Media laws failing challenge of online misinformation and hate

The ways people communicate change over time. And our laws, including the First Amendment, adapt to those changes. But it isn’t clear that recent changes and trends are adapting to our needs for truthful and reliable information, and for outlets of dissent, reform, and renewal, within today’s electronic communications environment.

When the Bill of Rights was enacted, “freedom of speech and of the press” meant actual speech and printing. Even as the First Amendment was first given life in the early Twentieth Century, it at first protected only the explicit exchange of ideas. But over the years, movies, broadcasting and many new forms of commercial and artistic expression emerged, and free speech jurisprudence changed too.

Photo by Rob via Flickr

In 1915 the Supreme Court found movies so dangerous ("they may be used for evil") that they enjoyed no First Amendment protection, but eventually, in *Joseph Burstyn v. Wilson*, in 1952, Justice Tom Clark eloquently embraced the expressiveness of movies: "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression."

So clearly the First Amendment has adapted to past changes in communications. And it is fair to ask how it is adapting today.

Cable TV and social media

Initially, consider two of today's most prominent communications phenomena—the bombardment of sensationalized 24-hour cable, and the substitution of easily manipulable social media for professional news gathering, editing, and dissemination. Scholars have told us these are huge changes.

Professor Eugene Volokh of UCLA has written about the Internet's "cheap speech," the new speech environment brought about because the Internet gives everyone access to the world, thereby largely displacing professional communicators. He makes clear how transformative the commercial internet has been in just 25 years. Journalist Jack Fuller, in *What's Happening to News?* in 2010 showed how sensationalized news, like that on cable, and hyped-up social media content, exploit our neurological vulnerabilities.

These developments come, moreover, during a historic change in communications. St. Louis University scholar Walter Ong identified the transition from oral to print culture that Gutenberg's printing revolution brought about 500 years ago. His one-time SLU colleague, Marshall McLuhan, showed that television and electronic communications were moving us toward a modern oral/electronic culture.

Culture bored by stimulation?

Media scholars like Neil Postman and Siva Vaidhyanathan have explored in more detail how modern multimedia communications methods are profoundly shaping our society—even to the extent, as Postman argued, that they are leading us into voluntary citizenship in Huxley's *Brave New World* – in Vaidhyanathan's words, "a culture deadened by feelings, bored by stimulation, distracted by empty pleasures."

In these crucial times, how are our laws responding? Let's look first at the narrow picture, involving some particular modern laws that most directly affect Internet communications.

Section 230 of the federal Communications Act is the 1996 statute that governs social media companies, and other Internet intermediaries. It arose because early experiences with online services showed that our ordinary publishing laws wouldn't work online. If intermediaries were subjected to traditional publisher or distributor liabilities, they'd be forced to review and censor everything that went through their system. We'd be vulnerable to "heckler's vetoes," because cautious publishers would take down content whenever they got complaints. Moreover, traditional publishing liability laws would have the perverse effect of imposing greater liability on those intermediaries who set standards for their customers' activities.

So, to avoid these problems, section 230 gave intermediaries immunity from liability for customer content (section (c)(1)), while also encouraging intermediaries to act as "Good Samaritans" and voluntarily police objectionable content (section (c)(2)) on their networks.

It was a great plan, and the expectation was that thousands of Internet platforms, in ordinary marketplace competition, would use their Good Samaritan protection to distinguish themselves as carrying reliable and non-offensive content. However, the network effect inherent in social media (everyone gravitates to the leading platform), together with various consolidations, eventually gave Facebook a near monopoly on social media, and Facebook for many years limited its Good Samaritan activities to cleaning up sexually offensive speech, while sitting smugly with its basic section 230 immunity as its pages filled up with politically harmful misinformation, disinformation, and hate speech.

Facebook algorithms favor hate and disinformation

Facebook has long used algorithms to favor and promote highly emotional content, often including hate and disinformation. As Philippine investigative journalist and recent Nobel laureate Maria Ressa has noted, social media algorithms "generate lies and hate"; this "divides and radicalizes us." But such activities are permissible under section 230, so long as the social media company doesn't create its own content but simply uses algorithms to promote its users' highest-emotion content. Only recently have social media companies begun to take seriously their Good Samaritan obligations with respect to disinformation and hate speech. And it seems doubtful that Facebook will ever abandon its focus on high-emotion content, which is its secret for engaging users.

Ideally, irresponsible and misleading social media content would have been overshadowed and negated by reliable information from traditional media. But because search, social media, and other Internet advertising removed traditional media's financial support, that has not happened. Legal developments (section 230 immunity) together with business developments (the refusal of social media to fully use its Good Samaritan powers, and the financial hit to traditional news media) have led us to today's environment where "cheap speech" often means false, misleading, and hateful speech.

This doesn't mean that section 230 is wrong, or that proposed section 230 "reforms" would work. Senator Josh Hawley's primary solution, for example, would restore the old heckler's veto, but put a pricetag on its use—essentially, giving heckler's veto powers primarily to his well-off conservative supporters.

The problem presented by section 230 seems less with the

statute itself and more with business developments (companies failing to use their Good Samaritan powers, and the decimation of traditional media), and user habits (their willing substitution of unreliable social media posts for journalist-reported news). But the combined result is disturbing, because it is generating misinformation and divisiveness.

Pseudonymity protects those spreading disinformation

Another problem today is anonymity, since hate speech and misinformation on social media so often comes from anonymous or pseudonymous speakers, manage to get labeled as "friends" and who hence become considered trustworthy by social media users (even though social media "friendship" is a misnomer, since unknown people are readily labeled as "friends").

There's a simple solution here: if a user's false identity makes content deceptive, it should be unlawful as fraud and deception. If, for example, a worker comes to your door, and falsely identifies himself as a reputable known contractor in your city, that is tortious, and probably criminal, fraud.

But strangely, in the context of Internet speech, the Supreme Court has allowed people who disseminate misleading information under false names to legally hide their false or hidden identities. The court did so by extending, in its 1995 decision, *McIntyre v. Ohio Elections Commission,* an old line of cases in which minorities and dissidents were allowed to use false or hidden identities when they expressed controversial political positions for which they reasonably feared retaliation. Now, however, as a Senate report recently acknowledged, under *McIntyre* and its lower court applications,

> even the worst purveyors of disinformation can now cloak themselves in the First Amendment protection for anonymous and pseudonymous speech.

Maybe this broadened protection for anonymity and pseudonymity comes from the widespread use of pseudonyms in colonial America. But that tradition seems to have developed partly from a tradition of modesty in authorship, and pseudonymous colonial authors could be readily uncovered, so they and their publishers were fully subject to liability for what they wrote. The modern development, under which the law helps keep true identities hidden, regardless of situation or motive, creates a new kind of First Amendment protection. It is troubling to the extent it encourages, and saves from prosecution, those who are actively spewing disinformation.

So at least in this narrow picture analysis, looking at section 230 and the modern expanded protection of hidden authorship, our laws aren't doing well in combating modern communications developments like sensationalism and disinformation.

First amendment retreats from protecting minorities and dissidents

Next, let's look at bigger picture changes in our First Amendment understandings.

First, the First Amendment is retreating from its traditional core role of protection of the speech of minorities and dissidents. That was the focus of the Supreme Court's free-speech jurisprudence for many years. But now, particularly under the Roberts Court, the First Amendment has become more of a majoritarian tool, protecting the rights of the rich, commercial entities, and even the government, to influence others. Washington University Professor Greg Magarian's book, *Managed Speech*, describes in detail this shift, which has occurred over the last 50 years, but has accelerated recently.

Next, as in almost all areas of American life, "trust the market" took over in free speech thinking in recent years. The broadcast Fairness Doctrine, originally created because of fear of the unique pervasiveness and persuasiveness of broadcast communications, was thrown out. So when even more pervasive and persuasive media like social media came about, we left that to the marketplace, which created tech giants, removed most of the advertising that had long sustained mainstream journalists, and allowed use of psychological profiling and high-emotion content to grab readers' attention.

Then, with professional journalism weakened and the news environment polluted, the most basic safety-valve mechanism of a democracy, elections, became strangely transformed by new First Amendment interpretations. *Citizens United v. Federal Elections Commission* in 2010 and similar rulings, all based on the First Amendment, have negated attempts to make elections fairer or more egalitarian. The principles that money is like speech, and that any attempt to restrain spending on elections violates the First Amendment, mean that the wealthy and powerful increasingly dominate what is said at election time, with the unsurprising result that their candidates and issues often prevail. This has made the speech of the wealthy and powerful ever more dominant.

All of these trends, concerning Internet communications and the broader First Amendment picture, should raise concerns even among ardent free-expression supporters.

In each individual situation, traditional First Amendment theories or doctrines have been applied (e.g., protection for anonymous speech; protection for those who wish to influence elections, etc.), but the applications have often been extreme or wooden, and deaf to the real purposes of free speech, which are to foster useful and reliable communications, create opportunities for the truth to emerge, and include everyone in the conversation.

First amendment interpretation have weakened journalism

Looking at effects, our recent First Amendment trends have tended to weaken traditional journalism in favor of the economic winners of the new communication marketplace. In many ways, that promotes irresponsible communications, not truth. They have tended to move protection for expressive rights from traditionally protected minorities, dissidents, watchdogs, and reformers, to the more wealthy, established, and comfortable. That limits, rather than expands, the conversation. They have transformed the content of our communications more heavily toward what is economically and psychologically powerful; that diminishes the truthful and useful content that we really need.

Maybe the success of the First Amendment in the last century has led to this situation, by leading the legal community to think narrowly in terms of historic doctrines and applications, and to pay less attention to adapting to the communications realities we face today. Maybe our lawmakers and leaders need to get into a mindset like that of Justice Clark in *Joseph Burstyn v. Wilson,* willing to reexamine old doctrines in light of new kinds of communications.

Old assumptions need rethinking

Looking at Internet-specific issues like anonymity and intermediary liability, lawmakers need to examine and carefully consider the actual environment in which they are being applied. This is a basic rule of judging, as retired federal judge Richard Posner pointed out in *Reflections on Judging*—judges make better decisions when they understand better the context, community, and environment that their decisions will affect.

Anonymity is no longer the situation of the lone dissident, and section 230 operates in an Internet business world far different than that of 1996. Lawmakers need to reexamine these legal measures, or work to adjust the business environment in which they apply.

In the bigger picture, legal thinkers need to move on from simplistic Enlightenment assumptions about human rationality. We know from modern neuroscience and psychological research that humans are far more irrational and susceptible to manipulation than our Enlightenment forbearers realized, and that psychologically targeted and high-emotion content often leads people astray.

If we can rethink the First Amendment for movies, we should be able to rethink it in light of the way the human brain really functions.

All of our basic needs for free expression remain today. We need open communications that can help us all seek out and learn truths about our lives and our communities. We need outlets for dissenters and minorities; tools for watch dogs, critics, and reformers; and mechanisms for change and equity.

But are these results really being promoted by our recent communications laws and First Amendment trends? If not, it is time to take a new look at them.

Mark Sableman is an intellectual Property, Media, and Internet Law Partner at Thompson Coburn LLP in St. Louis.