Property Rights to Information

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ABSTRACT: Laws against defamation regulate information sharing by correcting misstatements of fact in order to protect reputations. One benefit of enforcement of defamation laws is the reduction of information pollution. Misinformation increases search costs and thereby reducing efficiency in the procurement of accurate information. First Amendment protection over false speech has expanded over the last half century, decreasing the occurrence of defamation suits, leaving the information field wide open for information pollution undeterred by defamation suits. The market for information has changed dramatically with the popularization of the Internet, the exponential growth of speakers in the past decade, and the corresponding democratization of speech. These shifts have made modern media particularly vulnerable to harm from information pollution for two reasons. First, modern suffers from a tragedy of the commons—the idea that anyone can say anything without being punished for spreading misinformation. Second, misinformation in digital form is particularly harmful because it potentially lasts forever, significantly increasing its harm. Granting property rights is a typical solution to prevent pollution of a commons and can be used in the information context. Instituting an enforceable but limited property right to an individual’s readily verifiable personal information would incentivize individuals to maintain their own small corner of the information commons, decreasing the harm from information pollution. The property right may be structured to minimize chilling effects on speech through safe harbor provisions and limited access to monetary damages.
INTRODUCTION

This paper proposes an enforceable property right over one’s own personal information. This new cause of action would provide individuals with a narrowly tailored means to maintain their own section of the pool of information.

Self-enforcing regimes are ones in which users are given incentives to “perpetuate a mutually beneficial status quo.”¹ “If we don’t give you a receipt, your purchase is free,” read many signs attached to cash registers in coffee shops, bakeries, fast food restaurants, and other stores where small cash transactions are routinely conducted. These guarantees serve as a form of auditing, using the customer to police the behavior of employees. By promising the customer a receipt, the sign discourages employees from giving the customer his coffee and then pocketing the payment without ringing it up on the cash register. Although this typically happens with small purchases that the employee hopes will escape notice, the aggregation of these small amounts can significantly hurt a store’s bottom line, a problem known as “shrinkage.”² The

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¹ Thomas B. Pepinsky, “Durable Authoritarianism as a Self-Enforcing Coalition.”
² John Davis, Measure Marketing: 103 Key Metrics Every Marketer Needs (Singapore; Hoboken, N.J.: John Wiley
business owner attempts to prevent this by giving the customer a “right to receipt.” By incentivizing the customer to audit each of his or her purchases, the sign increases the likelihood that employees will process each purchase through the cash register.

The lesson of the “customer as cop” scheme is that the benefits of self-enforceable rights extend beyond the benefits to the holder of that right. In the coffee shop example, the participants in the transaction are the customer (who is enforcing his right to a receipt) and the employee (who is inclined to bypass the cash register, either through negligence or fraud). Yet the customer’s enforcement of his or her right also benefits the business owner, who experiences less shrinkage, and even other customers, who may experience lower prices as a result of reduced “shrinkage.”

A current example of a self-enforcing scheme in the context of information dissemination is defamation. The plaintiff in a defamation case sues to protect his right to reputation. Although the defamation plaintiff is not primarily concerned with information accuracy, by suing he makes real and credible the financial threat to publishers who fail to get the facts right. This, in turn, causes publishers to invest in mechanisms for improving accuracy (e.g. explicit internal practices, and fact-checking departments). The benefit from these mechanisms extends to every person later reported on by the publisher, and to the even wider audience for that information. Thus, by punishing people who harm the reputation of others, defamation also punishes “information polluters”—those who would contaminate the available pool of information with falsehoods, delaying or preventing everyone else from discovering the truth about the subject—reducing the clutter of misinformation and benefiting all information consumers.

& Sons (Asia) 2007), 104-105.

3 The same principle works for any “customer as cop” customer service guarantee. For instance, a gas station might guarantee, "if we don't ask to check your oil, we'll give you a quart for free." The business owner’s public guarantee encourages the customer to enforce the business’s policies against the business’s own employees.
Defamation used to be a much more credible threat to would-be information polluters. As the Supreme Court has expanded the protections of the First Amendment over the last 50 years, they have, simultaneously, run up against—and reduced—the protections afforded to the tort of defamation. During the era of the Civil Rights Movement, Vietnam and the Pentagon Papers, and Watergate, the Court repeatedly weighed the press’ right to report against the harm it might cause, and the Court routinely came down on the side of press freedom. In the Court’s view, the harm caused by defamation—damage to an individual’s reputation—is minimal. Conversely, the benefits of free speech—the press’s ability to publish, and the public’s ability to know—are substantial. Under this balancing approach, defamation suits have diminished to a slow trickle.

Courts routinely consider the public benefits from press activities, yet no court has considered the public harm caused by defamatory misinformation. Defamatory statements contribute to information pollution. Information pollution harms the public by increasing search costs; delaying or completely preventing users from finding the truth. This is so because modern

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4 50 A.L.R.3d 1311 (Originally published in 1973) (examination of the development of defamation from common law context into broadcast radio and television).


8 Notable exceptions include United States v. The Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979) (enjoining the publication of a magazine article “The H Bomb Secret: How we Got It, Why We’re Telling It,” under the National Security exception to the typical prohibition on prior restraints). Rhinehart v. Seattle Times Co., 98 Wash. 2d 226, 654 P.2d 673 (1982) aff’d, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984) (holding that when a protective order is entered on a showing of good cause, it is limited to the context of pretrial discovery, and does not restrict the dissemination of the information if it is gained from other sources in addition to the discovery, it does not offend the First Amendment).

9 See, e.g., Justice Potter Stewart, “Of the Press,” 26 Hastings L.J. 631 (1975) (“The public’s interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect”); Miami Herald 287 So.2d 78 (Fl.) (relying on the public’s “need to know” to uphold a “right to reply” state, “otherwise not only the candidate would be hurt, but also the people would be deprived of both sides of the controversy.”) (emphases in the original).

media suffers from a tragedy of the commons caused by users disseminating information without bearing the cost of spreading misinformation. Moreover, the harm from information pollution is greater because of the potential permanence of digital misinformation. It is inefficient and inaccurate for courts to consider the benefits to society from information dissemination without weighing the costs from information pollution. If the Court is willing to expand free speech rights based on public benefits from information dissemination, it must also consider the countervailing public harm from immunizing information polluters from any legal liability.

The Supreme Court’s disregard of public harm from misinformation may stem from its reliance on the “marketplace of ideas”—“that the best test of truth is the power of the thought to get itself accepted in the competition of the market.” To the extent that there is misinformation, the Court largely requires parties to fight it out in the media, relying on audiences to make their own determinations of truth after hearing both sides of the story. But the court fails to acknowledge that the marketplace is not a vacuum—that the nature of the market and the information that can rise to the surface changes with the changes in the media by which information is transmitted. The structure of the marketplace and its transformation affects the kind of information that wins out in the market, how it can be accessed, which players gain access to truthful/good information, etc. etc. This paper questions the assumptions underlying the

11 A tragedy of the commons theory posits that where a resource is available to all who care to use it, the quality of the resource will diminish over time. Individuals will tend to exploit the resource for personal gain rather than taking into consideration what is best for the entire resource-using community. Garrett Hardin, The Tragedy of the Commons, 162 Science 1243 (1968) (“Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.”).
12 The sheer number of new information published by amateurs through websites, blogs, social networking sites, video-sharing sites, and micro-blogging contributes to the democratization of media, but those sources arguably contribute more than their fair share of information pollution.
14 Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974) (suggesting “that parties use available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.”).
marketplace of ideas theory. It challenges whether truth prevails in the present-day unregulated marketplace of ideas, and if so how much truth prevails, to what audience, and in what form. It also questions the effectiveness of the self-help measures advocated by courts, such as the ability to rebut misinformation through “channels of communication.”

Because there is no adequate market solution, there is great potential for individual and public harm from information pollution. People require accurate information to structure their lives—to make intelligent decisions on issues as mundane choosing a restaurant that is open late or more important decisions like choosing a doctor with a particular education or not choosing an employee with a particular criminal background. In addition, to the extent that the nature and quality of the information that the public consumes affects their beliefs, it affects their ability to participate and contribute to a democratic society.

This paper proposes giving individuals enforceable property rights to certain personal pieces of information, i.e. information that is verifiably true and not subject to dispute, such as the telephone number of their business or the schools from which their educational degrees.

15 Gertz v. Robert Welch, Inc., 418 U.S. 323, 344, 94 S. Ct. 2997, 3009, 41 L. Ed. 2d 789 (1974) (holding that public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements then private individuals normally enjoy).

16 For cases holding that democracy needs an informed citizenry, see N.L.R.B v. Robbins Tire & Rubber Co., 437 U.S. 214 (Speaking about the FOIA: “[Its purpose] is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.); Thornhill v. State of Alabama 310 U.S. 88, 101, 102 (“The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times.”)

The ideas presented to a passive audience are often accepted, therefore influencing large groups into conforming behind ideas, meaning that the media exerts a significant influence over audiences. Under Cultivation Theory, those who spend more time watching television are more likely to perceive the real world in ways that reflect that television world. These individuals are compared with people who watch less television, but are otherwise comparable in terms of important demographic characteristics. Gerbner, G., Gross, L., Morgan, M., & Signorielli, N. (1986). Living with television: The dynamics of the cultivation process. In J. Bryant & D. Zillman (Eds.), Perspectives on media effects (pp. 17–40). Hilldale, NJ: Lawrence Erlbaum Associates. As a top down, linear, closed communication model, it regards audiences as passive, presenting ideas to society as a mass entity with their meaning open to little or no interpretation.
issued. Should a publisher misrepresent protected information, the rights-holder would have the power to demand a retraction, an amendment to a webpage, or some other remedy that would correct the information without imposing punitive damages on the publisher. Although a connection to an individual interest (e.g. financial, reputational) is not the main focus of the property right, the presence of an individual interest in the misrepresented information is an added incentive for the individual to correct the information, just as the promise of free coffee is an added incentive for a customer to demand a receipt. Like the “customer as cop” regime, an enforceable but limited property right to an individual’s readily verifiable personal information would allow individuals to maintain their own small corner of the information commons, decreasing the overall harm from information pollution.

I. ENCROACHMENT OF FIRST AMENDMENT INTO DEFAMATION

Defamation was once a strong example of self-enforcing check on information pollution. Defamation became less of a credible threat beginning with New York Times v. Sullivan and the line of cases that followed it represented the first significant extensions of First Amendment protection over false speech. Prior to those cases, the characteristics of a defamation suit had remained virtually unchanged from the birth of the First Amendment.\footnote{Prior to these cases, plaintiffs were subject to the various state defamation laws, some of which had imposed strict liability under a defamation per se theory. New York Times Co. v. Sullivan, 376 U.S. 254, 279, 84 S. Ct. 710, 725, 11 L. Ed. 2d 686 (1964) (“A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions-and to do so on pain of libel judgments virtually unlimited in amount-leads to a comparable ‘self-censorship.’”). Although defamation laws were robust, speech was also considerably more robust with the founding fathers routinely bashing one another in a partisan and scurrilous press.}

\emph{New York Times v. Sullivan} and its progeny changed that by raising the standard of proof for a defamation plaintiff. In that case, the Court held that where the target of an allegedly defamatory statement is a public official, a plaintiff claiming defamation must prove actual
malice,\(^{18}\) i.e. the publisher either knew the statement was false or acted with reckless disregard for the truth.\(^{19}\) The court reasoned that although there is no constitutionally protected value to false speech, some amount of false speech must be tolerated so as not to chill constitutionally-protected true speech.\(^{20}\)

Three years later, the Court extended the actual malice standard to “public figures” who “by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention” could tolerate defamatory comments about their person.\(^{21}\)

In *Rosenbloom v. Metromedia, Inc.*,\(^{22}\) a plurality of the Court further extended the *New York Times v. Sullivan* standard by requiring proof of “actual malice” in all defamation actions related to matters of “public or general interest,” regardless of a plaintiff’s status as a public or private person.\(^{23}\) Three years later, in *Gertz v. Welch*,\(^{24}\) the Court retreated from the requirement that a private person prove “actual malice” where a defamatory statement relates to a matter of

\(^{18}\) The phrase “actual malice” is a term of art. In fact, the court has suggested that ill will or related mental states are an improper constitutional basis of imposing liability. Actual malice does not mean ill will toward another or intent to interfere with the interests of the other in an unprivileged manner. See RST §§ 580A, 580B

\(^{19}\) To establish actual malice, a plaintiff needs to prove that defendant had knowledge of falsity or reckless disregard as to truth or falsity. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726, 11 L. Ed. 2d 686 (1964). Mere negligence regarding truth or falsity of statement will not suffice. See RST § 600.

\(^{20}\) Professor Brian Leiter puts forth three rationales for permitting harmful speech: “individual autonomy, democratic self governance, and the discovery of the truth (“the marketplace of ideas.”” Offensive Internet infra at 163. Professor explains the underlying principles behind these rationales by citing to John Stuart Mill:

First, Mill thinks we are not justified in assuming that we are infallible: we may be wrong, and that is a reason to permit dissident opinions, which may well be true. Second, even to the extent our present beliefs are partially true we are more likely to appreciate the whole truth to the extent we are exposed to different beliefs that, themselves, may capture other parts of the truth. Third, and finally, even to the extent our present beliefs are wholly true, we are more likely to hold them for the right kinds of reasons, and thus more reliably, to the extent we must confront other opinions, even those that are false.

Professor Leiter challenges these rationales to the extent that they do not contribute to utility and are not even categorically interested in what is true and what is not. *Id.* at 164 (“For this line of argument to justify a type of speech, the speech in question must be related to the truth or our knowledge of it, and discovering this kind of truth must actually help us maximize utility.”).

*Id.* at 164.

\(^{21}\) *Gertz*, 418 U.S. at 342.

\(^{22}\) 403 U.S. 29 (1971).

\(^{23}\) *Id.*

“public or general interest test,” but it kept the actual malice standard for public figure plaintiffs.

In making the distinction between public and private persons, the Gertz Court reasoned that private persons lack “access to the channels of effective communication . . . to counteract false statements” and have “relinquished no part of [their] good name[s]” by “thrusting themselves to the forefront of particular public controversies.” Because public figures have greater access to media, and therefore are more able to rebut false statements made about them, the Court held that their first resort for defamation was self-help, not an action for defamation.

These cases were decided during a golden age of journalism, when print and broadcast media were extremely influential in the United States. During this period, the press not only shaped public opinion by reporting from the sidelines; it actively uncovered law breaking in the White House and revealed social injustices. Under these circumstances, courts gave the press considerable legal latitude, repeatedly holding that the press’s right to report outweighed any the harm that it might cause. To the extent that there is misinformation, the Court frequently required parties to fight it out in the media, relying on the audience to make their own determinations of truth after hearing both sides of the story. Consequently, defamation suits,

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25 Private figures need only prove negligence instead of actual malice. New York Times Co. v. Sullivan, U.S. 254 (1964); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985); Gertz, 418 U.S. at 347 (“We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”).
27 Id. at 344-45.
28 Id.
29 “The Rise of Professional Journalism” In These Times, December 8, 2005 (profiling the rise of the American Journalist from the Dark Ages of post revolution U.S. into career reporter of the twentieth century), found at http://www.inthesetimes.com/article/2427/.
30 See footnotes 12-14 and accompanying text.
particularly successful defamation suits, became very rare.  

To this day the Court has repeatedly weighed the press’s right to report against the harm it might cause, and has consistently favored press freedoms despite the harm their activities might cause. In this balancing, the Court has viewed the harm caused by defamation—damage to an individual’s reputation—as minimal, especially when compared to the benefits of free speech—the press’s ability to publish, and the public’s ability to know. However, the court neglected to account for the public harm caused by defamatory misinformation, such as harm from information pollution.  

As is discussed in more detail in Part III, information pollution harms the public by increasing search costs—it delays or completely prevents users from finding the truth. Problems from information pollution are exacerbated by certain characteristics of modern media: anyone can disseminate information without bearing the cost of spreading misinformation, a so-called “tragedy of the commons” problem, and bad digital information persists forever. Consequently, modern media suffers from more bad information than ever, and information that will last forever, competing for people’s limited attention and resources ad infinitum. It is inefficient and inaccurate for courts to consider the benefits to society from information dissemination without contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.


34 See, e.g., United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972) (where a former CIA agent was prohibited by the terms of a secrecy agreement signed at time of hire from publishing an article written about his experiences within the agency); Flynt v. Rumsfeld, 355 F.3d 697 (D.C. Cir. 2004) (ruling that there is no constitutionally based right for the media to embed with U.S. military forces in combat); Courtroom Television Network LLC v. State of New York, 5 N.Y.3d 222, 833 N.E.2d 1197 (2005) (held that because cameras were initially permitted to courtroom on experimental basis, banning cameras from the courtroom does not violate the First Amendment).

35 See, e.g., Justice Potter Stewart, “Or of the Press,” 26 Hastings L.J. 631 (1975) (“The public’s interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect”); Miami Herald 287 So.2d 78 (Fl.) (relying on the public’s “need to know” to uphold a “right to reply” state, “otherwise not only the candidate would be hurt, but also the people would be deprived of both sides of the controversy.”) (emphases in the original).

36 Information pollution harms the public by increasing search costs; it delays or completely prevents users from finding the truth.
weighing the potentially enormous costs from information pollution.

II. COMBATING MISINFORMATION AND THE LIMITED EFFICACY OF REBUTTAL

The Supreme Court’s disregard of public harm from defamation stems from its belief that harm is sufficiently minimized via the “marketplace of ideas”—the idea that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”\(^{37}\) The marketplace of ideas theory is based on flawed assumptions, including the effectiveness of rebutting misinformation through “channels of communication.”\(^ {38}\) Determining the efficacy of the marketplace of ideas is crucial because there is great potential for harm to the modern information commons—if there is no adequate market solution for information pollution, a legal solution is warranted.

A. The Possibility of Failure in the Marketplace of Ideas

The First Amendment concept of the “marketplace of ideas” is widely credited to Oliver Wendell Holmes, Jr,\(^ {39}\) although the idea is much older.\(^ {40}\) Holmes famously argued in a vigorous

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\(^{37}\) Abrams v. United States, 250 U.S. 616, 630, 40 S. Ct. 17, 22, 63 L. Ed. 1173 (1919).

\(^{38}\) Gertz v. Robert Welch, Inc., 418 U.S. 323, 344, 94 S. Ct. 2997, 3009, 41 L. Ed. 2d 789 (1974) (holding that public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements then private individuals normally enjoy).

\(^{39}\) The instance most often associated with this attribution occurred in Holmes dissent of Abrams v. United States, 250 U.S. 616 (1919). (“Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition...But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas...that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.” Abrams at 630.);

\(^{40}\) Some trace the idea to Socrates and Aristotle, alleging that the Socratic method is the “marketplace’s” classroom-equivalent. Hofstader, R., & Metzger, W. P. (1955). The development of academic freedom in the United States. New York: Columbia University Press. See also Milton, J. (1644). Aeropagitica. (“And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter? Her confuting is the best and surest suppressing.”);

Perhaps the most famous pre-Holmes argument for the marketplace of ideas was John Stuart Mill’s *On Liberty*:
dissent:

[T]he ultimate good desired is better reached by free trade in ideas...that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.41

Cases invoking the concept of a “marketplace of ideas” have ranged from defamation42 to the constitutionality of electoral contributions.43 The concept plays a particularly significant role in cases that address press freedoms.44

Many legal rules rely on an unwavering trust in the marketplace of ideas. In the context of defamation law, the Court held in Gertz v. Robert Welch that “there is no such thing as a false idea. However pernicious an opinion may seem we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”45 Likewise, a plurality

If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.


41 Abrams at 630

42 New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (“The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” Quoting Roth v. United States, 354 U.S. 476, 484).

43 Citizens United v. Federal Election Commission, 130 S.Ct. 876, 884 (2010) (“Differential treatment of media corporations and other corporations cannot be squared with the First Amendment, and there is no support for the view that the Amendment’s original meaning would permit suppressing media corporations’ political speech. [The relevant case] interferes with the “open marketplace” of ideas protected by the First Amendment.”)

44 Red Lion Broadcasting Co. v. F.C.C., U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”); Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 537, 538 (1980) (“If the marketplace of ideas is to remain free and open, governments must not be allowed to choose “which issues are worth discussing or debating . . . .” Quoting Police Dept. of City of Chicago v. Mosley 408 U.S. 92, 96)

45 Gertz, 418 U.S. 323, 340; See also Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1981) (“We rely on a reverse Gresham’s law, trusting to good ideas to drive out bad ones and forbidding governmental intervention into the free market of ideas.”).
argued in Columbia Broadcasting System, Inc. v. Democratic National Committee: 46

The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success, and second, the journalistic integrity of its editors and publishers. 47

Subsequent cases have reiterated the market approach to First Amendment jurisprudence. 48

Despite strong language endorsing the marketplace of ideas, the Court is not as laissez-faire as it may seem. Constitutional protections favor certain types of speech, and even certain speakers, over others. 49 It is still permissible to regulate even the most constitutionally “valuable” speech to a certain extent, for instance by requiring political advertisements to communicate the source of financial sponsorship. 50 And as legal scholar Cass Sunstein notes, the Court’s preference for government inaction in certain contexts is itself a form of action because the status quo for information dissemination is based on a complex system of legal entitlements, e.g. radio or television broadcast licensing. 51 Despite some strongly worded dissents, for instance arguing that to apply it to “suicidal pornography . . . is to degrade the free market of ideas to a level with the black market for heroin,” 52 more often than not courts invoke the marketplace as a panacea.

46 412 U.S. 94, 117 (1973)
47 Id. at 117.
49 See, e.g., Nike, Inc. v. Kasky, 539 US 654 – 2003 (“Knowledgeable persons should be free to participate in such debate without fear of unfair reprisal. The interest in protecting such participants from the chilling effect of the prospect of expensive litigation is therefore also a matter of great importance.”); Martha Nussbaum, “The Offensive Internet: Privacy, Speech, and Reputation,” “The Internet’s Anonymity Problem” by Brian Leiter, 2011 (“Although it is common for cyber libertarians to talk as if all speech is immune to from legal regulation, even U.S. constitutional law permits the law to impose penalties for various kinds of “low-value” speech, such as defamation.”).
52 Herceg v. Hustler Magazine, Inc. 814 F.2d 1017, 1025,1026 (11th Cir. 1987) (Jones, C.J. Concurring and Dissenting, “Consonant with the first amendment, the state can protect its citizens against the moral evil of obscenity, the threat of civil disorder or injury posed by lawless mobs and fighting words, and the damage to reputation from libel or defamation, to say nothing of the myriad dangers lurking in “commercial speech.” Why cannot the state then fashion a remedy to protect its children’s lives when they are endangered by suicidal pornography? . . . . Despite the grand flourishes of rhetoric in many first amendment decisions concerning the
for any harms that speech at issue might cause.

The Court’s idealistic vision of the marketplace of ideas is anachronistic. Scholars have argued that while the classicist’s view of economic “free markets” has been repeatedly debunked over the past century, the classicist legal conception of a “marketplace of ideas” has remained unexamined. They have noted that to the extent there is a functioning marketplace for information, its outcome is not necessarily “truth.” Research in the area has suggested that information consumers are not looking for the truth so much as information that confirms their own biases. The current marketplace of ideas allows a special version of the “truth” to exist for every

For all of its power, the marketplace of ideas metaphor also has explanatory weaknesses and normative difficulties, almost all of which track the shortcomings of its idealized view of an uninhibited, costless, and perfectly efficient free market. Although this idealized conception of the marketplace may have held sway in 1919, economists have long since realized that the “neoclassical” view, though useful as an analytic tool, is far from descriptively accurate. In Professor Coase's estimation, the neoclassical approach “is a view disdainful of what happens in the real world, but it is one to which [neoclassical] economists have become accustomed, and they live in their world without discomfort.” So it is with the “marketplace of ideas” conception. As Paul Brietzke puts it, both models ignore a host of factors that make us human, including altruism, habit, bigotry, panic, genius, luck or its absence, and factors such as peer pressures, institutions, and cultures that turn us into social animals. A dehumanized, desocialized, and often sexist ‘economic man’ [or ‘speech man’] supposedly goes through life as if it were one long series of analogies to isolated transactions on the New York Stock Exchange. Professor Brietzke and other critics of the marketplace of ideas metaphor have frequently drawn parallels between failures in the real-world market and failures in the marketplace of ideas. Perhaps the most frequently identified failures are those caused by resource inequalities and disparities in communicative power and ability. The marketplace of ideas, these critics argue, is likely to reflect and justify the positions of powerful speakers, rather than the merit or “truth” of the ideas they express.


Id. (“And even if people could reason perfectly, the market still might not function as Holmes envisioned, so long as their preferences are too unstable to permit the pursuit of a single “truth.” Competition in such an imperfect marketplace of ideas will not lead to ideal results, critics allege, so long as the participants disagree about what good ideas are, or cannot identify good ideas when they see them.”)

Id. (“A related criticism suggests that even if the expression of ideas could be equalized, perhaps through government action, the efficiency of the marketplace of ideas would still be strictly limited by participants' imperfect ability to reason”) *See also* discussion in Part II.B of confirmation bias.
audience. Accordingly, news sources cater to this demand by providing increasingly isolated viewpoints that are not just divided amongst traditional geographic or political lines, but also cultural, ethnic, socio-economic, and religious lines as well.

The effects of this “information balkanization”\textsuperscript{56} reveal themselves in the persistence of false beliefs. For example, a 2010 poll showed that nearly 20 percent of the American population wrongly believed that President Obama was Muslim, a significant increase from a poll taken in 2008.\textsuperscript{57} Even more troubling were that out of the people who believed that President Obama was Muslim, 60\% attributed their beliefs to information they had gotten from the media. Joshua Dubois, President Obama’s Director of the Office of Faith-based and Neighborhood Partnerships, blamed intentional attempts to misinform: “While the president has been diligent and personally committed to his own Christian faith, there’s [sic] certainly folks who are intent on spreading falsehoods about the president and his values and beliefs.”\textsuperscript{58} Whether or not people were maliciously spreading falsehoods about President Obama’s faith, a significantly higher percentage of Republicans indicated that President Obama was a Muslim than the general population: 31 percent in one poll and 46 percent in another.\textsuperscript{59} These statistics suggest that media consumers are either not seeking the truth, or are unable to determine truth amid a swirl of rumors and misinformation.

If President Obama were to attempt to rebut this information, first he would have to devise a way of reaching that specific audience via increasingly splintered channels of communication, discussed in the next section. Second, even after he reached his intended

\textsuperscript{56}The concept of cyberbalkanization has been put forth before, albeit with relation to the internet: Science 29 November 1996: Vol. 274 no. 5292 pp. 1479-80. DOI: 10.1126/science.274.5292.1479
\textsuperscript{57}Jon Cohen and Michael D. Shear, “Poll shows more Americans think Obama is a Muslim,” \textit{Washington Post}, Thursday, August 19, 2010.
\textsuperscript{58}\textit{Id.}
audience, he would have to convince them of the falsity of their beliefs. The ineffectiveness of rebuttal is discussed in the last section.

B. Niche Audiences and Modern Channels of Communication

The Court’s main prescription for countering defamation—the plaintiff’s ability to rebut false information via channels of communication—is fundamentally grounded in a belief that “truth” will ultimately prevail in the marketplace of ideas:

The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.60

At the time of New York Times v. Sullivan, news came from the same syndicate: three national broadcast television stations, a few national newspapers, and local newspapers that got their national and international news from global news networks like the Associated Press.61 Either you had the clout to command the attention of one or more of these behemoths, or you did not.62

61 For an interesting discussion of the difference between the monolithic television audiences from as recently as the 1970s versus the modern television audience, see Louis Menand, “Talk Story, The New Yorker, Nov. 22, 2010. In his critique of a Dick Cavett memoir, he notes:

Seventeen and a half million people, Carson’s nightly average back in the late seventies, is more than twice the number who now watch “The Tonight Show with Jay Leno” and “The Late Show with David Letterman” combined. Measured in constant 1972 persons, “Tonight” is watched by a smaller audience than “The Dick Cavett Show” was when it was cut back to one week a month. The late-night talk-show potatoes have got very small. But today the original networks are like gigantic and benign marine creatures, relics of an earlier time on earth, swimming in a sea filled with more nimble and opportunistic predators, all competing for the chance to alarm, to titillate, and—if such a thing is still possible—to offend.

Id. at 134.
62 Parties could take out paid advertisements rebutting any falsehoods about them, but media companies were not required to publish these advertisements.

In part to circumvent this bottleneck to communicating with the masses, some states went so far as to ensure that defamation victims would have access to channels of communication by requiring defamers to publish rebuttals. The plurality in Rosenblroom argued that if states “fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of public concern.” The Court noted that “some states have adopted retractions statutes or right-of-reply statutes.”Id at n. 15. Although once endorsed by the Court as effective “solution[s lying] in the direction of ensuring their ability to respond, rather than in stifling public discussion of public concern,” the Court subsequently
Media has changed significantly with the introduction and proliferation of the Internet, which displaced traditional news sources as the go-to source for information consumers. A major appeal of the Internet as a news medium is its ability to reach niche audiences efficiently, but this splintering of niche audiences can be problematic. On the one hand, the Internet can be utilized to quickly find out information in a manner not possible prior to the information age. On the other, it is a tool to shout out subjective information to a targeted audience, which allows users to shut out opposing views, and only hear their own unique flavor of the news.


> If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance of misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to.

*Id.* at fn 2.

The Court argued that the statute might compel publishers “permit publication of [something] which their ‘reason’ tells them should not be published.” 418 U.S. 241 (1974), citing *Associated Press*, 326 U.S., at 20 n. 18. See also *Id.*, quoting *Pittsburgh Press Co. v. Hunab Relations Comm’n*, 413 U.S. 376, 391 (1973), dissent Justice Stewart (“government agency -- local, state, or federal can tell [p256] a newspaper in advance what it can print and what it cannot.”) *Id.* at 400. The *Miami Herald* Court focused on editorial discretion: “A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.” *Id.* at 258 (The choice of material to go into a new paper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public official -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”). Consequently, states could no longer ensure access to channels of communication to rebut.


64 http://news.bbc.co.uk/2/hi/8542430.stm


66 Marshall Van Alstyne & Erik Brynjolfsson, *Electronic Communities: Global Village or Cyberbalkans?*, “Just as separation in physical space, or basic balkanization, can divide geographic groups, we find that separation in virtual space, or “cyberbalkanization” can divide special interest groups. In certain cases, the latter can be more fragmented.” *Id* at 3. See also *The Virtual Revolution: Enemy of the State?* (BBC Two television broadcast Feb. 6, 2010).
network or newspaper used to ensure to a large extent a more balanced reporting style (to appeal to the largest audience possible) as well as a broad reach for any information shared. In contrast, new media has become increasingly splintered as the number of websites grows exponentially without a corresponding increase in audience, making it less likely than ever that a rebuttal would reach the intended audience.

Media is moving from a model dominated by a professional press to one in which market forces alone will not be able to combat the unique dangers of information pollution inherent in modern media. An aggressively laissez-faire approach under New York Times v. Sullivan is no longer appropriate to effectively combat information pollution, if it ever was. To the extent there is evidence of market failures, the law should develop fixes to minimize harm.67

C. Confirmation Bias and the Staying Power of False Information Despite Rebuttal

Even when a rebuttal reaches the original recipient of the misinformation, evidence suggests that he will still believe the original misinformation over the correction.68 As early researchers noted:

67 Id. (“Just as economists argue that regulation of real-world markets is desirable when and only when the market fails--because of fraud or monopoly, for example--proponents of the marketplace of ideas theory can argue that regulations of speech are permissible only when there are market failures in the marketplace of ideas. As in the economic market, such failures are likely to occur when circumstances make open competition impossible.”)

Stanley Ingber describes the problem:

Scholarly critics of the marketplace model argue that the model itself suggests a vital need for government regulation of the market. The imagery of the marketplace of ideas is rooted in laissez-faire economics. Although laissez-faire economic theory asserts that desirable economic conditions are best promoted by a free market system, today's economists widely admit that government regulation is needed to correct failures in the economic market caused by real world conditions. Similarly, real world conditions also interfere with the effective operation of the marketplace of ideas: sophisticated and expensive communication technology, monopoly control of the media, access limitations suffered by disfavored or impoverished groups, techniques of behavior manipulation, irrational responses to propaganda, and the arguably nonexistent of objective truth, all conflict with marketplace ideals. Consequently, critics of the market model conclude, as have critics of laissez-faire economics, that state intervention is necessary to correct communicative market failures.

68 The Gertz Court acknowledged in a footnote that “an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood,” but still maintained its preference for rebuttal as the “first remedy.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 375 n.9 (1974) (“Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie.”)
Beliefs can survive potent logical or empirical challenges. They can survive and even be bolstered by evidence that most uncommitted observers would agree logically demands some weakening of such beliefs. They can even survive the total destruction of their original evidential bases.69

The name for this is “confirmation bias”: a predisposition to believe information that supports a preconception, even when that information is later shown to be inaccurate.70

Writers and historians have remarked on the effects of confirmation bias for over two thousand years. Perhaps the earliest observation of the effect was the Greek historian Thucydides’s mention that “it is a habit of mankind . . . to use sovereign reason to thrust aside what they do not fancy.”71 The effect has also been discussed by Dante Alighieri,72 Sir Francis Bacon,73 and Leo Tolstoy.74

Most descriptions of confirmation bias focus on the inclination to believe information that supports preconceived beliefs; but false beliefs can persist even when the user has no previous prejudices regarding the matter. In a study measuring this effect, participants were asked to assess information supporting a hypothesis with which they had no prior experience. They were later told that the initial information they were given was false. Even though they had no previous knowledge or opinion about the hypothesis, and even though it was fully disclosed

72 In the Divine Comedy, St. Thomas Aquinas cautions Dante when they meet in Paradise, "opinion-hasty-often can incline to the wrong side, and then affection for one's own opinion binds, confines the mind.”
73 Bacon, in the Novum Organum, wrote, “The human understanding when it has once adopted an opinion ... draws all things else to support and agree with it. And though there be a greater number and weight of instances to be found on the other side, yet these it either neglects or despises, or else by some distinction sets aside or rejects[.]”
74 In his essay “What Is Art?”, Tolstoy wrote, “I know that most men—not only those considered clever, but even those who are very clever, and capable of understanding most difficult scientific, mathematical, or philosophic problems—can very seldom discern even the simplest and most obvious truth if it be such as to oblige them to admit the falsity of conclusions they have formed, perhaps with much difficulty—conclusions of which they are proud, which they have taught to others, and on which they have built their lives.”
that the information that formed the basis of the hypothesis was false, the original misinformation still informed their attitudes and inclined them in favor of the hypothesis.\textsuperscript{75}

In another experiment, subjects distinguished between real and fake suicide notes.\textsuperscript{76} They were then provided random feedback: some were told they had done well while others were told they had performed badly. Even after being fully informed that the feedback they had received was random and unrelated to their actual performance, the subjects were still influenced by that feedback, believing that they were better or worse than average based on what they had initially been told.\textsuperscript{77}

These studies suggest that even if a rebuttal did reach its intended audience, it may have limited efficacy. The only thing that reliably happens with the current model for dealing with information pollution is increased search costs as information consumers sift through the myriad sources and pieces of information to ascertain the truth.

\textbf{III. Modern Media, the Information Commons, and What’s at Stake}

The harm from information pollution for modern media is potentially vast. Unique characteristics inherent to modern media exacerbate problems from information pollution. First,

\textsuperscript{75} Ross, Lee; Lepper, Mark R.; Hubbard, Michael (1975), "Perseverance in self-perception and social perception: Biased attributional processes in the debriefing paradigm", \textit{Journal of Personality and Social Psychology} (American Psychological Association) 32 (5): 880–892 It is described as follows: “The…experiment was designed to provide a clear demonstration of the perseverance phenomenon. It also attempted to determine whether increased delay before debriefing would increase such perseverance. Subjects engaged in a novel task and were given false feedback indicating that they had performed much better than (success), much worse than (failure), or about the same as (average) an average student. At the completion of the task, subjects were left alone for either 5 (short-delay) or 25 (long-delay) minutes. Following this delay period, all subjects were debriefed concerning the deception in performance feedback. It was carefully explained that their putative performance had been determined before they entered the experiment, that they had received feedback unrelated to their actual performance, and that the deception had been necessary in terms of the purported rationale for the study. Subjects then completed a questionnaire designed to measure the extent to which the effects of the initial false feedback manipulation survived the debriefing procedures. In this questionnaire, estimates and predictions concerning objective performance scores complemented the familiar Likert-type ratings of ability.” \textit{Id.} at 882

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} \textit{Id.}
modern media suffers from a tragedy of the commons because the public can use it freely at no cost to anyone individually. Because it is a commons, there is a diminished incentive to maintain standards about what types and quality of information will be published, and a corresponding decrease in the value of the common to its users. Second, misinformation is particularly harmful because it lasts forever. These unique characteristics pose a danger of intolerably high search costs.

A. Modern Media’s Tragedy of the Commons Fosters Increased Information Pollution

Modern media suffers from a “tragedy of the commons,”78 a dilemma first identified in 1968 by Garrett Hardin in his eponymous Science Magazine article.79 Hardin posited that where a resource is available to all who care to use it, the quality of the resource will diminish over time.80 Individuals will tend to exploit the resource for personal gain rather than taking into

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78 Despite the incredible response Hardin’s article produced, there is no categorical definition of a tragedy of the commons. Shi-Ling Hsu, What is a Tragedy of the Commons? Overfishing and the Campaign Spending Problem, 69 Alb. L. Rev. 75, 77 (2006) (“Remarkably, of the thousands of putative applications of the tragedy of the commons, not one has sought to formally define the term. In fact, this overabundance of citations highlights the fact that although we invoke it often, we do not know exactly what constitutes a tragedy of the commons.”).

79 Garrett Hardin, The Tragedy of the Commons, 162 Science 1243 (1968).

80 Garrett Hardin, The Tragedy of the Commons, 162 Science 1243 (1968). Hardin described it thusly:

The tragedy of the commons develops in this way. Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. Such an arrangement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both man and beast well below the carrying capacity of the land.

Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality. At this point, the inherent logic of the commons remorselessly generates tragedy.
consideration what is best for the entire resource-using community. Modern media is a commons because there is: (1) ready access to disseminating information, (2) without bearing the costs of spreading misinformation, (3) in a relative vacuum of property rights or other regulation that would allow policing of the commons or exclusion of offending users. Each of these elements of a commons as applied to modern media is dealt with in turn.

Modern media is dominated by user-generated material such as blogs, YouTube, Twitter, and Facebook. It suffers from a commons because users can readily publish information, but they cannot keep others from doing the same. Professor Brian Leitner argues that not only are the financial barriers to publishing low, but the social barriers are as well:

Prior to cyberspace, if you wanted to reach more than your immediate circle of acquaintances, you usually had to have some kind of competence, education, status, intelligence, and ability: otherwise no one would listen to or publish you . . . . Now [those that would perpetuate online harms] need only a computer in order to abuse their targets, and to do so in a way that permits their defamation and harassment to be visited and revisited again and again by countless people anywhere on the planet, visitors who are often deprived of almost all relevant information about the speaker or his targets. This is

As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, “What is the utility to me of adding one more animal to my herd?” This utility has one negative and one positive component.

1) The positive component is a function of the increment of one animal. Since the herdsman receives all the proceeds from the sale of the additional animal, the positive utility is nearly 11.

2) The negative component is a function of the additional overgrazing created by one more animal. Since, however, the effects of overgrazing are shared by all the herdsmen, the negative utility for any particular decision-making herdsman is only a fraction of 21.

Adding together the component partial utilities, the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another. . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited.

Id. at 1244. (“Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.”).

81 Id. Professor Hsu argues that there are three elements of a commons: “(1) Mutual, uninternalized externalities…. (2) Group payoffs that are less in uncooperative outcomes than they are in cooperative ones…. (3) A resource that is rivalrous in consumption.” Hsu at 81-82

82 See also Leiter. (The harm of speech in cyberspace is sufficiently serious that we should rethink the legal protections afforded cyber speech that causes dignitary harms. Thanks to google (and similar search engines), cyber speech tends to be (1) permanent, (2) divorced from context, and (3) available to anyone.
because it is much easier and more effective to disseminate bad information over the Internet, as opposed to other media.\textsuperscript{83}

Reaching a worldwide audience has never been cheaper or more accessible. The downside to this low cost of entry is the explosion of content farms\textsuperscript{84} and other low-value websites aimed at driving as much traffic to their websites as cheaply as possible by manipulating search engines results.\textsuperscript{85}

Second, modern media participants do not bear the full cost of their use.\textsuperscript{86} New media is shielded from many traditional consequences of publishing bad information. Traditional media is encouraged to editorialize content by the real or perceived threats of litigation, the influence of advertisers, and concern about credibility.\textsuperscript{87} Likewise the high cost of entry associated with being a traditional publisher and reputational value associated with being one of only a few voices encourage traditional media to take appropriate levels of precaution in publishing harmful information.\textsuperscript{88} These incentives are largely absent in new media. New media users are further shielded through the use of anonymous speech, which some commentators have suggested is

\textsuperscript{83} P. 161 (“Economists say, correctly, that the “barriers to entry” are low in cyberspace. They are thinking mainly of the financial cost, but the barriers are “low” in a more significant way as well. Prior to cyberspace, if you wanted to reach more than your immediate circle of acquaintances, you usually had to have some kind of competence, education, status, intelligence, and ability: otherwise no one would listen to or publish you...Now [those that would perpetuate online harms] need only a computer in order to abuse their targets, and to do so in a way that permits their defamation and harassment to be visited and revisited again and again by countless people anywhere on the planet, visitors who are often deprived of almost all relevant information about the speaker or his targets.”)

\textsuperscript{84} Described as sites that deliberately cater their content to what is trending on search engines at any given time. The credibility of the information generated by them is dubious at best.


\textsuperscript{86} Hardin, supra at 1244.

\textsuperscript{87} Id. at 55 (“The case for lighter regulation (than on the Internet) might come from the greater need for advertiser or subscriber support in these broadcast media, inasmuch as both groups would exercise influence over content. In any event, radio and television stations could broadcast more anonymous messages, but they do not, and the threat of legal intervention plays some role in this state of affairs.”)

\textsuperscript{88} Id. at 56 (“the low cost of entry on the Internet is striking. In the case of newspapers and magazines, the cost of paper, publication and distribution surely cause the intermediary to screen content.”); Id. (“On the Internet, many readers might wish for less, but in the case of newspapers we worry that there are too few voices rather than too many...Scarcity of this sort means that the intermediary can be counted on to eliminate juvenile speech, and this in turn means that there is less need for legal regulation.”)
directly correlated to a proliferation of harmful speech.\textsuperscript{89} Professor Brian Leiter calls these sites “cyber-cesspools,” “chat rooms, websites, blogs, and often the comment sections of blogs—which are devoted in whole or in part to demeaning, harassing, and humiliating individuals.”\textsuperscript{90} Cyber bullying and online bigotry have become flashpoints for controversy, but because there are none of the typical social sanctions to anonymous speech, the perpetrators can continue unmolested.\textsuperscript{91}

Third, modern media suffers from a vacuum of property rights or regulation that would allow for adequate policing of the commons or exclusion of offending users.\textsuperscript{92} Much of harmful speech is not actionable as a tort because it does not rise to the requisite harm.\textsuperscript{93} Furthermore, Section 230\textsuperscript{94} of the Communication Decency Act\textsuperscript{95} absolves online service providers of most defamation liability and barred states from attempting to impose any stricter liabilities.\textsuperscript{96} Section

\textsuperscript{89} Sites like Facebook and YouTube are constantly filtering out the more shocking content from their sites posted by anonymous users. Other sites do not filter this content, either maliciously or because they simply do not have the resources. Levmore at 57 (“If the Internet’s first anonymity problem is the costs imposed on [an aggrieved individual], then its second anonymity problem is that Internet entrepreneurs with interactive sites are essentially obliged to spend resources in order to control the content of these sites, lest a high noise-to-signal ratio destroy the value of the medium to its users.”). This phenomenon has become so powerful that people are now being hired just to police websites for uploaded content that is deemed inappropriate. See \textit{Policing the Web’s Lurid Precincts} by Brad Stone, The New York Times, July 18, 2010.

\textsuperscript{90} Martha Nussbaum, “The Offensive Internet: Privacy, Speech, and Reputation,” “The Internet’s Anonymity Problem” by Brian Leiter, 2011, P. 155 (“I shall use the term “cyber-cesspool” to refer to those places in cyberspace—chat rooms, websites, blogs, and often the comment sections of blogs—which are devoted in whole or in part to demeaning, harassing, and humiliating individuals: in short, to violating their “dignity”.

\textsuperscript{91} http://news.cnet.com/8301-27083_3-10466220-247.html?tag=mncol;txt

\textsuperscript{92} Hardin \textit{supra} at 1245; Martha Nussbaum, “The Offensive Internet: Privacy, Speech, and Reputation.” “The Internet’s Anonymity Problem” by Saul Levmore, 2011 at 50 (“One can be the victim of soapbox invectives, crude thoughts recorded on a bathroom wall, malignant lines printed in a letter to the editor of a newspaper, hurtful statements or footage broadcast on television, or the same nasty words written in a comment on a blog site. The likelihood of injury seems greatest in the last of these settings, and it is there that the injured party is least protected by the law.”). See also Leiter at 164 (“Both tortious harms and dignitary harms are, in consequence, more harmful, than ever before.”).

\textsuperscript{93} \textit{Id.} (“Cyber cess-pools are thus an amalgamation of what I will call “tortious harms” [harms giving rise to causes of action for torts such as defamation and infliction of emotional distress] and “dignitary harms,” harms to individuals that are real enough to those affected and recognized by ordinary standards of decency, though not generally actionable.”)

\textsuperscript{94} “No 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.” 47 U.S.C Sec. 230(c)(1) (1998).

\textsuperscript{95} 47 U.S.C Sec. 230 (1998)

\textsuperscript{96} “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is
230 immunizes Cyber-Cesspools in a way that even traditional newspapers are not immune, disincentivizing site owners to regulate the content of their sites:

[N]o blog owner, or chat room administrator, or search engine operator, has any legal reason to make it harder for the Sociopath to express his thoughts about Jane Doe, to express them with no contextual information about the Sociopath or his target, and to do so in ways that are no longer ephemeral, but etched into the Internet’s permanent memory thanks to Google, for anyone anywhere to discover.

Section 230 provides the least protection where the harm is greatest.

This tragedy of the commons incentivizes low-value speech, which increases search costs by leading users repeatedly down erroneous paths, possibly preventing them from ever discovering the truth. The result is an overall decrease in utility of the information pool.

B. The Insidious Harm of Bad Digital Information and the Lack of a Means of Removal

Due to cheap electronic storage, misinformation will only accumulate, never diminish.

There is real harm in bad information preserved in this way, not just to the victim of any maliciousness, but to everyone. Our society requires good information to thrive. Individuals need accurate information to structure their lives, to make either their routine daily decisions like which businesses to patronize or decisions that could have a much bigger impact like who to marry. The nature and quality of the information that the public consumes affects their beliefs, which affect their ability to participate and contribute to a democratic society. Once bad

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97 Id. at 156 (“The effect of [Section 230] has been to treat cyber-cesspools wholly different from, for example, newspapers that decide to publish similar material. Whereas publishers of the latter are liable for the tortious letters or advertisements they publish, owners of cyber-cesspools are held legally unaccountable for even the most noxious material on their sites, even when put on notice as to its potentially tortious nature.”)

98 Id. at 166.

99 Id. at 161-162 (“The real question is why cyberspace should be treated more protectively when it comes to tortious harms and why it should not, in fact, be treated more restrictively when it comes to dignitary harms, given how much more harmful they are in cyberspace.”).


101 For cases holding that democracy needs an informed citizenry, see N.L.R.B v. Robbins Tire & Rubber Co., 437 U.S. 214 (Speaking about the FOIA: “[Its purpose] is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”);
information gets published it “will live on and on in libraries carefully archived, scrupulously indexed . . . silicon-chipped, deceiving researcher after researcher down through the ages, all of whom will make new errors on the strength of the original errors, and so on and on into an exponential explosion of errata.”

Professor Enrico Coiera, Director of the Centre for Health Informatics at the University of New South Wales, warns what is at stake:

For information consumers, a variation of Malthus’ law predicts that the exponential growth in information will mean that specific information will become increasingly expensive to find, because search costs will grow but human attention will remain limited. Furthermore, the low cost of creating poor-quality information on the Web means that the low-quality information may eventually swamp high-quality resources. The use of reputable information portals on the Web, or smart search technologies, may help in the short run, but it is unclear whether an “information famine” is avoidable in the longer term.102

Because of the cumulative nature of digital storage, misinformation will also accumulate, impairing the ability of people to sift through the muck to uncover the truth.103

Perhaps the most popular filters of bad information are internet search engines like Google. Originally designed to search for relevant information, the limitations of Google’s

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103 Charles Seife, Malthusian Information Famine, in This Will Change Everything: Ideas That Will Shape the Future 139 (John Brockman ed., 2010) “‘information grows exponentially, but useful information grows only linearly.’.”
search algorithm in filtering out low-value information are being tested by “search engine optimization” (“SEO”) tactics wielded by content farms.\textsuperscript{104} SEO are methods employed by websites to rise to the top of search results. There are two types of SEO; “White Hat” is permitted by Google and “Black Hat” is not.\textsuperscript{105} White Hat SEO involves actively seeding content with search-friendly keywords, even listing those keywords as “tags” at the beginnings of articles.\textsuperscript{106} Sites like The Huffington Post are famous for their successful use (or overuse) of White Hat tactics in generating content that is directed more at an audience of search engines than at humans.\textsuperscript{107} Black Hat tactics include the use of hidden keywords in the text or the manipulation of “links” that might make the website look to Google more popular than it really is.\textsuperscript{108} Because Google’s algorithm is very vulnerable to this type of gaming, Google penalizes or outright blocks websites that arbitrarily place large numbers of links to its page or engages in other Black Hat tactics, if they catch them.\textsuperscript{109}

In a recent example of what appears to be egregious black hatting, the New York Times ran an investigative report on J.C. Penney’s unlikely dominance of Google’s search results.\textsuperscript{110} Leading into the 2010 holiday season, J.C. Penney was turning up as the first search result for

\textsuperscript{104} Though it is perpetually cited as being a champion of openness, Google is notoriously secretive when it comes to how its search engine operates. What is known is that it uses an algorithm to populate its organic results based on the number of times that a site is linked to from other sites. Despite the lack of public understanding about how exactly the algorithm works, certain websites are inordinately successful at having their website pop up at the top of Google’s search results.


\textsuperscript{106} Id.

\textsuperscript{107} The online news source, The Huffington Post, is one of the most successful S.E.O. gamers. Because it posts stories of questionable newsworthiness, traditional news media and search-savvy techies suggest that the website is little more than a content farm solely motivated by high traffic. However, its recent acquisition by AOL appears to have renewed efforts at serious journalistic effort while still using “social media optimization” as a way of expanding readership.


\textsuperscript{109} Id.

terms as diverse as “dresses,” “bedding,” and “area rugs.” Describing it as “the most ambitious effort [at gaming] I’ve ever heard of,” the Times uncovered a number of tactics used by J.C. Penney that, while not illegal, violate Google’s policies, paying for a number of links to its site to be scattered across the Internet. The majority of the sites linking to J.C. Penney were unrelated to department store retail. When the Times notified Google of its investigative efforts, Google confirmed that J.C. Penney was in violation of its policies and sank J.C. Penney’s relevancy rating, in some instances to the point of obscurity. Without the Times doing its own investigation, however, J.C. Penney may never have been caught.

In reaction to the bad press and increasing user frustration, Google rolled out a new algorithm that seeks to reward high-value sites and downgrade sites that merely parrot popular internet activity. Google claimed that users will quickly notice the change. Google followed up the algorithm change with an option that allows users to block sites they find unhelpful. Under the title “Hide Sites to Find More of What You Want,” the Official Google Blog explained:

> We’re adding this feature because we believe giving you control over the results you find will provide an even more personalized and enjoyable experience on Google. In addition, while we’re not currently using the domains people block as a signal in ranking, we’ll look at the data and see whether it would be useful as we continue to evaluate and improve our search results in the future.

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111 Id. Google penalizes or outright blocks websites that arbitrarily place large numbers of links to its page across the web in order to optimize their position in search results.

112 Id.

113 Id. Google has sometimes outright deleted some Black Hatters from its results. Id. While it makes sense on its face that Google should (and does) do this to offender websites, there are opposing concerns. For example, users seeking a certain website that has been penalized, i.e. placed lower on the search results, will have to search more extensively to find what it is they’re looking for. While S.E.O. gaming may indeed be a prime example of a business ethics violation, where does Google’s own practice leave its users, who are merely, say, trying to find a beloved retailer’s website, as might be the case with J.C. Penney?


116 Id.
Google has promised that once you block the site, it will no longer populate your search results.\textsuperscript{117}

For many low-value sites, these two adjustments may mean less traffic in the immediate future. However, because there are firms whose sole purpose is to manipulate and increase a client’s search relevancy, it may only be a matter of time before SEO specialists discover and exploit vulnerabilities in the new algorithm. Far from reassuring, the recent Google changes have merely highlighted the inherent vulnerabilities of relying on a third party search engine to filter out bad information. This is particularly troubling because the filtering is done on the basis of popularity, but being at the top of Google search engine results is its own form of self-perpetuating popularity, making concrete the old German adage, “an old error is more popular than the new truth.”\textsuperscript{118}

Modern media represents a distinct departure from traditional media due to its vulnerability to tragedy of the commons problems and the permanency of bad digital information. While search engines like Google have performed relatively well in filtering out information pollution, their performance has declined recently as they battle the SEO industry and others who seek to game search algorithms.\textsuperscript{119} As information accumulates exponentially but our ability to process information remains constant, legal rules and regulations regarding the quality of information may be an important supplement to technological or market fixes to the problem of information pollution.\textsuperscript{120}

\textsuperscript{117} Id.
\textsuperscript{118} Old German proverb.
\textsuperscript{119} Enrico Coiera, \textit{Information Economics and the Internet, in 7(3) Journal of the American Medical Informatics Association} 215, 215 (2000) (“The use of reputable information portals on the Web, or smart search technologies, may help in the short run, but it is unclear whether an ‘information famine’ is avoidable in the longer term.”).
\textsuperscript{120} Levmore at 60 (“Even if most communications of a certain kind is useless or offensive, the free speech advocate opposes regulation because it might chill or eliminate some valuable communications…This description is however, insufficiently sensitive to the availability of alternatives.”)
IV. A NEW CAUSE OF ACTION FOR MISINFORMATION

Modern media is more susceptible to information pollution than traditional media, and consequently warrants different legal rules than those addressed to traditional media. This part proposes a new cause of action for misinformation that gives individuals small enforceable property rights to certain pieces of personal information. The new cause of action would have many benefits from self-policing information without unduly burdening speakers and threatening the uninhibited expression of speech that the First Amendment serves to protect. Should the very limited cause of action be successful, further expansion may be considered, where appropriate.

A. A New Limited Property Right to One’s Personal Information

The modern media commons suffers from a regulatory void caused by Section 230 and the decreased viability of defamation and other information torts. A typical remedy for commons problems is assigning property rights, thereby allowing users to prevent each other from abusing shared resources.  

This paper proposes a new cause of action for misinformation that gives individuals small enforceable property rights to certain pieces of information, such as their date of birth or the

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121 Professor Levmore has argued that increased regulation, particularly in the Internet context, may be the best course of action. He claims that the privileges bestowed on websites by Section 230 are now out of step with the current environment. Levmore at 56 (“To the extent that the original reason for this immunity was to allow the new medium to flourish and experiment, it seems that a reasonable test period has now passed.”) To bolster this, he claims that a regulation—free internet exposes internet entrepreneurs to higher costs due to the necessitated effort to patrol their websites to maintain legitimacy. Id. at 58 (“I have emphasized that one cost of internet anonymity is that a successful site must monitor and censor in order to inhibit what might become overwhelming noise.”) He calls for a social bargain among the Internet’s participants that in which internet providers, as “fairly passive entrepreneurs” would be willing to be regulated. Id. at 62 (“My strategy is to resort to the well-known guidepost of a hypothetical bargain among participants, or all citizens. Such a mechanism, or metaphor, might be especially apt if we think of the Internet provider as a fairly passive entrepreneur.”)

To support his argument for some type of regulation, he relies on a “market failure” of the Internet’s ability to facilitate a transaction between a given victim and the arbiter of bad information. Id. at 63. A legal solution would be the repeal of Section 230 of the Communications Decency Act, although there may be private action by reducing the amount of “juvenile” anonymous noise. Id.

122 Using Hardin’s original example, to prevent over-grazing of a pasture, exclusionary property rights could be assigned to particular farmers, who could then permit only certain individuals to graze and prohibit other harmful behavior.
telephone number of their business. Should a publication or other source misrepresent those pieces of information, the rights-holder could require a retraction, an amendment to a webpage, or other remedy meant to correct the information without imposing punitive damages on the publisher. By protecting their property rights, they also benefit others. They help the commons problem by eliminating certain pieces of misinformation from the marketplace.

Assigning property rights in personal information is a good choice because property rights are most effective when the owner has some stake in the outcome, e.g. a financial interest or an interest in one’s personhood or public persona. An example of an individual acting on their own financial interest might be using the property right to correct a phone number or address for a business. Although some businesses like Google welcome corrections, others, particularly phone directory systems that make money off Yellow Book style advertising, may try to require an up-sell to an advertisement before the correction is made.

An example of a person using the property right to protect their interest in their personhood or public persona is using the right to correct a false report of death. A more unusual example would include whether or not someone was dead. In a New York Times Op-Ed, media lawyer and former social psychologist Zick Rubin told the story of how he was incorrectly listed in a Wikia.com article as having died in 1997. Rubin humorously describes his predicament and his attempts to remedy it:

I knew that the report of my death could be bad for business, so I logged into Wikia.com and removed the “1997.” But when I checked a while later, I found the post had reverted to its prior form. I changed it again; again someone changed it back. Apparently the site had its doubts about some lawyer in Boston tinkering with the facts about American psychologists.

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123 See Google’s “Ways to Correct Business Information”, at http://maps.google.com/support/bin/answer.py?hl=en&answer=171429
124 For an example of Yellow Page style scams, see “FTC Puts Business Directory Scam out of Business,” found at http://www.ftc.gov/opa/2006/02/business_directory.shtm
When I complained to Wikia.com, I got a prompt and friendly reply from its co-founder, Angela Beesley, sending me her “kind regards” and telling me that she had corrected the article. But when I checked a week later, the “1944-1997” had returned. So I e-mailed her again (subject line: “inaccurate report that I am dead”), and got the following explanation:

“My change to the page was reverted on the grounds that the info included in this article was sourced from Reber and Reber’s the Dictionary of Psychology, third edition, 2001. Is it possible the page is talking about a different Zick Rubin? The article is about a social psychologist.”

I didn’t doubt that the Dictionary of Psychology was a highly authoritative source, and yet I persisted in wondering why Reber — or, for that matter, Reber — would know more than I would about whether I was alive or dead.

Rubin confirms the incorrect date of death in the Reber and Reber book and contemplates suing for defamation, but upon researching the matter discovered that “a false report of death is not on its own considered libelous.”^{126} Rubin discovers weeks later that, “Wikia.com had made the gutsy call that I was a reliable source on my own existence,” and corrected the false report of his death.^{127}

Although a connection to an individual interest (e.g. financial, reputational) is not the main focus of the property right, the presence of an individual interest in the misrepresented information is an added incentive for the individual to correct the information, just as the promise of free coffee is an added incentive for a customer to demand a receipt. As it is now, people like Rubin have no recourse, no leverage to demand that their information is correct. Providing property rights in this type of information is an appealing means of combating information pollution because it does not rely on an efficient market for information to resolve factual disputes, but on a legal rule allowing individuals to self-police their own corner of the information commons.

^{126} Id.
^{127} Id.
B. Minimizing the Chilling Effect on Speech through Safe Harbors, the General
Unavailability of Damages, and Technological Fixes

The property right in one’s personal information could be structured to minimize any
potential chilling effect on public discourse. An example of a non-punitive remedy would be a
safe harbor provision similar to Federal Rule of Procedure 11. Rule 11 promotes truth telling in
litigation by requiring attorneys to certify that their factual contentions have evidentiary
support. Violators of Rule 11 are subject to sanctions, but they are also provided with a 21-
day safe harbor to correct any false contentions. If they withdraw the contention within this
period, they are protected against a motion for sanctions.

A similar safe harbor provision could be adopted for the new property right in one’s
personal information. Just as parties frequently work out disputes among themselves through use
of the Rule 11 safe harbor provision, parties in an informational dispute will have similar
incentives to work any disputes out themselves without involving Courts. Parties would not be
allowed to collect damages against a publisher who has complied with the safe harbor. Through
threat of legal action, however, content providers would have greater accountability.

Many courts have expressed concern over the chilling effect of litigation in the information industries. Publishers
may be encouraged to downplay any negative allegations made for fear of lawsuit. The chilling effect of potential
liability against publishers is one of the driving policies behind all of First Amendment law. Courts have made the
determination many times that it is better for some false information to be published than to suppress truthful
information.

Although giving individuals property rights in their personal information might chill speech, there is some question
as to whether this is First Amendment protected speech. Recently, the Second Circuit in Sorrell v. IMS Health Inc,
invalidated a Vermont Prescription Confidentiality law as a restriction on free speech. Sorrell v. IMS Health Inc.,
131 S. Ct. 857, 178 L. Ed. 2d 623 (2011). In contrast, the First Circuit has upheld similar laws restricting access to
government collected data by analyzing access to the information as commercial conduct and therefore outweighed
by privacy interests. IMS Health Inc. v. Ayotte, 550 F.3d 42 (1st Cir. 2008); IMS Health Inc. v. Mills, 616 F.3d 7, 35
(1st Cir. 2010). Similarly, in a leading case on the collection and sale of government data, the U.S. Supreme Court
upheld a Congressional Act that restricted State sales of driver personal information on the basis of consent. Reno v.
the Commerce Clause to regulate States selling driver’s personal information without consent).

FRCP 11.

Id.

Id.
For passive information sites, such as customer review sites, another safe harbor could be a right of reply. Sites such as these rely heavily on user-generated content that is difficult or impossible for the site owner to verify. Instead of requiring these sites to extensively fact-check, these sites could instead opt to allow property owners to assert their own version of the truth. A good example of this type of publication is RateMyProfessors.com. The content from RateMyProfessors.com is generated from students commenting on the performance of their professors based on various criteria including ease, clarity, helpfulness, and a chili pepper for being “hot.” The purpose of the site is to allow students to vent or issue warnings or endorsements to would-be students, and is consequently a receptacle for both insults and praise. To promote an open dialogue, the site allows professors to “rebut,” with those rebuttals published in conjunction with the original student comment. Under the new property right, this type of rebuttal option would comply with the safe harbor provision.

C. The Unavailability of Money Damages and Other Means of Compensating the Victim

An optional aspect of the new property right would be a victim compensation fund, such as the one proposed by Professor Frederick Shauer for defamation plaintiffs. Professor Shauer

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132 See ratemyprofessors.com.
133 Id. When you click on the “rebuttal” tab, you receive the following message: “We invite you to register as a certified professor. With a Certified Professor Account you can post blog-like responses to your ratings, as well as add a photo to your professor page. Your rebuttals will accessible from a tab to the right of the "User Comments and Ratings" tab.”
134 Similar requirements of rights to rebuttal have been ruled unconstitutional. In Miami Herald, the Court focused on editorial discretion: “A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.” Id. at 258 (The choice of material to go into a new paper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public official -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.) Arguably the reverse is true, that when a publication is in fact “a passive receptacle or conduit for news, comment, and advertising,” a right of reply could be imposed on such a publication. Also, as the concurrence points out, there seems to be no constitutional implication on statutes that provide “retraction” as a remedy for defamation. Id., Justice Brennan concurrence. The Miami Herald rule arguably does not apply to publishers that are a passive receptacle for comment, such as the ubiquitous user-generated sites on the Internet. Moreover, the right to reply is only a safe harbor provision, not a requirement. Sites could choose to take advantage of the safe harbor or not.
makes the argument that if First Amendment protections are so valuable to society, why is it the individual victims that have to pay for it: “If it is ‘our’ First Amendment, then why don’t we and not [victims] pay for it?”136 He suggests a victim compensation fund, which he suggests “can be viewed as improving the existing model rather than as falling short of an ideal.”137 A side benefit would be that society “would then understand, as it probably does not now, both the costs of a free speech system, and that the [victim compensation] is the result not of necessity but of a conscious choice about where society wishes the immediate burden of its rights to fall.”138 Such an analysis would at minimum “focus[] us more sharply on the costs of the first Amendment, and on the identity of those who are paying for them.”139

CONCLUSION

Laws regulating information sharing are out of step with modern media, their application anachronistic in a society where cyber bullying and online bigotry have become flashpoints for controversy. As defamation suits become increasingly rare, the public pool of information becomes more polluted, due to the tragedy of the commons and the permanency of digital information. The marketplace of ideas is not well equipped to treat this information pollution; legal action is required.

Granting property rights is the traditional remedy to prevent pollution of a commons. An enforceable but limited property right to an individual’s readily verifiable personal information would incentivize individuals to maintain their own small corner of the information commons, decreasing the harm from information pollution. The property right could be structured in a way

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136 Id.
137 Id.
138 Id. at 1348.
139 Id.
that its enforcement would have a limited chilling effect, with safe harbor provisions and limited monetary damages. An optional victim compensation scheme could defer some costs to victims while minimizing any chilling effect on speech.