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Correcting Digital Speech

Jamie Lund*

The market for information has changed dramatically in the past decade with the popularization of the Internet, the exponential growth in number and variety of speakers, and the increased democratization of speech. These shifts have made digital media particularly vulnerable to harm from information pollution; the information market is not as capable as it once was of ensuring that the truth prevails. Anecdotal evidence suggests that information consumers are not looking for the truth, but rather, for information that confirms their own pre-existing biases. Moreover, there is significant evidence that people are resistant to changing their minds from what they had previously believed, even if it is later proven to be false. Combined, market failures in disseminating information and personal heuristics in interpreting information suggest that the remedy of more speech to combat false or defamatory speech is not as effective as once thought. Instead, First Amendment jurisprudence should be rebalanced to allow for a general right of correction for digital speech.

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I. MARKETPLACE OF IDEAS AND THE ILLUSORY REMEDY OF MORE SPEECH

The marketplace of ideas,¹ a theory popularized in the early twentieth century, has been used since its inception to justify an overall weakening in information-based torts such as common law defamation. Although courts acknowledged the real societal harm created by bad information, their belief in an efficient marketplace of ideas led them to conclude that high-quality information would eventually beat out low-quality information. On the basis of that belief, courts began closing the door to defamation plaintiffs, holding that their first resort should be self-help—to rebut low-quality speech with high-quality speech. Unfortunately, the marketplace of ideas theory is based on assumptions that have been proven untenable with recent research suggesting that information consumers are not looking for the truth, but rather for information that confirms their own pre-existing biases. Furthermore, when confronted with the truth, even unbiased information consumers will still tend to believe the lie. The problem is compounded by (1) the ready availability of dissemination, which has dramatically increased the quantity of low quality information, and (2) the relative permanence of amateur digital media, which exponentially increases the lifespan of low-quality information. Both are contributing greatly to the problem of information pollution, the high proportion of low-quality to high-quality information increasingly forcing information consumers to expend extra resources to sift through the rubbish, a growing harm that the Supreme Court has yet to recognize in its First Amendment jurisprudence.

Rebuttal is no longer a viable option. On the other hand, the dynamic nature of digital media has made retracting, correcting, or eliminating digital speech that has proven to be false relatively simple and easy, at least as compared to traditional media. In light of the weakened power of rebuttal speech, the relative ease of correcting digital media, and the increased harm from information pollution, this Essay advocates for a rebalancing of First Amendment jurisprudence to allow for a general remedy of correction for false digital speech.

¹“A forum in which expressions of opinion can freely compete for acceptance without governmental restraint.” BLACK’S LAW DICTIONARY *3d Pocket ed. 2006).

A. *The Evolution of Courts' Marketplace of Ideas Doctrine in Favor of a Self-Help Remedy of More Speech*

The latter half of the twentieth century saw many First Amendment incursions into defamation law (the common law doctrine most responsible for helping victims prevent or correct false information). The landmark case of *New York Times Co. v. Sullivan*² required public official plaintiffs to prove “actual malice”³ in defamation claims.⁴ To establish actual malice, a plaintiff needs to prove that the defendant had knowledge of falsity or reckless disregard as to truth or falsity,⁵ a very difficult standard to satisfy.⁶ The Court rationalized the defendant-friendly actual malice standard by arguing that the costs to free speech from a robust defamation law threatened dialogue on important public issues.⁷ This standard was tweaked over the years⁸ until it reached its current state in *Gertz v. Robert Welch, Inc.*⁹

In *Gertz*, the Court extended the application of 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.¹⁰ In distinguishing between public and private individuals, 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.”¹¹ Rationalizing that public figures have greater access to the media and therefore are better able to rebut false statements made about them, the

² *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

³ The phrase “actual malice” is a term of art. “Actual malice” does not mean ill will toward another or intent to interfere with the interests of another in an unprivileged manner. In fact, the Court has suggested that ill will or related mental states are an improper constitutional basis of imposing liability. See RESTATEMENT (SECOND) OF TORTS § 580A cmt. d (1978).

⁴ *Id.*

⁵ See *id.*

⁶ Mere negligence regarding the truth or falsity of a statement will not suffice but only actual subjective knowledge or reckless disregard of the statement’s truthfulness. See *id.* § 600 cmt. b.

⁷ See *id.* § 580A cmt. a.

⁸ In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), 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. 403 U.S. at 32.

⁹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

¹⁰ *Id.* at 342.

¹¹ *Id.* at 344–45.

Court held that their first resort for defamation relief was self-help, not an action for defamation.¹² In other words, a public figure plaintiff would either need to meet the exacting actual malice standard or (more likely) rely on the marketplace of ideas to correct harmful falsehoods about their character.

B. *The Possibility of Failure in the Marketplace of Ideas*

Legally speaking, the First Amendment concept of the marketplace of ideas is widely attributed to Oliver Wendell Holmes, Jr.,¹³ though the general idea predates him.¹⁴ Holmes famously argued in a vigorous dissent:

[T]he ultimate good desired is better reached by free trade in

¹² *Id.*

¹³ The instance most often associated with this attribution occurred in Holmes's dissent in *Abrams v. United States*, 250 U.S. 616 (1919). It states,

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.

Id. at 630.

¹⁴ Some trace the idea to Socrates and Aristotle, alleging that the Socratic Method is the "marketplace's" classroom-equivalent. RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955); see also JOHN MILTON, *AREOPAGITICA* 166–67 (Gryphon eds. 1992) (1644) ("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*:

If all mankind minus one were of one 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.

JOHN STUART MILL, *ON LIBERTY* 76 (Gertrude Himmelfarb ed., Penguin Classics 1982) (1859).

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.¹⁵

Cases invoking the concept of a marketplace of ideas have ranged from defamation¹⁶ to the constitutionality of electoral contributions.¹⁷ Indeed, the concept plays a particularly significant role in cases that address press freedoms.¹⁸

Many legal rules rely on an unwavering trust in the marketplace of ideas. In the context of defamation law, the majority in *Gertz* stated, “[T]here 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.”¹⁹ Likewise, a plurality argued in *Columbia Broadcasting System, Inc. v. Democratic National Committee*:²⁰ “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.”²¹ Subsequent cases have reiterated the market approach to First

¹⁵ *Abrams*, 250 U.S. at 630.

¹⁶ *N.Y. 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 (1957))).

¹⁷ *Citizens United v. FEC*, 130 S. Ct. 876, 906 (2010) (“This differential treatment cannot be squared with the First Amendment. There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations . . . [The relevant case] interferes with the ‘open marketplace’ of ideas protected by the First Amendment.”).

¹⁸ See *Red Lion Broad. Co. v. FCC*, 395 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.”); *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 537–38 (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 Chi. v. Mosley*, 408 U.S. 92, 96 (1972))).

¹⁹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); see also *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1020 (5th Cir. 1987) (“We rely on a reverse Greshom’s law, trusting to good ideas to drive out bad ones and forbidding governmental intervention into the free market of ideas.”).

²⁰ *Columbia Broad. Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94, 117 (1973).

²¹ *Id.*

Amendment jurisprudence.²²

The Court is not completely laissez-faire in regulating the marketplace of ideas. Constitutional protections favor certain types of speech, and even certain speakers, over others.²³ 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.²⁴ Furthermore, 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.²⁵ Despite a sprinkling of strongly worded dissents,²⁶ however, more often than not courts invoke market forces as a near cure-all for harms that the speech at issue might cause.

The Court’s conceptualization of the marketplace of ideas is

²² *Citizens United*, 130 S. Ct. at 876; *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992); *Pac. Gas and Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1 (1986); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 421 U.S. 1 (1976).

²³ *See, e.g., Nike, Inc. v. Kasky*, 539 US 654, 664 (2003) (Stevens, J., concurring) (“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.”); *see also* Brian Leiter, *Cleaning Cyber-Cesspools: Google and Free Speech*, in *THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION* 155–56 (Saul Levmore & Martha Nussbaum eds., 2010) (“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.”).

²⁴ 2 U.S.C. § 434 (2006).

²⁵ CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 34–38 (1993).

²⁶ One such dissent suggested that to apply the concept to “suicidal pornography . . . is to degrade the free market of ideas to a level with the black market for heroin.” *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1025–26 (5th 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 sanctity of ‘dangerous’ ideas, no federal court has held that death is a legitimate price to pay for freedom of speech.”); *see also* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 592 (1980) (Rehnquist, C.J., dissenting) (“While it is true that an important objective of the First Amendment is to foster the free flow of information, identification of speech that falls within its protection is not aided by the metaphorical reference to a ‘marketplace of ideas.’ There is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market.”).

unrealistic. Scholars have argued that while the classicist's view of economic "free markets" has been repeatedly debunked over the past century, its abstract counterpoint, i.e., the marketplace of ideas, has remained largely unexamined.²⁷ Furthermore, to the extent there is a functioning marketplace for information, its functioning does not necessarily produce unfettered truth.²⁸ This is due in part to the difficulties of a rebuttal reaching every information consumer affected by the misinformation and the persistence of false beliefs even after they have been corrected.²⁹

C. *Niche Audiences and Modern Channels of Communication*

The Court has always acknowledged the questionable efficacy of rebuttal as a remedy: "Indeed, the law of defamation is rooted in our

²⁷ Joseph Blocher explained as follows:

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.

Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 831–33 (2008) (alterations in original) (footnotes omitted).

²⁸ *Id.* at 833 ("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." (footnote omitted)).

²⁹ *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." (footnote omitted)); see also discussion *infra* Part II.B of confirmation bias.

experience that the truth rarely catches up with a lie.”³⁰ The problem has grown worse, however, with research suggesting that information consumers are not looking for the truth, but rather, for information that confirms their own pre-existing biases.³¹ Indications of such behavior can be seen in web consumers’ increasing tendency to patronize smaller, more category-specific sources of information, for example *TMZ*³² for the latest celebrity gossip or *Deadspin*³³ for insider sports reports.³⁴ As the potential audience for media becomes increasingly splintered into smaller niche audiences, the Court’s reliance on access to “channels of communication” as a guarantor for the efficacy of rebuttal should be reassessed for its continuing validity.

The Court’s primary prescription for countering defamation—the plaintiff rebutting false information via channels of communication—is fundamentally grounded in a belief that truth will ultimately prevail in the marketplace of ideas as long as all parties have access to “channels of effective communication” to rebut:

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.³⁵

At the time of *New York Times Co. v. Sullivan*, news stories came from the same few syndicates: three national broadcast television stations, a few national newspapers, and local newspapers that got their information from global wire services like the Associated Press.³⁶ Either a

³⁰ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 n.9 (1974). 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.” *Id.*

³¹ Lee Ross, Mark R. Lepper & Michael Hubbard, *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. OF PERSONALITY & SOC. PSYCHOL. 880, 880–91 (1975); see also Brad A. Greenberg, *The News Deal: How Price-Fixing and Collusion Can Save the Newspaper Industry—and Why Congress Should Promote It*, 59 UCLA L. REV. 414, 441 (2011) (noting that new media’s multitude of voices is actually “reducing viewpoint exposure” by making “it much easier for individuals to avoid viewpoints they do not share”).

³² Available at TMZ.com.

³³ Available at Deadspin.com.

³⁴ See David Carr, *News Trends Tilt Toward Niche Sites*, N.Y. TIMES, Sept. 12, 2011, at B1.

³⁵ *Gertz*, 418 U.S. at 344 (emphasis added).

³⁶ 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

party had the clout to command the attention of one or more of these behemoths, or they did not.

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 in the same publication. In fact, a plurality of the Supreme Court in *Rosenbloom v. Metromedia, Inc.*,³⁷ 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,”³⁸ noting that “some states have adopted retractions statutes or right-of-reply statutes.”³⁹

This changed in 1974 with *Miami Herald Publishing Co. v. Tornillo*,⁴⁰ when the Court invalidated as unconstitutional a Florida state statute that required that newspapers that “assail[ed] the personal character of any candidate” for election provide that candidate equal space with which to reply to the attack.⁴¹ The Court argued that the statute might compel publishers to “permit publication of [something]

Menand, *Talk Story: Dick Cavett and the Battles for Late Night*, NEW YORKER, Nov. 22, 2010, at 126 (reviewing DICK CAVETT, TALK SHOW: CONFRONTATIONS, POINTED COMMENTARY, AND OFF-SCREEN SECRETS (2010)). In his critique of the 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.

³⁷ 403 U.S. 29 (1971).

³⁸ *Id.* at 47.

³⁹ *Id.* at 46 n.15.

⁴⁰ *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

⁴¹ *Id.* at 245 n.2. The statute provided in part:

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.

which their ‘reason’ tells them should not be published.”⁴² Consequently, since 1974 states have been constitutionally prohibited from ensuring access to channels of communication to rebut defamation.

Apart from aforementioned legal changes, there have also been technological and market changes that have affected the ability of parties to rebut false claims via certain channels of communication. Media has changed significantly with the introduction of the Internet and its subsequent proliferation,⁴³ a development that has largely served in part to displace traditional news outlets as the go-to source for information consumers.⁴⁴ There has been an unprecedented expansion in the types of sources for information including websites, blogs, social networking sites, video-sharing sites, and micro-blogging. As websites compete for readers, an emerging trend has been to specialize in a particular type of information, or as one journalist puts it “*TMZ* for gossip, *Politico* for politics and *Deadspin* for sports, and so on.”⁴⁵ Moreover, net tools like Twitter, RSS readers, and even Facebook work to streamline a consumer’s exposure to information, directing their attention only to those sources that they have pre-approved.

The exponential increase in media outlets means that previously neglected niche audiences are now being served efficiently,⁴⁶ however some commentators have warned that people are decreasingly using

⁴² *Id.* at 254 (citing *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945)); see also *Miami Herald*, 418 U.S. at 255–56 (quoting *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 400 (1973) (Stewart, J., dissenting) (“[No] government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot.”)). The *Miami Herald* Court focused on editorial discretion: “A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.” *Miami Herald*, 418 U.S. at 258 (“The choice of material to go into a newspaper, 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.”).

⁴³ Initially developed in the 1970s as a communication system for the government and university researchers, the Internet as we know it today began to take shape in the late-1980s with the introduction of a hyper textual interface. See generally Bruce Sterling, *A Short History of the Internet*, MAG. OF FANTASY & SCI. FICTION, Feb. 1993, available at http://w2.eff.org/Net_culture/internet_sterling.history.txt.

⁴⁴ *Online ‘More Popular Than Newspapers’ in US*, BBC (Mar. 1, 2010, 8:49 AM), <http://news.bbc.co.uk/2/hi/8542430.stm>.

⁴⁵ See Carr, *supra* note 34.

⁴⁶ Saul Hansell, *As Internet TV Aims at Niche Audiences, the Silvercast Is Born*, N.Y. TIMES (Mar. 12, 2006), <http://www.nytimes.com/2006/03/12/business/yourmoney/12silver.html?pagewanted=all>.

general news sources.⁴⁷ Stereotypes abound of individuals who only receive their news from conservative Fox News, liberal MSNBC, or lighthearted Comedy Central, a result that was not even possible at the time *New York Times Co. v. Sullivan* was decided.⁴⁸ The diversification of contemporary news media facilitates a special version of the truth to exist for every audience, a significant hurdle for defamation plaintiffs seeking to make an effective rebuttal.

The effects of this “information balkanization”⁴⁹ reveal themselves in the largely unchecked spread of some false beliefs. For example, a 2010 poll showed that nearly 20 percent of the American population wrongly believed that President Obama was Muslim,⁵⁰ a significant increase from a poll taken in 2008.⁵¹ Even more troubling, out of the people who believed that President Obama was Muslim, 60 percent attributed their belief to information they had gotten from the media. Joshua Dubois, the President’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.”⁵² The poll indicated that a significantly higher percentage of Republicans believed that President Obama was a Muslim than did the general population: 31 percent in one poll and 46 percent in another.⁵³ The fact that Republicans are more likely to believe falsehoods about a Democratic president and attributed their beliefs to media sources suggests that consumers seek out media that supports their own pre-existing biases, not necessarily those espousing unbiased

⁴⁷ Marshall Van Alstyne & Erik Brynjolfsson, *Electronic Communities: Global Village or Cyberbalkans?* (Mar. 1996), <http://web.mit.edu/marshall/www/papers/CyberBalkans.pdf> (“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.”); *see also The Virtual Revolution: Enemy of the State?* (BBC television broadcast Feb. 6, 2010).

⁴⁸ *See* Van Alstyne & Brynjolfsson; *supra* note 47; *see* Menand, *supra* note 36.

⁴⁹ The concept of cyberbalkanization has been put forth before, albeit with relation to the Internet. Alstyne & Brynjolfsson, *supra* note 47.

⁵⁰ Jon Cohen & Michael D. Shear, *Poll Shows More Americans Think Obama is a Muslim*, WASH. POST, (Aug. 19, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/18/AR2010081806913.html>.

⁵¹ *Growing Doubts About McCain’s Judgment, Age and Campaign Conduct*, PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, Oct. 21, 2008, *available at* <http://www.people-press.org/files/legacy-pdf/462.pdf>.

⁵² *See* Cohen & Shear, *supra* note 50.

⁵³ *Growing Number of Americans Say Obama is a Muslim*, PEW FORUM ON RELIGION & PUB. LIFE, Aug. 18, 2010.

truth. Thus, although there may be an efficient marketplace of ideas, it does not necessarily promote unpopular accurate information over fashionable falsehoods, particularly when consumers can isolate themselves in a personalized media niche that merely echoes their own preconceived biases.

D. Confirmation Bias and the Staying Power of False Information Despite Correction

Even when individuals are not self-selecting out of particular types of information, for example, even where the original recipient has no particular personal bias toward the information, research suggests that he will still tend to believe the original misinformation in spite of the correction. As researchers noted:

[B]eliefs 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.⁵⁴

The name for this phenomenon is “confirmation bias”: a predisposition to believe information that supports a preconception, even when that information is later shown to be inaccurate.⁵⁵

Most descriptions of confirmation bias focus on an individual’s inclination to believe information that supports preconceived beliefs, but false beliefs can persist even when the user has no previous prejudice regarding the matter at hand.⁵⁶ In a study measuring the confirmation bias 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.⁵⁷ Even though they had no previous knowledge or opinion about the hypothesis and were told that the information forming the basis of

⁵⁴ Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 129, 129–52 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) (“Two paradigms illustrate this resilience. The first involves the capacity of belief to survive and even be strengthened by new data, which, from a normative standpoint should lead to the moderation of such beliefs. The second involves the survival of beliefs after their original evidential bases have been negated.”).

⁵⁵ JONATHAN BARON, *THINKING AND DECIDING* 191–218 (3d ed. 2000).

⁵⁶ See Ross & Anderson, *supra* note 54, at 144 (“It appears that beliefs—from relatively narrow personal impressions to broader social theories—are remarkably resilient in the face of empirical challenges that seem logically devastating.”).

⁵⁷ Ross, Lepper & Howard, *supra* note 31, at 888.

the hypothesis was false, the original misinformation still informed their attitudes and inclined them in favor of the hypothesis.⁵⁸

In another experiment, subjects attempted to distinguish between real and fake suicide notes.⁵⁹ They were then provided selective feedback: some were told they had done well while others were told they had performed poorly. Even after being fully informed that the feedback they had received was random and unrelated to their actual performances, 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.⁶⁰

The Supreme Court's view of the marketplace of ideas relies on the assumption that it is possible to correct misinformation through rebuttal. Unfortunately, these studies indicate that even if a correction reaches its intended audience, it may have limited efficacy, suggesting that the Court's prescribed remedy of more speech to fight harmful speech is illusory.

E. *Reweighing the Increasing Public Harm from Information Pollution Against the Public Benefits of Information Dissemination*

To this day courts have repeatedly weighed the press's right to report against the harm that protecting that right might cause and has consistently favored press freedoms despite the harm the press's activities might cause.⁶¹ In this balancing, courts have viewed the harm

⁵⁸ *Id.* at 882. 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.

Id.

⁵⁹ *Id.*

⁶⁰ *Id.* at 883–84.

⁶¹ See, e.g., *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); *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972) (holding that the First Amendment

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.⁶² Under this balancing approach, defamation suits have diminished to a slow trickle.⁶³ However, the Court has neglected to account for the public harm caused by defamatory misinformation, such as (the now increasing) harm from information pollution.⁶⁴

Defamatory statements contribute to information pollution, which harms the public by increasing search costs. Information pollution dilutes the availability of high-quality information with the prevalence of low-quality information. As users spend time and energy to cull through irrelevant or incorrect information, they will repeatedly be led down erroneous paths and possibly prevented from ever discovering the truth.⁶⁵ False information is particularly harmful because it may be more difficult for information consumers to identify, and users may unknowingly rely on it to their detriment. Not only are increased search costs from information pollution a waste of resources, without intervention, the quality of the information pool could continue to degrade until users avoid certain means of dissemination entirely.

Modern media is particularly susceptible to harm from information pollution because it suffers from a tragedy of the commons⁶⁶ caused by

allowed a former CIA agent bound by the terms of a secrecy agreement to publish non-classified or otherwise public information without it being initially screened by the agency itself); *Courtroom Television Network LLC v. New York*, 833 N.E.2d 1197 (N.Y. 2005) (holding that the law did not violate the First Amendment because members of the press could enjoy unrestrained, personal access to courtroom proceedings notwithstanding a statutory ban on cameras).

⁶² See, e.g., Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975) (“The public’s interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect.”).

⁶³ See, e.g., Elena Kagan, *A Libel Story Then and Now*, 18 L. & SOC. INQUIRY 197 (1993) (examining the history and impact of *New York Times Co. v. Sullivan*, and adverse consequences of the actual malice rule); John Koblin, *The End to Libel*, N.Y. OBSERVER (June 8, 2010, 1:23 AM), <http://www.observer.com/2010/media/end-libel> (following the trend of dwindling libel suits against mass media corporations).

⁶⁴ Information pollution harms the public by increasing search costs; it delays or completely prevents users from finding the truth. Jamie Lund, *Property Rights to Information*, 10 NW. J. TECH. & INTELL. PROP. 1, 7–8 (2011), available at <http://scholarlycommons.law.northwestern.edu/njtip/vol10/iss1/1>.

⁶⁵ Jonathan Lazar, *Help! I’m Lost: User Frustration in Web Navigation*, 1 IT & SOC’Y 18, 24 (2003).

⁶⁶ 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*, SCIENCE, Dec. 13,

users disseminating information without bearing the cost of spreading misinformation.⁶⁷ The sheer number of amateur news sources, including websites, blogs, social networking sites, video-sharing sites, and micro-blogging, have in large part democratized media. Arguably, however, those sources also contribute a good deal of information pollution—more than their fair share.⁶⁸ “Because modern media suffers from a tragedy of the commons, users are incentivized to over-produce low- or no-value speech.”⁶⁹

The harm from information is further compounded by the relative permanence of digital information. Due to cheap electronic storage, misinformation will only accumulate and never diminish. There is real harm in bad information preserved in this way, not just to the subjects but to everyone. Once bad 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.”⁷⁰

In weighing the benefits and harm from particular types of speech, courts should consider not only the societal benefits from information dissemination but the concomitant costs imposed by information pollution. In light of this increasing harm from information pollution and ability for even niche audiences to have a voice, perhaps it is time for the Court to adapt its *New York Times Co. v. Sullivan* line of cases to be less concerned about promoting quantity of speech and more concerned about enabling quality.

F. *A Lemons Problem?*

The case for increased regulation of modern digital media may be illuminated by analogizing traditional media and modern digital media to the varying markets of new and used cars, as economist George Akerlof discussed in his 1970 paper *The Market for ‘Lemons’: Quality Uncertainty and the Market Mechanism*.⁷¹

1968, at 1243, available at <http://www.sciencemag.org/content/162/3859/1243.full.pdf> (“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.”).

⁶⁷ See Lund, *supra* note 64, at 5–6.

⁶⁸ *Id.* at 2 n.7.

⁶⁹ *Id.* at 7.

⁷⁰ John McPhee, *Checkpoints*, NEW YORKER, Feb. 9, 2009, at 59 (internal quotation marks omitted).

⁷¹ George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q. J. OF ECON. 488 (1970).

Due to information asymmetry and lacking costly and explicit guarantees, independent used-car salesmen generally are not able to assert the quality of a vehicle with credibility. Consumers looking for new cars can look at *Consumer Reports* and other similarly styled reviews to determine whether a particular year, make, or model of a vehicle is problematic. Consumers looking for a used car can also use such sources of information, but must also ascertain whether the particular used car they are looking at has hidden flaws—perhaps it has been in an accident, has a faulty electrical system, or suffers from some other problem that is not immediately apparent. Because these problems can drastically affect a used car’s value and are sometimes costly and difficult to ascertain, purchasers of used cars will naturally discount a used car’s value for not only obvious flaws but for the possibility of hidden flaws.

Due to the information asymmetry between seller and purchaser, purchasers will discount the true value of cars in good condition without hidden flaws. Consequently, sellers of low-quality vehicles will be overpaid and sellers of high-quality vehicles will be underpaid. Because sellers will never receive the true value of their cars, owners of quality used cars will either elect not to sell or will “eat the cost” of a markdown, leaving primarily those whose cars are already valued at the bottom of the market. In this way, the combination of difficult-to-identify lemons and wary consumers practically ensures that a vast majority of used cars sold are likely to be somehow defective. Possible solutions to the lemons problem include sellers offering a guarantee to purchasers certifying the quality of the used car, or increasing regulation that would allow purchasers of lemons to recoup their losses. Increased regulation can be desirable in these situations because sellers can sell high-quality vehicles for their actual value, and decreased risk to buyers may invite more buyers to participate in the market.

Amateur digital media suffers from similar vulnerabilities as the independent used-car market. Amateur digital media, analogous to the used-car market, is susceptible to a heterogeneous degree of information quality. In the marketplace of ideas, it is often difficult for the average consumer to verify the quality of a particular piece of information apart from the source’s reputation. Like the used-car market, if left unregulated, the presence of bad amateur media may drive out the presence of good.

It is possible that as information consumers have multiple bad experiences with amateur digital media, they may opt exclusively in favor of reliable, established sources such as the *New York Times* for news, just as some consumers of cars choose to buy a new car. But of course, not everyone wants to buy a new car, for reasons related to pricing and costs, as well as variety and selection. Instead of letting information pollution drown out the valuable amateur digital media, the law could set certain standards for all media that would guarantee to information consumers a certain level of quality, thereby preventing a lemons problem for amateur digital media.

G. *A Modern Rule for Digital Media*

Solutions to the problems relating to information pollution in digital media are readily available and do not require abandoning the traditional rule—requiring public figure defamation plaintiffs to either prove actual malice in a lawsuit or resort to the self-help remedy of rebuttal through the channels of communication—at least to the extent that the traditional rule still operates efficiently for traditional media. Moreover, the unique format and architecture of digital media present opportunities for unique solutions.

One such solution stems from the ability to correct data in a manner that audiences will likely see such corrections. Previously, once information was released into the world it was next to impossible to correct. Newspapers might follow up with a correction buried in the back pages of the next day's edition, but any owner of the original media would still have the flawed version. In contrast, modern digital media is typically as easy to correct as it is to generate and disseminate in the first place, a feature that traditional media outlets have already started to utilize. While a correction to the print version of the *New York Times* is relegated to page A2 in the next day's edition with little context, the same correction will appear immediately in the digital version of the original article on nytimes.com.⁷² Original readers are likely to be misled, either because of effects of confirmation bias or because they never see the correction, but new readers will only see the corrected version.

This Essay proposes a general remedy of correction for false digital

⁷² For the corrections policy for the print version, see Editor's Note, New Correction Policy, N.Y. TIMES, Sept. 30, 2004, available at <http://www.nytimes.com/2004/09/30/pageoneplus/30NOTE.html>. An example of a correction for the online version of the *New York Times* is Amy Harmon, *Navigating Love and Autism*, N.Y. TIMES (Dec. 26, 2011), <http://www.nytimes.com/2011/12/26/us/navigating-love-and-autism.html> (correcting the name of a My Little Pony character name from Fluttershy to Twilight Sparkle).

speech. Respectable publishers already have correction systems in place and although a legal rule enforcing the norm of “correction” would disproportionately harm amateur journalists who do not already have a process for corrections,⁷³ amateur journalists would also benefit disproportionately from such a rule because their reputations are most vulnerable. In other words, regulation would alleviate the lemons problem to which amateur digital media is susceptible, the same way increased regulation in the used car market allows for greater diversity and exchange.

The *New York Times* actual malice standard need not be completely abandoned, but rather modified to better accommodate the characteristics of digital media. Specifically, the standard is to be assessed not at the time of “publication” but at the moment of choosing to “continue publishing” in light of new information pointing to the falsity of the statement. For instance, a blogger who initially posts an article that later turns out to be untrue is not at fault unless he or she published the article with a knowing or reckless disregard for the statements’ falsity. After the blogger is informed of the article’s falsehood, however, if the blogger chooses to “continue publishing” the article by keeping it on the website without correction, this well may constitute a reckless or knowing disregard for the truth. Publishers who stand by their word can defend their positions in court and if the content were proven incorrect, the First Amendment would not necessarily shield them for their continued publication.⁷⁴

⁷³ Traditional publishers like the *New York Times* already have mechanisms in place for corrections that translate well to the digital medium, but bloggers and other amateur media have fewer resources to verify challenged facts. There is some risk that any heightened legal burden in this respect would have a chilling effect on amateur news sources—that aggressive potential plaintiffs could scare bloggers and others into retracting damaging but truthful statements. Then again, if there really were newsworthiness to the information, it would presumably be picked up by a more established news source that could bear the brunt of the defense. (This, of course, assumes the survival of traditional media outlets in, more or less, their present form.) For more information about the survival of traditional media, see Brad A. Greenberg, *A Public Press? Evaluating the Viability of Government Subsidies for the Newspaper Industry*, 19 UCLA ENT. L. REV. 189 (2012); Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV. 4 (Oct. 19, 2009, 1:00 PM), http://www.cjr.org/reconstruction/the_reconstruction_of_american.php?

⁷⁴ Under a legal regime in which modern amateur media outlets are incentivized to “correct” false statements of fact, proactive bloggers and journalists might consider citing their sources to preempt authenticity-related challenges. The resource Wikipedia currently employs a similar citation system that allows users to immediately verify the truthfulness of the Wikipedia articles. This is in large part what makes it a viable reference resource. Moreover, the ability to hyperlink directly to an authority only increases the reader’s ability to confirm an assertion’s veracity. Creating such an “e-paper trail” regime for online statements could then be used as prima facie evidence in litigation—potentially benefitting either party, depending on

The most salient benefit of imposing a remedy of “correction” on all digital media is an overall improvement in the quality and reliability of information to consumers. All digital media would share in the increased reputational value of being considered more reliable. Because the policy of correcting misinformation is a net gain to all parties, legally requiring this practice of recalcitrant publishers who refuse to correct falsehoods despite substantial evidence to the contrary does not seem like an onerous toll on free speech.

II. CONCLUSION

Problems from information pollution are exacerbated by certain characteristics of digital media; anyone can disseminate information without bearing the cost of spreading misinformation 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 inappropriate for courts to consider the societal benefits of information dissemination without weighing the potentially enormous costs that information pollution poses.

The marketplace of ideas theory is based on flawed assumptions, including the effectiveness of rebutting misinformation through “channels of communication.”⁷⁵ 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.

the facts. Not only would such a practice aid legal disputes, it would bring more integrity to the nature of information found on the Internet.

⁷⁵ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) (holding that “[p]ublic 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”).