public safety or relations with the government of a country outside the United Kingdom²⁰⁹’ as outlined in Section 40(5)(b).

This clause grants quite a lot of power to the Secretary of State, a branch of the executive, to influence a regulatory body (Ofcom) which is supposed to be independent of this type of pressure. The second problem with this proposed structure is that the Secretary doesn’t even need to justify or give reasons for requests for the changes in the codes of practice. This could lead to a situation whereby the Secretary of State directs Ofcom to change a code of practice for no apparent reason and is under no obligation to give a reason. This could lead to an abuse of power. The Bill could be improved by the Secretary of State giving a reason for the change request and keeping this confidential between the Secretary and the regulator, if required, for national security. This would also increase trust and transparency between both organisations.

²⁰⁷ ‘Online Safety Bill: factsheet’ policy paper, para 8.

²⁰⁸ Online Safety Bill, <<https://publications.parliament.uk/pa/bills/cbill/58-03/0121/220121.pdf>> accessed 4 August 2022.

²⁰⁹ Ibid, section 40(5)(b).

This Bill could be further improved by requiring anyone who launches ads or boosts posts on social media platform to first go through an identification verification process, and thus A) reducing the amount of social media advertisements from ‘ghost’ profiles; and B) holding those who promote harmful information via advertisements accountable. Without this verification process being a requirement for any advertisements or boosted content, all legal pursuits to hold those responsible to account will be futile. A platform cannot hold people accountable if they don’t know who these people are.

An alternative to this improvement would be to only allow advertisements that originate in the UK, which are linked to a UK bank account and a UK passport or other form of official identification. Although this would be an extreme measure and would negatively impact foreign companies trying to target UK-based citizens in their marketing strategies, it would reduce the likelihood of foreign state digital interference and influence. It wouldn’t necessarily remove the possibility of UK citizens influenced by foreign States and posting advertisements or disinformation on their behalf, but a UK citizen residing in the UK with a UK bank account would be easier to penalise than a foreign citizen acting in a foreign State behind a ghost or unverified account. The latter would require foreign State co-operation, the foreign government acknowledging their citizen’s actions or their involvement in the distribution of the disinformation and an agreement to extradite. The former would be a less burdensome and onerous ordeal.

Another measure the UK has taken to tackle online misinformation is introducing a Foreign Interference Offence in the National Security Bill²¹⁰. This Bill was created following the Russian attacks on Ukraine, and related content which spread disinformation, much of which was targeted at foreign audiences. Its aim is to oblige social media giants, search engines and apps which allow the creation and sharing of content, to take preventative and proactive steps to reduce foreign state-sponsored disinformation targeted at UK citizens²¹¹. Specified steps the tech giants must take include removing content from fake accounts which are linked with foreign states, and

²¹⁰ ‘National Security Bill’, <<https://publications.parliament.uk/pa/bills/cbill/58-03/0007/220007.pdf>> accessed 24 July 2022.

²¹¹ Press release ‘Internet Safety laws strengthened to fight Russian and hostile state disinformation’, <<https://www.gov.uk/government/news/internet-safety-laws-strengthened-to-fight-russian-and-hostile-state-disinformation>> accessed 24 July 2022.

which aim to influence elections and litigation, spread sensitive or illegally obtained information, or aim to influence democracy²¹².

A new Foreign Interference offence created by the National Security Bill states in Section 13(12) someone who commits an offence under this section ‘is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or a fine (or both)²¹³’.

In a press release, Security Minister Damian Hinds said:

Disinformation is often seeded by multiple fake personas, with the aim of getting real users, unwittingly, then to ‘share’ it. We need the big online platforms to do more to identify and disrupt this sort of coordinated inauthentic behaviour. That is what this proposed change in the law is about²¹⁴.

A weakness of this Bill is that, although it aims to preserve national security and the foundations of democracy, it could adversely affect the freedom of the press and punish whistleblowing. Part 1 of the Bill refers to the obtaining or disclosing of protected information and states that a person commits an offence if they obtain, copy, record or keep protected information, or disclose or provide access to protected information²¹⁵. A person who commits an offence under this section faces a sentence of imprisonment for life²¹⁶. There is a ‘foreign power condition’ to this offence, outlined in section 24 of the Bill, which is met if the person’s actions are carried out for, or on behalf of, a foreign power. In practice, this could be a foreign state or organisation giving funding to a journalist or a whistle-blower.

In the House of Commons debate on the National Security Bill, Tory MP, David Davis, criticised the penalisation of the press that this act would allow – ‘we criticise nations from Russia to Turkey for the things that are done there, including the assassinations of journalists, presumably authorised by Ministers within those

²¹² Ibid, para 6.

²¹³ ‘National Security Bill’, <<https://publications.parliament.uk/pa/bills/cbill/58-03/0007/220007.pdf>> s 13(12).

²¹⁴ Ibid, para 9.

²¹⁵ ‘National Security Bill’, <<https://publications.parliament.uk/pa/bills/cbill/58-03/0007/220007.pdf>> Part 1, p 6.

²¹⁶ Ibid p 7.

Governments under their legal systems, and here we are creating the equivalent within our own legal system²¹⁷.

In conclusion, the National Security Bill aims to protect the UK from threats of foreign espionage and sabotage, but it could reduce revelations by media investigations and whistleblowing. The Online Safety Bill aims to make the internet safer for users, but the Bill gives quite a lot of power to the executive, to influence a regulatory body (Ofcom) which is supposed to be independent. The Online Safety Bill also doesn't require verification processes for anyone who wants to post an add or boost content on social media channels – a measure which could reduce the number of misleading or misinforming ads launched from ghost profiles and identify those who post misinformation. Knowing who creates adverts containing misinformation is a vital step in holding them accountable.

Hungarian legislation to reduce online misinformation

The difficulty in restricting the publication of content in the name of suppressing misinformation is that some States could use this as a vehicle to control what the media publishes. This concern has been raised by many critics of the Hungarian government's new legislation.

The new legislation, Act XII of 2020 on the Containment of the Coronavirus²¹⁸, added section 322/A to the Hungarian Criminal Code, which brought in special punitive powers for spreading misinformation relating to Covid-19. Someone found guilty of distributing false information relating to Covid-19 may be sentenced to prison for up to five years, or up to eight years if the misinformation results in the death of another

²¹⁷ <<https://hansard.parliament.uk/commons/2022-06-06/debates/12D4FE61-34CE-4483-BB06-591D9C14C14A/NationalSecurityBill#contribution-D9138D90-7FCB-41B6-A1AA-B409A6B9137F>> accessed 24 July 2022, para 5.

²¹⁸ Act XII of 2020 on the Containment of Coronavirus, <<https://perma.cc/9LMR-YS3L>> accessed 27 July 2022.

person²¹⁹, as outlined in Section 337(2) and Section 322(A)(3) of Act XII of 2020 on the Containment of Coronavirus²²⁰.

In a statement criticising the legislation, Reporters Without Borders said these measures to reduce misinformation ‘does not justify draconian powers that risk being used against journalists whose work is indispensable in protecting public health and ensuring accountability²²¹’. Deputy Director of the International Press Institute, Scott Griffen, also criticised the Hungarian measures, calling it a “dark day for press freedom in Hungary” and stating “Viktor Orbán now has yet another tool in his arsenal for silencing what remains of the country’s independent press²²²”.

The obvious problem with suppressing media expression in the name of public safety is that this blurs the line between a government introducing measures that are for public safety and a government only allowing propaganda. Another worrying element of the Hungarian legislation is that it says these measures ‘can be extended until the end of the state of danger²²³’. As there is no guaranteed end point to a global pandemic, these oppressive measures could last for years. Furthermore, this ‘state of danger’ isn’t necessarily specified as the danger of Coronavirus. In theory, another virus or natural disaster could present itself in Hungary, which could also be considered a ‘state of danger’. The original danger caused by Coronavirus could pivot to another danger, such as a rise in flooding or the threat of Russian invasion, and the Hungarian government could justify extending these measures to tackle whatever new danger they are facing.

A third worrying element of this legislation is that, during the declared state of emergency, it absolved the government from parliamentary scrutiny, which broadened

²¹⁹ ‘Hungary: National Assembly Adopts Act Giving Government Special Powers during Coronavirus Pandemic’, *Library of Congress* website, <<https://www.loc.gov/item/global-legal-monitor/2020-05-26/hungary-national-assembly-adopts-act-giving-government-special-powers-during-coronavirus-pandemic/>> para 5

²²⁰ Act XII of 2020 on the Containment of Coronavirus, <<https://perma.cc/9LMR-YS3L>> accessed 27 July 2022.

²²¹ ‘Covid-19 and press freedom: Europe must oppose measures proposed by Viktor Orbán’, *Reporters Without Borders*, <<https://rsf.org/en/covid-19-and-press-freedom-europe-must-oppose-measures-proposed-viktor-orb%C3%A1n>> accessed 26 July 2022, para 7.

²²² ‘Hungary: Press freedom threatened as Orbán handed new powers’, *IPI*, <<https://ipi.media/hungary-press-freedom-threatened-as-orban-handed-new-powers-2/>> accessed 26 July 2022, para 4.

²²³ *Ibid*, para 2.

the government's power to rule by decree²²⁴. This eroded the possibility of executive challenging the government's regime. The government has effectively given itself a free reign to rule in a more absolute manner. It is an entirely disproportionate measure, considering the aim of the legislation and the consequence it has on the running of the country.

In a statement criticising the Hungarian government's new legislation, Amnesty International pointed out that Hungary has commitments to other legal instruments including the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), and that derogations from human rights obligations must 'not exceed "the extent strictly required by the exigencies of the situation"^{225,226}'. The statement further emphasised that the legislation tackling Covid-19 misinformation should not come at the expense of other human rights, and that Hungary 'must comply at all times with its minimum core obligations concerning rights under the Convention while dealing with the current public health emergency²²⁷'.

Finally, although the Act refers to the punishment of an 'untrue fact', it doesn't specify how it measures the truth of a fact. This leaves a very broad range of discretion and interpretation to the Hungarian police or the State branch responsible for monitoring the publication of Covid-19 information. It also fails to describe how the Act will work in tandem with Article 10 of the ECHR or the Hungarian Constitution (known as the 'Fundamental Law') which preserves freedom of expression under Article IX(1)²²⁸. Again, this leaves a wide power of discretion and interpretation to the police.

²²⁴ 'Hungary: Government must not use extraordinary power to roll back human rights amid COVID-19 emergency' (*Amnesty International*, 31 March 2020) <<https://www.amnesty.org/en/documents/eur27/2046/2020/en/>> accessed 27 July 2022.

²²⁵ Article 15 of the ECHR.

²²⁶ 'Hungary: Government must not use extraordinary power to roll back human rights amid COVID-19 emergency' (*Amnesty International*, 31 March 2020) <<https://www.amnesty.org/en/documents/eur27/2046/2020/en/>> accessed 27 July 2022, p 1, para 5.

²²⁷ Ibid.

²²⁸ Fundamental Law of Hungary, <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2021\)046-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)046-e)> accessed 27 July 2022.

American legislation to reduce online misinformation

On the 22nd July 2021, Senator Amy Klobuchar introduced the Health Misinformation Act of 2021²²⁹, which aims to penalise the tech giants that allow false information, specifically relating to health information, to be distributed on their platforms – ‘To amend the Communications Act of 1934 to provide that, under certain circumstances, an interactive computer service provider that allows for the proliferation of health misinformation through that service shall be treated as the publisher or speaker of that misinformation, and for other purposes²³⁰.’

The Health Misinformation Act will amend Section 230 of the Communications Decency Act. This section is a safety blanket for tech giants because it removes them from being liable for the content people create and share on their platforms. This amendment reads as follows:

A provider of an interactive computer service shall be treated as the publisher or speaker of health misinformation that is created or developed through the interactive computer service during a covered period if the provider promotes that health misinformation through an algorithm used by the provider (or similar software functionality), except that this subparagraph shall not apply if that promotion occurs through a neutral mechanism, such as through the use of chronological functionality.²³¹”

This amendment would put greater responsibility on the tech giants for the health content shared on their platforms.

Ireland and Europe’s legislation to tackle online misinformation

Ireland’s Broadcasting (Amendment) Bill 2019²³² was integrated into the Online Safety and Media Regulation Bill 2022. The Bill establishes a new regulator, the Media Commission, which has the power to impose fines of up to €20 million or 10%

²²⁹ Congress.gov <<https://www.congress.gov/bill/117th-congress/senate-bill/2448/text>> accessed 26 December 2021.

²³⁰ Ibid.

²³¹ Ibid.

of an organisation's turnover²³³ for non-compliance and the power to prosecute senior management of the corporates responsible for hosting harmful content online.

The European Commission proposed new rules on political advertising in November 2021²³⁴. These rules would require greater transparency in political marketing and communications including political adverts to be labelled, to clarify who paid for the marketing and how much they paid. Digital targeting using sensitive data would be banned unless the campaign team had the explicit consent of the targeted individual. The measures on these new rules include scope, transparency labels, strict conditions for targeting and amplification, and fines for breaches of these rules²³⁵.

What are the differences in these pieces of legislation?

The (UK) Online Safety Bill specifies punishment for sharing content that is 'false in a material respect'. The (Irish) Online Safety and Media Regulation Bill doesn't specifically refer to misinformation or false information. It refers to harmful content including bullying or humiliating content; content that promotes or encourages an eating disorder; or content that promotes or encourages self-harm or suicide (section 139(A)(3)). Misinformation may not have an obvious or tangible 'harm' element to it, other than misleading or misinforming the public. This harm element in misleading or misinforming can be difficult to prove. If it's difficult to prove, it's difficult to regulate. For this reason, the Bill is ineffective at addressing misinformation, and more suitable to addressing harmful content.

The Health Misinformation Act specifically refers to health information, not false online information generally. The new rules proposed by the European Commission specify that advertisements should be 'free from disinformation'²³⁶ but the category of advertising specified in these new laws relate only to political advertising.

²³³ Online Safety and Media Regulation Bill, 'Powers of the Media Commission', accessed 4 August 2022.

²³⁴ 'European Democracy: Commission sets out new laws on political advertising, electoral rights and party funding', European Commission Website <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6118 > accessed 3 January 2022.

²³⁵ Ibid, para 4.

²³⁶ Ibid, section 'Clear rules on transparency and targeting of political advertising', para 1.

What are the gaps in these pieces of legislation; how can these gaps and weaknesses be rectified?

The Code of Practice on Disinformation was signed by Google, Facebook on Twitter in October 2018²³⁷. Microsoft signed it in May 2019 and TikTok signed it in 2020. The Code's goals include 'transparency in political advertising to the closure of fake accounts and demonetization of purveyors of disinformation²³⁸'. A major limitation of this code is that it isn't a legally binding commitment, so if it is broken, there are no consequences. It is, however, likely that this code will be changed and expanded because the European Commission referenced its plans for developing it in 'several areas to make it strong, stable and flexible²³⁹' in the European Democracy Action Plan²⁴⁰.

The Health Misinformation Act 2021 doesn't propose measures to tackling general misinformation online. It specifically refers to false health information. The weakness is the Act is how niche it is, however, if this legislation is enforceable and successful, elements of it can be replicated in legislation designed to tackle other areas affected by misinformation, including politics, news and inaccurate representation of scientific findings. Similarly, although the new advertising rules proposed by the European Commission specifically relate to political advertising, if they are enforceable and successful, they can be replicated for legislation to tackle misinformation in other areas.

There are many gaps in the pieces of legislation addressed above. There are also pieces of legislation which lack clarity on the issues they address. An example of this is the legislation that is used for engaging with influencers, discussed in the next section.

²³⁷ 'Code of Practice on Disinformation' European Commission Website <<https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation>> accessed 3 January 2022.

²³⁸ Ibid, para 1.

²³⁹ 'Strengthening the EU Code of Practice on Disinformation' European Commission Website <https://ec.europa.eu/info/strategy/priorities-2019-2024/new-push-european-democracy/european-democracy-action-plan/strengthening-eu-code-practice-disinformation_en> para 6.

²⁴⁰ 'European Democracy Action Plan' European Commission Website <https://ec.europa.eu/info/strategy/priorities-2019-2024/new-push-european-democracy/european-democracy-action-plan_en> accessed 3 January 2022.

Influencers in Limbo Legislation

The Advertising Standards Authority of Ireland states that ‘all marketing communications should be legal, decent, honest and truthful²⁴¹’. However, the Advertising and Self-Regulation section of this website states ‘Non-commercial marketing communications, i.e. those which express the advertiser’s position on a political, religious, industrial relations, social or aesthetic matter or an issue of public concern, are not subject to the Code [of Standards for Advertising and Marketing Communications in Ireland].²⁴²’ This excludes quite a wide margin of categories, including all non-commercial content, or all content that doesn’t have a sales element to it. Because many influencers aren’t directly selling products themselves, they might be simply promoting or recommending products; they may not fit into the traditional category of a seller or a commercial entity. A weakness of the Standards for Advertising and Marketing Communications in Ireland is that it doesn’t adequately refer to influencers. The ASAI could rectify this gap by updating this Code to include boundaries and guidelines for influencers. Other jurisdictions have brought in legislation to provide clarity on what influencers can and cannot promote on their social media channels, such as the Australian Therapeutic Goods and Advertising Code²⁴³, discussed further in Chapter 1.

The Public Relations Institute of Ireland (PRII) Social Media Guidelines states that it is unethical and illegal for influencers who are paid to promote content and do not make it clear that the content is endorsed or a sponsored post. Just as traditional media outlets, such as broadsheet and tabloid papers, must make it clear when printed content is sponsored, ‘the principles of engagement...also hold true for social media influencers.²⁴⁴’

Chapter 4 of Ireland’s Consumer Protection Act 2007 provides for prohibited commercial practises which include prohibiting a trader from misleading, false,

²⁴¹ ASAI.ie, <<https://www.asai.ie/>> accessed 23 December 2021.

²⁴² ASAI.ie, <<https://www.asai.ie/advertising-self-regulation/>> accessed 23 December 2021.

²⁴³ The Therapeutic Goods and Advertising Code, Australian Government website, <<https://www.tga.gov.au/therapeutic-goods-advertising-code>> accessed 12 June 2022.

²⁴⁴ PRII, ‘Social Media Guidelines’, <<https://www.prii.ie/about/social-media-guidelines.html>> accessed 2 August 2022.

aggressive or prohibited commercial practices, but doesn't specifically refer to the role of an 'influencer'. Part 1, section 2 of the Consumer Protection Act 2007 defines a "trader" as '(a) a person who is acting for purposes related to the person's trade, business or profession, and (b) a person acting on behalf of a person referred to in paragraph (a)'. While an influencer who is paid could fall into the latter category, legislation that is specific to the boundaries of influencer advertising would provide greater clarity.

Section 55(1)(q) of the Consumer Protection Act 2007 also specifies that a trader should not use 'editorial content in the media to promote a product (if a trader has paid for that promotion) if it is not made clear that the promotion is a paid promotion, whether in the content itself or in any oral, written, visual or descriptive representation in the promotion'. A weakness of this section is that it uses the term 'media' but doesn't define 'media' in the Interpretations and application section. It doesn't state that the term 'media' includes 'social media'. In fact, the Act doesn't use the term 'social media' at all. It could be argued that social media is different to media and therefore the restrictions outlined in section 55(1)(q) don't apply to influencers sharing content on their social media accounts. For this reason, further legislation should be introduced in Ireland making it clear what influencers can and cannot promote, and for health and safety purposes, social media influencers who are not qualified medical professionals, should be restricted from promoting health products, with similar rules to those set out in the Australian Therapeutic Goods and Advertising Code.

Putting information into Context

One of the common issues in analysing data is who decides what data is false and what data is true. Mark Deem and Peter Warren discuss the issue of information selection and use in *AI on Trial* – 'If we talk about disinformation, we are discussing data, and we are simply talking about good and bad data and whether it is allowable, so this becomes a philosophical examination about us and our use of data for our own,

particular ends.²⁴⁵ The issue of who decides on the accuracy of data is discussed further in Chapter 2.

Deem and Warren also emphasise the importance of putting data into context and the danger of not doing so. The example they give is the recording of Covid-19 deaths in America whereby people who had Covid-19 and died, were automatically recorded as having died of Covid-19²⁴⁶. This isn't necessarily true. Someone could have died of cancer but had Covid-19 at the time of their death, and so the death is recorded as a Covid-19 death. Although these deaths may have been accelerated by the virus, the virus didn't necessarily cause these deaths. The result of this kind data presentation is an erosion of public trust in the virus updates. When public trust is lost, it is difficult to regain, and the long-term consequence could be non-compliance with lockdown restrictions because of a disbelief in the presentation of the data. Not putting data into context is misleading and inaccurate presenting of data findings is a form of misinformation.

The importance of putting data into context is vital for its accurate portrayal. For example, if a company was looking at an employee's attendance record and stated in their feedback form that the employee only came to work 3 days a week, it may portray the employee as having a high absent rate. However, if the employee was only contracted to work 3 days a week, and came into the office 3 days a week, their attendance rate would be perfect. Data presented in the media or published online should follow guidelines to putting their findings into context, for clarity. Part of this context includes outlining the limitations of the data.

In her article 'Putting data back into context – why context is hard', Catherine D'Ignazio, Assistant Professor of Data Visualization & Civic Media at Emerson College, states 'some institutions may publish their data and metadata freely but be less forthcoming about their data's limitations. This can lead to serious cases of misuse and misrepresentation of data²⁴⁷.' D'Ignazio gives a case study example of the danger

²⁴⁵ Mark Deem and Peter Warren, *AI on Trial* (Bloomsbury, 2022) Chapter 12 'Who or what decides which information is bad?' para 1.

²⁴⁶ Ibid, para 3.

²⁴⁷ Catherine D'Ignazio, 'Putting data back into context – why context is hard' (*DataJournalism.com*, published 4 April 2019)

<<https://datajournalism.com/read/longreads/putting-data-back-into-context>> accessed 3 August 2022, para 8.

in not outlining the limitation of data: FiveThirtyEight is a news website which uses statistical analysis in its articles. The website published an article on a kidnapping story. It did not verify its data prior to publishing the article, ‘because of [the] pressure to attract big data scientific research funding, [they] failed to describe the limitations of their ‘events’ data (which is not events data at all, but rather ‘media reports about events’ data)²⁴⁸’.

Inaccurate reporting of missing data points is one of the sixteen ethical issues of data reporting identified in Catherine A. Marco and Gregory L. Larkin’s paper ‘Research Ethics: Ethical Issues of Data Reporting and the Quest for Authenticity²⁴⁹’. There are various guidelines on data reporting, depending on the research area. The Equator (Enhancing the Quality and Transparency of Health Research) Network alone lists 82 different types of reporting guidelines on its website²⁵⁰. Having a legislative framework on data reporting and presentation which obliges data scientists to include specification of limitations, reporting errors and methodologies would reduce misleading data presentation. In William and Jacqueline Goodrum’s article ‘Beyond the three laws: an argument for regulating data scientists as fiduciaries’, they suggest if legislation is introduced to regulate artificial intelligence and machine learning, with the aim of protecting the public, ‘then such laws must also expressly regulate data scientists²⁵¹’.

The regulation of a profession isn’t a new or radical concept. As Goodrum’s article points out, lawyers, doctors and accountants are some of the many professions that are regulated by external bodies²⁵². Data scientists aren’t currently subjected to governmental regulation²⁵³. This means there is no minimum standards or commonly adhered to guidelines. The presentation of data can be wide-reaching, influencing lobbying strategies, governmental policies and NGO priorities. It is vital that this data

²⁴⁸ Ibid.

²⁴⁹ Catherine A. Marco and Gregory L. Larkin ‘Research Ethics: Ethical Issues of Data Reporting and the Quest for Authenticity’ *Academic and Emergency Medicine*, June 2000, <<https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1553-2712.2000.tb02049.x>> p 693.

²⁵⁰ Equator network, Reporting Guidelines, <<https://www.equator-network.org/reporting-guidelines-report-section/data-2/>> accessed 4 August 2022.

²⁵¹ William Goodrum, Ph.D. & Jacqueline Goodrum, J.D. ‘Beyond the three laws: an argument for regulating data scientists as fiduciaries’, *Richmond Journal of Law & Technology* (2021) para 4.

²⁵² Ibid, para 5.

²⁵³ Ibid.

is accurate, transparent and clear, so that it doesn't mislead policymakers, politicians or the government.

There is also a lack of data literacy in the general public. Goodrum refers to a 2018 Census-wide survey by Qlik²⁵⁴ which found that just '24% of business decision makers surveyed are fully confident in their ability to read, work with, analyze, and argue with data²⁵⁵'. This Qlik survey also found that just 32% of the C-suite [senior leaders] is viewed as data literate, potentially holding senior leaders back from encouraging their workforces to use data to their advantage²⁵⁶. This lack of data literacy and understanding outlines the heavy reliance on data scientists, and their interpretation and presentation of the data. For this reason, data scientists should be regulated, and the presentation of data should follow certain guidelines which encourage transparency, with limitations acknowledged and sign-posted so that decision-makers aren't misled.

Conclusion

In conclusion, this dissertation examined the concept of misinformation in a digital age, and the different jurisdictional attempts to tackle it in the EU, the UK, Australia and America. Chapter One explored freedom of speech and restricting falsities. It found that freedom of expression is vital for the betterment of society, however, this

²⁵⁴ 'Lead with Data - How to Drive Data Literacy in Enterprise', QLIK (2018), <<https://www.qlik.com/us/bi/-/media/08F37D711A58406E83BA8418EB1D58C9>> accessed 4 August 2022.

²⁵⁵ Ibid, page 4.

²⁵⁶ Ibid.

freedom should not be extended to allow defamatory statements, harassment, or sharing content that is misleading or harmful.

Chapter Two explored the problems in separating truths and falsities and came to five possible solutions including labelling, removing or editing content, deleting accounts of serial misinformation offenders, restricting the promotion of false or misleading information, and rejecting advertisement submissions that are inaccurate.

Chapter 3 examined the practicalities of the different pieces of legislation, how influencers are left in limbo legislation, and the importance of putting data into context for accurate presentation. It found that Ireland's existing legislation lacks clarity on influencer marketing; and there should be minimum qualification requirements and a governing body for data scientists.

It is important to reduce online misinformation because it informs people's choices on their health, nutritional intake, education, travel, political support and votes. Just as information is power, misinforming people strips them of power. It is vital that the Legislature introduce laws to reduce online misinformation, while preserving freedom of speech. Tech giants self-regulating is an insufficient solution to this problem. This problem is widespread and requires a multi-tier response, including specified legislation on influencer marketing; a requirement for a harmful or reckless element to offences relating to misinformation; a regulatory independent body monitoring media, social media and online platforms for non-compliance with guidelines on tackling misinformation; and minimum requirements for online advertising, such as the adverts coming from verified users and restricting advertising from accounts that have been linked to spreading misinformation or disinformation.

On the 12th of January 2021, Pew Research published survey figures which found that 86% of Americans get their news from digital devices²⁵⁷. Gone are the days where people look to broadsheet, tabloid or broadcast outlets for their news. This immense power on the tech giants requires a response of integrity and integrity, so that the

²⁵⁷ Elisa Shearer, 'More than eight in ten Americans get news from digital devices' (*Pew Research Centre*, 12 January 2021) <<https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/>> accessed 7 August 2022.

public are empowered to make informed choices that effect their lives. Reducing obvious disinformation and misinformation is the foundation of this responsibility.

This also needs to be weighed against the right to freedom of expression. In January 2015, at the University of Vermont, Salman Rushdie said ‘The moment you limit free speech, it’s not free speech²⁵⁸’. While freedom of expression ought to be a high priority for governments and any restrictions ought to be carefully considered, there is a need for some. There is a need to restrict it in favour of doctor/patient confidentiality, advertising standards, data protection, defamation and to combat activities which undermine the structure of democracy. If a political party put advertisements on social media targeting members of the public likely to vote for the opposing party, with disinformation relating to voting dates and locations, it would deprive these voters of their right to vote. It would be a pitiful argument to respond with ‘Those citizens missed out on exercising their right to vote, but at least freedom of expression wasn’t violated’.

Having said that, free speech is a vital element of discovering truth and therefore it is highly problematic to censor an argument believed to be false, but which has not been scrutinised. Censorship for the sake of removing misinformation and preserving truth can, ironically, suppress truth. There is also no all-knowing censor who is qualified to adjudicate on what is false and what is true, and who is also free of biases and can resist abuse of censorship powers. Online misinformation can be extremely harmful but should not be used as a justification to shut down dissenting views. Sometimes it isn’t possible to know for certain if something is true or not, particularly in the field of medicine and dealing with novel viruses, or when challenging outdated scientific beliefs. Opposition and scrutiny are vital for innovation and medical breakthroughs, so freedom of speech is a vital part of progress, however, this doesn’t mean allowing objectively and obviously false information to be shared on social media platforms,

²⁵⁸Salman Rushdie on Charlie Hebdo: Freedom of speech must be absolute’, <[Salman Rushdie on Charlie Hebdo: Freedom of speech must be absolute | Mashable - YouTube](#)> at 1.30.

because this can negatively influence daily choices and be detrimental to fundamental rights.

Recommendations

This dissertation identified the risks in allowing misinformation and the risks in censorship. Social media platforms have a responsibility to ensure their platforms are safe but that also allow people to freely express themselves. Methods were identified to reduce online misinformation, but they should be used as part of a balancing act with freedom of expression. Censorship should only be used when statements are obviously false and harmful, rather than enforcing a draconian regime that ultimately risks suppressing truth and progress.

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