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**Curing the Ills of the Infodemic: An  
Overview of Transatlantic Legal Measures  
and Capacities for Countering COVID-19  
Falsehoods and Digital Disinformation**

**Yitzchak Besser**

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# TTLF Working Papers

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## **Abstract**

This working paper discusses the impact of COVID-19 false information and the state of the law in the United States and Europe with respect to addressing this deadly problem. The paper is still very much a work in progress, and does not address certain important considerations, such as legal requirements related to the medical profession or the possibility of creating fiduciary duties for professional and political speakers. Neither does it discuss ongoing litigation related to government efforts to counter false speech online—sometimes characterized under a theory of state action—nor specific statements made by individual politicians. Instead, it attempts to present the lay of the land regarding the law about online false speech in the COVID-19 context. A forthcoming version of this paper will delve into the nuances of legal restrictions for commercial speech, and investigate how bad actors profit from disinformation. It will also discuss copyright and consumer protection law in relation to the online information services sector, with a particular emphasis on regulating false advertising, fake medical products, and the like. It will also look at recent attempts by the U.S. Federal Trade Commission to crack down on false digital speech such as fake reviews and testimonials, and investigate unfair and deceptive trade practices related to the digital services sector, commonly connected to unconscionable user interface design techniques known as “dark patterns.”

## **Curing the Ills of the Infodemic: An Overview of Transatlantic Legal Measures and Capacities for Countering COVID-19 Falsehoods and Digital Disinformation**

Yitzchak Besser

The coronavirus disease 2019 (“COVID-19”) is an infectious disease caused by the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).<sup>1</sup> This disease caused a catastrophic pandemic that initially began in China in December 2019 before spreading throughout the world.<sup>2</sup> The rapid spread of COVID-19 caused the World Health Organization (“WHO”) to declare a Public Health Emergency of International Concern on January 30, 2020, and to characterize the situation as a pandemic on March 11 of that year.<sup>3</sup> Over three years later, the WHO concluded that, although the disease was still prevalent, the pandemic had receded and the global emergency had concluded.<sup>4</sup> As of November 22, 2023, there have been over 772 million confirmed cases of COVID-19 globally, according to the WHO, and approximately 7 million people have died from the disease.<sup>5</sup>

As WHO director-general Tedros Adhanom Ghebreyesus noted in 2020,<sup>6</sup> the COVID-19 pandemic also created an infodemic, i.e. an “overabundance of information” that “includes deliberate attempts to disseminate wrong information to undermine the public health response

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<sup>1</sup> *Coronavirus disease (COVID-19) pandemic*, WORLD HEALTH ORGANIZATION (last viewed Nov. 27, 2023), <https://www.who.int/europe/emergencies/situations/covid-19>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *WHO Coronavirus (COVID-19) Dashboard*, WORLD HEALTH ORGANIZATION (last viewed Nov. 27, 2023), <https://covid19.who.int/?mapFilter=deaths>.

<sup>6</sup> *The COVID-19 infodemic*, 20 LANCET INFECTIOUS DISEASES 8 (Aug. 2020), [https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(20\)30565-X/fulltext#articleInformation](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30565-X/fulltext#articleInformation).

and advance alternative agendas of groups or individuals.”<sup>7</sup> In other words, an infodemic is characterized by the prevalence of medical misinformation and disinformation that “can be harmful to people’s physical and mental health; increase stigmatization; threaten precious health gains; and lead to poor observance of public health measures, thus reducing their effectiveness and endangering countries’ abilities to stop” the underlying disease.<sup>8</sup> Although both misinformation and disinformation are false, the key difference between them is that the latter is spread with an intent to deceive while the former is not.<sup>9</sup>

According to a joint statement released by several international organizations included the WHO and the United Nations, “misinformation costs lives” and disinformation in the COVID-19 context “polariz[ed] public debate...; amplify[ed] hate speech; heighten[ed] the risk of conflict, violence and human rights violations; and threaten[ed] long-term prospects for advancing democracy, human rights and social cohesion.”<sup>10</sup> Combating the forces of the COVID-19 infodemic have been crucial for the medical and policy successes in the battle against the disease.<sup>11</sup> These forces of misinformation and disinformation find much of their strength through social media, where misinformation and disinformation can proliferate exponentially

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<sup>7</sup> *Managing the COVID-19 infodemic: Promoting healthy behaviors and mitigating the harm from misinformation and disinformation*, WORLD HEALTH ORGANIZATION (Sept. 23, 2020), <https://www.who.int/news/item/23-09-2020-managing-the-covid-19-infodemic-promoting-healthy-behaviours-and-mitigating-the-harm-from-misinformation-and-disinformation>.

<sup>8</sup> *Id.*

<sup>9</sup> *Let’s flatten the infodemic curve*, WORLD HEALTH ORGANIZATION (last viewed Nov. 27, 2023), <https://www.who.int/news-room/spotlight/let-s-flatten-the-infodemic-curve>

<sup>10</sup> *Managing the COVID-19 infodemic: Promoting healthy behaviors and mitigating the harm from misinformation and disinformation*, WORLD HEALTH ORGANIZATION (Sept. 23, 2020), <https://www.who.int/news/item/23-09-2020-managing-the-covid-19-infodemic-promoting-healthy-behaviours-and-mitigating-the-harm-from-misinformation-and-disinformation>.

<sup>11</sup> *Id.*

and spread like a virus.<sup>12</sup> Social media platforms’ algorithms and architectures<sup>13</sup> facilitate the spread of false information, much of which is predicated on conspiracy theories<sup>14</sup> that are often successful in influencing people’s behavior because they “provide the comfort of an explanation in times of uncertainty and anxiety.”<sup>15</sup> Conspiracy theories play on people’s emotions, and “hijack[] the mental cues that we use to decide whether the source [of the conspiracy theory] is legitimate and thus trustworthy.”<sup>16</sup> They are at their most damaging when they “incorporate grains of truth” alongside their falsities and emotional manipulation.<sup>17</sup>

Research has shown that false information on social media spreads “significantly farther, faster, deeper, and more broadly” than accurate content.<sup>18</sup> As one example, a June 2020 study showed that COVID-19 misinformation videos on YouTube accrued nearly 20 million shares and 71 million reactions on Facebook, Twitter, and Reddit between October 2019 and June 2020, easily beating the 15 million shares and 42 million reactions generated by all YouTube videos posted during that time by the top five English-language news broadcasters combined.<sup>19</sup>

Although medical misinformation has existed long before the COVID-19 pandemic, the speed,

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<sup>12</sup> Zaracostas, J., *How to fight an infodemic*, 395 LANCET 676 (Feb. 29, 2020), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30461-X/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30461-X/fulltext)

<sup>13</sup> Sadiq Muhammad T & Saji K. Mathew, *The disaster of misinformation: A review of research in social media*, 13 INT. J. DATA SCI. ANAL. 271, 272 (2022), <file://ca3-ps01/DEMFR/YitzchakBesser/Downloads/s41060-022-00311-6.pdf>.

<sup>14</sup> *Understanding the infodemic and misinformation in the fight against COVID-19*, PAN AMERICAN HEALTH ORGANIZATION, at 1 (2020), [https://iris.paho.org/bitstream/handle/10665.2/52052/Factsheet-infodemic\\_eng.pdf](https://iris.paho.org/bitstream/handle/10665.2/52052/Factsheet-infodemic_eng.pdf).

<sup>15</sup> *The COVID-19 infodemic*, 20 LANCET INFECTIOUS DISEASES 8 (Aug. 2020), [https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(20\)30565-X/fulltext](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30565-X/fulltext).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Jason A. Gallo & Clare Y. Cho, *Social Media: Misinformation and Content Moderation Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE, at 16 (Jan. 27, 2021), <https://crsreports.congress.gov/product/pdf/R/R46662> (quoting Soroush Vosoughi, Deb Roy, & Sinan Aral, *The Spread of True and False News Online*, 359 SCIENCE 1146-1151 (March 9, 2018), <https://doi.org/10.1126/science.aap9559>).

<sup>19</sup> *Id.* (citing Aleksu Knuutila et al., *COVID-Related Misinformation on YouTube: The Spread of Misinformation Videos on Social Media and the Effectiveness of Platform Policies*, Oxford Internet Institute, University of Oxford, Computational Propaganda Project, COMPROP Data Memo 2020.6, September 21, 2020, at <https://comprop.oii.ox.ac.uk/wp-content/uploads/sites/93/2020/09/Knuutila-YouTube-misinfo-memo-v1.pdf>).

scope, and reach of the Internet has severely exacerbated the problem and created a 21<sup>st</sup>-century concern that 20<sup>th</sup>-century approaches may not be able to solve.<sup>20</sup>

During the first three months of 2020 alone, nearly 6,000 people were hospitalized due to COVID-19 misinformation, and at least 800 people may have died for the same reason.<sup>21</sup> According to a November 2021 study, three out of every four American adults believed or were unsure whether to believe at least one of eight different false statements about COVID-19 used in the study.<sup>22</sup> This belief in false information—and a corresponding distrust of information coming from reputable sources—has had a lethal impact,<sup>23</sup> in that approximately one out of every three U.S. Covid-19-related deaths could have been prevented if public health recommendations had been followed.<sup>24</sup> In short, the COVID-19 infodemic has made its corresponding pandemic much more deadly than it would otherwise have been,<sup>25</sup> and can easily be characterized as a serious threat to a country’s national security.<sup>26</sup> This is especially true for

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<sup>20</sup> Maria Mercedes Ferreira Caceres et al., *The impact of misinformation on the COVID-19 pandemic*, 9 AIMS PUBLIC HEALTH 2, 262, 269 (Jan. 12, 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9114791/>.

<sup>21</sup> *Fighting misinformation in the time of COVID-19, one click at a time*, WORLD HEALTH ORGANIZATION (Apr. 27, 2021), <https://www.who.int/news-room/feature-stories/detail/fighting-misinformation-in-the-time-of-covid-19-one-click-at-a-time>.

<sup>22</sup> Liz Hamel et al., *KFF COVID-19 Vaccine Monitor: Media and Misinformation*, KFF (Nov. 8, 2021), [https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-media-and-misinformation/?utm\\_campaign=KFF-2021-polling-surveys&utm\\_medium=email&\\_hsmi=2&\\_hsenc=p2ANqtz--dx3j-kOIXAvH-62u7sPXMaiNOwsbVA21UtdXKd3JvjW58VzSlbeqKV6UJiKICpoWILUSMKAqOwtTsP7SugLT8Nt9YPw&utm\\_content=2&utm\\_source=hs\\_email](https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-media-and-misinformation/?utm_campaign=KFF-2021-polling-surveys&utm_medium=email&_hsmi=2&_hsenc=p2ANqtz--dx3j-kOIXAvH-62u7sPXMaiNOwsbVA21UtdXKd3JvjW58VzSlbeqKV6UJiKICpoWILUSMKAqOwtTsP7SugLT8Nt9YPw&utm_content=2&utm_source=hs_email).

<sup>23</sup> Michael A. Gisondi et al., *A Deadly Infodemic: Social media and the power of COVID-19 Misinformation*, 24 J. MED. INT. RES. 1-2 ((2022), <https://www.jmir.org/2022/2/e35552>.

<sup>24</sup> Sahana Sule et al., *Communication of COVID-19 Misinformation on Social Media by Physicians in the US*, JAMA NETWORK OPEN (Aug. 15, 2023), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2808358>.

<sup>25</sup> Michael A. Gisondi et al., *A Deadly Infodemic: Social Media and the Power of COVID-19 Misinformation* 24 J MED INTERNET RES (Feb. 2022), <https://www.jmir.org/2022/2/e35552>.

<sup>26</sup> *2021 Public-Private Analytic Exchange Program, Dep’t of Homeland Security, Combatting Targeted Disinformation Campaigns: A whole-of-society issue, Part Two*, at 10 (Aug. 2021), [https://www.dhs.gov/sites/default/files/publications/phase\\_ii\\_-\\_combatting\\_targeted\\_disinformation.pdf](https://www.dhs.gov/sites/default/files/publications/phase_ii_-_combatting_targeted_disinformation.pdf).



the United States, which has the highest COVID death toll in the world<sup>27</sup>—a “dubious distinction... due in no small part to mis-/disinformation, [and] a shocking statistic given that [the] country pioneered the most effective vaccines and distributed them widely.”<sup>28</sup>

The extreme consequences of false information has prompted U.S. Food and Drug Administration Commissioner Dr. Robert Califf to call for better regulation designed to root out misinformation.<sup>29</sup> In his words, false information “is the most common cause of death in the United States.”<sup>30</sup> Similarly, in November 2021, National Institutes of Health Director Dr. Francis Collins told National Public Radio that the country had “probably lost 100,000 people to COVID-19 who were unvaccinated because they had information that told them that this wasn’t something that would be safe for them.”<sup>31</sup> He agreed that “misinformation is the deadliest disease at this point,” and called out bad actors that were “intentionally spreading this kind of information that they know to be false for some political or personal reasons.”<sup>32</sup> He argued that these people should be “track[ed] down” and questioned.<sup>33</sup> “[I]sn’t there some kind of justice for

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<sup>27</sup> *Number of novel coronavirus (COVID-19) deaths worldwide as of May 2, 2023, by country and territory*, STATISTA (last viewed Nov. 30, 2023), <https://www.statista.com/statistics/1093256/novel-coronavirus-2019ncov-deaths-worldwide-by-country/>.

<sup>28</sup> Tracy Mitrano, *Missouri v. Biden*, INSIDE HIGHER ED (Sept. 11, 2023), <https://www.insidehighered.com/opinion/blogs/law-policy-and-it/2023/09/11/missouri-v-biden-where-first-amendment-and-security-meet>.

<sup>29</sup> Meg Tirrell, *Health misinformation is lowering U.S. life expectancy, FDA Commissioner Robert Califf says*, CNBC (Apr. 11, 2023), <https://www.cnbc.com/2023/04/11/us-life-expectancy-hurt-by-misinformation-fda-commissioner-robert-califf.html>.

<sup>30</sup> Darius Tahir, *FDA head Robert Califf battles misinformation – sometimes with fuzzy facts*, KFF HEALTH NEWS (July 24, 2023), <https://kffhealthnews.org/news/article/fda-head-robert-califf-battles-misinformation-sometimes-with-fuzzy-facts/>.

<sup>31</sup> *NIH director says pandemic’s toll is now on the shoulders of the unvaccinated*, NPR (Nov. 21, 2021), <https://www.npr.org/2021/11/21/1057815902/nih-director-says-pandemics-toll-is-now-on-the-shoulders-of-the-unvaccinated>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

this kind of action?” he asked.<sup>34</sup> “Isn’t this like yelling fire in a crowded theater? Are you really allowed to do that without some consequences?”<sup>35</sup> This paper aims to answer that very question.

Since “prevention is the most effective way to combat misinformation,”<sup>36</sup> government and policymakers should take a more proactive approach to countering the next infodemic. To do so, one must understand the limits of the law with respect to free expression. This paper will therefore address the legal challenges and opportunities associated with regulating false information. It will examine American free speech jurisprudence, and discuss social media platforms’ efforts to address the situation surrounding COVID-19 misinformation and disinformation. The paper will then investigate the intricacies of European free speech law, and discuss governmental, regulatory, and public policy efforts to combat the infodemic. Finally, it will recommend courses of action for addressing the problem of disinformation.

## I. False Information and Free Speech Law in the United States

The cornerstone of American free speech law is the First Amendment’s invocation that “Congress shall make no law...abridging the freedom of speech, or of the press.”<sup>37</sup> Although this principle has been present since the founding of the nation, modern free speech jurisprudence only came into being in 1919 with the landmark case of Schenck v. United States,<sup>38</sup> which involved two activists who argued that the World War I draft violated the Thirteenth Amendment and spread pamphlets urging conscripts to “assert their rights” and challenge the conscription

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Maria Mercedes Ferreira Caceres et al., *The impact of misinformation on the COVID-19 pandemic*, 9 AIMS PUBLIC HEALTH 2, 262, 269 (Jan. 12, 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9114791/>

<sup>37</sup> U.S. Const. amend. I.

<sup>38</sup> David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHICAGO L. REV. 1207, 1207 (1983), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=4343&context=uclrev>.

act.<sup>39</sup> The activists were found guilty of conspiracy to violate the Espionage Act; conspiracy to commit an offense against the United States; and unlawful use of the mail system.<sup>40</sup> They argued that the First Amendment protected their actions, but the Supreme Court disagreed.<sup>41</sup> Justice Oliver Wendell Holmes, Jr., writing for the majority, famously stated in the opinion that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic,”<sup>42</sup> a sentiment echoed by the NIH’s Dr. Collins nearly a century later.<sup>43</sup> “The question in every case,” Holmes continued, “is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” This “clear and present danger” test would guide Supreme Court decisions for the next fifty years.

As one example, the Supreme Court returned to the clear and present danger test in 1951 when it deliberated on Dennis v. United States, a case involving several organizers of the Communist Party of the United States of America.<sup>44</sup> A jury concluded that the Communists had violated the Smith Act by conspiring to create an organization that advocated for the destruction of the government by force and violence.<sup>45</sup> As in Schenck, the appellants argued that the First Amendment protected their actions,<sup>46</sup> but here too the Court disagreed.<sup>47</sup> It began with the conclusion that it was “squarely presented with the application of the ‘clear and present danger’ test, and must decide what that phrase imports.”<sup>48</sup> Notably, it reasoned that the government can

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<sup>39</sup> Schenck v. United States, 249 U.S. 47, 50–51 (1919).

<sup>40</sup> *Id.* at 49–49.

<sup>41</sup> *Id.* at 51–43.

<sup>42</sup> *Id.* at 52.

<sup>43</sup> *Supra*, NPR note.

<sup>44</sup> Dennis v. United States, 341 U.S. 494, 497 (1951).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 502.

<sup>47</sup> *Id.* at 510–11.

<sup>48</sup> *Id.* at 508.

act even in the absence of an imminent threat of violence, stating that “[o]bviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited.”<sup>49</sup> Under this rationale, the clear and present danger test criminalized indoctrination to violence: “If the Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.”<sup>50</sup> Even if an attempt to overthrow the government by force is weak and “doomed from the outset,” the attempt itself is still a sufficient evil for Congress to prevent and “[i]t is the existence of the conspiracy which creates the danger.”<sup>51</sup> Thus, the Supreme Court concluded that under the clear and present danger test, “[i]f the ingredients of the reaction are present, [it] cannot bind the Government to wait until the catalyst is added.”<sup>52</sup>

The Supreme Court shifted away from the clear and present danger test in 1969 when it decided the seminal case of Brandenburg v. Ohio.<sup>53</sup> The appellant in that case was a Ku Klux Klan leader convicted under the Ohio Criminal Syndicalism statute for “‘advocating the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform’ and for ‘voluntarily assembl(ing) with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.’”<sup>54</sup> Brandenburg gave a televised speech at a KKK rally, saying, “We’re not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance

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<sup>49</sup> *Id.* at 509.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 510–11.

<sup>52</sup> *Id.* at

<sup>53</sup> Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

<sup>54</sup> *Id.* at 444–45.

taken” and “We are marching on Congress July the Fourth, four hundred thousand strong.”<sup>55</sup> He also called for “the nigger [to] be returned to Africa, the Jew returned to Israel.”<sup>56</sup> Although some people carried weapons, *Brandenburg* did not.<sup>57</sup> In a per curiam decision, the Court cited *Dennis* as standing for “the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>58</sup> This “likely to incite imminent lawless action” standard has since become the benchmark for evaluating the limits of First Amendment protections and the government’s ability to prohibit advocacy for lawlessness and “punish speech because of the dangerous ideas it communicated.”<sup>59</sup> But *Brandenburg* relates to the “mere advocacy of the use of force or violence,”<sup>60</sup> and the government’s ability to “protect the public safety”<sup>61</sup> from harmful speech and prohibit “words that create an immediate panic”<sup>62</sup> survived the case.<sup>63</sup>

Having established that advocacy for objectionable ideas can be legitimate under the First Amendment, another factor must be addressed in the context of medically inaccurate statements. By its nature, these statements are false, and so one question presents itself: is false speech protected under the First Amendment? In *United States v. Alvarez*, the Supreme Court addressed

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<sup>55</sup> *Id.* at 446.

<sup>56</sup> *Id.* at 447.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Evelyn Douek & Genevieve Lakier, *Rereading Schenck v. United States*, KNIGHT FIRST AMEND. INST. AT COLUMBIA U. (July 7, 2022), <https://knightcolumbia.org/blog/rereading-schenck-v-united-states-2>

<sup>60</sup> *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982).

<sup>61</sup> *Nolan v. California Coastal Com’n*, 483 U.S. 825, 837 (1987).

<sup>62</sup> *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982).

<sup>63</sup> Douek, *supra* note 53.

this issue.<sup>64</sup> The case related to Alvarez’s lie about being awarded the Congressional Medal of Honor.<sup>65</sup> By lying about this topic, Alvarez violated the Stolen Valor Act.<sup>66</sup> He argued that the law was a “content-based suppression of pure speech, speech not falling within any of the few categories of expression where content-based regulation is permissible.”<sup>67</sup> The Supreme Court noted that as a general rule, “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>68</sup> Although there are a number of well-known categories of speech that break his rule, the Court continued, <sup>69</sup> “absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements” because “some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.”<sup>70</sup> In short, laws “that target falsity and nothing more” cannot stand.<sup>71</sup>

Although the ordinary “remedy for speech that is false is speech that is true,”<sup>72</sup> the government can still prohibit “defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation.”<sup>73</sup> Thus, a statement that is both false and harmful can fall out from under the aegis of the First Amendment.<sup>74</sup> Notably, in rejecting the government’s argument in Alvarez that

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<sup>64</sup> United States v. Alvarez, 567 U.S. 709, 718–19 (2012).

<sup>65</sup> *Id.* at 713-14.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 716.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 717.

<sup>70</sup> *Id.* at 718.

<sup>71</sup> *Id.* at 719.

<sup>72</sup> *Id.* at 727.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

counterspeech as a remedy was insufficient, the Court stated that “in order to show that public refutation is not an adequate alternative, the Government must demonstrate that unchallenged claims undermine the public’s perception of the military and the integrity of its awards system.”<sup>75</sup> A similar standard could be applicable when false speech undermines the public’s perception of the nation’s medical system and healthcare leadership, rather than its military.

However, harm alone is not always sufficient for a false statement to lose its First Amendment protection. In certain instances such as defamation of a public figure, the speaker is only liable if they made the statement with knowledge of its falsehood or reckless disregard for the truth.<sup>76</sup> “Where false claims are made to effect a fraud or secure moneys or other valuable considerations... it is well established that the Government may restrict speech without affronting the First Amendment.”<sup>77</sup> Thus, the *mens rea* of the speaker is vital under First Amendment analysis, as is the speaker’s goal in making the statement.<sup>78</sup>

Returning to the COVID-19 context, there are several types of harmful statements. Some relate to racial or religious conspiracy theories, but these should be cabined to a conversation regarding hate speech. In contrast, other COVID-19 disinformation statements argue that the pandemic is a hoax, that vaccination is harmful, or that unfounded alternatives to vaccination can prevent infection. For these statements, a key consideration is whether—like shouting fire in a crowded theater—they create an immediate panic that would harm the public safety.<sup>79</sup> Another important factor to consider is the intent of the speaker: are they intending to engage in “mere advocacy” for medically inaccurate ideas or are they intending to deceive their audience through

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<sup>75</sup> *Id.* at 728.

<sup>76</sup> *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964))

<sup>77</sup> *Id.* at 723 (citing *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

<sup>78</sup> *Id.*; see also *Counterman v. Colorado*, 600 U.S. 66, 72–77 (2023)

<sup>79</sup> Douek, *supra* note 53.

the promotion of ideas that they know to be false so as to gain some benefit from the lie? The former is misinformation and is more likely to be protected. The latter is disinformation, against which there is a stronger case for criminalization as it is akin to fraudulent speech, which is not protected under the First Amendment.<sup>80</sup>

Yet even if disinformation could be restricted under the First Amendment, digital disinformation presents an entirely separate problem. Although the speaker of a false statement made online may be held liable as discussed above, social media platforms are immune from liability under Section 230 of the Communications Decency Act of 1996, which states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>81</sup> Although the Supreme Court has yet to deliberate on this statute, several appellate courts have done so, with the quintessential Section 230 case—Zeran v. America Online, Inc.—coming out of the Fourth Circuit.<sup>82</sup> In that 1997 case, an anonymous user posted a message on an AOL bulletin board advertising “shirts featuring offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City.”<sup>83</sup> The message included Kenneth Zeran’s home phone number, and told people interested in purchasing the shirts to call “Ken.”<sup>84</sup> Zeran subsequently “received a high volume of calls, comprised primarily of angry and

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<sup>80</sup> Valerie C. Brannon, *False Speech and the First Amendment: Constitutional Limits on Regulating Misinformation*, CONGRESSIONAL RESEARCH SERVICE, at 1 (Aug. 1, 2022), [https://crsreports.congress.gov/product/pdf/IF/IF12180#:~:text=The%20Supreme%20Court%20has%20said,witho ut%20violating%20the%20First%20Amendment; see also Michael M. Epstein, Regulating Fraud on the Marketplace of Ideas: Federal Securities Law as a Model for Constitutionally Permissible Social Media Regulation, 46 SEATTLE U. L. REV. 39, 41, 50–52 \(2022\), .](https://crsreports.congress.gov/product/pdf/IF/IF12180#:~:text=The%20Supreme%20Court%20has%20said,witho ut%20violating%20the%20First%20Amendment; see also Michael M. Epstein, Regulating Fraud on the Marketplace of Ideas: Federal Securities Law as a Model for Constitutionally Permissible Social Media Regulation, 46 SEATTLE U. L. REV. 39, 41, 50–52 (2022), .)

<sup>81</sup> 47 U.S.C. § 230

<sup>82</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

<sup>83</sup> *Id.* at 329.

<sup>84</sup> *Id.*



derogatory messages, but also including death threats.”<sup>85</sup> He contacted AOL about the problem, and was told that the message would be removed, which it was.<sup>86</sup> However, over the next five days, new similar messages appeared, and the threatening phone calls continued.<sup>87</sup> At one point, “Zeran was receiving an abusive phone call approximately every two minutes,” and throughout this period, he contacted AOL repeatedly.<sup>88</sup> Shortly thereafter, an Oklahoma City radio announcer told his audience about the messages’ contents, attributed them to “Ken,” and told his audience to call Zeran’s number. Zeran was then “inundated with death threats and other violent calls.”<sup>89</sup> He sued AOL, arguing that the social media company unreasonably delayed in removing the defamatory postings, refused to retract them, and failed to screen for similar messages after becoming aware of them.<sup>90</sup> The circuit court interpreted Section 230 as “preclude[ing] courts from entertaining claims that would place a computer service provider in a publisher’s role” and barring “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.”<sup>91</sup> It concluded that “Congress decided that free speech on the Internet and self-regulation of offensive speech were so important” that they warranted the immunities provided under Section 230.<sup>92</sup> This understanding of the statute has become the consensus opinion across the country.<sup>93</sup> In sum, Congress intended to treat digital statements—and more

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 328.

<sup>91</sup> *Id.* at 330.

<sup>92</sup> *Id.* at 335.

<sup>93</sup> See *e.g.*, *Green v. America Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003); *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015); *Doe v. MySpace, Inc.*; 528 F.3d 413, 419–20 (5th Cir. 2008).

specifically, companies that host digital statements—differently than other categories of speech, and this has complicated efforts to counter disinformation proliferated on the Internet.<sup>94</sup>

## II. False Information and Free Speech Law in Europe

Europe, in contrast, has taken a decidedly different tack toward the problem of false speech on the Internet. Like the United States, the European Union protects its citizens' freedom of speech, and considers it to be one of its bedrock principles, as enshrined in the E.U. Charter of Fundamental Rights.<sup>95</sup> The relevant article reads, "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."<sup>96</sup> E.U. nations are bound to comply with the Charter when implementing E.U. law, although an individual citizen's rights are protected by his or her country's constitution.<sup>97</sup> The Charter is recognized as having the same legal value<sup>98</sup> as the founding documents of the E.U.—the Treaty on the Functioning of the European Union, the Treaty on the European Union, and the Lisbon Treaty.<sup>99</sup> Likewise, the rights guaranteed by the European Convention for the Protection of

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<sup>94</sup> Ben Sperry, *Knowledge and Decisions in the Information Age: The Law & Economics of Regulating Misinformation on Social-Media Platforms*, 59 INT'L CENTER FOR L. & ECON. (Sept. 22, 2023), <https://laweconcenter.org/resources/knowledge-and-decisions-in-the-information-age-the-law-economics-of-regulating-misinformation-on-social-media-platforms/>; Alan Z. Rozenshtein, *Interpreting the ambiguities of Section 230*, BROOKINGS INST. (Oct. 26, 2023), <https://www.brookings.edu/articles/interpreting-the-ambiguities-of-section-230/>; Valerie C. Brannon, *Free Speech and the Regulation of Social Media Content*, at 1, CONGRESSIONAL RESEARCH SERVICE (Mar. 27, 2019), <https://crsreports.congress.gov/product/pdf/R/R45650/2>; Jason A. Gallo & Clare Y. Cho, *Social Media: Misinformation and Content Moderation Issues for Congress*, at 1, CONGRESSIONAL RESEARCH SERVICE (Jan. 27, 2021), <https://crsreports.congress.gov/product/pdf/R/R46662>;

<sup>95</sup> Art. II, Title II, Charter of Fundamental Rights of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>.

<sup>96</sup> *Id.*

<sup>97</sup> *Freedom of expression and information*, EUROPEAN COMMISSION (last viewed Nov. 30, 2023), [https://commission.europa.eu/aid-development-cooperation-fundamental-rights/your-rights-eu/know-your-rights/freedoms/freedom-expression-and-information\\_en#what-to-do-if-your-rights-have-been-breached](https://commission.europa.eu/aid-development-cooperation-fundamental-rights/your-rights-eu/know-your-rights/freedoms/freedom-expression-and-information_en#what-to-do-if-your-rights-have-been-breached).

<sup>98</sup> Art. 6, Section 1, Consolidated Version of the Treaty on European Union (Oct. 26, 2012), [https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF)

<sup>99</sup> *Types of institutions and bodies*, EUROPEAN UNION (last viewed Nov. 30, 2023), [https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/types-institutions-and-bodies\\_en](https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/types-institutions-and-bodies_en).

Human Rights and Fundamental Freedoms (“Convention”) “shall constitute general principles of the Union’s law.”<sup>100</sup> The Court of Justice of the European Union is the judiciary that interprets these documents as well as the acts passed by the international body.<sup>101</sup>

The Convention, which articulates the right to freedom of expression,<sup>102</sup> has been integrated into the legislation of virtually all European states, who must give priority to the Convention over any conflicting national law.<sup>103</sup> The jurisprudence of the European Court of Human Rights is similarly binding on these countries.<sup>104</sup> In addition to protecting the right to freedom of expression, the Convention—as one might expect—upholds several other rights, including the right to liberty and security.<sup>105</sup> When the applications of these freedoms conflict, the European Court of Human Rights is called upon to adjudicate the issue, and has ruled that content-based restrictions to the freedom of expression is acceptable when dealing with incitement to hatred and racial discrimination because the “freedom of expression may not be used to lead to the destruction of the rights and freedoms granted by the Convention.”<sup>106</sup> As one scholar noted, a nation’s ability to ensure the freedom of expression can be destroyed by an absolute tolerance of ideas promoting intolerance.<sup>107</sup> Framed another way, a nation is harmed by

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<sup>100</sup> Art. 6, Section 3, Consolidated Version of the Treaty on European Union (Oct. 26, 2012), [https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF)

<sup>101</sup> *Id.*

<sup>102</sup> Art. 10, European Convention on Human Rights, [https://www.echr.coe.int/documents/d/echr/convention\\_ENG](https://www.echr.coe.int/documents/d/echr/convention_ENG).

<sup>103</sup> Dominika Bychawska-Siniarska, *Protecting the right to freedom of expression under the European Convention on Human Rights*, at 9, COUNCIL OF EUROPE (July 2017), <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>.

<sup>104</sup> *Id.* at 10.

<sup>105</sup> Art. 5, European Convention on Human Rights, [https://www.echr.coe.int/documents/d/echr/convention\\_ENG](https://www.echr.coe.int/documents/d/echr/convention_ENG).

<sup>106</sup> Dominika Bychawska-Siniarska, *PROTECTING THE RIGHT TO FREEDOM OF EXPRESSION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, at 12, COUNCIL OF EUROPE (July 2017), <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814> (citing *Garaudy v. France*, June 24, 2003, decision).

<sup>107</sup> *Id.*

its tolerance of harmful speech, as the COVID-19 infodemic demonstrated, begging the question: at what point does that harm become intolerable for the nation?

Under European law, a government may interfere with the freedom of expression when: (1) the interference is prescribed by law; (2) the interference is aimed at protecting a key interest or value; and (3) the interference is necessary for a democratic state.<sup>108</sup> Examples of a key interest or value include: “national security, territorial integrity, public safety, prevention of disorder or crime; protection of health; morals; reputation or rights of others; preventing the disclosure of information received in confidence; and maintaining the authority and impartiality of the judiciary.”<sup>109</sup> Thus, a European state may restrict free speech to protect the nation’s health and safety against an infodemic/pandemic dual threat like the one presented by the COVID-19 crisis. Turning to digital speech, the European Court of Human Rights has held that an online service provider can be held liable for third-party content and comments that it hosts on its website, although not every case will warrant this result.<sup>110</sup> These circumstances open the door to European regulation of digital disinformation in a manner unavailable in the United States, as Europeans have “much greater leeway” when it comes to speech restriction and are not bound by any analogous version of Section 230.<sup>111</sup>

In the wake of the COVID-19 crisis and the ongoing war in Ukraine, disinformation “has increased in importance on European policy makers’ agenda.”<sup>112</sup> One recent European measure

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<sup>108</sup> *Id.* at 32–33.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 113 (citing *Delft v. Estonia*, June 16, 2015 (GC)).

<sup>111</sup> Jacob Mchangama, *The Real Threat to Social Media is Europe*, FOREIGN POLICY (Apr. 25, 2022) <https://foreignpolicy.com/2022/04/25/the-real-threat-to-social-media-is-europe/>.

<sup>112</sup> <sup>112</sup> Andreu Casero-Ripollés et al., *The European approach to online disinformation: geopolitical and regulatory dissonance*, 10 HUMANITIES AND SOC. SCI. COMMUNICATIONS 657, 8 (Oct 6, 2023), <https://www.nature.com/articles/s41599-023-02179-8#citeas>.

to regulate online speech is the Digital Services Act (“DSA”), which was passed on April 23, 2022, and will fully go into effect in 2024.<sup>113</sup> The DSA will require large online content providers and social media platforms to take meaningful steps toward combating misinformation and disinformation, among other things, and includes limits on the power of these companies to “steer people toward certain ideas and to target people based on their race, religion, or sexual preference.”<sup>114</sup> The law will grant governments the power to request takedowns of illegal content, and will require social media platforms to create tools that allow users to flag unlawful content for swift removal.<sup>115</sup> Companies that fail to follow the law could face billion-dollar fines or bans from the E.U.<sup>116</sup> The DSA is the third landmark piece of European legislation aimed at the high-tech sector, and follows the Digital Markets Act, passed in 2022, and the General Data Protection Regulation, passed in 2018.<sup>117</sup>

Although the broad strokes of the DSA are clear and one can certainly point to several takeaways about the law,<sup>118</sup> the details are hardly well-defined.<sup>119</sup> Some view this European law as directly targeting American companies because “U.S. lawmakers have done nothing” to address the problem of harmful online speech, causing the E.U. to step up and fill “the massive

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<sup>113</sup> *Digital Services Act: Commission welcomes political agreement on rules ensuring a safe and accountable online environment*, EUROPEAN COMMISSION (Apr. 23, 2022), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_2545](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2545); Jared Schroeder, *A new EU law will influence US free speech more than Elon Musk*, HILL (Apr. 29, 2022), <https://thehill.com/opinion/technology/3468836-a-new-eu-law-will-influence-us-free-speech-more-than-elon-musk/>.

<sup>114</sup> Jared Schroeder, *A new EU law will influence US free speech more than Elon Musk*, HILL (Apr. 29, 2022), <https://thehill.com/opinion/technology/3468836-a-new-eu-law-will-influence-us-free-speech-more-than-elon-musk/>.

<sup>115</sup> *EU law targets Big Tech over hate speech, disinformation*, NPR (Apr. 23, 2022), <https://www.npr.org/2022/04/23/109448542/eu-law-big-tech-hate-speech-disinformation>.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Xawery Konarski, *The Digital Services Act (DSA) and combating disinformation – 10 key takeaways*, LEXOLOGY (Oct. 5, 2023), <https://www.lexology.com/library/detail.aspx?g=ce8a0507-d4bd-42a4-889c-ab16f1a1b209>.

<sup>119</sup> Joan Barata, *Europe’s tech regulations may put free speech at risk*, CENTER FOR EUROPEAN POLICY ANALYSIS (May 18, 2022), <https://cepa.org/article/europes-tech-regulations-may-put-free-speech-at-risk/>.

void in regulation.”<sup>120</sup> As one set of scholars noted, the E.U.’s policy approach is built on a “geopolitical logic... that conceives disinformation as a weapon used by foreign rivals or enemies to exploit the vulnerabilities of democratic publics to manipulation and interferences... [and] conceives pluralism and openness as a potential vulnerability and as result considers it acceptable to witness a stronger public intervention of the public sphere.”<sup>121</sup> Simultaneously, disinformation is also often conceptualized as an undesired outcome originating from “the competition for the attention of publics in a distorted digital attention market” and an unfortunate byproduct of an essentially positive “tendency to digitalization of the public spheres.”<sup>122</sup> These two different mentalities with respect to disinformation continue to guide the E.U.’s recent policy initiatives, as they have in the past with the promotion of a non-binding European Code of Practice on Disinformation through which big tech companies agreed on September 26, 2018, to self-regulate their platforms as part of a counter-disinformation campaign.<sup>123</sup> The passage of the DSA suggests that this self-regulation program left something to be desired by European policymakers.<sup>124</sup> That being said, the DSA sets out a “co-regulatory framework” that incorporates elements of voluntary self-regulation<sup>125</sup> and the Code was strengthened in 2022.<sup>126</sup>

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<sup>120</sup> Jared Schroeder, *A new EU law will influence US free speech more than Elon Musk*, HILL (Apr. 29, 2022), <https://thehill.com/opinion/technology/3468836-a-new-eu-law-will-influence-us-free-speech-more-than-elon-musk/>.

<sup>121</sup> Andreu Casero-Ripollés et al., *The European approach to online disinformation: geopolitical and regulatory dissonance*, 10 HUMANITIES AND SOC. SCI. COMMUNICATIONS 657, 3 (Oct 6, 2023), <https://www.nature.com/articles/s41599-023-02179-8#citeas>.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 3-4, 6.

<sup>124</sup> *Id.* at 8.

<sup>125</sup> *Id.*

<sup>126</sup> *The 2022 Code of Practice on Disinformation*, EUROPEAN COMMISSION (last viewed Dec. 2, 2023), <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation>.

The nature of the E.U. as a union has resulted in differing approaches to disinformation on a national and transnational basis.<sup>127</sup> For example, Germany passed a law in 2017 that obligates platforms of a certain size to delete unlawful content related to disinformation and hate speech within 24 hours of receiving notice and establishes substantial monetary penalties for non-compliance.<sup>128</sup> Other states have not taken quite so hard a line.<sup>129</sup> This regulatory patchwork and multilateral approach to countering COVID-19 disinformation<sup>130</sup> is reminiscent of the American approach to privacy law, which lacks a federal standard and instead relies on state-level regulation, with the vital difference being the overarching structure provided by the DSA. Although the act is certainly not flawless,<sup>131</sup> it demonstrates a manifest European commitment to take the problem of disinformation seriously—a commitment unmatched in the U.S.<sup>132</sup> In the words of Fox Rothschild’s Mark G. McCreary, Europe has “sent a message to the world that it is willing to set the global gold standard for reining in anticompetitive behavior and harm caused to consumers by social media companies.”<sup>133</sup>

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<sup>127</sup> Andreu Casero-Ripollés et al., *The European approach to online disinformation: geopolitical and regulatory dissonance*, 10 HUMANITIES AND SOC. SCI. COMMUNICATIONS 657, 7–8 (Oct 6, 2023), <https://www.nature.com/articles/s41599-023-02179-8#citeas>.

<sup>128</sup> *Id.*

<sup>129</sup> *The effect of communication and disinformation during the COVID-19 pandemic*, at 13–17, 39–48 EUROPEAN PARLIAMENT (Jan. 2023), [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740063/IPOL\\_STU\(2023\)740063\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740063/IPOL_STU(2023)740063_EN.pdf)

<sup>130</sup> *The effect of communication and disinformation during the COVID-19 pandemic*, at 13–17, 39–48 EUROPEAN PARLIAMENT (Jan. 2023), [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740063/IPOL\\_STU\(2023\)740063\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740063/IPOL_STU(2023)740063_EN.pdf)

<sup>131</sup> Sharon Galantino, *How will the EU Digital Services Act affect the regulation of disinformation?*, 20 SCRIPTED 89, 114–24 (Feb. 2023), <https://script-ed.org/article/how-will-the-eu-digital-services-act-affect-the-regulation-of-disinformation/>.

<sup>132</sup> Mark G. McCreary, *Unlike the US, the EU has the support to address online misinformation*, LEGAL INTELLIGENCER (July 3, 2022), <https://www.law.com/thelegalintelligencer/2022/07/03/unlike-the-us-the-eu-has-the-support-to-address-online-misinformation/?slreturn=20231102223907>.

<sup>133</sup> *Id.*

Throughout history, lies have typically outsped truths.<sup>134</sup> Yet the nature of the Internet means that society cannot afford to disregard the consequences of this maxim, especially when we consider them from the perspective of cyber defense.<sup>135</sup> Balancing the needs of national security with our convictions of freedom is no easy task, but it must be done with an eye on both past decisions and current circumstances. To answer U.S. National Institutes of Health Director Dr. Francis Collins’s questions about disinformation and yelling fire in a crowded theater, the two types of speech are legally distinct, in that the latter exploits immediacy and urgency in a manner that the former does not.<sup>136</sup> But that difference does not alleviate concerns about the dangers of disinformation, nor does reliance on prior generations’ counsel about the disinfecting power of solar radiation.<sup>137</sup> Reciting by rote yesterday’s aphorisms is rarely a recipe for tomorrow’s successes. Instead, we must look at the world as we find it today, and study our own circumstances as well as the solutions of our allies. To counter contemporary challenges like digital disinformation, we must understand the law, apply it where we can, and consider reforming it when we cannot.

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<sup>134</sup> Oliver Tearle, *Who Said, ‘A Lie Is Halfway Round the World Before the Truth Has Got Its Boots On’?*, INTERESTING LITERATURE (last viewed, Dec. 2, 2023), <https://interestingliterature.com/2021/06/lie-halfway-round-world-before-truth-boots-on-quote-origin-meaning/#>.

<sup>135</sup> Tracy Mitrano, *Missouri v. Biden*, INSIDE HIGHER ED (Sept. 11, 2023), <https://www.insidehighered.com/opinion/blogs/law-policy-and-it/2023/09/11/missouri-v-biden-where-first-amendment-and-security-meet>

<sup>136</sup> Evelyn Douek & Genevieve Lakier, *Rereading Schenck v. United States*, KNIGHT FIRST AMEND. INST. AT COLUMBIA U. (July 7, 2022), <https://knightcolumbia.org/blog/rereading-schenck-v-united-states-2>.

<sup>137</sup> Louis Brandeis, *What publicity can do*, in *Other People’s Money* (2014), <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v>.