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Internet Freedom and Human Rights

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INTERNET FREEDOM AND HUMAN RIGHTS

By Daniel Joyce*

Abstract

This article considers whether the internet has become so significant, for the provision of and access to information, and in the formation of political community and associated questions of participation, that it requires further human rights protection beyond freedom of expression. In short, should internet freedom be configured as a human right? The article begins by considering the ubiquity of the internet and its significance. A wider historical view is then taken to understand internet freedom in terms of its lineage and development from earlier debates over freedom of expression and the right to communicate, through to recognition of the significance of an information society and the need for internet regulation on the international plane. The current debate over internet freedom is then analyzed with particular focus given to Hillary Clinton's speech on internet freedom and its subsequent articulation by Special Rapporteur Frank La Rue. The concluding part introduces the critical work of Evgeny Morozov and Jaron Lanier to an international law audience in order to deepen the debate over internet freedom, and to point to the concept's limitations and dangers. It is too early to say whether a 'right to internet freedom' has achieved universal recognition, but this article makes the case that it is worth taking seriously and that internet freedom may need its own category of protection beyond freedom of expression.

* Lecturer, UNSW Law; Affiliated Research Fellow, Erik Castrén Institute of International Law and Human Rights, University of Helsinki. Email: daniel.joyce@unsw.edu.au.

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The law has traditionally offered some protection for free speech - either through domestic constitutions, as an aspect of media law or as a human right. The rise of the internet and the changing media landscape prompts the question, ‘Are traditional free speech protections adequate?’

In this article I will consider whether the internet has become so significant, for the provision of information, media content and in terms of our system of international communication, that it requires further protection. In short, should internet freedom and access be configured as a human right? I will chart the history of this question from earlier iterations such as ‘the right to communicate’ to present day discussions concerning the internet, freedom and the significance of an information society. Methodologically the paper aims to place current debates within a broader context, also considering the role of communication within human rights. Whilst it is too early to say whether a ‘right to internet freedom’ already exists, the internet – especially in its public sphere dimension – prompts re-evaluation of freedom of expression jurisprudence, most notably in terms of the significance of questions of access and participation, but also in terms of the magnification of the potential for harm, and points to the need for conceptual development of the area of internet freedom.

The paper concludes by engaging with the work of Evgeny Morozov and Jaron Lanier to look at the range of claims made for and against internet freedom.¹ The motivation here is to deepen analysis of the current debates over the nature of international regulation of speech and the internet. Such discussions tend to revert to technology-centred, free speech-centred or culturally relativistic grounds. Whilst some of this territory is well-trodden, the ideas which underpin conceptions of internet freedom and regulation remain central to the continued development of the international system and to the efficacy of the field of human rights itself.

¹ E. Morozov, *The Net Delusion: How Not To Liberate the World* (2011); E. Morozov, *To Save Everything, Click Here: The Folly Of Technological Solutionism* (2013); J. Lanier, *You Are Not A Gadget: A Manifesto* (2011); J. Lanier, *Who Owns The Future?* (2013).

1. The Internet and the Information Society

The internet has certainly become a vital piece of infrastructure and a significant avenue for global communication, community formation and governance. Whilst its emergence has led to a shift in our levels of international co-operation and interaction, it is by no means without danger or criticism. A variety of claims are made for the internet as a mechanism which facilitates the international system and in particular human rights. But not all actors in the international system see the internet in such a way, and some actors are sending mixed messages – notable here is the United States of America (US) which calls for internet freedom, but which has also been embarrassed by the NSA surveillance scandal in the wake of Edward Snowden's leaks to the Guardian newspaper.

A typical recent statement regarding the significance of the internet comes from the UN Secretary-General who, in addressing a forum on internet security in 2014, specifically linked the internet with freedom and the human rights framework, but also said the following:

I am disturbed by how States abuse laws on Internet access. I am concerned that surveillance programmes are becoming too aggressive. I understand that national security and criminal activity may justify some exceptional and narrowly-tailored use of surveillance. But that is all the more reason to safeguard human rights and fundamental freedoms. Some argue that they need to curtail freedoms to preserve order. I say they need to protect freedom or they will undermine order.²

Here is the familiar balancing act between liberty and security, and the argument that liberty will lead to a more secure community. The forum took place in Estonia, where there is sensitivity about Russian cyber-attacks on regional states, and in the aftermath of the NSA revelations. Consequently, of interest is the inclusion of surveillance in discussions of internet freedom.³ Surveillance must now be seen not only in the context

² UN Secretary-General, 'Curtailling Freedom Does Not Preserve Order, But Undermines It', transcript of video message to the fourth annual Freedom Online Coalition Conference: Free and Secure Internet for All, Tallinn, Estonia, SG/SM/15808, PI/2088, 29 April 2014.

³ On this issue of surveillance and the right to freedom of expression see, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/23/40, 17 April 2013.

of closed internet states such as China, but also those who have championed internet freedom in theory, but have in practice been revealed to have been using the internet and digital platforms to conduct widespread surveillance of citizens.⁴ These practices have done much to damage the credibility of earlier calls for internet freedom.

In his concluding comments the Secretary-General returns to more positive territory. Whilst noting that internet freedom must be on the international agenda alongside cybersecurity and the digital divide, he states that the UN wants ‘to ensure that the Internet is an affordable, reliable, secure and trustworthy global public resource that can help people to improve our world’.⁵ There are dangers and there have been recent problems, but ultimately the vision of internet freedom, and of the internet as a global public good with reformist capacity, is reinforced.

The question left hanging is what would be necessary in terms of international co-operation and even governance for this vision to achieve its transformative potential? Undoubtedly the framing of the internet’s significance in human rights terms brings with it a capacity to offer a powerful new rhetorical and normative tool for advocacy and standard-setting, but it also can offer false hope and more of the same.⁶ Whilst drawn to such critical perspectives regarding both the internet and human rights, there is also radical potential in the concept of internet freedom.

Despite reminders from both scholars and governments that the internet in fact is not a ‘borderless world’⁷, the notion of some kind of right to the internet and to an internet free from authoritarian or other controls still holds power. If we took the idea of internet freedom seriously and gave more thought to its content, the hope would be that it would not end up looking like a rehearsal of liberal internationalism, but that it might offer

⁴ For further detail see the Guardian’s online resources regarding the NSA surveillance program available at: <http://www.theguardian.com/world/the-nsa-files>.

⁵ UN Secretary-General, ‘Curtailing Freedom Does Not Preserve Order, But Undermines It’, transcript of video message to the fourth annual Freedom Online Coalition Conference: Free and Secure Internet for All, Tallinn, Estonia, SG/SM/15808, PI/2088, 29 April 2014.

⁶ Golder, ‘Beyond Redemption?: Problematising the Critique of Human Rights in Contemporary International Legal Thought’, 2(1) *London Review of International Law* (2014) 77.

⁷ J. Goldsmith and T. Wu, *Who Controls the Internet? Illusions of a Borderless World* (2006).

something distinct. As with other efforts to re-brand first generation rights, there is necessary skepticism regarding whether a right to internet freedom offers anything in addition to the right to freedom of expression, or whether this is simply old wine in new bottles?

The arrival of the internet and the development of digital media technologies have intensified debate over the need for international media regulation. Some have argued for greater regulation given the globalizing character and transnational impact of the internet. Others have opposed such changes and have continued to uphold a private law model of media regulation and self-regulation cast in the neutral tones of infrastructure development and co-ordination, technical expertise and co-operation. With regard to the international law framework, a significant question that has been raised is how the right to freedom of expression can adapt to the digital context.⁸

A lingering concern is whether these benefits can or should be further protected through the international human rights framework: most specifically whether its mechanisms of proportionality can balance the seemingly incommensurable values in play.⁹ Indeed the internet is viewed by many not as a place of democratic deliberation and interconnection, but as an anarchic place of fragmentation, commodification and crime.¹⁰ Consequently, the debate over internet regulation has been framed in a range of ways – often contradictory. It is remarkable how unregulated the internet is at the level of international law and how regulation is viewed through lenses as various as crime, security, child protection, morality, development, culture, speech or privacy. Ideas of infrastructural equality (net neutrality¹¹) and broader notions of democratic freedom (to

⁸ Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society', 79 NYU L Rev (2004) 1; Rowbottom, 'Media Freedom and Political Debate in the Digital Era', 69(4) MLR (2006) 489; Balkin, 'Idea: The First Amendment is an Information Policy', 41 Hofstra Law Review (2012) 1.

⁹ Endicott, 'Proportionality and Incommensurability', University of Oxford Legal Research Paper Series, No 40/2012, February 2013.

¹⁰ See further, Joyce, 'Human Rights and the Mediatization of International Law', 23 Leiden Journal of International Law (2010) 507.

¹¹ See further, Morozov, *The Net Delusion*, supra note 1, at 224-225. Tim Wu is credited with coining the term, and has criticised what he sees as the potential for its undoing in present policy development, see further: http://www.timwu.org/network_neutrality.html;

communicate, exchange, compete for market access and even to be anonymous or forgotten) have flavoured much of the discourse regarding internet regulation, but so too have more authoritarian notions of government control, surveillance and punishment. On the one hand, the internet and associated digital media technologies are presented as revolutionary, emancipatory and even as tools for democratisation and the re-branding of liberal internationalism. On the other, the internet represents information overload, the ‘deluge’ of big data, mass privacy and copyright violation, and the resurgence of surveillance culture and control.¹²

The protection of free speech and the benefits of globalisation in the form of an information society have been resilient organising principles within recent debates over internet regulation. Whilst controversial, ideas of revitalised mechanisms and spheres of political communication along with the formation of global audiences and new forms of community, remain central to the internet’s overriding narrative of progress.¹³ These grander claims made for the internet’s paradigm-shifting place in international life rely at least in part on efforts to re-articulate the significance of freedom of expression. The Human Rights Committee in its updated General Comment on Article 19 has also pointed to the need to take greater account of the internet and digital media with regard to free speech protection.¹⁴

General Comment No 34 begins with foundational ideas regarding freedom of expression such as its catalytic role in the promotion and protection of other human rights, reinforcing the traditional significance of journalism, but also of the media in all its new and digital varieties, including ‘electronic and internet-based modes of expression’.¹⁵ The Committee emphasise the right of access to information – the accepted view of expression as having both aspects of giving and receiving. But this is

<http://www.newyorker.com/online/blogs/elements/2014/05/tom-wheeler-fcc-net-neutrality-problems.html>.

¹² Johns, ‘The Deluge’, 1 *London Review of International Law* (2013) 9.

¹³ Community is a highly contested and often ideological concept in the international sphere. See further: Kritsiotis, ‘Imagining the International Community’, 13(4) *EJIL* (2002) 961.

¹⁴ UN Human Rights Committee, General Comment No 34, Article 19: Freedoms of Opinion and Expression, CCPR/C/GC/34, September 2011.

¹⁵ General Comment No 34, paras 3 and 11.

given context in terms of the increasing significance of the internet and its interactive and communicative possibilities. The Committee exhorts States parties to:

Take account of the extent to which developments in information and communication technologies, such as the internet and mobile-based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.¹⁶

Thus protecting freedom of expression is said to involve practical safeguards against wide-ranging restrictions placed on websites, other platforms such as blogs, service providers and search engines. Any restrictions are to be construed narrowly and in light of broader systemic concerns to balance freedom of expression with other human rights.¹⁷ Whilst such an approach falls short of calling for a right to internet freedom, the Committee is clearly attempting to translate traditional human rights principles regarding freedom of expression into a digital media and internet context. As the next section examines, such concerns to re-interpret freedom of expression in light of changing contexts of communicative forms and mechanisms has some lineage. As do the social foundations of speech protection - though the information society has a particular resonance, the constitutive public sphere significance of communication is not a new idea.¹⁸

2. Free Speech, the Right to Communicate and an Information Society

The right to freedom of expression is commonly thought of as a central and facilitative human right, universally recognized and forming the basis for the contestation and safeguarding of other rights.¹⁹ In this sense, the theoretical foundations of free expression – what is often termed the right to free speech – can be traced back to

¹⁶ General Comment No 34, para 15.

¹⁷ General Comment No 34, paras 3 and 43.

¹⁸ Cf. J. Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (1991).

¹⁹ See for example M. Ignatieff, *Human Rights as Politics and Idolatry* (2001), at 90.

recognition of the need for unhindered political communication between citizens in their efforts to form and participate in government and the development of society.

The Universal Declaration of Human Rights of 1948 addresses freedom of expression in Article 19, which guarantees that: '[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'.

From this flows an emphasis in the other international and regional instruments dealing with freedom of expression on two aspects: the right to express oneself, and the right to seek and receive information.²⁰ The article is also rather technologically neutral in addition to its interactive emphasis. It is not concerned with old media or new media, but rather with 'any media and regardless of frontiers'.

But can we adapt the right to freedom of expression to extend it to deal with the imbalances which exist in terms of communication flows and access to communications technologies such as the internet, when such access is of increasing significance in the present day?

The concept of the right to communicate was first put forward in 1969 by Jean d'Arcy who worked for the UN Office of Public Information.²¹ He was responding to changes in communications technologies such as satellite communication, and argued that a new human right to communicate was needed in addition to Article 19 of the UDHR guaranteeing free expression. This idea was subsequently taken up in academic and policy circles, and also notably by UNESCO in the 1970s and 1980s.²²

²⁰ International Covenant on Civil and Political Rights, Article 19.

²¹ D'Arcy, 'Direct Broadcast Satellites and the Right to Communicate', 118 *European Broadcasting Union Review* (1969) 14, cited in McIver Jr., Birdsall and Rasmussen, 'The Internet and the Right to Communicate', 8(12) *First Monday* (2003).

²² UNESCO Resolution 4.121, Right to Communicate, 1974; UNESCO Resolution 3.2 Right to Communicate, 1983; MacBride Commission, 'Many Voices, One World: Communication and Society. Today and Tomorrow' (UNESCO, Paris, 1980). See further: http://righttocommunicate.com/?q=human_rights.

However, an agreed definition of the right remained elusive, and it was not incorporated into an international human rights treaty. Some saw the right as a collective, umbrella right drawing on pre-existing rights such as Article 19, and others saw it as an individual right which would need its own expression. The right to communicate was also linked with efforts within UNESCO to develop a New World Information and Communications Order (NWICO).²³

This itself led to controversy and along with a range of other factors contributed to the withdrawal of the US and the UK from the organization in the 1980s. UNESCO dropped the issue from its agenda. The right to communicate was a victim, in part, of Cold War politics and fears that NWICO would lead to further state controls over media and information and restrict free expression. However, some like Antonio Pasquali continue to defend what he regards as ‘a tremendous and unequal battle for equity in global communication’.²⁴

These themes of inequality of access to media, information and communications infrastructure resurfaced in the context of the internet’s emergence into everyday usage and its perceived potential to address these earlier concerns. What was earlier seen as a battle for equity in communication was re-situated in a debate around access to information and communication technologies (ICTs) and the internet, and access to hardware such as inexpensive laptops and mobile and smart phones. This problem of inequality of access has been termed the digital divide. Addressing this divide was a principal concern of the international community in a series of summits held in Geneva in 2003 and Tunis in 2005 – the World Summit on the Information Society process (WSIS) - aimed at developing soft law principles and mechanisms to ensure that the internet and communications technologies would be used fairly and equally for wider benefit and to assist in the achievement of development.²⁵

²³ UNESCO Resolution 4.19 related to A New World Information and Communication Order, XXI session of the General Conference, Belgrade 1980.

²⁴ Pasquali, ‘The South and the Imbalance in Communication’, 1(3) Global Media and Communication (2005) 289, at 289.

²⁵ See further: <http://www.itu.int/wsis/index.html>, in particular the Geneva Declaration of Principles, WSIS-03/GENEVA/DOC/0004, 10-12 December 2003 and the Tunis Commitment, WSIS-05/TUNIS/DOC/7, 16-18 November 2005.

The WSIS process saw a re-agitation for multilateral public governance of the internet and the International Telecommunications Union (ITU) sought to position itself as central to such a governance structure and in brokering between private sector interests as well as those of member states. The ITU dared to tread where UNESCO had failed and similarly met with fierce resistance from the United States²⁶ and others to the idea of a UN-style framework for global governance of the internet. What emerged instead was a confirmation of the private model of multi-stakeholder governance²⁷ and the continuing role of ICANN in internet domain name governance, US retention of control over key internet infrastructure in the form of root servers and the creation of an Internet Governance Forum to enable civil society participation in the longer term. The WSIS process also produced declarations elaborating a number of principles regarding the information society, drawing conceptually on human rights and development goals.²⁸ Subsequent forums have been held in Geneva to follow up in terms of implementation.

²⁶ See for example the developing position of the US government at the time: Ambassador David A. Gross, U.S. Coordinator, International Communications and Information Policy, 'ICANN Oversight and Security of Internet Root Servers and the Domain Name System (DNS)', Testimony before the Senate Committee on Commerce, Science, and Transportation, Subcommittee on Communications, 30 September 2004, available at: <http://2001-2009.state.gov/e/eeb/rls/rm/36700.htm>. See also a sample of US media reaction to the maintenance of the status quo at the time in form of a Washington Times editorial, 'A Free Internet', 17 November 2005, available at: <http://www.washingtontimes.com/news/2005/nov/17/20051117-083540-8621r/>. These anxieties regarding ITU involvement in internet governance issues remain, see: <http://www.digitaltrends.com/web/fmr-us-ambassador-david-gross-explains-un-takeover-of-the-internet/#!RJms2>; and opposition to perceptions of US dominance has been revived in the context of the NSA revelations, see Jemima Kiss, 'NSA Furore Has Roots in US Internet Imperialism', The Guardian, 2 November 2013, available at: <http://www.theguardian.com/technology/2013/nov/01/nsa-furore-roots-us-internet-imperialism>.

²⁷ See further J. Malcolm, Multi-Stakeholder Governance and the Internet Governance Forum (2008).

²⁸ Joyce, *supra* note 10, at 513-515.

3. Internet Freedom as a Human Right?

So far these principles are emerging in a soft law context, and it remains uncertain whether calls for a revival of the right to communicate within an information society will be carried forward in the guise of internet freedom or will rather go the way of the ‘right to communicate’ in the context of the NWICO. What is perhaps most significant here are the resilience and adaptability of the concept of a right to communicate and, more generally, the attraction of rights-based discourse to a new generation of activists concerned with issues of expression and communication.²⁹ More recently these themes have been linked to a broader developing category of internet freedom. This concept has been picked up by governments, UN actors and civil society, most notably in Hillary Clinton’s remarks on internet freedom whilst US Secretary of State.³⁰

On 21 January 2010, Secretary of State Clinton gave a significant and controversial speech on internet freedom where she outlined the US commitment to internet freedom and structured her understanding of the concept through the lens of Roosevelt’s Four Freedoms Speech modified to include not only its original freedoms such as speech and religion, but also the freedom to connect online. The discussion is framed initially by reference to the ‘on the ground’ effects of communication networks in assisting with disaster response in Haiti and with humanitarian fund raising. A picture is presented of a world mediated via the internet which can be experienced in real time and where the communications infrastructure of the internet and the spread of associated information networks are ‘forming a new nervous system for our planet’.³¹ But the effects are mixed. Information is said to have ‘never been so free’, even in situations of authoritarian control.³² Yet information technologies and the connectivity they bring are also ‘being exploited to undermine human progress and political rights’.³³ The internet and its invasive and surveillance dimension can be ‘hijacked by governments to crush dissent and deny human rights’.³⁴ What is offered is a ‘principled’ approach to the internet – ‘a

²⁹ See for example: <http://www.internetdeclaration.org/>.

³⁰ Hillary Rodham Clinton, ‘Remarks on Internet Freedom’, 21 January 2010; see also R. MacKinnon, *The Consent of the Networked: The Worldwide Struggle for Internet Freedom* (2013).

³¹ Clinton, *supra* note 30, at 2.

³² *Ibid.*

³³ *Ibid.*

³⁴ Clinton, *supra* note 30, at 3.

single internet where all of humanity has equal access to knowledge and ideas'.³⁵ If the lens offered is universal, its template is to some extent parochial and exemplified by the First Amendment to the US Constitution.

In her remarks Clinton both makes the connection between the development of the internet, its secure future and the human rights framework as typified by the UDHR, whilst also offering up a peculiarly American conception of that framework with an emphasis on the export of liberal values such as speech and democracy, the opening up of market access and protection for intellectual property, along with recognition of the need for protection and enforcement with regards to the darker side of the internet – its potential adoption and misuse by cyber criminals, terror networks and those who would seek to harm and exploit women and children.

Whilst these are all familiar tropes in the ongoing debates over international regulation and management of the internet, an unexpected ideological dimension is emphasised with a revival of a type of Cold War rhetoric: there are good and bad states and actors; progress is driven by both technology and principles; and the struggle involves the breaking down and erection of barriers. Though for Clinton the internet offers the possibility for transcendence of Cold War divisions and 'stands for connection', in some contexts 'virtual walls are cropping up in place of visible walls'.³⁶ The liberating idea of internet freedom (with bloggers and netizens as the new pamphleteers) is then countered by a more troubling image of 'a new information curtain... descending across much of the world'.³⁷

Clinton recognises that 'free expression has its limits' and these are characterised in terms of terror, hate speech, anonymity, privacy and intellectual property theft.³⁸ Perhaps the historical context for her speech, when Wikileaks had achieved such prominence and notoriety, accounts for the inclusion of anonymity as a key limit. For part of the earlier libertarian promise of the internet was that there would remain the

³⁵ Ibid.

³⁶ Clinton, *supra* note 30, at 4.

³⁷ Ibid.

³⁸ Ibid.

possibility of anonymity and that this might represent not cover for the trolls and criminals, but rather allow for a degree of freedom in terms of interactions online.³⁹ Online anonymity as a value and as a technical possibility appears to be on the wane, whether in privacy jurisprudence⁴⁰, in discourse regarding the threats constituted by anonymity, or in governmental efforts to prosecute otherwise anonymous leakers such as Chelsea Manning or Edward Snowden. Anonymity can of course be a protection for human rights activists working together online using tools such as the onion router (TOR) to cover their tracks and avoid government control. But increasingly anonymity is presented as a cover for those who would seek to threaten national security rather than work to highlight governmental abuses, and its mechanisms like TOR and Wikileaks are proving to be less than secure. Whilst anonymity can assist certain groups to use the internet for human rights-related activities and to avoid related punishment or censorship, it appears that its place within the broader concept of internet freedom is much less certain. Publicity may rely on secrecy, but secrecy confronts broader systemic demands for transparency and accountability.

Clinton's vision of internet freedom references the need to balance freedom of speech with religious and minority freedom, though no mention is made of contemporary flashpoints such as the Cartoon Controversy or Innocence of Muslims video, rather the focus is on repression in Saudi Arabia, Vietnam and China.⁴¹ A significant focus for Clinton's conception of internet freedom is the digital divide and the potential for the internet to be 'a great equalizer', providing 'access to knowledge and potential markets'.⁴² Economic growth and poverty eradication are significant end goals, but so too is the opening up of markets for countries such as the US. In this context cyber security is not to be afforded against the familiar threats of '[v]iolent extremists, criminal cartels, sexual predators, and authoritarian governments', but also entails secure online commercial platforms and intellectual property protection.⁴³ This will require a 'coordinated response by all governments, the private sector, and the

³⁹ See for example, John Perry Barlow's 'Declaration of the Independence of Cyberspace', 8 February 1996: available at <https://projects.eff.org/~barlow/Declaration-Final.html>.

⁴⁰ Hughes, 'No Reasonable Expectation of Anonymity?', 2(2) *Journal of Media Law* (2010) 169.

⁴¹ Clinton, *supra* note 30, at 5.

⁴² *Ibid.*

⁴³ Clinton, *supra* note 30, at 6.

international community'.⁴⁴ Allusions are made to soft law creation in the form of 'norms of behaviour' and a 'global networked commons', but there is also a threat of unilateral punitive action to protect US interests.⁴⁵

Several other significant strands of the concept of internet freedom are developed. Clinton points to 'the freedom to connect' and references the role 'online organizing' has played in human rights advocacy and democratic reform processes. It is true that the internet offers great potential in terms of online communication and co-ordination, but there remain serious challenges concerning the level and depth of 'connection' achieved through the internet, especially in terms of empathy and the creation of 'communities of concern'.⁴⁶ What is helpful, is the focus here on the communicative dimension of not only public diplomacy, but also of international law and its institutional structures, illustrated especially in the field of human rights advocacy and protection. Connection is a useful frame through which to consider internet freedom as it brings together various elements both relevant to access and infrastructure, but also to communication and content. In some sense connection is a converged and technologically neutral concept. The community-forming and relational dimension of connection and especially the ethical dimension will prove to be vital avenues for further analysis and research if this concept of internet freedom is to be taken seriously. Indeed Clinton, herself, points to our 'need to work towards a world in which access to networks and information brings people closer together and expands the definition of the global community'.⁴⁷

But again connection is configured in both the terms of rights and the empowerment of citizens, and in the market terminology of internet entrepreneurialism and informational economics – as Clinton warns, '[i]f businesses in your nations are denied access to... [either political or commercial speech] it will inevitably impact on growth'.⁴⁸ Connection is about 'one internet, one global community, and a common body of knowledge', and is thus aligned with the broader goals and mandates for peace and

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Joyce, 'Media Witnesses: Human Rights in an Age of Digital Media', 8 *Intercultural Human Rights Law Review* (2013) 232.

⁴⁷ Clinton, *supra* note 30, at 11.

⁴⁸ Clinton, *supra* note 30, at 8-9.

security (to avoid a ‘fragmented planet’), but it is also concerned with one market where there is ‘trust between firms and their customers’.⁴⁹ Clinton’s vision for internet freedom is both a parable of global progress through unity and an exercise in a rather parochial form of branding. It is problematic for these reasons, but it is also highly significant and has sparked wider debate on the issue and perhaps also signalled recognition of the need for a change in conceptions of US ownership of the internet.

The debate over internet freedom was taken a further step with the Report dated 16 May 2011 of Special Rapporteur, Frank La Rue, provocatively suggesting that access to the internet should be considered in human rights terms and that achieving universal access to the internet should be a priority for all States.⁵⁰ La Rue’s report develops general principles on the right to freedom of expression and the internet, considering topics such as blocking and filtering of content, intermediary liability, cyber attacks, privacy and data protection and access to the internet and necessary infrastructure. In a converged online context it is difficult to separate out these questions and human rights methodologies offer some practical application in the balancing involved given that an overarching framework is provided along with a methodology of proportionality. Such tools are useful, but as many have noted human rights frameworks and jurisprudence are not always able to resolve disputes involving incommensurable values and positions, however well-intentioned such frameworks purport to be.

The context for the La Rue report on freedom of expression and the internet was the UN Human Rights Council’s resolution 7/36, along with broader recognition of the increasing significance of the internet reinforced by early analysis of the Arab Spring. The latter context is clearly influential with La Rue remarking:

The Special Rapporteur believes that the Internet is one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation

⁴⁹ Clinton, *supra* note 30, at 10.

⁵⁰ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Human Rights Council, A/HRC/17/27, 16 May 2011; see also Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Human Rights Council, A/HRC/23/40, 17 April 2013.

building democratic societies. Indeed, the recent wave of demonstrations in countries across the Middle East and North African region has shown the key role that the internet can play in mobilizing the population to call for justice, equality, accountability and better respect for human rights.⁵¹

As significant as those movements and their ramifications have been, at the present time it is by no means a simple calculation to equate related internet activity and access with any resulting freedom. To take Egypt as a case in point, democracy has in fact been supplanted by military rule and even traditional media have been interfered with in the most blunt manner.⁵²

Nevertheless, the attempt by the Special Rapporteur to consider the implications for free speech protection in terms of internet freedom have been productive and welcome. La Rue has emphasised access to the internet as being significant in free speech terms, along with the need to minimise restrictions placed upon internet content. According to La Rue access to the internet has at least two dimensions: access to content (without the arbitrary and unwarranted filtering or blocking of content); and access to the infrastructure and equipment required to use the Internet.⁵³ Access is clearly a significant element of internet freedom which has both continuity with ideas within free speech of expression and reception, but also is extended conceptually to acknowledge the importance of access to information and infrastructure, in a way which is resonant of strands of thinking within communications development discourse and the information society.

In terms of general principles regarding freedom of expression and the internet, La Rue emphasises the interactive nature of Web 2.0 forms and the ways in which the possibilities for self-publication have increased, such that ‘individuals are no longer passive recipients, but [are] also active publishers of information’.⁵⁴ In truth, these changes have led to an increase in opinion, but perhaps at the expense of more objective

⁵¹ Special Rapporteur’s Report, 16 May 2011, *supra* note 50, at 4.

⁵² An example being the imprisonment and ‘trial’ in Egypt of Al Jazeera journalists including Peter Greste.

⁵³ Special Rapporteur’s Report, 16 May 2011, *supra* note 50, at 4.

⁵⁴ Special Rapporteur’s Report, 16 May 2011, *supra* note 50, at 6.

forms of information traditionally gathered by accountability journalists. It is this kind of information which has underscored the watchdog function of the media. Digital and citizen media can still enhance and contribute to the collection, analysis and spread of such information in the form of news and investigative journalism, and the role can be complimentary as well as supplementary ‘where there is no independent media’.⁵⁵

A key aspect of the La Rue report is the statement that consideration of the internet is critical to consideration of freedom of expression more broadly – ‘the Internet has become a key means by which individuals can exercise their right to freedom of opinion and expression, as guaranteed by article 19’.⁵⁶ It is also characterised, as elsewhere, as an ‘enabler’ and ‘facilitator’ whose character is shaped by speed, reach and anonymity.⁵⁷

Whilst the internet’s reach highlights the need to act together to address threats such as online child pornography, it also creates new subjects for protection such as bloggers who have been imprisoned and internet intermediaries such as Google who face disproportionate responsibility for online violations of defamation, privacy and data protection laws, and for ensuring cyber security.⁵⁸ Despite the growth of domestic jurisprudence establishing authority for the liability for intermediaries where a variety of media laws are violated, La Rue ‘believes that censorship measures should never be delegated to a private entity, and that no one should be held liable for content on the Internet of which they are not the author.’⁵⁹ Although regulation with a multilateral and public character may be preferred for many aspects of the internet, the approach taken to internet regulation in general has been characterised as multi-stakeholder governance⁶⁰ – involving a curious mix of private, public, domestic and international actors. Whilst indicating a preference for public actors to be involved in the human rights-related dimensions of regulation, the Special Rapporteur takes account of the significance of multi-stakeholder governance elsewhere and notes the role of digital media and internet-related multinational corporations such as Google, Microsoft and

⁵⁵ Special Rapporteur’s Report, 16 May 2011, *supra* note 50, at 7.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Special Rapporteur’s Report, 16 May 2011, *supra* note 50, at 10-12.

⁵⁹ Special Rapporteur’s Report, 16 May 2011, *supra* note 50, at 13.

⁶⁰ Malcolm, *supra* note 27.

Yahoo! in such governance, whether through the Global Network Initiative, through the development of norms via terms of service, and through the impact of corporate responsibility measures such as Google's Transparency Report or the development of policies regarding its operations in contexts where there is significant content restriction and internet censorship, such as in China.⁶¹ In relation to the significance of terms of service the Special Rapporteur 'encourages corporations to establish clear and unambiguous terms of service in line with international human rights norms and principles, increase transparency of and accountability for their activities, and continuously review the impact of their services and technologies on the right to freedom of expression of their users, as well as the potential pitfalls involved when they are misused.'⁶²

These companies have also had notable influence on government policy and through involvement (often as defendants) in test cases with international significance such as those addressing search engine (intermediary) liability for defamation, and in the complex process of drawing jurisdictional boundaries where online publication is multi-jurisdictional.⁶³ But there are also concerns about the levels of liability, responsibility and ultimately the forms of public and private power with which they are saddled. Google prides itself on doing no harm, but who is to judge and for whom?⁶⁴

Further final dimensions addressed in the La Rue report are familiar – cyber-attacks, the threat of internet disconnection, privacy and data protection, and the question of ensuring universal access to the internet.⁶⁵ Ensuring internet access involves addressing the inequalities inherent in the digital divide and attempting to resolve imbalances in communication flows and thus also in terms of information, advocacy and political participation. These are themes familiar from earlier debates involving the right to communicate and in developing principles for an information society. Ultimately

⁶¹ Special Rapporteur's Report, 16 May 2011, *supra* note 50, at 13.

⁶² Special Rapporteur's Report, 16 May 2011, *supra* note 50, at 14.

⁶³ See for example in the Australian context, *Trkulja v Google* (No 5) [2012] VSC 533.

⁶⁴ Google's 'philosophy' including its adaptation of the credo 'don't be evil' can be found online at: <https://www.google.com.au/intl/en/about/company/philosophy/>.

⁶⁵ Special Rapporteur's Report, 16 May 2011, *supra* note 50, at 14-19.

questions of access, availability and affordability of the internet are given highest priority by the Special Rapporteur.⁶⁶ The report states that:

... without Internet access, which facilitates economic development and the enjoyment of a range of human rights, marginalized groups and developing States remain trapped in a disadvantaged situation, thereby perpetuating inequality both within and between States... to combat situations of inequality it is critical to ensure that marginalized or disadvantaged sections of society can express their grievances effectively and that their voices are heard.⁶⁷

Internet freedom clearly involves more than questions of infrastructure and the architecture of the internet. Internet freedom engages with key human rights principles such as freedom of expression, privacy and even security. On this account, the internet is more than the medium, it has become part of the message. Its infrastructure should be de-centralised to a degree to avoid the potential for an internet kill switch and to ensure the diversity of communication flows.

Despite the claims made for internet freedom, any move towards global regulation of the internet remains highly contested, as witnessed in the failure of the World Summit on the Information Society process to generate meaningful public regulation.⁶⁸ As noted above, often such regulation is painted in fearful terms which suggest that authoritarian or controlled political systems as in China, the Middle East and Russia might seek to influence mechanisms of global governance to subvert freedom of expression and political freedoms. Thus 'freedom' is juxtaposed with 'regulation' at the international level. This approach does have parallels with the largely facilitative and protective (of media and expression) domestic media laws in contexts such as the US and Europe. Media law operates in different modes, but at times is heavily de-regulatory in emphasis, or pre-supposes a good media in public watchdog mode, which, save for extreme or limit cases, is to be protected rather than restrained.

⁶⁶ Ibid.

⁶⁷ Special Rapporteur's Report, 16 May 2011, *supra* note 50, at 17.

⁶⁸ See: <http://www.itu.int/wsis/index.html>.

An interesting question to be asked of advocates for internet freedom as a human right, and/or as a sub-species of the right to freedom of expression, is whether such advocacy entails a broader argument for a human rights-centred approach and framework for internet regulation? Or whether there is a preference asserted for freedom of expression as against other rights such as privacy, religion and intellectual property. Recently a founding figure of the internet movement Sir Tim Berners-Lee has called for a more principled approach to internet regulation, along the lines of a 'Magna Carta' for the internet.⁶⁹ Others have framed similar projects as an 'international law of the internet' or 'principles of international internet law'.⁷⁰ The key question for present purposes is to determine what place human rights principles such as freedom of speech or a newly articulated right to internet freedom should play within such frameworks?

There is a further dimension to this also. A part of the argument for internet freedom appears to involve not only the normative framework of human rights and its ongoing development in light of technological change, but also a claim that freedom of speech in these new online spaces and forms is a central driver of the human rights movement and enabling its key methodologies of advocacy and publicity. From this perspective the development of civil society and NGOs as actors within the international legal system has been essential to the development of human rights – configured not only as a system of natural law-inspired rights of the citizen as against the state, but as part of a shift towards an active engagement with ideas of humanitarianism and the development of ethical relations across borders.⁷¹

⁶⁹ Jemima Kiss, 'An Online Magna Carta: Berners-Lee Calls for Bill of Rights for Web', *The Guardian*, 12 March 2014, available at: <http://www.theguardian.com/technology/2014/mar/12/online-magna-carta-berners-lee-web>. See valuable criticism of this move from Lyria Bennett Moses and David Vaile, 'If the Web Wants Rules Who Will Make Them?', 14 March 2014, available at: <http://theconversation.com/if-the-web-wants-rules-who-will-make-them-24349>.

⁷⁰ Land, 'Toward an International Law of the Internet', 54 *Harvard Int'l LJ* (2013) 393; Ueppmann-Wittzack, 'Principles of International Internet Law', 11 *German LJ* (2010) 1245. Others have framed the debate in terms of engagement with China, Tsai, 'How to Create International Law: The Case of Internet Freedom in China', 21 *Duke J Comp & Int'l L* (2011) 401.

⁷¹ See further a critique of this US-centric development in Kingsbury, 'First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society', 3 *Chi J Int'l L* (2002) 183.

At another level, much of the anxiety expressed regarding ITU- or UN-driven regulation of the internet reflects a broader anxiety about maintaining control over multilateral processes which themselves can be hijacked. The debate concerning internet regulation and China's attempts to control its internet sovereignty is of special interest.⁷² Clinton's remarks reference a contrasting position taken between the US and China, but the internet is still said to have resulted in 'tremendous progress' in China.⁷³ The Special Rapporteur, Frank La Rue is more direct in his criticism of blocking and filtering of the internet in China 'which has in place one of the most sophisticated and extensive systems for controlling information on the Internet, [and which] has adopted extensive filtering systems that block access to websites containing terms such as "democracy" and "human rights".'⁷⁴

China and the US have become contrasting archetypes in the debate over internet freedom. But the picture is complicated by the co-existence in China of proliferating forms of interactive social media such as Weibo⁷⁵ alongside extensive government controls, and by the revelation in the US that the government had placed pressure on internet and digital media companies to collaborate in massive surveillance of citizens in the name of security. Though this latter revelation is often framed in terms of privacy concerns and data protection, the viability of the promise of internet freedom is also at stake.

Framing internet freedom in terms of human rights and understanding freedom of expression's place online have been important developments.⁷⁶ The internet does offer international law and its participants new forms of communication and means to transcend space and time. But the internet does not simply equate to political freedom or to democracy. This is clear from La Rue's analysis and also in the criticism which he

⁷² See: <http://www.economist.com/news/special-report/21574628-internet-was-expected-help-democratise-china-instead-it-has-enabled>.

⁷³ Clinton, *supra* note 30, at 9-10.

⁷⁴ Special Rapporteur's Report, 16 May 2011, *supra* note 50, at 9.

⁷⁵ Weibo is a massively successful Chinese language micro blogging platform which shares some similarities with Twitter and Facebook: www.weibo.com.

⁷⁶ See for example the Human Rights Council's affirmation that rights must be protected online, 'The promotion, protection and enjoyment of human rights on the internet', A/HRC/20/L.13, adopted on 5 July 2012.

has received. In early 2012 Vinton Cerf, a significant figure at Google and in the internet community published a response to La Rue in the *New York Times* stating that internet access is not a human right: ‘technology is an enabler of rights, not a right itself’.⁷⁷ According to Cerf, improving the internet is just one avenue ‘by which to improve the human condition’.⁷⁸ Whilst Robert McDowell (US FCC Commissioner) wrote in *The Wall Street Journal* of the ‘UN Threat to Internet Freedom’, arguing that the net had thrived to date precisely without top-down international regulation, and as a result of the multi-stakeholder governance model – a ‘consensus-driven private-sector approach’ which held government interference to a minimum and which should be broadened if reforms are called for.⁷⁹ Debates regarding internet governance and freedom are ongoing with the US signalling a policy change in relation to ICANN and the ITU re-igniting for global internet regulations. The status quo remains for the present and there is no unitary global regulator of the internet. Nor has a right to internet freedom or access been entrenched, though the Special Rapporteur’s analysis, in particular, has deepened understanding of the significance of the internet for freedom of expression.

4. The Internet and the Development of Human Rights – Critical Perspectives on Internet Freedom

In this final section, having mapped out the policy debates over internet freedom and human rights and charted their recent history back to efforts to conceive of a right to communicate, I return to critically examine the claims made for internet freedom and the internet. To do so I turn to examine the work of Evgeny Morozov (critic) and Jaron Lanier (technology theorist) to add depth to and unsettle the terms of current debates over internet regulation and freedom, and to illustrate the ways in which the claims for internet freedom are both overblown in rhetoric and yet deserving of our attention. Morozov provides a significant critique of net freedom and Lanier, with subtlety and a degree of eccentricity, highlights the need to remain cogniscent of the human dimension in embracing technology. Both contrast yet provide perspectives of significance for the

⁷⁷ Vinton G. Cerf, ‘Internet Access Is Not a Human Right’, *New York Times*, 4 January 2012, available at: http://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html?_r=0.

⁷⁸ Ibid.

⁷⁹ Robert M. McDowell, ‘The U.N. Threat to Internet Freedom’, *The Wall Street Journal*, 21 February 2012, available at: <http://online.wsj.com/news/articles/SB10001424052970204792404577229074023195322>.

debates within international law over whether the internet should be recognised in human rights terms. Both point in their own way to the continuing significance of the internet for the field of international law.

Evgeny Morozov's book *The Net Delusion: How Not To Liberate The World* offers a blistering critique of the digital or cyber-utopianism and net-centrism involved in concepts such as internet freedom.⁸⁰ Morozov points to the twin developments of commodification and control which have increasingly defined the experience of the internet and questions our too easily made assumptions regarding the internet and its connections with democratisation. He is particularly keen to widen our view to examine also how those in the West are implicated in reducing internet freedoms. He states:

The West has been slow to discover that the fight for democracy wasn't won back in 1989. For two decades it has been resting on its laurels, expecting that Starbucks, MTV and Google will do the rest just fine. Such a laissez-faire approach to democratization has proved rather toothless against resurgent authoritarianism, which has masterfully adapted to this new, highly globalized world. Today's authoritarianism is of the hedonism- and consumerism-friendly kind...⁸¹

Morozov is critical of what he sees as a simplistic analysis of the internet's role in increasing freedom and of the ways in which its significance in terms of political freedoms has been increasingly hitched to corporate interest and the dominance of certain internet platforms such as Facebook and Twitter. He offers the following shorthand as illustration of the broader point: '[t]he Freedom Agenda is out; the Twitter Agenda is in'.⁸² Morozov warns of the naivety involved in the popular idea that the development and spread of the internet must lead to better outcomes in terms of political freedoms. He is also sceptical of the UN's efforts to harness and package the internet and information technologies as a means of self-reform – '[c]yber-utopians

⁸⁰ For reasons of space I focus here on the strands of his arguments relating to internet freedom. In this and subsequent work Morozov offers a wide-ranging critique of the hypocrisies involved in much policy-making regarding the internet, and of efforts to simplistically link the internet to democratic reforms: Morozov, *The Net Delusion*, supra note 1; cf. Morozov, *To Save Everything, Click Here*, supra note 1.

⁸¹ Morozov, *The Net Delusion*, supra note 1, at ix.

⁸² Morozov, *The Net Delusion*, supra note 1, at xii.

ambitiously set out to build a new and improved United Nations, only to end up with a digital Cirque du Soleil'.⁸³

It is not that Morozov refuses to see potential in the internet, rather he is critical of the ways in which a net freedom agenda both in the US and within the international community has been accepted rather uncritically without deeper consideration of accompanying possibilities of propaganda, surveillance and censorship. He argues, however, against going to another extreme, that of 'digital defeatism'.⁸⁴ Such views coming in 2011 have proved remarkably prescient, but his tone of relentless critique and cynicism perhaps does go too far. There is a danger that his powerful critical insights themselves may stray into the territory of rhetoric and over-simplification. His argument is also couched in the familiar terms of realism as a tonic against the temptations of cyber-utopianism and its related philosophy of action, Internet-centrism, which Morozov sees as framing questions regarding democracy not according to context and political realities, but in terms of an internet-related solution. To do so, he wagers, involves failing to appreciate 'the highly political nature of technology'.⁸⁵

Morozov offers a critique of the easy assumptions made about the power of social media and online interactions in terms of focusing and facilitating movements for social change such as in the Arab Spring, but links such understandings in foreign policy to earlier efforts to harness media and culture for the purposes of public diplomacy during the Cold War era.⁸⁶ He warns against 'unthinking glorification of digital activism' which risks confusion of 'priorities with capabilities' and reinforces a certain utilitarianism as clicktivism.⁸⁷

In an early chapter entitled 'Texting Like It's 1989', Morozov focuses on Secretary Clinton's remarks on internet freedom, as analysed above, and acknowledges that this was a seminal moment and a shift in the development of the notion of internet freedom

⁸³ Morozov, *The Net Delusion*, supra note 1, at xiii.

⁸⁴ Morozov, *The Net Delusion*, supra note 1, at xv.

⁸⁵ Morozov, *The Net Delusion*, supra note 1, at xv-xvii.

⁸⁶ Morozov, *The Net Delusion*, supra note 1, Chapter 1 'The Google Doctrine', Chapter 7 'Why Kierkegaard Hates Slacktivism'.

⁸⁷ Morozov, *The Net Delusion*, supra note 1, at 196-201.

and its foreign policy significance. Morozov also points to the disturbing revisionism involved in linking internet freedom with Cold War rhetoric, reflecting caustically that '[e]xcessive optimism and empty McKinsey-speak aside, it was Clinton's creative use of recent history that really stood out'.⁸⁸ He also argues that indulging in nostalgic and reductive metaphors of internet firewalls as the new Berlin wall, risks underestimating the sophistication of practices of internet control and censorship in China and elsewhere.⁸⁹ It further risks conflating the interests of an international community with the rather more parochial foreign policy concerns of the powerful.

In a chapter entitled 'Open Networks, Narrow Minds: Cultural Contradictions of Internet Freedom' Morozov looks at the repressive potential of many laws regarding the internet within the West. In doing so he highlights the censorship conducted by the private sector and its own regulatory power in developing terms of service, norms and practices surrounding filtering and removal of certain content online. Governments are simply often not able to undertake the complex task of regulation of the internet which has left private companies with both a regulatory burden and power.⁹⁰ Intermediaries such as Google, You Tube and Facebook have achieved a dominance which in practical terms means that digital activists are bound to engage with these mechanisms if they seek global audiences. An example here is the human rights community's reliance on You Tube, Facebook, Twitter and other commercial operators after an initial wave of independent sites failed to compete for attention. This inevitably engages private interests in public decision-making around content which is arguably offensive, political or at least contested. According to Morozov these problems with internet freedom need to be addressed in Silicon Valley as well as on the streets. He also points to the tensions between protecting certain forms of anonymity where they might be conducive to political and communicative freedoms, whilst facing up to the growth of cybercrime and its use of technologies of anonymity to avoid scrutiny and detection.⁹¹ Perhaps after all we would not wish to have a totally free internet?

⁸⁸ Morozov, *The Net Delusion*, supra note 1, at 34.

⁸⁹ Morozov, *The Net Delusion*, supra note 1, at 45.

⁹⁰ Morozov, *The Net Delusion*, supra note 1, at 223.

⁹¹ Morozov, *The Net Delusion*, supra note 1, at 221.

The problem is that internet freedom can mean different things to different people, as can its exceptions cast in terms of security and terror. Morozov warns of the ‘cost of building government policy around highly ambiguous terms and then choosing to use them in completely different contexts’.⁹² Perhaps this is where the juridification of a concept such as internet freedom and its analysis and development in human rights terms may prove more useful than Morozov appears to think. Just as the argument for free speech has been deployed in ambiguous, conflictual and contradictory ways, greater attention to its philosophical foundations and to its content in the human rights jurisprudence has offered certain benefits and a line of authoritative if not always coherent decision-making in a contentious area of human rights adjudication.⁹³ Such juridification has come at the expense of wider political understandings of the significance of speech, but it does provide one relevant framework and discourse for the resolution of disputes regarding expression. Perhaps we should not be too quick to dismiss internet freedom as a human right after all?

Morozov is right, however, to point to the difficulties in terms of defending internet freedom on the one hand whilst condoning and engaging in interference with and surveillance of sites that the West does not like. In doing so he assists in pointing to the inherent pathologies of internet freedom and he concludes that in its current form ‘the Internet freedom agenda looks more like a marketing ploy’.⁹⁴ Furthermore, he argues that all the talk and positioning surrounding internet freedom has led to increased governmental supervision and control of digital spaces for activism and expression, all with detrimental consequences in human rights terms.⁹⁵ The problem with Morozov’s critique is that he is uncertain as to what to replace internet freedom with. In the concluding pages of his book, Morozov offers a rather vague sketch of what he sees as preferable - ‘cyber-realism’.⁹⁶ To merely substitute idealism for realism, at the end of his polemic, seems to make his otherwise usefully critical insights less attractive although

⁹² Morozov, *The Net Delusion*, supra note 1, at 225.

⁹³ E. Barendt, *Freedom of Speech*, Second Edition (2005), Chapter I ‘Why Protect Free Speech?’.

⁹⁴ Morozov, *The Net Delusion*, supra note 1, at 233.

⁹⁵ Morozov, *The Net Delusion*, supra note 1, at 235, and for further detail Chapter 9 ‘Internet Freedoms and Their Consequences’.

⁹⁶ Morozov, *The Net Delusion*, supra note 1, at 318-320.

the turn to realism and a strain of pragmatism within the field of human rights is familiar (though not without its own critics).

By contrast, Jaron Lanier is an American theorist of technology, who has been involved in pioneering the development of virtual reality. His 2011 manifesto, *You Are Not A Gadget* provides a further critical, though perhaps more hopeful, lens for analysing the internet.⁹⁷ While his work engages less directly than Morozov's with the debate over internet freedom in human rights or foreign policy terms, Lanier advocates powerfully for a humanistic understanding of technology. He is concerned that free culture may actually be the undoing of the creative and culture industries and that digital forms may threaten as well as enhance individual and collective experience and exchange of knowledge and information. He writes that '[t]he frenetic energy of the original flowering of the web has reappeared in a new generation, but there is a new brittleness to the types of connection people make online. This is a side effect of the illusion that digital representations can capture much about actual human relationships.'⁹⁸

In part this is an argument for a human-centred approach to technology, but Lanier is more forgiving of the role of the market in protecting intellectual property and establishing economic foundations for the media and culture industries than might be expected. Lanier is both a Silicon Valley insider and a deeply eccentric visionary whose politics are rooted in a mix of counterculture, romantic humanism and internet-based entrepreneurial capitalism. Perhaps again a very American blend of contemporary left politics?

Lanier offers a technology-specific approach to theorising human rights and internet freedom by emphasising the human dimension of technology. He argues, '[i]t is only human choice that makes the human world function' and he is concerned with efforts to replace choice with technology.⁹⁹ Lanier is attentive to the need to understand the ideological contours of debates regarding technology and argues that technology should

⁹⁷ Again for reasons of time and space I am only able to address the key concerns in this text: Lanier, *You Are Not A Gadget*, supra note 1; see further, Lanier, *Who Owns The Future?*, supra note 1.

⁹⁸ Lanier, *You Are Not A Gadget*, supra note 1, at 71.

⁹⁹ Lanier, *You Are Not A Gadget*, supra note 1, at 107.

be seen not as an end or good, but as a tool with which to achieve the ends we desire. He presciently warns of several dangers in framing and implementing an information society including reductionism, inattention to architectural effects and oversimplification of complexity: '[i]nformation systems need to have information in order to run, but information underrepresents reality. Demand more from information than it can give, and you end up with monstrous designs.'¹⁰⁰

Lanier argues for a people not software-centred approach to the development of the digital environment. This argument comes from someone who knows and develops software and who is attuned to the ways in which its design can entrench both positive and negative outcomes. Lanier's diagnosis is that the digital world has become shaped by a dominant ideology which he terms 'cybernetic totalitarianism' and that this has led to failure on both the spiritual and behavioural level. Spiritually the danger is that we invest hope in gadgets rather than people and that we lose sight of the human in fixating upon ideas of a unitary information system with a preference for anonymity and the crowd.¹⁰¹ Lanier is also concerned that free culture in fact will deliver economic ruin for many whilst promising the false hope of getting lucky in the new digital economy.

Lanier points to a flatness in the developing global networks that will endanger diversity and creativity, replacing individual expression with a rather bland, if open, form of wiki-style collective knowledge.¹⁰² His remedy relies also in part on a certain understanding of realism which is located in adopting a pragmatic approach to computationalism.¹⁰³ He argues that whilst computationalism does not itself give people a special place, we should use this methodology creatively and speculatively in our efforts to grapple with complexity – in essence he points to a new digital humanism, including exploration of post symbolic forms of communication.¹⁰⁴

¹⁰⁰ Lanier, *You Are Not A Gadget*, supra note 1, at 69.

¹⁰¹ Lanier, *You Are Not A Gadget*, supra note 1, at 75.

¹⁰² Lanier, *You Are Not A Gadget*, supra note 1, Chapters 9-11.

¹⁰³ Lanier, *You Are Not A Gadget*, supra note 1, at 157, and Chapter 12.

¹⁰⁴ Lanier, *You Are Not A Gadget*, supra note 1, at 177-178, 190-192.

Jaron Lanier's work is esoteric and not fully developed, but it provides powerful insights in relation to the human and ideological dimensions of technology. He warns that '[p]eople will accept ideas presented in technological form that would be abhorrent in any other form'.¹⁰⁵ Whilst the idea of internet freedom is problematic from a variety of perspectives, it also has power and potential in human rights terms along these humanistic lines. Lanier's attention to some positives in the commodification of the culture industries and his scepticism regarding free culture and the open source tribe are also valuable reminders that the dichotomies which shape the internet - public/private, commodified/free, speech/violation – demand unpacking, for they each have value and harm and increasingly blend in unanticipated ways.

The message is important, the medium of the internet is a part of its meaning, but for Lanier the authors, not the mechanisms for expression and publication, are what are ultimately significant and should be valued. In his own way then Lanier partly points to the benefits of grounding ideas of internet freedom within a human-centred, if not specifically human rights, framework which is technologically literate, but focused on human flourishing and protection of distinctiveness. The internet may be one of many technologies of freedom, but it can also flatten the wealth of human experience and harm human rights to expression and privacy if technology itself is mistaken for freedom.

Conclusion

Internet freedom deserves a critical reception, but if taken seriously and given deeper analysis and meaning, it might yet prove to be a significant and even rather dangerous idea. For some it may be too early to make a call as to whether there is recognition of a human right of internet freedom.¹⁰⁶ Nevertheless, this article has attempted to take the notion of internet freedom seriously and to chart its lineage through earlier debates over internet regulation, an information society, the right to communicate and also freedom

¹⁰⁵ Lanier, *You Are Not A Gadget*, supra note 1, at 48.

¹⁰⁶ For a more doctrinal approach to this question which is in agreement on this aspect see: Tully, 'A Human Right to Access the Internet? Problems and Prospects', 14 *Human Rights Law Review* (2014) 175, at 194-195.

of expression more generally. In doing so I have pointed to the need to appreciate that internet freedom – with its concerns regarding access, speech and participation – may build on traditional conceptions of freedom of expression, but requires different thinking and ultimately will require a different box given the paradigm shift which the internet represents in terms of communications technology.

Underlying these debates over the internet and human rights are deeper divisions regarding the nature of political freedoms and the ways in which a human rights framework can or should help to shape, frame and even protect such freedoms. Processes of juridification, even those involving human rights advocacy, can of course have harmful as well as beneficial consequences. As Morozov and Lanier illustrate, so too can the internet itself. But neither is static in form or effect.

Technology has helped to shape our experience of the world and has played its own role in shaping consciousness and understandings of human rights.¹⁰⁷ The internet is having an impact in this regard, but its effects are complex. The challenge for human rights jurisprudence and discourse is to bring both stability and a coherent framework to bear upon such complexities, but to also adapt to them. In one critical respect the concept of internet freedom and the discourse of human rights share common ground – both are objects for critique and yet are also themselves critical tools.

The internet is typically presented as futuristic, though in fact it may already be old technology. But in the shock of the new-already-old there are familiar themes resonating in the debates over internet freedom – themes which can be traced to the rise of the telegraph, to subsequent debates over the power of television, and through to the Cold War and its aftermath. Internet freedom may not yet be recognised as a human right, but these debates will help to shape future understanding of the significance of internet freedom, both in terms of freedom of expression and on its own account. Most significantly, internet freedom draws into view the importance of access and participation when translating traditional human rights conceptions of freedom of

¹⁰⁷ T. S. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (1999), at 90.

expression into digital and online contexts. It also points to the potential limitations of traditional freedom of expression jurisprudence when stretched to adapt to the context of the internet and its myriad interactions, both beneficial and harmful.

