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Thinking Clearly About Speaking Freely – Part 7: Misusing Misinformation

by

Randolph J. May *

In [Part 6](#) of this "[Thinking Clearly About Speaking Freely](#)" series, I said everyone was all atwitter about Twitter in light of Elon Musk's bid. More to the point: "Those most atwitter about possible changes at Twitter, whether brought about by Elon Musk gaining control or otherwise, are those on the Left who don't want to see Twitter relax its policing of what they claim to be 'misinformation' or 'disinformation.'"

That was before it looked like he might actually succeed in acquiring the little Blue Bird.

Mr. Musk has said he wants Twitter to be a "de facto public town square" that adheres to "free speech principles."

Little could I comprehend how apoplectic the reactions of many of those on the Left would be to the proposed buyout. To take but one example, MSNBC host Ari Melber suggested Mr. Musk could suppress political debate on Twitter by "secretly ban[ning] one party's candidate." Or Twitter could "turn down the reach of their stuff ...and the rest of us might not find out about it until after the election."

Wait. Didn't Twitter "turn down the reach" of the *New York Post's* Hunter Biden Laptop Story reporting until after the election, claiming, in part, that the *Post's* reporting could be "misinformation?" I assume that Mr. Melber was suitably disturbed by that "turn down" and that his concern was not completely assuaged when, in March 2021, Twitter's then-CEO Jack Dorsey admitted it had all been a "total mistake."

A year ago, when I began this ["Thinking Clearly About Speaking Freely"](#) series, I pointed out that the basis for actions that "cancel" speech often are claims the speech constitutes "misinformation" or "disinformation." While acknowledging that there's speech on Twitter and other online social media sites that falls into those categories, I stated then that, "to a significant extent, whether or not lawful speech is properly characterized as such frequently depends on one's perspective."

There are many examples of "misinformation" or "disinformation" claims serving as the basis for suppressing speech involving matters of public significance. As Vivek Ramaswamy and Jed Rubenfeld pointed out in a recent *Wall Street Journal* piece, ["How Elon Musk Can Liberate Twitter,"](#) such assertions often are put forward when the websites deem the content merely "unproven" or "lacking context." In other words, where there is no claim that the information is false.

While Mr. Musk may wish to return Twitter to something closer to the original proclaimed ideal of a public square akin to a free speech zone, I suspect he understands that, in one way or the other, and to some degree or another, some content moderation may be desirable, say, for pornography or truly extremist speech aimed at provoking violence. As I said in [Part 6](#), there is content beyond that which is traditionally entitled to First Amendment protection that, in some instances, Twitter and other sites may wish to restrict. As private entities, they generally are protected by the First Amendment in doing so, with only a few exceptions, say, for example, if they willingly coordinate speech-suppressive actions with the government or accede to government directions.

Regarding claims that certain lawful content constitutes "misinformation" or "disinformation," I suggest that Twitter adopt a policy that presumes, as a default position, that the speech in question should not be restricted. In effect, under this policy, the default position would be reliance on a presumption (that could be overcome by clear and convincing evidence) that more speech, not less, is the best way to combat misinformation and disinformation claims.

As concerned as I may have been the past several years regarding misuse of "misinformation" claims to restrict speech that ought to remain within the realm of legitimate public debate, I am far more concerned about the government arrogating to itself the power to weaponize assertions of misinformation to silence views that may not comport with the official government line.

For now, just a few quick examples, with perhaps more to say about them and others in later installments. Tom Wheeler, the Chairman of the Federal Communications Commission during the Obama Administration, has proposed a new ["focused specialized agency to oversee dominant digital companies."](#) The realm of its oversight authority would be broad, including this: "Government instigated, supervised, approved, and enforced behavioral standards utilizing a development process similar to the technology standards process." Given Mr. Wheeler's expressed concerns regarding what he considers to be harms resulting from misinformation and

disinformation on digital platforms, empowering a new federal agency to instigate, supervise, approve, and enforce behavioral standards is truly worrisome – and more to the point, assuming such standards would relate to the content moderation practices of Twitter and other digital platforms, a threat to free speech violative of the First Amendment.

In December 2020, nine Democratic House members, all part of a group called the Congressional Task Force on Digital Citizenship, wrote a [letter](#) to then-President-elect Joe Biden urging the creation of "a new multiagency Digital Democracy Task Force to develop a strategy focused on building greater national resilience to online threats and equipping federal agencies with the tools to communicate during disinformation events." While their proposal did not contain any specifics regarding the powers that should be granted to government agencies to combat supposed harms from online content, the references to "rampant" misinformation suggest that some form of government direction from the multiagency Task Force might follow.

Finally, this past week's announcement that the Department of Homeland Security has created a new "Disinformation Governance Board" to combat disinformation raises Orwellian alarm bells. There is little information available now regarding how the Disinformation Board is organized, its powers, how it will go about determining what constitutes disinformation, and so forth. But we know enough to understand that it's a cause for concern when the government tasks itself with the job of determining whether speech – remember, that's what we're talking about – is true or whether, instead, it constitutes disinformation that should be restricted.

It's one thing to be concerned, as I have been, about private entities such as Twitter, Facebook, and other digital media giants restricting too much speech based on "misinformation" or "disinformation" claims. But my concern rises to an entirely different level when it is the government exercising the censorial power. That truly does raise grave First Amendment concerns.

* Randolph J. May is President of the Free State Foundation, a free market-oriented think tank in Rockville, MD. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it.

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Randolph J. May, [Thinking Clearly About Speaking Freely – Part 1](#), (April 19, 2021)

Randolph J. May, [Thinking Clearly About Speaking Freely – Part 2](#), (May 3, 2021)

Randolph J. May, [Thinking Clearly About Speaking Freely – Part 3](#) (June 4, 2021)

Randolph J. May, [Thinking Clearly About Speaking Freely – Part 4](#) (June 15, 2021)

Randolph J. May, [Thinking Clearly About Speaking Freely – Part 5 - Catholic Law's Inaugural Seigenthaler Debate](#) (February 4, 2022)

Randolph J. May, [Thinking Clearly About Speaking Freely – Part 6: All Atwitter About Twitter](#) (April 18, 2022)