Democratized Content and Its Discontents

Author : Andrea Matwyshyn

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Claudia E. Haupt, Licensing Knowledge, 72 **Vand. L. Rev.** 501 (2019).

There once was a dream that was the Internet. But now the harsh morning light of Internet reality propels us to consider whether to get out of bed. Questions of content (un)trustworthiness seem omnipresent, and the liability protections of Section 230 of the Communications Decency Act are showing their age, in the opinion of their Congressional sponsors. Debates over "fake news," "deep fakes," "shallow fakes," and hybrid warfare reveal diverging ethical defaults, even among similarly situated Internet companies. Anti-vaxxers' and medical professionals' opinions are mistakenly considered equivalent by a portion of Internet users, and algorithms make personalized content recommendations that sometimes perpetuate false and radical beliefs. Recent indictments remind us that jurists have never resolved the question of who counts as a "publisher" on the Internet (and what duties of care that role entails). Meanwhile, machine-learning practitioners, information security experts, and other technology professionals debate the construction of shared ethical codes and professional practices. Each of these conversations inevitably implicates questions of content intermediation in technology contexts, as well as the role of "expert" knowledge, professional licensing/credentialing, and professional liability.

Claudia Haupt in *Licensing Knowledge* asks us to consider "whether expert knowledge is still relevant in the information age." Answering in the affirmative, Haupt's article offers an injection of helpful intellectual rigor into discussions of knowledge construction, expertise, and the First Amendment. Haupt engages head-on the question of the Yelpification of expertise and knowledge (and its corresponding quality control challenges) as she takes us on a thought-provoking, interdisciplinary romp into the complex issues of "expert" speech and its intersection with personalization, professional licensing, and liability. As the article explains, "[s]cholars of the legal profession have asserted that '[t]he Internet has provided consumers with increasing access to information about the law and to information about the quality of services provided.'" (P. 522.) Yet, the ability to judge the quality of this information presents challenges particularly because of the rise of the lay "Internet expert." These information asymmetries impact information accuracy and warrant consideration.

After introducing the tension between the First Amendment interests of speakers and the interest of states in preserving high-quality services in commercial contexts, the article argues that expert and professional speech is part of an effort to re-calibrate existing licensing regimes. Walking the reader through caselaw spanning a wide array of "experts"—from tour guides to doctors—Haupt highlights that not all professional licensing schemes are the same, and not all occupations pose equivalent threats to health and safety. In particular, Haupt distinguishes between information and knowledge: a specific type of information communicated as professional advice. Professional knowledge, argues Haupt, is rooted in expertise formed in the context of a knowledge community and conveyed for the benefit of a particular client. Haupt explains that by adopting a framework that distinguishes information and knowledge, it is possible to reconcile the interests of speakers and listeners, thereby reconciling licensing regimes with the First Amendment.

Building on insights from the science and technology studies literature regarding the epistemological foundations of expert knowledge, the article next turns to reconciling democratization of knowledge

with the challenge of maintaining information accuracy. Haupt explains that some scholars suggest that the public can rise to the level of lay experts with "experiential knowledge of a condition." (P. 533.) However, other scholars discard the idea of a lay expert as an oxymoron, suggesting that the primary question turns on the formalized extension of knowledge and a determination of whose knowledge counts as expertise. Haupt then connects this dominant view to the idea of expertise being formed in knowledge communities. She explains that the modern idea of scientific expertise arises from two historically distinct elements: "occupational expertise and the expertise claimed by scientists as privileged knowers of truth about the world." (P. 534.)

Haupt highlights that one distinction between professions and other occupations is the fusion of theory and practice. A claim of authority arises from the existence of a shared methodology within the knowledge community of professionals. Haupt explains that "the link between expertise and authority extends to the professions in that professional experts monopolize the ability to speak the truth." (P. 538.) A knowledge asymmetry therefore persists, but this undemocratic reality, perhaps counterintuitively, presents the potential to advance public discourse. While the First Amendment frames expert knowledge as opinion equal to other opinions, licensing regimes by design create speaker inequality by acknowledging the role of listener interests.

Haupt explains that in the situation where both a professional licensing regime and a remedy in tort for malpractice exist, professional speech protection and licensing are actually complementary. The category of "professional speech," argues Haupt, is thus fundamentally different and presents a "unique category of speech." (P. 552.) It "reflects the shared knowledge of professionals" in the "knowledge community that is communicated from professional to client within the confines of a professional—client relationship." She tells us that "bad professional advice is properly suppressed." (P. 555.)

In a legal context, Haupt's arguments might bring to mind the licensing/liability of broker dealers and investment advisors—a structure where compelled disclosure and regulatory oversight of personalized advice work in tandem with the dynamics of licensing, communities of practice, duties of care, and malpractice liability, without significant First Amendment concerns. Indeed, in the halcyon days of the late 1990s, the issues of personalization of investment advice, democratized access to markets, and market trust animated the SEC's analysis of the permissibility of Internet brokerages such as E*TRADE. Thus, Haupt's discussion offers insights that implicate a host of Internet-related trustworthiness and intermediation issues, both past and future.

The framing of Haupt's argument around knowledge communities might also remind the reader of Michael Polanyi's related insights on "tacit knowledge" and "public mental heritage" held by professionals in "normative dynamic orders." Polanyi explains that "[i]n each field" generations pass on "a public mental heritage" comprised of both substantive and "tacit knowledge," the unspoken but shared culture of "knowing how" one obtains only from being inside the community.[1] In other words, relevant dynamic orders of experts, through consultation, competition, or a combination of the two, introduce new participants into their community of expertise. "Then, when they suggest their own additions or reforms, they return to the public and claim publicly that these be accepted by society–to become in their turn a part of the common heritage."[2] To wit, we might also view Haupt's *Licensing Knowledge* itself as a noteworthy contribution to the public mental heritage of the legal profession.

1. Andrea M. Matwyshyn, *CYBER!*, 2017 **BYU L. Rev.** 1109, 1166 (2018) (quoting Michael Polanyi, The Study of Man 33 (1958)).
2. Michael Polanyi, *The Growth of Thought in Society*, 8 **Economica** 428, 438 (1941).

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