

HARVARD BUSINESS LAW REVIEW

TRUTH

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I. Introduction

The internet has spawned two major policy debates: the extent and control of protection of personal data privacy, and the impact and control of interference in public policy, most notably elections.

On the one hand, there is a concern that social media privacy controls are deficient and that personal data is being shared without informed consent, while the increased speed and reduced costs of data processing has enabled aggregating fragments of personal information into detailed personal dossiers.

On the other hand, there is a concern that lack of information about sources of information in social media fosters propagation of false information that can influence elections.

In this article, I argue that proposed solutions to these two problems are incompatible—providing greater protection of personal data will make it more difficult to protect against meddling in elections, while requiring, in effect, censorship of political posts will make it more difficult to respect privacy concerns. I begin in Section II by identifying the common phenomenon that has brought both problems into focus: increased speed and decreased cost of data collection and transfer and how it exacerbates the concerns. I then summarize in Section III the concerns over control of personal data and proposed solutions, focusing in particular on recent problems at Facebook and how they argue in effect for a right to anonymity. In that section I also introduce the constitutional basis for anonymity, found in the First Amendment. I then summarize in Section IV the more recent concerns over the proliferation of false information on social media, focusing in particular on recent problems with election meddling and how they argue against a right to anonymity. In that section I also explore the elusive definition of “truth”, comparing approaches under a sampling of statutes and introduce the limited role that truth plays in determining First Amendment protections. I also explain how identifying the source of information is an important element of distinguishing between fact and fiction and of evaluating the weight to be given to opinion and how anonymity hinders achieving those goals. Finally, I introduce the complication

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of corporate speech and the impact of recent Supreme Court cases on the rights of corporations. In Section V, I conclude that direct regulation of political speech on social media is unlikely to succeed and propose instead that the solution lies in the First Amendment itself—promotion of more speech.

II. The Problems of Speed and Cost

The adage of “finding a needle in a haystack” may have lost its relevance in the digital age. With modern data processing, it is no longer difficult to identify a needle in a haystack. As a result, data, even in raw form, has become a valuable commodity. In 2017, *The Economist* magazine reported that the most valuable resource in the world was no longer oil, but was personal data.¹

As computing power and data transmission speeds have increased, while the cost of data storage, processing and dissemination have dropped, it has become possible both to collect and correlate² more data and to disseminate information—accurate or not—with greater speed. This has led to two concerns.

The first concern is that privacy is being invaded through the collection of bits and pieces of information that an individual discloses by using the internet³ and correlation of that information to build extensive dossiers on individuals.⁴ Proposed solutions range from outright prohibition of some types of data collection⁵ to requirements that data collectors provide notice

¹ See *The world’s most valuable resource is no longer oil, but data*, *ECONOMIST* (May 6, 2017), <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data> (noting that the five most valuable publicly traded companies in the world were Alphabet, Amazon, Apple, Facebook and Microsoft, with combined earnings for the first quarter of 2017 of \$25 billion and arguing for antitrust scrutiny).

² See *Facebook, Social Media Privacy, and the Use and Abuse of Data*, *Hearing Before the U.S. S. Comm. on the Judiciary and the U.S. S. Comm. on Com., Sci. and Transp.*, 115th Cong. 3 (2018) (Testimony of Mark Zuckerberg, Chairman and Chief Executive Officer, Facebook). One example of the possibilities for using features intended for a different purpose to be used to correlate data about an individual was disclosed in Congressional hearings in 2018: “[Facebook] found out that a feature that lets you look someone up by their phone number and email was abused. This feature is useful in cases where people have the same name, but it was abused to link people’s public Facebook information to a phone number they already had. When we found out about the abuse, we shut this feature down.”

³ Note that some data is shared intentionally—sharing a photo with friends on Facebook—and some is not—the user’s IP address and type of connection and equipment are (of necessity) automatically shared without explicit user permission.

⁴ See *Facebook, Social Media Privacy, and the Use and Abuse of Data*, *Hearing Before the U.S. S. Comm. on the Judiciary and the U.S. S. Comm. on Commerce, Science and Transportation*, 115th Cong. 2 (2018) (Statement of Sen. Chuck Grassley, Chairman, S. Judiciary Comm.). The amount of data and computing power has gotten so great that it is possible to identify and create a picture of an individual even if the data that is collected is anonymized. (“President Obama’s campaign developed an app utilizing . . . Facebook . . . to capture the information of not just the apps users, but millions of their friends. The digital director for Obama for America 2012 described the data-scraping app as something that would ‘wind up being the most groundbreaking piece of technology developed for this campaign.’ The effectiveness of these social media tactics can be debated, but their use over the past years across the political spectrum and their increased significance cannot.”)

⁵ For example, collection of data on minors.

of what data they collect and how they use it, coupled with a requirement to obtain informed consent.⁶

The second concern is that the reduced cost and increased speed of disseminating data exacerbates problems related to the distribution of untrue information. Evil actors can use the internet to spread misinformation,⁷ most notably in an effort to influence elections,⁸ although it is easy to imagine how misinformation could be weaponized in a commercial context.⁹ Because dissemination is so cheap, it is possible to make repeated distributions of the same untrue information, thereby creating a superficial appearance of accuracy. Because data can be disseminated so quickly, the problem of last-minute false rumors in elections is exacerbated.

Misinformation in presidential elections is, of course, not a new phenomenon. In the 1880 presidential election, a forged letter was published on October 20, 1880 in an attempt to sway the election – what would have been considered “the last minute” in the pre-internet era.¹⁰ The New York Advertiser published what purported to be a letter signed by candidate Gen. James Garfield, supporting unregulated Chinese immigration. His opponent, General Winfield Hancock, used the publication to argue that Garfield’s election would cost citizens jobs. A week later—what might have been considered “timely” by pre-internet standards—the Garfield campaign arranged for the publication of a copy of an old Garfield letter to show that the handwriting and signature were different, and apparently convinced enough voters that the letter was a forgery to win election.¹¹

As Elaine Kamarck explains, however, “[e]very dirty trick that was possible before the internet is [now] cheaper, faster and easier to hide.”¹² That is particularly important in the case of elections:

⁶ See, e.g., Max S. Oppenheimer, *Internet Cookies: When Is Permission Consent*, 85 NEB. L. REV. 383, 390 (2007); discussion of the analogy to DNA at p. 5, *infra*. Note that requiring consent has the at least theoretical side effect of allowing users to require payment in exchange for consent.

⁷ Soroush Vosoughi, *The Spread of Trust and False News Online*, 359 SCIENCE 1146, 1146–49 (2018). A study reported in Science found that false information spread significantly faster and more broadly than accurate information.

⁸ See generally REPORT OF THE SPECIAL COUNSEL ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 ELECTION AND OBSTRUCTION OF JUSTICE (Mar. 2019), <https://www.justice.gov/storage/report.pdf>.

⁹ For example, the owner of a piece of real estate could profit by spreading the false information that there was oil located on the property; stock promoters could profit by inflating the value of their stock through false statements as to the assets the company owned or the profits the company had made.

¹⁰ *Garfield's death warrant. That letter in which he advocates an extended Chinese immigration --- He advises that employer's union of Lynn, Mass., "that the question of employees is only a question of private and corporate economy" ---Read, Workin*, LIBRARY OF CONGRESS, <https://www.loc.gov/resource/rbpe.1600140b/?st=text> (last visited Feb. 26, 2020). The 1860 election was held two weeks after its publication, on November 2. *Presidential Election of 1880: A Resource Guide*, LIBRARY OF CONGRESS, <https://www.loc.gov/rr/program/bib/elections/election1880.html>. (last visited Feb. 26, 2020). It took the Garfield campaign a week to publish a response.

¹¹ Garfield was elected by a margin of 59 electoral votes, but less than 8,500 popular votes. See *supra* note 10.

¹² Elaine Kamarck, *Cybersecurity and Election Interference*, BROOKINGS (Jul. 11, 2019), <https://www.brookings.edu/blog/fixgov/2019/07/11/a-short-history-of-campaign-dirty-tricks-before-twitter-and-facebook/>.

Elections are fought over a finite period of time—Election Day is the endpoint [A] dirty trick timed to occur before the election can have a definitive impact even if it is proven to be false. The ramifications can be enormous because U.S. elections cannot be re-run.¹³

Proposed solutions to this problem include requiring service providers to reject posting of untrue statements and denying posting privileges to serious offenders.¹⁴

III. Control of Personal Data

A. The Issue of Ownership

Major disseminators of information now include social media: Facebook, Google, Twitter and the like. Their business model relies on gathering data and disseminating it—sometimes at their users’ behest, but sometimes through aggregation of those bits and pieces of personal data shared by users unintentionally by virtue of actions on the internet.¹⁵

Ownership of this information is largely resolved as a matter of contract, typically by a user’s choosing to opt in or opt out of permissions.¹⁶ The default rules are less clear, as is the validity of “click to accept” agreements in general.¹⁷

The European Union has been in the forefront of protecting data privacy and therefore establishing ownership in the user. Through enforceable regulation,¹⁸ processors of personal data must implement certain principles. They must clearly disclose any data collection and state how long data is being retained, and must have one of six enumerated bases for data collection and processing:

[By the] consent¹⁹ by the subject;
to fulfill contractual obligations with the subject;

¹³ *Id.*

¹⁴ Some such activities are already prohibited by situation-specific statutes such as the Securities and Exchange Act of 1934 regulation of the dissemination of information regarding publicly traded securities or the Food and Drug Act prohibition of disseminating claims regarding drugs that have not been reviewed and verified by the FDA. Others would be sanctioned, at the option of affected individuals, by common law rights such as defamation, libel, slander, invasion of privacy and the right of publicity. *See infra* pp. 9–11.

¹⁵ “Facebook currently has 2.13 billion monthly active users across the world Like their expanding user base, the data collected on Facebook users has also skyrocketed Facebook has access to dozens of data points, ranging from ads you’ve clicked on, events you’ve attended, and your location based on your mobile device.” *See supra* note 4 at 1.

¹⁶ There is a distinction between a property right and a contract right. Hansmann and Kraakman define property as an interest in an object enforceable against the world, while a contract right is only enforceable against the parties to the contract. *See* Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEG. STUDIES, 373, 374 (2002).

¹⁷ *See generally* Oppenheimer, *supra* note 6.

¹⁸ *See* O.J. (L 119) 6.

¹⁹ Consent must be informed and explicit, cannot be “opt out” and the subject must have the right to withdraw consent. *See* O.J. (L 119) 7. For a discussion of the problems of online consent, *see generally* Oppenheimer, *supra* note 6.

to comply with the processor's legal obligations;
 to protect the vital interests of an individual;
 to perform a task in the public interest or in official authority; [or]
 for “legitimate interests,” unless those interests are overridden by interests of the subject.²⁰

There are exceptions for data that has been anonymized, meaning that it is impossible to determine the individual linked to the data,²¹ and in some cases pseudonymization,²² meaning that data cannot be attributed to a specific individual without additional information.²³

In the absence of federal U.S. regulation, one tempting analogy is to the rights in shed DNA, another field in which the dramatic increase in the speed of analysis and drop in the cost of analysis has raised concerns about collection and aggregation.²⁴ As Judge Kozinski pointed out in dissent in a Fourth Amendment case concerning the use of DNA evidence²⁵ “we can’t go anywhere . . . without leaving a bread-crumbs trail of identifying DNA matter.”²⁶ Judge Kozinski’s concerns, while directed to the fear of government collection and aggregation of DNA data, seem strikingly on point with respect to the collection and aggregation of online digital information: “[i]f we have no legitimate expectation of privacy in such bodily material, what possible impediment can there be to having the government collect what we leave behind, extract its DNA signature and enhance CODIS to include everyone?”²⁷ In response to this type of concern, several states have, by statute, protected DNA as property.²⁸ Similar efforts to legislate ownership of electronic data are underway, with the European Union in the forefront of the effort.

B. The Constitutional Basis for Anonymity

One important aspect of the right to control one’s data is the right to remain anonymous. As will be explained below, recognizing this right has serious implications for the ability to control misinformation.²⁹

²⁰ See *supra* note 18.

²¹ See *supra* note 18, at Recital 26.

²² Encryption is an example of pseudonymization—the additional information required is the key—if the decryption key is kept separate from the data. See *supra* note 18, at art. 4(5).

²³ See *supra* note 18, at Recital 26.

²⁴ *Carpenter v. United States*, 138 S. Ct. 2206, 2219 (2018) (In a search warrant case, the Court did note “the seismic shifts in digital technology” that made possible the “detailed, encyclopedic, and effortlessly compiled” information available from cell service location records.).

²⁵ *United States v. Kincade*, 379 F.3d 813, 873 (9th Cir. 2004).

²⁶ *Id.*; Elizabeth E. Joh, *Reclaiming “Abandoned” DNA: The Fourth Amendment and Genetic Privacy*, 100 NW U.L. REV. 857, 867 (2006) (Writing on the issue of ownership of shed DNA, Elizabeth Joh observes “leaving DNA in public places cannot be avoided.”).

²⁷ *Kincade*, 379 F.3d at 873.

²⁸ ALASKA STAT. § 18.13.010(a)(2) (2004) (“[A] DNA sample [is] the exclusive property of the person sampled.”); COLO. REV. STAT. § 10-3-1104.7(1)(a) (2009) (“Genetic information is the unique property of the individual to whom the information pertains.”); FLA. STAT. § 760.40(2)(a) (2009) (“[Genetic testing results] are the exclusive property of the person tested.”); GA. CODE ANN. § 33-54-1(1) (1995) (“Genetic information is the unique property of the individual tested.”); LA. STAT. ANN. § 22:1023(E) (2009) (describing genetic information as “property” of the person tested); OR. REV. STAT. § 192.537(1) (2009) (“[A]n individual’s genetic information and DNA sample are private.”).

²⁹ See *generally infra* pp. 6–15.

Anonymous speech occupies an honored place in U.S. history, tracing its heritage to the works of Federalists Hamilton, Madison and Jay under the pseudonym “Publius” and Anti-Federalist “Federal Farmer.”³⁰

In addition to the general principle that a property owner’s control extends to the right to decide whether—and with whom—to share it, the right to speak anonymously also enjoys constitutional protection, for the simple reason that “anonymity is a shield from the tyranny of the majority. . . . It thus exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation . . . at the hand of an intolerant society.”³¹

The right to anonymity is not absolute, but is subject to strict scrutiny and yields only to compelling government interests and narrow scope.³²

IV. Misinformation and Election Meddling

Truth is usually³³ good. It is also, sometimes, in the eye of the beholder. The consequence is that, in order to protect “true” speech, it is necessary to accept a degree of “untrue”—even undesirable—speech, including speech that includes facts misleadingly taken out of context, facts without evidentiary support—and “facts” that are just plain false. Notably, the literal language of the First Amendment protects speech, not truth. Laws that protect truth must be reconciled with First Amendment protections. Speech is protected by the First Amendment; truth is protected by a series of criminal and civil laws including reputational laws (libel, slander, defamation), intellectual property laws (right of privacy, right of publicity, trademark), and specific laws in the

³⁰ *Talley v. California*, 362 U.S. 60, 61 (1960) (striking down city ordinance requiring distributors of leaflets to identify themselves) (“Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.”).

³¹ *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (striking down law forbidding distributing anonymous campaign literature). *See also* *Bates v. Little Rock*, 361 U.S. 516 (1960) (striking down local ordinance requiring NAACP to disclose names of members and contributors); *Watchtower v. Village of Stratton*, 536 U.S. 150 (2002) (religious literature); *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. 2009) (protecting anonymous Internet speaker’s identity under a balancing test that balances the speaker’s right to anonymity against “the strength of the prima facie case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant’s identity.”).

³² Superior government interests were found in *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding disclosure of campaign contributions unless a record of threats, harassment, or reprisals could be shown), *Meese v. Keene*, 481 U.S. 465 (1987), (upholding Foreign Agents Registration Act of 1938 requiring disclosure of sponsors of political propaganda) and in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) (upholding disclosure requirement of the Bipartisan Campaign Reform Act of 2003 for persons spending \$10,000 on electioneering communication or donating \$1,000 to a group for that purpose).

³³ Sir Winston Churchill writes of amusing Josef Stalin at the November 30, 1943 Teheran Conference by observing “[i]n wartime, truth is so precious that she should always be attended by a bodyguard of lies.” Winston Churchill, *THE SECOND WORLD WAR, VOLUME V : CLOSING THE RING* 338 (1951) (noting the need for deception surrounding preparation for the Operation Overlord Allied invasion of France).

government arena. Because each of these laws has specific goals, they protect truth in many circumstances—and a certain degree of “untruthiness” in others.³⁴

There is great concern over the use of social media³⁵ to disseminate false³⁶ information in order to influence major policy decisions, most notably elections. The issue broke into the public consciousness with the 2016 Presidential Election. The Russia-based Internet Research Agency allegedly interfered in the campaign using hundreds of Facebook accounts to run ads and spread false information to disrupt the campaign of Hillary Clinton, with the content was seen by an estimated 157 million Americans.³⁷

Facebook was widely criticized for allowing false information to go viral,³⁸ and Congress held hearings on the dual problems of protection of privacy and control of inaccurate information.³⁹ Facebook CEO Mark Zuckerberg conceded “we didn’t do enough to prevent these tools from being used for harm as well. That goes for fake news, foreign interference in elections, and hate speech, as well as developers and data privacy. We didn’t take a broad enough view of our responsibility, and that was a big mistake. It was my mistake, and I’m sorry.”⁴⁰ Although not doing enough to control “fake news, foreign interference in elections, and hate speech, as well as developers and data privacy” was a big mistake, on January 9, 2020, Facebook announced that it would “continue to allow political campaigns to use the site to target advertisements to particular slices of the electorate and that it would not police the truthfulness of the messages sent out.”⁴¹

³⁴ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (As Justice Powell noted “[u]nder the First Amendment there is no such thing as a false . . . [it] requires that we protect some falsehood in order to protect speech that matters.”).

³⁵ The underlying problem is not social media itself, but any mechanism for cheap, broad, mass communication without intermediation. At the moment, the vehicle that enables this is social media platforms: Facebook, Twitter, What’s App, etc.

³⁶ A significant problem is raised in determining what is “false.” As discussed below, there are models to look to for guidance—for example, the defamation model and the SEC model—but it must be recognized that these models are designed to accomplish specific policy objectives that may, or may not, translate easily to addressing the current problem. *See infra* pp. 9–12.

³⁷ *See supra* note 2 at 4; Indictment at 3, *United States v. Internet Research Agency, LLC.*, No. 18-3061 (D.D.C. Feb. 16, 2018) (alleging Conspiracy to Defraud the United States, filed through Special Counsel Robert Mueller).

³⁸ Seth Fiegerman, *Facebook’s global fight against fake news*, CNNMONEY (May 9, 2017) (“NewsWhip, a company that tracks social media content and helps newsrooms flag fake news stories going viral . . . [concluded that] more than a third of the top 200 stories about the two U.S. presidential candidates were from fake news sites during the two months before the election.”), <https://money.cnn.com/2017/05/09/technology/facebook-fake-news/index.html>.

³⁹ *Facebook, Social Media Privacy, and the Use and Abuse of Data: Hearing Before the S. Comm. on the Judiciary and the S. Comm. on Commerce, Sci. & Transp.*, 115th Cong. (2018).

⁴⁰ *See supra* note 2.

⁴¹ Mike Isaac & Cecilia Kang, *Facebook Says It Won’t Back Down From Allowing Lies in Political Ads*, N.Y. TIMES (Jan. 9, 2020), <https://www.nytimes.com/2020/01/09/technology/facebook-political-ads-lies.html>.

While elections are currently the most talked-about focus of discussions of how to promote truth, political motivation⁴² is not the only force behind untruthful news; greed⁴³ and satire⁴⁴ also have their role.

As of this writing, Twitter has decided not to accept political ads and Google limited targeting by political advertisers to age, gender, general location and postal code.⁴⁵ Facebook decided not to ban political ads, but added a control to its Ad Preferences menu, giving people the power to opt to see fewer political and issue ads. “Facebook does not believe decisions about political ads should be made by private companies . . . We have based (our policy) on the principle that people should be able to hear from those who wish to lead them, warts and all, and that what they say should be scrutinized and debated in public.”⁴⁶

A. Defining Truth

There are several legal models of truth, discussed below. Note that each defines truth somewhat differently, a result that makes perfect sense because each model is designed, not to protect a philosophical version of truth, but to protect a particular interest by a particular group to whom true information has an identifiable value. There is no overarching “protection of truth” statute and, as Justice Powell noted “the First Amendment . . . requires that we protect some

⁴² Political motivation can work in two directions: spreading fake news or suppressing truthful news (or unfavored opinion). See Michael Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative News*, GIZMODO (May 9, 2016) (reporting that human curators “routinely suppressed conservative news”: “I’d come on shift and I’d discover that CPAC or Mitt Romney or Glenn Beck or popular conservative topics wouldn’t be trending because either the curator didn’t recognize the news topic or it was like they had a bias against Ted Cruz.”).

⁴³ See, e.g., Seth Fiegerman, *Facebook’s global fight against fake news*, CNNMONEY (May 9, 2017), <https://money.cnn.com/2017/05/09/technology/facebook-fake-news/index.html> (“During the U.S. election, teenagers in Macedonia reportedly created more than 100 fake political news websites and promoted them on Facebook, all in order to make money from online advertising.”).

⁴⁴ See, e.g., Alex Kantrowitz, *How The 2016 Election Blew Up In Facebook’s Face*, BUZZFEED (Nov. 21, 2016), <https://www.buzzfeednews.com/article/alexkantrowitz/2016-election-blew-up-in-facebooks-face> (“It’s no coincidence that Jestin Coler started *National Report*, his wildly successful fake news site, only a few months after Facebook added the mobile share button. The California-based satirist watched in a bit of amazement as articles from fringe conservative news sites began booming across Facebook, and decided he wanted in on the action. ‘I was seeing those sorts of sites all over the place with large followings and they were getting good traffic and I just thought to myself, *Well I could do that,*’ Coler told BuzzFeed News. And so he debuted *National Report* in February 2013. Coler could have reported the news, or simply blogged. But he noticed that fringe political pages would pick up just about anything that helped them make their point, including fabricated news. So *National Report* began publishing fake news about gun control, abortion, and President Obama, which Coler suspected would set off the right. It sure did. The sites quickly began aggregating his stories . . . *National Report* had impact. Real impact. Shortly after Coler fabricated a story about food stamps being used in Colorado to buy weed, the Colorado legislature introduced a real bill to ban the practice . . . ‘2014 ended up being huge for us,’ he said. *National Report* received around 30 million page views that year . . .”).

⁴⁵ Dan Cohen, *Facebook Continues to Resist Calls to Limit Political Advertising, Fact-Check Content*, ADWEEK (Jan. 9, 2020), <https://www.adweek.com/digital/facebook-continues-to-resist-calls-to-limit-political-advertising-fact-check-content/>

⁴⁶ *Id.*

falsehood.”⁴⁷ In the words of Sir Winston Churchill, “[t]here are a terrible lot of lies going about the world, and the worst of it is that half of them are true.”⁴⁸

1. The perjury model

Perjury is, generally, knowingly making an untrue statement under oath.⁴⁹ The standard is codified by federal and state statutes⁵⁰ and applies to statements made to legislative, administrative or judicial entities. A federal statute also permits other, unsworn, statements to be made by affidavit under penalties of perjury.⁵¹

2. The general federal model of truthfulness

There is a general requirement of truthfulness as regards statements to federal instrumentalities set forth in 18 U.S.C. § 1001.⁵² The standards in this general statute deem it untruthful if a statement is “false, fictitious, or fraudulent.”⁵³ They also include statements made to falsify, conceal or cover up a material fact.⁵⁴ In order to be untruthful in the sense required to violate the statute, the statements must be made “knowingly and willfully.”⁵⁵

3. The Federal Securities model

One of the foundations of U.S. securities regulatory law is that investors are entitled to truthful information regarding financial status from companies⁵⁶ they invest in. The principal

⁴⁷ Gertz, 418 U.S. at 341 (1974).

⁴⁸ WOLFGANG MIEDER & GEORGE B. BRYAN, *THE PROVERBIAL WINSTON S. CHURCHILL: AN INDEX TO PROVERBS IN THE WORKS OF SIR WINSTON CHURCHILL* 285 (1995).

⁴⁹ Department of Justice, *Criminal Resource Manual*, § 1743. *Perjury – Overview of 18 U.S.C. §1621 and 1623 Violations*, <https://www.justice.gov/archives/jm/criminal-resource-manual-1743-perjury-overview-18-usc-1621-and-1623-violations>. (“Several Federal statutes criminalize perjury and related false statements. The two most commonly used statutes for perjury offenses are 18 U.S.C. §§ 1621 and 1623. Section 1621 is the traditional, broadly applicable perjury statute, and is used to prosecute perjuries committed before legislative, administrative or judicial bodies.”) Other federal statutes penalize specific false statements: 18 U.S.C. § 1503 (obstruction), 18 U.S.C. § 287 (false claims), and the Federal false statement statute, 18 U.S.C. § 1001. *Id.*

⁵⁰ *E.g.*, 18 U.S.C. § 1621 (1994) (“Whoever . . . having taken an oath before a competent . . . authority . . . in any case in which a law . . . authorizes an oath to be administered, that he will testify . . . truly . . . , willfully and contrary to such oath states . . . any material matter which he does not believe to be true . . . is guilty of perjury”)

⁵¹ 28 U.S.C. § 1746 (1976) (“Wherever, under any . . . requirement made pursuant to law, any matter is . . . permitted to be supported . . . by the sworn declaration, . . . or affidavit, in writing of the person making the same . . . such matter may, with like force and effect, be supported . . . by the unsworn declaration . . . or statement, in writing of such person which is subscribed by him, as true under penalty of perjury. . . .”).

⁵² 18 U.S.C. § 1001(a) makes it unlawful (with certain exceptions enumerated in subsections 1001(b) and (c)) to knowingly and willfully falsify, conceal or cover up a material fact; to make a materially false, fictitious, or fraudulent statement; or make or use any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry, “in any matter within the jurisdiction of the executive, legislative or judicial branch of the Government of the United States.” 18 U.S.C § 1001 (2006).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Companies act, of course, through individuals: directors, officers, managers, partners and other employees and agents. The securities laws extend liability to such individuals who make untrue statements and also extend liability

source of power to demand truthfulness with respect to regulated securities is Section 10b of the Securities and Exchange Act of 1934, and the Securities and Exchange Commission’s Rule 10b-5 promulgated pursuant to the 1934 Act.

The Securities Exchange Act of 1934 creates broad duties of publicly traded companies to provide accurate information. The Act prohibits filing false and misleading statements in documents filed with the SEC,⁵⁷ but Section 10(b) and rules promulgated thereunder go further and prohibit fraudulent and deceptive practices and untrue statements or omissions of material facts in connection with the purchase or sale of any security.⁵⁸ This extends the duty beyond providing specified information in periodic reports to the Commission, requiring that the reporting company also must include “any additional material information that may be necessary to make the required statements not misleading.”⁵⁹ Liability extends beyond the company itself,⁶⁰ to those officers who sign the statements and to persons controlling them.⁶¹

The goal of truthfulness in this context is to maintain investor confidence in the market.⁶² A countervailing consideration, however, is that the disclosure required by the SEC for the benefit of investors has the collateral consequence of providing information to competitors.⁶³

4. The FDA model

Another area of federal regulation where complete and truthful information is critical is the regulation of marketing of food and pharmaceuticals.

The authority to assure truthfulness in the development, approval, manufacturing, and marketing of pharmaceuticals is conferred on the Food and Drug Administration by the Federal Food, Drug, and Cosmetic Act.⁶⁴

Regulations promulgated by the FDA provide:

to certain “responsible officers” and “controlling individuals.” Securities and Exchange Act, 15 U.S.C. § 20(a) (1934).

⁵⁷ *Id.* at § 18.

⁵⁸ 17 C.F.R. § 240.10b-5 (2020). The rule applies not only to formal filings with the SEC, but to any company dissemination of information, including press releases.

⁵⁹ 17 C.F.R. § 240.12b-20 (2020).

⁶⁰ A corporation or other statutory entity is separate from its owners and agents. *See infra* pp. 12–13.

⁶¹ Securities Act of 1933, 15 U.S.C. § 77a (1933); Securities and Exchange Act of 1934, 15 U.S.C. § 78a (1934).

⁶² Timely Disclosure of Material Corporate Developments, Securities Act Release No. 5092, Exchange Act Release No. 8995, Investment Company Act Release No. 6209. (“Corporate managements are urged to . . . set up procedures which will insure that prompt disclosure be made of material corporate developments, both favorable and unfavorable, so that investor confidence can be maintained in an orderly and effective securities market.”).

⁶³ Alan R. Palmiter, *Toward Disclosure Choice in Securities Offerings*, 1999 Columbia Bus. L. Rev. 1, 12 (1999)

⁶⁴ Regulation of drug labelling is conferred by Misbranded Drugs and Devices Act, 21 U.S.C. § 352(a) (2018) and the regulation of advertising of prescription drugs is conferred by Misbranded Drugs and Devices Act 21 U.S.C. § 352(n).

A print advertisement for a prescription drug must contain a true statement of the product's established name; quantitative composition; information in brief summary relating to side effects, contraindications, and effectiveness; and, for published direct-to-consumer advertisements, a statement encouraging consumers to report negative side effects to FDA (21 53 U.S.C. 352(n)). FDA implementing regulations provide further clarification on the information to include in brief summary: "a true statement of information in brief summary relating to side effects, contraindications ([to] . . . include side effects, warnings, precautions, and contraindications and include any such information under such headings as cautions, special considerations, important notes, etc.) and effectiveness."⁶⁵

The FDA states its mission, through the Office of Prescription Drug Promotion (OPDP), as "[t]o protect the public health by ensuring that prescription drug information is truthful, balanced, and accurately communicated."⁶⁶ To accomplish that mission, "OPDP reviewers have responsibility for reviewing prescription drug advertising and promotional labeling to ensure that the information contained in these promotional materials is not false or misleading."⁶⁷ The FDA's website expands on its goals: "[p]rescription drug advertising must: [b]e accurate, balance the risk and benefit information, be consistent with the prescribing information approved by FDA and only include information that is supported by strong evidence."⁶⁸

5. The defamation model

Defamation is in general malicious publication of untrue information that brings another individual into disrepute.⁶⁹ However, the defamatory statement must be made with actual malice if directed to a public figure,⁷⁰ a particularly important distinction in the current context because presumably those involved in elections generally will be public figures. A further issue is presented if the dissemination involves opinion or satire rather than fact: in general, such statements cannot be the basis of defamation,⁷¹ although there are exceptions, for example when what the opinion implies an assertion of fact.⁷²

⁶⁵ 21 C.F.R. § 202.1(e)(1) (2008).

⁶⁶ The Office of Prescription Drug Promotion, Mission (Feb. 26, 2020, 12:57 AM), <https://www.fda.gov/about-fda/center-drug-evaluation-and-research-cder/office-prescription-drug-promotion-opdp>.

⁶⁷ *Id.* The Office of Prescription Drug Promotion, Truthful Prescription Drug Advertising and Promotion (Bad Ad Program) The Prescriber's Role- Recognize and Report (Feb. 26, 2020, 12:33 AM), <https://www.fda.gov/about-fda/center-drug-evaluation-and-research-cder/office-prescription-drug-promotion-opdp>.

⁶⁸ The Office of Prescription Drug Promotion, Truthful Prescription Drug Advertising and Promotion (Bad Ad Program) The Prescriber's Role- Recognize and Report (Feb. 26, 2020, 12:33 AM), <https://www.fda.gov/about-fda/center-drug-evaluation-and-research-cder/office-prescription-drug-promotion-opdp>.

⁶⁹ Additional laws further complicate the basic problem: some states recognize intrusion upon seclusion, invasion of privacy or a right of publicity, all of which control speech which is truthful. For a general discussion of these rights, see Max Stul Oppenheimer, *Fame: Ownership Implications of Intellectual Property and Agency Law*, 30 Fordham Intell. Prop. Media & Ent. L.J. 447 (2020).

⁷⁰ See *New York Times v. Sullivan*, 376 U.S. 254 (1964).

⁷¹ *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988).

⁷² *Milkovich v. Lorain Journal*, 497 U.S. 1, 17 (1990) [noting that there is not "a wholesale defamation exemption for anything that might be labeled 'opinion'" since "expressions of 'opinion' may often imply an assertion of objective fact."].

Each of these models of “truth” is different because each is attempting to support a different objective. In some cases, it is important to err on the side of caution; in others it is more important to allow for the possibility that there may be multiple legitimate versions of the truth. Deriving a general definition of truth for the internet seems impossible, because of the multiple objectives involved in communication over the internet.

B. The Role of Source in Determining Truth

Accurate information is generally more valuable than inaccurate information, but there is an exception to this seemingly obvious rule: deliberate misinformation can be a valuable commodity to the disseminator of the misinformation if it leads an opponent or competitor to make bad decisions.

Thus, evaluating the truth of a statement is aided by knowing the source of the statement. Two factors are at play: the reliability of the source⁷³ and the bias or neutrality of the source.⁷⁴

C. Problems in Determining Source

The conflict between the usefulness of source in evaluating information and the First Amendment right to anonymity⁷⁵ should be apparent. If a writer chooses to remain anonymous, valuable information as to the weight to be given to the writing is missing. This does not mean the writing is wrong or valueless, it may however mean that the writing’s value is based on its content and persuasive power rather than the reputation of the writer. However, where the writing is informational rather than persuasive, the anonymity problem remains. Moreover, where the persuasiveness of the writing is at issue, anonymity allows multiple publication by the same individual under multiple identities, thereby lending, however irrationally, reliability to the information that would not be present if it were known that the information came from a single source.⁷⁶

⁷³ Some sources are more authoritative than others—official government websites are more authoritative than commentators’ explanations. Some are more reliable because of the skill or knowledge of the author—peer reviewed scientific publications are more reliable than infomercials.

⁷⁴ Even a knowledgeable and honest source may make judgments in how to weight information in its presentation of conclusions. Prosecution and defense often describe similar facts to a jury in different ways. The introduction of dishonesty makes the problem even worse.

⁷⁵ *See supra* pp. 5–6.

⁷⁶ The phenomenon that receiving the same information multiple times increases the likelihood that it will be perceived as true, known as the “illusory truth effect,” has been studied many times under many conditions since the late 1970s. Marian Schwartz, *Repetition and Rated Truth Value of Statements*, 95 *Am. J. Psychology* 393 (1982) (reporting on two studies from the 1970’s concluding that “with repetition, . . . statements were judged more likely to be true”); Lisa K. Fazio et al., *Knowledge Does Not Protect Against Illusory Truth*, 144 *J. Experimental Psychology* 993 (2015). While in general repetition leads to increased perception of truth, Fazio reports that “statements previously spoken by untrustworthy voices received lower truth ratings than new items”, a phenomenon referred to in the literature as the “reverse illusory truth effect.” *Id.* at 993–94. Thus, anonymous dissemination may in fact increase the perception of truth, since that segment of the public that would distrust the actual source is precluded from this negative effect.

Even if it were possible to limit individuals' ability to publish multiple times, the problem would remain because of recent Supreme Court cases on the rights of corporations.⁷⁷ A corporation is a statutory entity,⁷⁸ created under state law, and having an existence and rights independent of those of its owners.⁷⁹ Corporations are formed by filing Articles of Incorporation with a state agency—typically, the Articles do not require disclosure of the true owners of the corporation.⁸⁰ The Supreme Court has held that corporations have many of the rights of individuals, notably the right to contribute to election campaigns⁸¹ and the right to assert the religious beliefs of its owners.⁸²

In sum, a moment's thought exposes an irreconcilable problem in trying to solve both problems simultaneously. In order to regulate dissemination of information, it is necessary to know who the disseminator is. Requiring identification and collection of that information is inconsistent with the goal of protecting privacy; failing to require identification of the disseminator leads to a situation where misinformation can be disseminated until caught, then disseminated from a different source until that source is caught and so on. The ease and low cost of creating new identities makes this a losing proposition.⁸³

⁷⁷ The discussion that follows would logically apply to any type of statutory entity, for example, limited liability companies and limited partnerships. To date, the cases have dealt with corporations.

⁷⁸ Most states have adopted, with modifications, the Uniform Corporations Act. In Maryland, it is enacted as the Corporations and Associations Article of the Maryland Code. MD CODE ANN., CORPS. & ASS'NS §§ 1-101–12-1007.

⁷⁹ "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819).

⁸⁰ Technically, ownership could not be required as a filing requirement, because there could be no owners until after the State accepts the filing. Typically, no subsequent filing involves disclosure of ownership.

⁸¹ See Citizens United v. Federal Election Com'n, 558 U.S. 310, 394 (2010) (explaining that the First Amendment prohibits the government from restricting corporate expenditures for political communications); McConnell v. Federal Election Com'n, 540 U.S. 93, 135 (2003).

⁸² See, e.g., Burwell v. Hobby Lobby Stores Inc., 573 U.S. 682, 708 (2014). The Hobby Lobby case involved statutory interpretation of a provision of the Religious Freedom Restoration Act (RFRA), which provided that the "[g]overnment shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000 (1993). The constitutionality of RFRA had been upheld in 2006 by Gonzales v. Centro Espirita but Hobby Lobby posed a question of interpretation of the word "person" in order to determine whether a corporate actor was entitled to the same protection of RFRA as its owners would have been. See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 418 (2006); Burwell, 573 U.S. at 682. Relying on the Dictionary Act, which defines "person" as including "corporations . . . as well as individuals" and concluding that "[t]he plain terms of RFRA make it perfectly clear that Congress did not discriminate who wish to run their businesses as for-profit corporation in the manner required by their religious beliefs," the court concluded that for those purposes corporations had the same rights as individuals. *Id.* Arguably, a distinction might be made in a future case that a different rule applies to corporations with many stockholders—Hobby Lobby had few stockholders. *Id.* For purposes of this article, that possibility is irrelevant. If an individual decided to manipulate internet perception by operating through corporate entities, it would undoubtedly involve entities with few—perhaps as few as one—stockholders. Using the Internal Revenue Code definition, the Washington Post has calculated that approximately 90% of U.S. corporations are "closely held," and approximately 52% of the U.S. workforce is employed by "closely held" corporations. Aaron Blake, *A Lot of People Could be Affected by the Supreme Court's Birth Control Decision—theoretically*, WASHINGTON POST (June 30, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/06/30/a-lot-of-people-could-be-affected-by-the-supreme-courts-birth-control-decision/>.

⁸³ The DMCA procedure and the eBay and Amazon take-down experience.

D. Problems in Regulating Truth

The Free Speech Clause⁸⁴ was important enough to be included in James Madison’s original proposed Bill of Rights.⁸⁵ While not providing contemporary explanations, many scholars⁸⁶ and the Supreme Court⁸⁷ have addressed the function of the clause. Two dominant themes arise in the cases. One is offered by the Supreme Court in *Walker v. Sons of Confederate Veterans*: “the Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government”⁸⁸ The other is offered by Justice Douglas in the Pentagon Papers case that “[t]he dominant purpose of the First Amendment was to prohibit the widespread practice of government suppression of embarrassing information.”⁸⁹

It is tempting to think that the Founders ratified the First Amendment at a time when news media was honest, reliable, and discreet. The use of news media to spread information of questionable pedigree can, however, trace its history in this country to its Founding.

James Thomson Callender, best known today for his articles alleging that Thomas Jefferson had children with Sally Hemmings,⁹⁰ is a prime example. Early in his journalistic career, he criticized, among others, George Washington “whom he claimed had ‘debauched’ and ‘deceived’ the nation by promoting himself as a popular idol.”⁹¹ “When Callender lost his job . . . at the *Philadelphia Gazette*, he turned to writing pamphlets supporting the Republican party Jefferson helped his journalist ally by securing him a position on the Republican paper, *The Aurora*

⁸⁴ “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

⁸⁵ See Amendments Offered in Congress by James Madison (June 8, 1789), http://www.constitution.org/bor/amd_jmad.htm.

⁸⁶ See, e.g., James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 493–97 (2011); Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 670 (1990); David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 431 (1983); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20–21 (1971); William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107 (1982).

⁸⁷ See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 452 (2011); *Buckley v. Valeo*, 424 U.S. 1, 53 (1976) (per curiam); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *Whitney v. California*, 274 U.S. 357, 372–79 (1927) (Brandeis, J., concurring).

⁸⁸ *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015).

⁸⁹ *New York Times Co. v. U.S.*, 403 U.S. 713, 722 (1971). It may be noted that, while both the free speech and free press provisions are contained in the same amendment, they may be viewed as related, but distinct rights and the rationale for the two need not be the same. These distinctions are not relevant to the subject of this article; for a discussion of these distinctions, see *supra* note 86. The critical issue of how to balance the importance of an “alert, aware, and free” citizenry—whether alerted and made aware by the press or other means—against the need for secrecy in national defense and international relations is, however, relevant to the topic of this article and is discussed in the balance of this Part IV. D.

⁹⁰ See Anne Gibson, *Renowned Historian Recounts Jefferson-Hemings controversy for Clark Audience*, CLARK NOW (Dec. 12, 2018), <https://clarknow.clarku.edu/2018/12/12/renowned-historian-recounts-jefferson-hemings-controversy-for-clark-audience/>. “In 1998, DNA findings published in the journal *Nature* (later corroborated independently by The Thomas Jefferson Foundation) confirmed the strong likelihood that Jefferson had fathered at least one child by his slave Sally Hemmings.” *Id.*

⁹¹ THOMAS JEFFERSON’S MONTICELLO, <https://www.monticello.org/site/research-and-collections/james-callender> (last visited Feb. 25, 2020, 9:24 PM).

. . . .”⁹² Callender attacked Alexander Hamilton by publishing a pamphlet in which he exposed the relationship between Hamilton and a married woman.⁹³

Callender’s attacks on Hamilton paled in comparison to the calumny that he directed at [John] Adams In 1799, bankrolled by Jefferson . . . , Callender began work on *The Prospects before Us*. Dredging up the pro-monarchy charges that always dogged Adams, Callender accused the president of being “mentally deranged,” planning to crown himself king, and grooming John Quincy as his heir to the throne. Adams was a “hideous hermaphroditical character, which has neither the force of a man, nor the gentleness and sensibility of a woman.” Adams, alleged Callender, had brought about The Quasi-War crisis with France through his own “steadfast antipathy” toward the former ally. In other words, Adams’ reelection would result in war; Jefferson’s election would ensure peace.⁹⁴

“Jefferson had been impressed by the smear campaign and wrote, ‘Such papers cannot fail to produce the best effects.’”⁹⁵ While President Adams remained silent, Abigail Adams “revved her correspondence with Jefferson to deliver her own blistering attack on his character, accusing him of “the blackest calumny and foulest falsehoods.”⁹⁶

When elected President, Jefferson pardoned Callender (who had been convicted of violating the Sedition Act) but failed to appoint him to a federal job, Callender retaliated by publishing allegations that Jefferson had children by a slave.⁹⁷

Despite being the object of such unfavorable news coverage, Jefferson wrote, “Were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.”⁹⁸

⁹² *Id.*

⁹³ MICHAEL DUREY, *WITH THE HAMMER OF TRUTH: JAMES THOMSON CALLENDER AND AMERICA’S EARLY NATIONAL HEROES* 102 (1st ed. 1990) (citing JAMES CALLENDER, *A HISTORY OF THE UNITED STATES FOR 1796*, 205 (Philadelphia, Snowden & McCorkle 1797)). Hamilton admitted to the relationship in his own pamphlet. See JAMES MADISON, *REYNOLDS PAMPHLET* (n.p. 1797), available at <https://founders.archives.gov/documents/Hamilton/01-21-02-0138-0002>.

⁹⁴ John Adams & Abigail Adams, *Biography: James Callender*, AMERICAN EXPERIENCE, www.pbs.org/wgbh/americanexperience/features/adams-james-callender/.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Richmond Recorder*, September 1, 1802 (cited in BRODIE, FAWN, THOMAS JEFFERSON, *AN INTIMATE HISTORY* 349 (1974)) (“It is well known that the man, Whom is delighteth the people to honor, keeps and for many years has kept, as his concubine, one of his slaves. Her name is Sally. The name of her eldest son is Tom. His features are said to bear a striking though sable resemblance to those of the President himself.”); see also Elaine Kamarck, BROOKINGS (July 11, 2019), <https://www.brookings.edu/blog/fixgov/2019/07/11/a-short-history-of-campaign-dirty-tricks-before-twitter-and-facebook/> (“For nearly two centuries this was held up as an early example of dirty campaigning. In 1998, thanks to DNA testing, it turned out that Thomas Jefferson had indeed fathered illegitimate children with his slave.”)

⁹⁸ Letter to Edward Carrington (Jan. 16 1787), available at founders.archives.gov/documents/Jefferson/01-11-02-0047.

V. The Basis for a Solution

It should be apparent from the above that a solution to the data privacy problem works against a solution to the election meddling problem.⁹⁹ Moreover, any solution must contend with the multiple practical problems of ease of anonymous dissemination (especially when coupled with the ease of creating artificial corporate entities, each with its own personhood) and the constitutional problems of restraining speech and protecting anonymity.

Delegating the solution to private parties (for example, asking Facebook to monitor and block false speech) does not solve the problem—in fact, it complicates it by introducing potential conflicts of interest.¹⁰⁰

That does not, however, leave no room to address the problem. The fundamental problem is not new.¹⁰¹ What is new is the ease, speed, and anonymity with which information can be disseminated. The solution, then, is to meet speed with speed. Traditional methods of dealing with untrue publications has been civil action under defamation laws, or criminal prosecution. Those solutions, however, are so cumbersome that they are not resolved in time to address the harm that can arise in time-sensitive situations such as elections.

A solution may lie in the source of the problem itself: the speed and low cost of the internet plus the protection of the First Amendment.

In a 2012 interview, Piers Morgan challenged Justice Scalia’s position in *Citizens United* and asked “how would Thomas Jefferson view it?”¹⁰² Justice Scalia responded “Jefferson would have said, ‘[t]he more speech, the better.’”

Perhaps the solution is that simple. Provide a mechanism that uses the speed of the internet to challenge false speech with true speech, and a mechanism for adjudicating which is which by a trusted neutral body.

⁹⁹ Using personal data in elections is not *per se* bad. While “data has been used in advertising and political campaigns for decades . . . [t]he amount and types of data obtained . . . has seen a dramatic change. Campaigns, including President Bush, Obama, and Trump, all used these increasing amounts of data to focus on micro-targeting and personalization over numerous social media platforms, especially Facebook.” *Joint Hearing of the Senate Judiciary Committee and Senate Commerce Committee on Facebook, Social Media Privacy, and the Use and Abuse of Data*, 115th Cong. 5 (2018) (statement of Senator Chuck Grassley).

¹⁰⁰ Putting aside the possibility of corporate bias in favor of one candidate or another, Facebook makes money selling ads, so deciding when to constrain the sale of those ads is a conflict of interest.

¹⁰¹ For examples from early U. S. history, see *supra* Part D.

¹⁰² Bill Mears, *Scalia Dismisses Talk of Internal Court Rancor*, CNN (July 19, 2012), <https://www.cnn.com/2012/07/19/us/scalia-morgan-interview/index.html>.

Before the internet, this would have been handled through the normal court system and, given the availability of temporary restraining orders, that would usually have been speedy enough.¹⁰³

Given the speed of internet communications, it is worth exploring creation of a special court to hear, on an expedited basis, allegations of untrue internet posts. While there are constitutional guarantees of a speedy trial, there do not appear to be any cases challenging a trial that proceeded too quickly.¹⁰⁴ The fact of a challenge could be made public, along with the resolution, leaving the public to draw what inferences it may.

Certainly this procedure could be subject to abuse. However, existing tools (for example Federal Rule 11 sanctions) should be adequate to deal with them.

There are existing extra-judicial models of speedy resolution of internet disputes.

eBay provides a procedure establishing their Verified Rights Owner (VeRO) program, through which owners of intellectual property can advise eBay that a product on the eBay website implicates an unauthorized use of their intellectual property and the allegedly offending product listing is removed from the website.¹⁰⁵ The marketer of the product can contest the decision, and the owner of the intellectual property rights is given five days to respond.¹⁰⁶

Amazon provides a similar summary procedure. If Amazon receives a report of trademark infringement from the rights owner, it removes the challenged listing, subject to allowing relisting if the report is retracted or successfully challenged.¹⁰⁷

Assignment of internet domain names is administered by the Internet Corporation for Assigned Names and Numbers (ICANN). Conflicts arise when one party (Respondent) attempts to register a domain name that uses a trademark owned by another party (Complainant)¹⁰⁸ or when a Complainant challenges the legitimacy of a Respondent's registered domain name. ICANN has established a procedure for deciding whether to assign the requested domain name.¹⁰⁹ Either has the potential to disrupt: either causing potential confusion among the trademark owner's potential

¹⁰³ In unusual cases, courts have shown an ability to respond quickly. For example, in *New York Times v. United States* (the "Pentagon Papers" case), the Supreme Court granted certiorari and set oral argument for the following day. 403 U.S. 713, 753 (1971) (Harlan, J. dissenting)

¹⁰⁴ Clearly, there is some speed that is so great that a defendant would not have adequate time to prepare a defense and that would violate due process.

¹⁰⁵ The process is initiated by submitting a Notice of Claimed Infringement (NOCI). *Verified Rights Owner Program*, EBAY, pages.ebay.com/seller-center/listing-and-marketing/verified-rights-owner-program.html#m17-1-tb1 (last visited Feb. 24, 2020).

¹⁰⁶ *Verified Rights Owner Program*, EBAY INC., <https://pages.ebay.com/seller-center/listing-and-marketing/verified-rights-owner-program.html#m17-1-tb1> (last visited Mmm. DD, YYYY). This procedure is, of course, contractual and agreed to by sellers as a condition to using the eBay platform.

¹⁰⁷ Challenges are sent to dispute@amazon.com. Amazon further provides: "To learn more about this policy, search for 'Intellectual Property Violations' in Seller Central Help."

¹⁰⁸ *Rules for Uniform Domain Name Dispute Resolution Policy*, THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (Mar. 11, 2015), <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en>.

¹⁰⁹ *Id.*

customers, or causing the registered domain owner to lose business while the dispute is resolved. ICANN addresses both in its dispute resolution regulations. The rules provide for a simple procedure for initiating a complaint by submitting a complaint to a provider and an expedited procedure for resolving the dispute. Within two business days, the Registrar is to lock the domain name. The lock remains in place until the dispute is resolved. The respondent has twenty days to respond, and an administrative panel is appointed within five calendar days following receipt of the response.¹¹⁰

While there are many details to be worked out, a step toward this solution would require two innovations: first, the creation of a special court for handling questions of dissemination of false information on an expedited basis, and second the creation of in rem jurisdiction, allowing the special court to issue orders that would bind all dealing with the offensive matter.

In combination, this would allow a quick decision as to the veracity of the information, a decision that would carry an “official” stamp of approval (or disapproval) and avoid the “whack-a-mole” problem.

It may be observed that there are costs—probably large costs—involved in prosecuting and defending such cases. It may also be observed that the system would be subject to abuse. Publishers of legitimate information might be subjected to harassment through baseless suits; publishers of false information might subject the system to harassment through multiple publications in different jurisdictions by multiple parties. Three countervailing arguments should be considered:

1. Approaching this from an in rem perspective should help by reducing redundancy and multiplicity of suits;
2. Traditional tools for controlling abuse of process would be available; and
3. Perhaps of greatest importance, this is attempt to solve a serious problem and should be worth the expense.

¹¹⁰ *Id.*