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Jonathan Gray April 18, 2012

Clarifying the Terms of the Debate: Paving the Way for Legal Protections of Personal Reputation Online

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Abstract

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This paper works primarily to eliminate the barriers to serious discussion of the issue of protecting personal reputation online in a legal manner. Little has been done to protect personal reputations from online harms. A variety of reasonable solutions have been proposed, but, as it stands, we are still lacking adequate protections for personal reputation online. Why is that? We tend to suppose that the responses to and criticisms of those proposals have simply won out in a well-reasoned debate. This paper seeks to explore the forces that shape that debate in order to better understand our failure to protect personal reputations online. If it turns out that the debate is stilted in such a way as to distort the problem and prevent serious discussion of the issue, we will need to shift the terms of the debate so as to aid progress in protecting personal reputation online. This paper analyzes in three parts the content of that debate. First, it establishes the problem of reputational harm and then works through one of the major conflicts in the language we use to conceptualize reputation, looking towards how that conflict is reflected in our failures to protect reputation today. It suggests that legal protections would overcome those failures. Second, it works through the First Amendment tradition in order to understand its guidance in this area and how its invocation functions as a response to calls for better personal reputation protections online. Third, it examines three significant assumptions guiding the debate, ending with an analysis of the major line of thought guiding speech practices today: the metaphor of the marketplace of ideas. The paper concludes by describing the necessary paths for future research to follow if we are to achieve adequate protections for personal reputation online. This paper and that future research will work to reconfigure the debate over reputation protections and encourage serious discussion of the issue of protecting personal reputation online.

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Chapter 1: Where We Stand

Contemporary problems

Ashley Payne

In August of 2009 in the small town of Winder, GA, high school teacher Ashley Payne was summoned to the principal's office at Apalachee High School to discuss a complaint received regarding Payne.[1] Upon meeting with the principal she was asked if she had a Facebook page. Payne replied in the affirmative, confused as to why she was being asked about it. Were there any pictures of her on Facebook with alcohol? Yes, she had recently been on a trip through Europe and had pictures up of her travels there, some of which included alcohol. Still, Payne was twenty four years old, so what was the big deal? Additionally, Payne had posted a status which stated that she was going to play 'Crazy Bitch Bingo.'[2] The principal informed her that one of her student's parents had made a complaint to the school about her Facebook page and was told either to resign or be suspended. The latter choice entailed a risk of losing her teaching license, so Payne opted to resign.

Payne had her privacy settings set to the highest level on Facebook and limited to complete viewing by only her adult friends. Despite this, whoever made the complaint against

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[1] Erin Moriarty, "Did the Internet Kill Privacy?," CBS News, February 6, 2011, http://www.cbsnews.com/2100-3445_162-7323148.html.

[2] Maureen Downey, "Court rules against Ashley Payne in Facebook case. But more to come," *The Atlanta Journal-Constitution*, October 10, 2011, http://blogs.ajc.com/get-schooled-blog/2011/10/10/court-rules-against-ashley-payne-in-facebook-case/.

Payne was able to see the picture in question. It was later revealed that the identity of that individual was unknown. Perhaps the principal's characterization of that individual was correct, or perhaps the individual was someone looking to cause problems for Payne, as he or she would have had to invest some energy into exposing the picture on a profile with high privacy settings. Either way Payne had taken precautions to ensure the protection of her Facebook profile and had not engaged in any behavior which typically disqualifies an individual from performing as a high school teacher. Payne decided to go to graduate school after the incident but has sought legal remedy.[3] She sued to get her job back, but because she was not fired, her path to recovery was difficult and her job was not restored. She has additionally sought monetary compensation.

Rachel North

On July 7, 2005, Rachel North was riding a crowded tube train in London when a bomb suddenly went off, killing 26 people in her carriage.[4] This turned out to be one among a series of suicide attacks that were carried out in London targeting users of the public transportation system. In total, 56 people were killed and over 700 injured. North escaped with a gash to the bone in her wrist and went to a hospital for treatment. After leaving the hospital she went home to attempt to sleep but found she could not, so she went online to a large London community board where she found many posts about the attack, none of which were written by any people directly involved in the event. So North wrote, not only about the attack itself, but about the ensuing crisis, the feelings of trauma and panic she continued to feel after the attack. She wrote day after day and eventually attracted the attention of the BBC, who posted her blog on their

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[3] David Ibata, "Ruling goes against Barrow teacher who lost job over Facebook posting," *The Atlanta Journal-Constitution*, October 10, 2011, http://www.ajc.com/news/ruling-goes-against-barrow-1198216.html.
[4] Rachel North, interview by Jon Ronson, *This American Life*, NPR, August 10, 2007.

website.

North soon started receiving cryptic comments on her blog triggering her to install a service called Site Meter which tracks where users come from in the online world. She found that she was receiving a lot of hits from a website run by conspiracy theorists who believed that the attacks were actually a result of an accidental power surge and that the British government was attempting to cover this up. They had quoted North on their site with her descriptions of the attack, attempting to use these as evidence in favor of their theory. She jumped into the fray, upset by their accusations, but this only led the conspiracists to question her identity. They began to support the idea that she was actually a government spokesperson used to cover up the attacks. Some suggested that she was not even an individual but simply a mouthpiece run by a team of individuals working psychological operations to control the London populace.

North, increasingly upset at the accusations, wrote: "I do not work for the government. I'm a normal person. I have a normal job in a normal office, and I'm getting sick of this. I'm requesting politely that you drop this and stop making accusations which are not true. It is completely out of order, frankly. Please stop." North began receiving death threats from the conspiracists, who also contacted her parents. While nothing came of these, the harm had already been done. Not only had North suffered having her words misused in arguments entirely opposed to her experiences, but her name became forever linked to conspiracy theorists as well. A quick search on Google for 'Rachel North' reveals within the first entries a website titled "rachel-north-liar-and-charletane.blogspot.com/."[5]

Joshua Meggitt

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[5] "Rachel 'North' was never in the bombed July 7th carriage?," last modified July 28, 2008, http://rachel-north-liar-and-charletane.blogspot.com/.

Marieke Hardy is an Australian newspaper columnist and blogger, former actress, television writer, and broadcaster.[6] On June 3, 2004, she started a blog under the pseudonym 'Ms Fits,' called "Reasons You Will Hate Me," which, as Hardy describes it, is a page of "Ill-informed rantings and half-baked theories from someone who should know better." Her blog won the 'Best Australian or New Zealand Weblog' at the 2008 Bloggies, a major set of blog awards determined by public voting.[7] No topic is safe from Hardy's writing, and she is quick to make fun of not only the political goings-on of Australia but the visitors to her blog as well. While the sardonic tone of her blog is apparent from the outset, it can still be unsettling for a visitor to the blog to come under attack from a woman they do not know online for views they unthinkingly posted in the comments section.[8] Unsurprisingly - considering the title of Hardy's blog - a hate blog arose targeting Ms Fits.

Hardy became aware of the blog and sought to find out the identity of its creator. Eventually she found that Joshua Meggitt was the author of the hate blog and did her best to respond to him. Meggitt had criticized Hardy in a blog post of his own, and his post had attracted a comment by someone with a similar style and attitude as that expressed on the hate blog. Hardy posted accusations of Meggitt on her blog and linked to the post on her Twitter account under the hashtag '#mencallmethings,' a tag used by female columnists to show the worst comments they had received online. This 'name and shame' spread quickly throughout the Australian blogosphere and overseas as well due to the popularity of both Hardy and her blog.

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[6] Michelle Griffin, "Writer Hardy pays up in legal row over wrong online shaming," *The Age*, December 27, 2011, http://www.theage.com.au/technology/technology-news/writer-hardy-pays-up-in-legal-row-over-wrong-online-shaming-20111226-1pagk.html. "Reasons you will hate me," last modified May 26, 2008, http://reasonsyouwillhateme.com/.

[7] "the 2008 bloggies," the weblog awards, http://2008.bloggi.es/.

[8] See "O holy Livvy," *Reasons You Will Hate Me*, November 5, 2007, http://reasonsyouwillhateme.com/o-holy-livvy.

Retribution had been dealt; surely now Meggitt would have to end his diatribes. Except that Meggitt was not the author of the hate blog.

Meggitt, a man from Melbourne, and his wife suddenly had the easily-induced vitriol of the online world directed their way. This meant fear both on- and offline. Hardy was a TV personality - the group of followers who might defend her were not limited to the blogosphere. Eventually, Hardy became aware of Meggitt's innocence and posted a retraction on her blog, apologizing for any harm caused to him and his family. Meggitt sought a legal settlement and ended up receiving monetary compensation for his troubles. While he appeared content with the outcome, saying, "I'm glad this mess is finally over," his lawyer, Stuart Gibson, seemed less pleased. Gibson stated: "where an original publisher apologises, one would be foolish to ignore subsequent republishers of the same material," worried that the mess was not actually over. Getting retractions from these publishers will prove much more difficult.

David Iserson

David Iserson wanted to be an actor when he was a kid.[9] He played a boy who talked to whales in a small production and had a minor role in a showing of the musical "Guys and Dolls" at summer camp. His grandmother would drive him to audition for TV commercials several times a week, but nothing came of his efforts. Eventually his father, who worked for a furniture store in Freehold, NJ, suggested that he do a commercial for the store, Silvert's Furniture. Iserson's dad had been doing the commercials for the store for some time, but the store had just received a shipment of 'teenage' furniture and David's father felt it appropriate for David to take on the role. So Iserson headed to the store and there made the commercial. At the time David

[9] David Iserson, interview by Ira Glass, *This American Life*, NPR, August 10, 2007.

was excited to be part of the commercial, and it is clear from a quick viewing that David took his role seriously.[10]

His father brought the video home after editing to show to his family. He had spoken with the director, and both were extremely pleased with the outcome. As soon as Iserson's father put on the commercial, though, David began to feel horrible. It is not atypical for a local commercial, meaning that it has its share of humorous lines and suffers from low production quality. There is nothing particularly off about the commercial; it is simply what one might expect from a local business attempting to make a commercial about teenage furniture with the son of an employee. The ad went on air while Iserson was still in middle school. At one point Iserson cheerfully says: "Oh, yeah, Silvert's has sets for you girls, too." This line in particular attracted the attention of bullies at David's school. David remarked that if he heard this line while walking, he could expect to be shoved into the lockers shortly thereafter.

For the remainder of his middle school and high school years, Iserson suffered all the humiliation that the commercial generated. This humiliation was not limited to the bullying, but came about as a result of the expanded showing of the commercial to areas which Iserson had not envisioned at the time of production. The ad became a regular showing at New York Rangers' hockey games, where Iserson would be forced to recite lines from the commercial at audience members' request. Fortunately for David his childhood days occurred prior to the rise of the internet, or he might have had to endure even more humiliation.

Robert Steinbuch

Robert Steinbuch worked in Washington, D.C. as an attorney for United States Senator

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[10] See "Old Commercial for Silvert's Furniture," [n.d.], video clip, Youtube, http://www.youtube.com/watch?v=CUq00djKra0.

Michael DeWine.[11] In February of 2004 DeWine had hired a new staff assistant, Jessica Cutler, to whom Steinbuch was attracted. Cutler was a twenty-five-year-old at the time and interested in her job only insofar as it looked good on her resume and provided her with opportunities to meet new guys. In early May of that year a mutual friend of Steinbuch and Cutler arranged for the pair to meet. They went out for drinks together one Thursday night and developed an interest in each other that would quickly develop into a sexual relationship. Shortly thereafter they were sleeping together and it appeared as though the relationship might turn serious. On May 18, though, the relationship came to a quick end with a big surprise for Steinbuch.

Cutler had started a blog on May 5 called "the Washingtonienne," where she detailed her sexual life and surviving in the D.C. environment. While some of the personal details Cutler provided were embarrassing to Steinbuch - he likes submissive women and kinky sex, apparently - others were more disturbing. It turns out that Steinbuch was hardly the only guy that Cutler was seeing at the time. In one post she details the six individuals she is having sexual relationships with, some for money and some for pleasure. On May 18, Steinbuch met with Cutler with a printout of her blog and promptly ended the relationship. She had not expected for Steinbuch to see it, but that very morning a popular blog called "Wonkette" linked to her site, writing: "Compared to our humble blog, *Washingtonienne* has half the politics and twice the ass-fucking." Visitors flooded her site and before Cutler could shut it down the news had reached a much larger audience than Cutler had ever intended it to reach. She was fired thereafter but became a celebrity, was given a $300,000 advance to write a book, and posed nude for Playboy.[12]

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[11] Daniel Solove, "Gossip and the Virtues of Knowing Less," in *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (New Haven, CT: Yale University Press, 2007), http://docs.law.gwu.edu/facweb/dsolove/Future-of-Reputation/text/futureofreputation-ch3.pdf.

[12] Andrew J. McClurg, "Online Lessons on Unprotected Sex," *The Washington Post*, August 15, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/08/14/AR2005081401034.html.

Steinbuch's fate was a little less fortunate. Not only had his sexual fantasies been exposed to the wide world of the internet, but his emotional toil at being cheated on was there for all the world to see. In June 2005 sued Cutler for "defamation" and "intentional infliction of emotional distress," among other things. In the suit he states: "It is one thing to be manipulated and used by a lover, it is another thing to be cruelly exposed to the world." In doing so, Steinbuch draws attention to the magnitude of the harm done. When Steinbuch says "the world," he is not referring simply to the group of individuals who make up his normal social network but to the entirety of the online world. As of 2012 the conflict remains unresolved.

Anthony Weiner

Anthony Weiner resigned from Congress on June 21, 2011.[13] He had been a member of the House of Representatives for over ten years, representing New York's 9th congressional district. He was known for being particularly demanding of his employees and himself.[14] Several of those who worked for him resigned because of the stress. On the other hand, though, those who stayed on respected Weiner for his commitment to his work and the city. His demanding style goes hand in hand with a genuine concern for the fate of his district. He was known for sleeping little and staying in constant contact with his employees, texting them over weekends and at odd hours. Weiner was one of the most technologically immersed of Congressmen during his tenure. At the time of his arrival in Congress in 1998, Weiner was already texting and using instant messaging services. His resignation in 2011 was a direct result of an improper use of

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[13] Luke Fuszard, "Anthony Weiner, The Millennial Generation, And Why America Needs More Career Politicians," *Business Insider*, July 24, 2011, http://www.businessinsider.com/anthony-weiner-the-millennial-generation-and-why-america-needs-more-career-politicians-2011-6.

[14] David W. Chen, "Congressman Pushes Staff Hard, or Out the Door," *The New York Times*, July 23, 2008, http://www.nytimes.com/2008/07/23/nyregion/23weiner.html?_r=1.

technology.

Weiner sent a link to a photo of a sexual nature concerning himself to one of his female followers on Twitter on May 27, 2011. While the link was not up for long, another Twitter member discovered the photo and sent it to conservative blogger Andrew Breitbart.[15] Breitbart discovered further material that Weiner had sent out to other women which he then reported in addition to Weiner's May 27 debacle. Initially Weiner denied that the photos were his and suggested that his Twitter account had been hacked by political opponents. After Breitbart reported on additional photos on June 6, though, Weiner apologized and admitted that the photos were of him and that he had sent out sexually explicit messages and photos to women on Twitter and other social media devices.[16] Despite these interactions, Weiner claimed that he had never had any sort of physical relations with any of the women he contacted. His crime lay purely in having had sexually charged communications with women through social media.

Polling of New York City residents did not resolve the issue of whether or not Weiner should resign in the wake of the scandal.[17] Different surveys taken had different results, and none revealed a large majority deciding one way or the other. Nonetheless Weiner announced that he would resign on June 16 and submitted his formal resignation on June 20, which became effective on June 21. President Obama had suggested that the scandal was a distraction and that Weiner should resign.[18] Weiner had been collecting funds to run for mayor of New York City in

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[15] Amanda Muñoz-Temple, "The Man Behind Weiner's Resignation," *National Journal*, June 16, 2011, http://www.nationaljournal.com/the-man-behind-weiner-s-resignation-20110616.

[16] "Transcript of Weiner's Statement Confessing to Twitter Photo, Past Relationships," *NBC New York*, June 7, 2011, http://www.nbcnewyork.com/news/local/Weiner-Admits-Confesses-Photo-Twitter-Relationships-123268493.html.

[17] Mark Blumenthal, "Anthony Weiner Polls: NYC Split on Resignation, Against Mayoral Run," *Huffington Post*, August 7, 2011, http://www.huffingtonpost.com/2011/06/07/anthony-weiner-polls-nyc_n_872857.html.

[18] President Barack Obama, interview by Ann Curry, *TODAY*, TODAY News, June 13, 2011.

2013 after an unsuccessful run in 2005.[19]

Nikki Catsouras

Nikki Catsouras was an eighteen-year-old who had just graduated from high school.[20] She came from a wealthy family in Orange County. On Halloween of 2006 she ate lunch with her family at home. Her father Christos left for work shortly thereafter. Nikki, who was not allowed to drive the family's expensive sports car, took the opportunity to sneak to the garage and drive her father's Porsche 911 Carrera. Nikki's mother Lesli heard the door shut as Nikki headed out to the car and went to see what was happening. She saw Nikki reversing out of the driveway and yelled out for her to stop, but Nikki continued. Lesli then called Christos to let him know about Nikki. Christos immediately set out to find her and called 911 to notify the police, where he was put on hold. As he was waiting on hold he saw police cars fly by with their sirens on. When he finally got through he asked if there had been an accident, to which the respondent replied: "Yes, a black Porsche."

Catsouras was attempting to pass a car on a toll road when she clipped the car going over 100 miles per hour. The Porsche slid across the median and slammed into a concrete toll both. Nikki died at the scene of the crash. The scene was so gruesome that the coroner did not allow her parents to identify her. However, California Highway Patrol officers took pictures of the scene, standard protocol for fatal traffic accidents in California. The pictures were emailed by the officers to someone who then leaked the photos to the internet. Toxicology revealed traces of cocaine in Nikki's system. She had had a cocaine-induced psychosis just months before, and her

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[19] Michael Howard Saul, "Weiner Leading Mayoral Money Chase," *The Wall Street Journal*, July 13, 2010, http://online.wsj.com/article/SB10001424052748704288204575363610741624330.html.

[20] Jessica Bennett, "A Tragedy That Won't Fade Away," *Newsweek*, April 24, 2009, http://www.thedailybeast.com/newsweek/2009/04/24/a-tragedy-that-won-t-fade-away.html.

parents knew that she had taken cocaine the night before. Nikki had a history of brain problems and they were hoping to take her to the psychiatrist the day of the accident, after letting her sleep off the effects of the previous night's cocaine.

Christos, a real-estate agent, was checking his email just days after Nikki's death and opened what appeared to be a routine property listing. Instead the violent image of his dead daughter popped up on screen with the caption, "Woohoo Daddy! Hey daddy, I'm still alive." Various sites hosted the pictures, with a fake Myspace being setup for Nikki, linking to the pictures. On one site someone wrote: "That spoiled rich girl deserved it." Elsewhere a commentator wrote: "What a waste of a Porsche." The Catsouras sued the California Highway patrol, enlisted the aid of ReputationDefender - a private company that protects reputation online - in attempting to get rid of the photos, and set up protections on their home computers to prevent photos from popping up. The Catsouras do not let their daughters use social networking sites, and two of the three daughters are now homeschooled to avoid having to deal with the issue. ReputationDefender was able to persuade websites to remove at least 2,500 photos of the accident, but founder Michael Fertik expressed dismay that it would be impossible to remove all the pictures, saying of the internet, "whether you opt in or not, you're opted in."[21]

Conceptualizing reputation

At the heart of each of these examples is the idea of reputational harm. While we may not be able to pinpoint precisely what it is about each of these stories that bothers us, we can at least

[21] Christopher Goffard, "Gruesome death photos are at the forefront of an Internet privacy battle," *Los Angeles Times*, May 15, 2010, http://articles.latimes.com/2010/may/15/local/la-me-death-photos-20100515/2.

agree that the situation before us is unfortunate.[22] Some of us think that more should be done to address these harms but are unsure how we should go about doing this.[23] Others of us find that we must bear the burden of reputational harms because the interests on the other side of the balancing equation outweigh our interest in protecting personal reputation.[24] These individuals might argue that free speech is much more important than reputation, and so we must suffer reputational harm as a cost to achieve our free speech ideals. This position might be plausible, but we cannot even say at this point if that is the case because it is unclear what lies on the reputation side of the equation. We might grasp how troubling these reputational harms are, but we do not adequately grasp the concept of reputation itself.[25]

This is not to say that we lack a concept of reputation. We can readily identify harms to

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[22] One could have any of a number of reasons for thinking the previous stories unfortunate or cruel. The point here is not that there is one shared standard by which we all evaluate the situation but that there is agreement that something is wrong in the examples given. The 'we' of the statement is thus very inclusive. It encompasses not only policymakers and academics but the public at large as well. Throughout the paper I will use 'we' in this inclusive manner so as to focus on common ways of thinking about reputation and to deal with that obstacle to developing policy- public perception.

[23] See Cass Sunstein, *On Rumors: How Falsehoods Spread, Why We Believe Them, What Can Be Done* (New York: Farrar, Straus and Giroux, 2009) for an account of the problem of reputation harm focused on processes and a conclusion which leaves unresolved how to address the problem. See Daniel Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (New Haven: Yale University Press, 2007) where Solove suggests that "we need to find some middle ground between the libertarian and authoritarian approaches," but leaves open the question of what this middle ground might be.

[24] See Eugene Volokh,. "Freedom of Speech and Information Privacy: the Troubling Implications of a Right to Stop People From Speaking About You," Stanford Law Review 52 (2000): 1049-51 for an account of how reputation protections which limit speech function as a right to have the government stop others from speaking about you. Volokh thinks this wrong and proposes contractual information privacy programs to get around the problem. See Lior Strahilevitz, "Reputation Nation: Law in an Era of Ubiquitous Personal Information," Northwestern University Law Review 102 (2008) for how information privacy regimes can encourage unlawful discrimination. See Richard Epstein, *Forbidden Grounds: The Case Against Employee Discrimination Laws* (Cambridge, MA: Harvard University Press, 1992) for more of the same. See Harry Kalven, Jr., "Privacy in Tort Law - Were Warren and Brandeis Wrong?," *Law and Contemporary Problems* 31 (1966): 326-7 for a concern over the room reputation and privacy protections opens up for trivial and problematic cases.

[25] Chen Yehudai suggests that "reputation is a concept that keeps evolving and hence evades a single, static definition." Chen Yehudai, "Informational Blackmail: Survived by Technicality?" Marquette Law Review 92 (2009). The expectation, then, for an *adequate* grasp of the concept is not for some clearly defined, undynamic notion.

reputation, so we have some idea of what a reputation is. Reputation, understood generally, is a form of social apprehension of an entity comprising information ranging from past behavior and character traits to stereotypes and misunderstandings.[26] A lot falls under the heading of 'reputational information,' with the types of information falling under this heading varying from individual to individual. And not only does the content of a reputation vary as perceived by different individuals, but the evaluation of this content varies as well.[27] Two individuals might substantially agree about the content of a third individual's reputation but still disagree as to whether or not that third individual *possesses* a good reputation. While this can easily be explained by pointing out that evaluations of reputation are external to the concept of reputation, such an explanation fails to do justice to the fact that our selection of what content to include under 'reputational information' is driven by normative judgments.

When we meet individuals and as we come to know them, we begin to develop an understanding of their reputation. This reputation is tied to both our own perception and the perception of others regarding the individual. When we fill out the content of this reputation, we make value judgments about what is important in this person. The details we choose to include

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[26] See Nick Emler, "Gossip, Reputation and Social Adaptation," In Good Gossip, edited by Robert Goodman and Aaron B. Ze'ev, 117-33 (Lawrence, KS: Kansas University Press, 1994) for an account of how "Reputations do not exist except in the conversations that people have about one another." See Robert N. Bellah, "The Meaning of Reputation in American Society," *California Law Review* 74 (1986) for an account of how reputation is "the extension of recognition as a member of society." See Robert C. Post, "The Social Foundations of Defamation Law: Reputation and the Constitution," *California Law Review* 74 (1986) for an account of three significant ways reputation has been understood by defamation law. Post writes that "Defamation law presupposes an image of how individuals are tied together."

[27] See Post, "The Social Foundations of Defamation Law: Reputation and the Constitution." See Larissa Barnett Lidsky, "Defamation, Reputation, and the Myth of Community," Washington Law Review 71 (1996) where Lidsky writes: "There is no homogeneous community whose norms provide the benchmark for identifying whether a statement is defamatory." See Robert C. Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort," *California Law Review* 77 (1989) where Post invokes Goffman's descriptions of rules of deference and demeanor to show how the privacy tort upholds social norms and redresses harms to personality. See Erving Goffman, "The Nature of Deference and Demeanor," *American Anthropologist* 58 (1956) for a discussion of how deference and demeanor convey social relations and positions.

about this person are determined by evaluative criteria.[28] These may differ from individual to individual, or from field to field, though they tend to be more consistent across certain fields, such as business. In the realm of personal reputation evaluative criteria can vary greatly, with each individual having a different idea about the ideal reputation. Any adequate account of reputation must be able to account for this dynamic nature of reputation.

Resolving this problem is extraordinarily important for developing protections for reputation. We need a concept of reputation that is not too narrow and not too broad. If we use a concept of reputation which can only account for one or a limited number of ideal reputations, then we will fail to protect a number of reputations just as deserving of protection. If we use a concept of reputation so broad as to account for any ideal reputation, then we will have a meaningless concept which no one can get behind to protect, or, worse, we will develop protections which create larger problems than they address. Attempts have been made to address this problem. Methods of classifying reputation have arisen which seem to elude the problem of identifying what qualities are appropriate as reputational information and the value ascribed to these qualities by defining reputation in terms of the social interactions within which it is situated.

In business relationships, for instance, individuals possess business reputations. This method of classifying reputation provides an easy way to identify what relationship we are dealing with. What reputational information is contained under the heading 'business reputation'? - any information deemed relevant to determining interaction with that individual in a business capacity. By talking about reputation in this way one can accommodate all kinds of information and the ways in which this information might be evaluated. This might seem

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[28] This decision to include certain details may not be conscious. The processes of observation and evaluation are often inseparable.

obvious; it will be suggested that this method of classification deals exclusively with social interactions and makes no claim about what sort of content should fill out a reputation. It will, on these grounds, seem silly even to suggest that classifying reputation according to types of social interaction is in any way a response to the problem of the dynamic nature of reputation. Before we can evaluate these claims we need a better understanding of what goes in when classifying reputation in this way.

The one thing that is immediately clear about defining reputation in terms of the relationships it applies to is that this method of classification does not tell us much about the content of a reputation. It is not clear at all what might fall under the heading of 'business reputation' when referred to in isolation.[29] In this sense it appears to be value neutral towards reputational content. It addresses the problem of the dynamic nature of reputation by leaving room for any ideal reputations within the designated field of social interactions. To some degree, then, opponents of my earlier claims are correct: speaking about business reputation generally tells us nothing about the content of that reputation and my point about this method of understanding reputation as a response to the variability of ideal reputations among individuals means next to nothing. Arguing that a method of classification which avoids questions of ideals by outsourcing the problem hardly seems a meaningful response to the problem of the dynamic nature of reputation.

However, we do not typically speak about business reputations generally unless we are attempting to devise plans to protect reputations.[30] When we have business interactions with

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[29] By this I mean business reputation abstracted from any social context. This notion makes little sense because the descriptor ‘business’ provides social context. Yet we do speak about business reputation in isolation, and our discussions suffer for it.

[30] This is because reputation protections need to work at a high level of generality. We would not want to develop regulations on the basis of narrow conceptions of reputation which exclude much of what we desire to protect.

individuals, we are given the context to make sense of that reputation. We are told what role the individual fulfills, on whose behalf he or she works, the key actors with whom the individual will interact, etc. The values which guide the construction and evaluation of an individual's reputation are to be found within the goals defined by these elements. To answer the question of what makes a good reputation we simply turn to the goals we have for our business interaction. If we are hoping to build an extended relationship with someone we might prioritize trust as an aspect of someone's reputation. If we are attempting to improve public relations we might prioritize the spotlessness of an individual's reputation. The method of classifying reputation according to the social interactions to which it pertains does not maintain any value-neutrality for the concept of reputation. Instead, it provides us with a convenient question for identifying the value of a reputation: for what purposes are we engaging in social interaction?

Regardless of how we think the terms should be used and our understanding of their limitations, we still use these terms in ways which extend beyond simply tying types of reputations to certain social interactions. Thinking about reputation in terms of social interactions distances the concept of reputation from the values which determine its composition and worth, but value is ultimately inseparable from the concept of reputation. While classifying reputation according to social interactions appears a value-neutral practice, in reality it is a way of moving different reputations into different fields with different evaluative criteria.[31] As a way of speaking about reputation, this method is extremely useful. It is perhaps the most obvious way to speak about reputation, and people readily understand what you mean when you classify reputation according to social interactions. But the unintended effects of speaking about

[31] See Post, "The Social Foundations of Defamation Law: Reputation and the Constitution," where Post writes that "the meaning and significance of reputation will depend upon the kinds of social relationships that defamation law is designed to uphold."

reputation in this way cannot be ignored. When we decide to protect reputation, this choice to export the value of reputation changes how we approach the problem of reputational harm and the solutions we will find appropriate.

As the value of the reputation has been made to lie within the social interactions, protections developed not for the reputations but for the relationships themselves.[32] Because the approach of this method was to elude the problem of defining appropriate qualities for a good reputation, the approach to solving reputational harms has been to elude focusing on the reputation itself. Thus, while this method of conceptualizing reputation can account for the dynamic nature of reputation, this is only an incidental effect and not central to the type of reputation protection developed in accordance with this model. By placing the value of a reputation external to itself, we have left room only for arguments which are grounded in justifications external to the reputation itself. In business, for example, the grounds of protecting reputation lie in the value of the business transactions. As soon as these transactions become worthless, reputation will accordingly drop in value. In areas like business this works out fine because business interactions tend to maintain their value, and, in the instances when they do not, qualities deemed important for most business interaction work to prevent reputational harm.[33]

We say that an individual possesses a reputation, meaning that a reputation describes one certain individual and that this individual has some degree of control over the content of that

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[32] See Post, "The Social Foundations of Defamation Law: Reputation and the Constitution," where Post writes: "Reputation thus inheres in the social apprehension that we have of each other. In one sense, of course, virtually all of our social relationships consist of such apprehension, and it is not clear what it would mean for them all to be 'protected' by defamation law." In characterizing reputation this way Post shows how protections work around relationships. This idea is reinforced by his earlier notion (see note 31) that a reputation's value is dependent upon social relationships.

[33] These qualities might be lubricants to future business transactions with other businesses. If, for instance, a business transaction fell through between two entities and one party acted maliciously afterward, their future business transactions would suffer for it.

reputation.[34] Though this phrasing eases talk about reputation it also obfuscates some essential characteristics of reputation. One does not possess a reputation in any standard sense of the word because our reputations are ascribed to us whether or not we desire them. We do not choose our own reputation. Our reputations are not internal to us but are instead external, lying in the social network around us. Reputation cannot exist apart from this social framework because it consists in a certain apprehension of one individual by others based on various qualities deemed relevant to determining interaction with that individual. The essentially perceptual nature of reputation creates a problem for both the subject of reputational information and the perceiving entity: a subject's reputation may not line up with his or her actual character and behavior and may mislead or deceive the perceiver. A gap separates the individual's reputation from his or her individual qualities or character.

For some individuals this gap presents the chance to cast oneself in an undeservedly positive light. These individuals see the gap as an opportunity. For others, the gap functions to produce an inaccurately negative portrayal. These individuals suffer the gap as an unfair burden on their social interactions. Benefits and harms do not work exclusively from the subject's side, either. Reputation does work for both sides of the interaction - the subject's and the perceivers'. A perceiving agent can take advantage of the gap by holding the subject to a higher standard than might be appropriate or can be deceived into continuing interaction with a subject who would not be considered for social interaction were his or her actual qualities known. Common amongst all of these approaches is the recognition that the gap between reputation and individual

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[34] The idea of reputation possession ties in easily with Post's conception of reputation as property as expressed in Post, "The Social Foundations of Defamation Law: Reputation and the Constitution." However, reputation possession is to be understood much more broadly than Post's "reputation as property," a notion which can be given monetary value. The idea of reputation possession appears in our everyday talk; we say: "she has a reputation for neat work."

characteristics is significant for determining social interaction.

Were we to erase this gap, what would we be left with? Presumably we would have an accurate reputation - one which lined up with the subject's character and behavior; but what would it mean for these things to line up? Who would determine what the subject's actual qualities are to see if his or her reputation mirrored these qualities? What the language of reputation possession leads us to believe is that the answer to this question is the subject him- or herself. The subject of reputational information seems the best candidate for this task, as he or she is likely to be the most familiar with the qualities which the reputational information comprises. However, there are bound to be some qualities which escape even the most reflective of individuals and other qualities which the subject will distort, intentionally or unintentionally. The language of reputation possession suggests furthermore that the subject has a right to make these determinations.

There are a number of problems with this idea. It goes directly against the idea that reputations are ascribed to us. It ignores the limitations of the individual in both determining his or her own character and behavior and maintaining a reputation in line with these qualities. Most importantly, it does not line up with the common method of classifying reputation by social interactions. We ascribe rights to individuals for a number of reasons, one among them being that the item or activity to which we have a right is inherently valuable. But this method of conceptualizing reputation by the social interactions to which it pertains has moved the value of a reputation external to the reputation itself. It seems strange to suggest that we have a right to something which lacks value. The fact that we are tempted to do so suggests that there is something wrong with our current understanding of reputation.

So we have a method of classifying reputation that, while working on the basis of a

useful distinction, leads to a number of problems for developing reputation protection. It claims to be value-neutral in its conceptualization but, when put into effect, works on the basis of value distinctions. In its way of doing so, it exports the value of reputation, forcing arguments about protecting reputation to work on the basis of justifications external to reputation. And this method of classification conflicts with our usage of the language of reputation possession. We are left with a problematic concept of reputation and problematic language to deal with the idea of reputation. What are our options for dealing with these problems?

We could attempt to do away with classifying reputation according to social interactions in order to restore value to reputation.[35] In this way we could make sense of the language of reputation possession and make arguments for reputation protection much easier. But there is something to this method of classification. We are going to divide reputation into classes regardless of whether or not we embrace this method as it does not make sense to speak of reputation in general. This understanding of reputation is one of the easiest ones to embrace, as we already tend to be able to identify classes of social interaction. There is very little necessary background knowledge for approaching reputation when classified in this way. We could suggest that people stop classifying reputation in this way, but it is highly unlikely that that would happen, and it might make reputation even more difficult to understand. Or we could attempt to do away with the language of reputation possession. It is perhaps even more problematic than the previous method of classification. Yet it makes sense of our feeling that there is something

[35] There are a number of interesting attempts to conceptualize reputation in new ways that do not hinge exclusively on distinctions between social relationships. See Helen Nissenbaum, "Privacy as Contextual Integrity," *Washington Law Review* 79 (2004) for an account of information privacy which could easily be transferred to our understanding of reputation. "Privacy as contextual integrity" asks a different set of questions - "who is gathering the information, who is analyzing it, who is disseminating it and to whom, the nature of the information, the relationships among the various parties, and even larger institutional and social circumstances" - in order to account for private information in a more nuanced way.

inherently valuable about reputation.

I would suggest that we tie the value of reputation not to something inherently valuable in reputation but instead to something which always accompanies the idea of reputation. In this way we could avoid the harms of classifying reputation solely by the social interactions to which it pertains and avoid the problem of having the value of reputation disappear whenever the notion to which it is linked lost its value. My suggestion would be to tie reputation to an ideal community, the sort that we will say approximated in the next chapter. However, there are plenty of options available for reconstructing reputation, some which might be more viable than my suggestion. This is an area for future research.

Why private attempts to protect reputation fail

In 2006 Michael Fertik and Owen Tripp founded the online service "ReputationDefender."[36] The service was originally for parents seeking to adequately deal with reputational harm done to their children through social networking sites like Facebook and Myspace. Individuals could contact ReputationDefender asking for certain content to be removed or monitored. Fertik and his partners soon realized that the service was important to adults as well and expanded reputational protection services to adults. While the service could not be used to remove all material, as major news publications are extraordinarily difficult to

[36] Scott Gilbertson, "Delete Your Bad Web Rep," *Wired*, November 7, 2006, http://www.wired.com/science/discoveries/news/2006/11/72063.

confront and certain types of speech are off limits for removal, it did see some success.[37] In the Catsouras incident, for instance, ReputationDefender removed numerous photos of Nikki from the online world. ReputationDefender tracked websites which hosted the photos, requested content removal, and used coding to make the pictures more difficult to find in Google searches. Overall, though, the strategy could not succeed as the family lacked legal grounds for compelling websites to comply with their requests. Fertik remarked, "it became a virtually unwinnable battle."[38]

Private attempts to protect reputation are reactionary. Agencies like ReputationDefender cannot produce regulations which prevent the original publication of defamatory or harmful content. Because information travels so quickly and easily online, reactionary work is unlikely to stop the spread of and remove all negative material. Fertik and company appear to have realized this as they chose to change their name in 2010 to Reputation.com, reasoning that the new name "better communicates the scope of our solutions, beyond the "defensive" and onto the "proactive" face of reputation and privacy management."[39] Reputation.com is today one of the largest players in the field of online reputation management (ORM).[40] While private actors

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[37] Major news organizations do not need to fear legal action to the same degree that bloggers might because they possess more financial and legal resources to deal with such problems. Additionally, "newsworthy" speech has legal protection under the current legal regime. In principle this makes sense. However, we often find that the check for whether or not speech is newsworthy is to ask whether or not it has been published by a news organization. While an inquiry into this problem would be interesting, it is too big to tackle here. For alternatives to classifying speech by newsworthiness, see Cass Sunstein, "Low Value Speech Revisited," *Northwestern University Law Review* 83 (1989). For a critical response to Sunstein's position, see Larry Alexander, "Low Value Speech," *Northwestern University Law Review* 83 (1989), where Alexander attempts to return the discussion of speech back to the media and the audience. For a description of how defamation laws provide a way to equalize imbalances between major news organizations and individuals online see Larissa Barnett Lidsky, "Silencing John Doe: Defamation and Discourse in Cyberspace," Duke Law Journal 49 (2000).

[38] Bennett, "A Tragedy That Won't Fade Away."

[39] Rob Frappier, "Changing Our Name, But Not Our Mission," (Press Release), *Reputation.com*, January 12, 2011, http://www.reputation.com/blog/2011/01/12/changing-our-name-but-not-our-mission/.

[40] Tom McNichol, "Fixing the Reputations of Reputation Managers," *Bloomberg Businessweek*, February 2, 2012, http://www.businessweek.com/magazine/fixing-the-reputations-of-reputation-managers-02022012.html.

seeking to protect reputation have their limitations, the success of Reputation.com suggests that these actors can work significantly in protecting reputation.

The "proactive" measures available to programs like Reputation.com are fairly limited in scope. Working on the basis of an understanding of search engines, ORM programs can manipulate search results to their advantage. Sites like Google determine their search results through complex algorithms which take into account a number of factors, ranging from keyword frequency to web prominence as determined by the amount of links directing to a site.[41] When someone approaches an ORM program like Reputation.com to have their reputation protected, he or she is seeking to minimize the chance that any defamatory content which has him or her as its subject from being viewed. We have our own limited abilities to do that through privacy controls and discretion on our own part, but, as the previous stories reveal, sometimes the fate of our information is beyond our control. ORM programs can minimize the chance of defamatory information being accessed by decreasing the standing of sites which host such information relative to other sites as designated by the algorithms which guide search engines.[42] This means doing things which either minimize the impact of defamatory sites as determined by those algorithms or maximize the impact of other sites to displace the defamatory sites in the search engine results. The former option is considered reactionary while the latter option is considered proactive.[43]

If Reputation.com, deemed by *Bloomberg Businessweek* in February 2012 the "most prominent player" in online reputation management, fails to adequately protect reputation - if the Catsouras still have to worry about going online - then should we expect other private

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[41] "How Google Search Works," Google, http://www.google.com/competition/howgooglesearchworks.html.
[42] "How we make you look your best online," Reputation.com, https://www.reputation.com/reputationdefender.
[43] Sites like Reputation.com do not reveal all that they do to protect reputations. There are certainly other options available to them than the ones I have listed, but these are the primary ways ORM programs protect reputation.

actors to succeed in ORM?[44] When ORM programs send a cease-and-desist to websites which host defamatory content, they expect those sites to comply out of fear for legal consequences. However, those sites rarely have to worry about legal consequences as they often simply host the material and are not the creators of the material.[45] This means that ORM programs are primarily taking the "proactive" approach, going as far as creating new positive sites to raise in search engine results to displace the defamatory content.[46] In the case of individuals seeking to protect business reputations this task is not so difficult - a relatively clear set of standards establish what traits are considered desirable and undesirable in the business world. But when an individual seeks to protect personal reputation there is no clear set of standards which determine what traits are good and bad. Here the "proactive" approach is doomed to fail.

There exists such a wide diversity of ideal personal reputations that it is difficult for ORM programs to pursue personal reputation protection without direction provided by the individual seeking protection. While businesses may turn to ORM programs before they suffer any reputational harm as they know how much is at stake and how easily the tides can turn, individuals are unlikely to want to pay a fee to protect their personal reputation prior to any harm, meaning that they will face Fertik's "virtually unwinnable battle." Businesses can approach ORM programs for aid at any point and the ORM programs will be able to monitor information online about them without the need for constant attention by the business.

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[44] McNichol, "Fixing the Reputations of Reputation Managers." Other ORM programs include: ReputationChanger.com and Elixir Interactive.

[45] The law distinguishes between "publishers" and "distributors" in order to prevent sites from being held liable for content they did not create. Were we not to have such a distinction forums, bulletin boards, and mass blogs would be nearly impossible to keep out of legal trouble. For some case history of this distinction see *Stratton Oakmont, Inc.* v. *Prodigy Services* Co. 1995 WL 323710 (N.Y. Sup. Ct. 1995) and *Doe* v. *America Online, Inc.* 783 So.2d 1010 (2001). In *Zeran* v. *America Online, Inc.* 129 F.3d 327 (1997) the Court establishes the immunity of internet service providers from liability for defamatory content.

[46] McNichol, "Fixing the Reputations of Reputation Managers."

Individuals, on the other hand, if they did choose to pay a monthly fee to have their reputations protected, could certainly provide a description of the sort of reputation they would like to have online, but could not adequately prepare for the sort of harm that the Catsouras family experiences. No one could; reactionary programs will always have their work cut out for them.

ORM programs cannot adequately protect personal reputation. They are reactionary, need to work on the basis of a relatively clear conception of an ideal reputation, and oftentimes do not get to the bottom of the harm. While they certainly provide an attractive service for businesses and some individuals and play an important role in reputation protection in the current environment, we can envision a more attractive environment for reputation protection, one which might actually be proactive in the sense of preventing reputational harm in the first place, or, at the very least, provide genuine incentives for sites to listen when we send out cease-and-desists.[47] Furthermore, such an environment would not need to be a 'service' that people buy into. This would attend to Fertik's concern that "you're opted in" to the online world and all its harms whether you want to be or not. ORM programs are not cut out to deal with this fact because they must be enlisted for their aid. Additionally, a system which protects reputation through real regulations would not force us to pay for our reputation protection.

Is reputation protection the sort of thing we should have to pay for? The "About us" section of Reputation.com's website reads: "We believe you have the right to own your own online reputation."[48] They mean this in a trivial sense, as a commercial way of attracting your attention, not in the more meaningful sense of reputation possession we identified earlier. If

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[47] There exists an expansive body of literature on possible reputation protections. Some of these will be noted in the conclusion, but for now we need only note that serious discussion of these possible futures is highly difficult considering the current layout of the debate over reputation protection. My goal here is to alter the layout of the debate in a way conducive to developing regulations more capable of adequately protecting reputation.

[48] "About Us," Reputation.com, http://www.reputation.com/company.

the harms of the online world are not something we can "opt out" of, and if the services which charge fees for reputation protection cannot adequately fulfill their goals, then perhaps a set of legal regulations which do not work on the basis of pay are more feasible as a response to the reputational harms of our age. We need to consider legal regulations as a genuine option in our search for adequate personal reputation protections.

There is a set of options available for dealing with personal reputation protection. This includes legal regulations, private attempts at protection, and dismissal of the problem in the face of harms which might come about as a result of developing reputation protections. We have already shown how private attempts will fail to adequately protect reputation; we should now consider legal regulations as a real option. Unfortunately, there are barriers which have prevented serious discussion of the issue up to this point. There are certain assumptions about reputational harm and protections which lead many decision makers to dismiss the issue. These assumptions will be explored in chapter three. Before we get to those assumptions we should consider the most formidable barrier to serious discussion of the issue in legal circles: the First Amendment.[49] Whenever anyone suggests that we develop regulations which might restrict speech in some nominal way, they are not taken seriously, or, if they are, they are treated as blasphemers. In chapter two we turn to the First Amendment tradition to explore its triumphs and

[49] Scanning articles about developing reputation protections reveals the constant background concern of the First Amendment. It shapes discussions of the issue in a much more significant way than it should. For examples of arguments which take into account of the First Amendment see Erwin Chemerinsky, "In Defense of Truth," Case Western University Law Review 41 (1991) and Benjamin F. Heidlage, "Limiting the Scarlet @: Daniel J. Solove's The Future of Reputation," Review of The Future of Reputation: Gossip, Rumor, and Privacy on the Internet, by Daniel J. Solove, New York University Law Review 83 (2008). Oftentimes the First Amendment is not explicitly mentioned but functions simply as a presence which arguments for reputation protection must work around. This, indeed, is what the First Amendment is meant to do. Invocations of the First Amendment are not meant here only in a scholarly context. Again, I want to draw attention to the broadness of 'we' to suggest that the First Amendment looms large in public perception of these issues. The misunderstandings we have about the First Amendment tradition have hurt our chances of having serious discussion of issues of reputation protections.

downfalls, showing how it has its own share of problems which should lead us to be more skeptical of the First Amendment as a response to demands for better personal reputation protection. In both of these chapters and in the stories of this chapter I hope to show that the final option of dismissing the problem of reputation harm is not one we can risk taking. The ultimate goal is to pave the way directly for serious discussion of legal protections of personal reputation.

Chapter 2: A New Look at an Old Tradition

What we've been up to, here and abroad

Thanks to social media, people have found ways to circumvent restrictions and communicate freely with others. This has led to massive social and political changes, both good and bad. In 2011 alone we witnessed and participated in regime changes across several dictatorships, brought wealth inequality into the standard political vocabulary of Americans through the Occupy movement, established aid networks in the wake of natural disasters, exposed problems through citizen media which might never have reached public eyes or ears, at least stalled the imposition of debit card fees by several major banks, and collectively mourned the death of one of the most inspiring inventors and entrepreneurs of our time.[50] Already in 2012 we have seen one of the largest organized internet blackouts in United States' history in

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[50] For the role of social media in the Arab Spring revolutions see Philip N. Howard, "The Arab Spring's Cascading Effects," *Miller-McCune*, February 23, 2011, http://www.miller-mccune.com/politics/the-cascading-effects-of-the-arab-spring-28575/. For its role in the Occupy movement see William Yardley, "The Branding of the Occupy Movement," *The New York Times*, November 27, 2011, http://www.nytimes.com/2011/11/28/business/media/the-branding-of-the-occupy-movement.html?_r=2. For its role in disaster aid in Japan see 4 "TEDxTokyo - Hiroshi Ishii - The Last Farewell - English," May 21, 2011, video clip, YouTube, http://www.youtube.com/watch?v=jSMSjaZy5hY&feature=relmfu. For an example of citizen media see "GlobalVoices," Global Voices, http://globalvoicesonline.org/. For public pressure on banks see Susanna Kim and Matt Gutman, "Bank of America Cancels $5 Fee," *ABC News*, November 1, 2011, http://abcnews.go.com/Business/bank-america-drops-plan-debit-card-fee/story?id=14857970#.T3Rp5L9ksU8. For public mourning over Steve Jobs see "Steve Jobs: 1955-2011," *Wired*, http://www.wired.com/promo/memorial/stevejobs/ and "Remembering Steve," Apple, http://www.apple.com/stevejobs/.

opposition to U.S. legislation cracking down on online piracy.[51] And what's most exciting about all this is that *we* have done it, that the term 'we' can even be used this broadly.[52]

The restrictions around which we have worked vary regionally and topically. For those involved in the construction of aid networks in the aftermath of the Tohoku earthquake, the restrictions tended to be technological or material. Television and radio networks were unavailable to many.[53] Some individuals turned to social media on their phones and posted requests for help to sites like Twitter and Facebook where they could also find valuable real-time information. For many, though, internet and phone access were unavailable, so communities posted paper lists of missing people in community centers. Dissemination of this information required only a handful of connected individuals. Those with camera phones and working networks took pictures of these lists and posted them online. Then individuals from around the world transcribed these lists, posting them as searchable text documents onto websites devoted to crisis response.[54] From there crisis response teams could move much more quickly and intelligently in their rescue efforts.

In some regions of Mexico citizen journalists have worked around safety restrictions. Local news media organizations suffer threats and attacks from drug organizations in response to reports concerning the drug wars. Many news organizations are forced to avoid reporting on issues concerning drug violence or trade, with some having even adopted an official policy of

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[51] Vlad Savov, "The SOPA blackout: Wikipedia, Reddit, Mozilla, Google, and many others protest proposed law," *The Verge*, January 18, 2012, http://www.theverge.com/2012/1/18/2715300/sopa-blackout-wikipedia-reddit-mozilla-google-protest.

[52] These examples illustrate what I referred to as approximating ideal communities in the previous chapter. While there are certainly problems with these events online, they showcase the potential for an online community responsive to external needs in a meaningful way.

[53] Saira Syed, "Japan quake: infrastructure damage will delay recovery," *BBC News*, March 16, 2011, http://www.bbc.co.uk/news/business-12756379.

[54] "TEDxTokyo - Hiroshi Ishii - The Last Farewell - English," Youtube.

self-censorship concerning drug war news. Yet there is still a heavy demand for this news, as people's safety is at stake, and so the distribution of drug war news shifts into the hands of the citizen media. Twitter, in particular, has emerged as a popular technology for the citizen media, with the use of hashtags as a means of focusing and distributing information. There are hashtags for cities, such as '#verfollow' for Veracruz, which people latch on to distribute information about concerns in the city.[55] The pseudonymity available online has enabled citizens to distance themselves somewhat from the safety concerns which plague the local news organizations.

During the Arab Spring, restrictions on communication have tended to be both technological and safety oriented. Perhaps the better way to describe these restrictions is to say that they have been political, and have worked through both technological and safety mechanisms. For Egyptians, regulatory authorities controlling licensing to internet service providers (ISPs) presented an obstacle to communication. On January 27, 2011, for instance, Egyptian ISPs disconnected the internet for all of Egypt aside from a handful of companies and government ministries.[56] Similar measures were taken in Tunisia in response to revolt, with authorities blocking web pages.[57] The Tunisian Internet Agency additionally harvested login information for individuals on various popular sites, Facebook among them, by injecting extra code onto the sites' pages and then used this information in some instances to delete accounts.[58] Political pressure to restrict avenues of communication during the Arab Spring often worked, however, to reinforce some of the central concerns of that movement. Among the major demands

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[55] Andrés Monroy-Hernández, "Shouting fire in a crowded hashtag," posted on the *Social Media Collective Research Blog*, August 31, 2011, http://socialmediacollective.org/2011/08/31/shouting-fire-in-a-crowded-hashtag/.
[56] James Cowie, "Egypt leaves the internet," post on the *Renesys blog*, January 27, 2011, http://www.renesys.com/blog/2011/01/egypt-leaves-the-internet.shtml.
[57] Afef Abrougui, "Tunisia: Internet Censorship Makes a Comeback," *Global Voices*, May 17, 2011, http://globalvoicesonline.org/2011/05/17/tunisia-internet-censorship-makes-a-comeback/.
[58] Nate Anderson, "Tweeting Tyrants Out of Tunisia: Global Internet at its Best," *Wired*, January 14, 2011, http://www.wired.com/threatlevel/2011/01/tunisia/all/1.

of protesters were calls for greater free speech and transparency.[59]

Here in the United States we do not for the most part have to work around restrictions imposed externally. The restrictions on speech that we do have tend to be inherent in either the form or medium of communication, such as the 140-character limit for communication via Twitter, or the result of laws which restrict speech only incidentally. During the Occupy movement, for instance, restrictions on park usage forced protesters to relocate during certain periods, such as at night. Public nuisance laws additionally limited the forms of protest available to Occupants.[60] Social media enables individuals to circumvent these restrictions as well as restrictions inherent to protests such as the inability to organize on the spot. Online communication meant that information could be received easily by many individuals at any time and any place without disruption to physical public spaces.[61] The fact that these are the few restrictions around which we must work can be attributed in large part to our robust free speech protections.

There are few things as widely admired or supported in our nation's history as the steady expansion of protections afforded under the First Amendment. Freedom of speech and freedom of the press are touted as two of the most basic and necessary of guarantors of democracy. We jokingly invoke the freedom of speech when we are told to be quiet, and we do not even glance twice at the most disturbing of tabloids at the registers of the supermarket check-outs. Recent decisions such as *Citizens United* have expanded freedom of expression farther than even

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[59] Yasmine Ryan, "Tunisia's bitter cyberwar," *Al Jazeera*, January 6, 2011, http://www.aljazeera.com/indepth/features/2011/01/20111614145839362.html.

[60] James Barron and Colin Moynihan, "City Reopens Park After Protesters Are Evicted," *The New York Times*, November 15, 2011, http://www.nytimes.com/2011/11/16/nyregion/police-begin-clearing-zuccotti-park-of-protesters.html?hp.

[61] Alysia Santo, "Occupy Wall Street's Media Team," *Columbia Journalism Review*, October 7, 2011, http://www.cjr.org/the_news_frontier/occupy_wall_streets_media_team.php.

supporters of the *Sullivan* decision might have dreamed (or dreaded) possible.[62] The freedoms of speech and of the press are among the first concerns we are made aware of as young citizens. Not only are these freedoms prominent parts of the practices of our nation, they are prideful parts of our national identity. We *enjoy* these freedoms and consider them a boon to our country.

And for good reason. The fact that the Occupy protests can occur without the restrictions faced in other areas of the world, that we need not fear imprisonment or fines for voicing criticism of the government, that we can go online and talk to whomever we want are all guaranteed by First Amendment protections. We needn't verify the acceptability of our statements with an authority before we talk or worry about whose eyes our publications will reach. And not only do First Amendment protections release us from a range of worries, but they also open up realms of conduct conducive to positive social engagement and governance responsive to public concerns. Our freedoms to choose whether or not to participate in a religious group, to petition the government, and to assemble to defend or advocate causes are all guaranteed by the First Amendment. On both the individual and the social level the First Amendment promises much to the American citizen.

However, the individual and social realms often clash. Social media and the online world exacerbate these clashes to an intensity unseen prior to the creation of cyberspace as well as create new problems unique to the modern age. In earlier times one might have commented negatively upon an individual based on faulty information thought to be true (or known to be true). Before long, the error could be corrected and the individual's reputation restored. Nowadays, though, the speed of dissemination online and the permanence of the information there mean that reputational harms are incredibly hard - if not impossible - to correct. Recall

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[62] Citizens United v. Federal Election Commission, 558 U.S. 08-205 (2010). New York Times Co. v. Sullivan 376 U.S. 254 (1964).

Robert Steinbuch's problem. This means not only personal strife but lost opportunities as well. One can be denied a job for comments made online and not even have the opportunity to defend one's self. It is less costly for the employer to evaluate another application than to have to verify negative comments made about applicants. Or one might find oneself embroiled in a conflict protecting loved ones from harms facilitated by social media. Think about the Catsouras family's attempts to protect their children. These problems are allowed, at least as it stands today, because it is thought that the social benefits or harms of denying such speech outweigh these individual harms.

Clearly, though, the First Amendment works to aid both the individual and the society, and not always at the expense of the former. But the question arises: how are the individual and society weighted when they do come into conflict as a result of First Amendment guarantees? What values do we uphold when we make free speech decisions? There are a variety of theories offered up which explain the purpose of the First Amendment, and, in doing so, go to answer our questions.[63] Some prioritize the public benefits of the First Amendment and emphasize the magnitude of social harms enabled in the absence of First Amendment protections. Other theories focus on the individual and the autonomy granted him or her by First Amendment guarantees. These theories, while interesting and significant for our understanding of the First Amendment, do not concern us here. Rather, we are concerned with how the First Amendment actually works out in contemporary times and what this means for both the individual and the society. What has happened and is happening under the First Amendment? The questions which arise in this tradition are of philosophical value.

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[63] For examples of these theories see Alexander Meiklejohn, "The First Amendment is an Absolute," *Supreme Court Review* 1961; Martin H. Redish, "The Value of Free Speech," *University of Pe*nnsylvania Law Review 130 (1982); Owen M. Fiss, "Free Speech and Social Structure," *Iowa Law Review* 71 (1986).

For this an extensive history is not necessary. While a lengthy First Amendment doctrine is presupposed by modern First Amendment decisions, the implications of these decisions can be understood independently of that background. When the narrative demands the inclusion of earlier decisions these decisions will of course be included, but our story will focus primarily on decisions which come during the twentieth century. The reasons for this are multiple: earlier decisions have often been overridden by newer decisions, the significance of earlier decisions can often be captured in more recent decisions, and modern decisions are more connected to the issues we face today. This last point is especially significant from the standpoint of the interaction between social media and First Amendment doctrine. Many of the issues which plague our interaction with social media do not arise until modern times or, if present earlier, are unrecognizable in the early First Amendment doctrine. The cases presented here are selected on the basis of their relevance to modern concerns about reputation protection or their ability to show the problems of the First Amendment tradition.

Our Honorable Tradition

In 1919 Jacob Abrams, along with four other Russians, printed and distributed circulars denouncing United States' policy towards the Russian Revolution and calling for workers providing munitions and aid to the U.S. war efforts to go on strike. The leaflet encouraging cessation of production of materials for war was written in Yiddish. The group was convicted under the Sedition Act of 1918 for urging curtailment of production of materials deemed essential to the war effort.[64] The Sedition Act was an amendment to the Espionage Act of 1917, part of a set of laws prohibiting speech abusive of the American government or disruptive of

[64] Abrams v. United States, 250 U.S. 616 (1919).

military operations passed during the First Red Scare. The Supreme Court had already commented on the Espionage Act earlier in 1919, unanimously concluding in *Schenck* v. *United States* that speech which might be tolerated during normal times could be restricted during wartime if the speech was found to create a "clear and present danger" of harms Congress could rightfully prevent.[65]

Abrams v. *United States* provided the Court with a chance to comment on speech which, if successful on a large scale, would be of significant social harm. The fact that the leaflet was published in Yiddish suggests that this was unlikely to happen, but it is still an important point to consider. Without a fully equipped army the survival of the nation during wartime becomes precarious. The federal government stood by the policy that military production was necessary for the continued survival of the nation. Attempts to obstruct the production of materials for the military, then, clearly conflicted with our interest in preserving the nation. However, the freedoms protected by the First Amendment are seen as necessary to the continued survival of the nation as well. The question *Abrams* brings up provided the Court with an opportunity to comment on the conflict between freedom and safety.

As Justice Holmes' opinion reveals, the Sedition Act does indeed abridge Abrams' right to free speech, so the question becomes to what extent free speech is necessary when balanced against our interest in military production.[66] Abrams argued that the act was intended only to prevent harm to the Russian cause and, further, was protected under the First Amendment freedoms of speech and of the press. The Supreme Court responded that, regardless of whether

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[65] Schenck v. United States, 249 U.S. 47 (1919).

[66] Holmes writes in his dissenting opinion: "A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime."

or not the circulars were directed at protecting Russian interests, because their plain intent and tendency was to incite resistance detrimental to a cause deemed necessary for the war, Abrams' conviction was justified and the act constitutional. Justice Clarke, writing for the majority, argued that the leaflets were not instances of "candid discussion" but functioned only as an impediment to the American cause. In a memorable dissent Justice Holmes argued against restrictions on speech claiming that "the ultimate good desired is better reached by free trade in ideas," embedding the metaphor of the marketplace of ideas into free speech discourse for all who come after.

Schenck and *Abrams* provide the backdrop for First Amendment adjudication in the twentieth century. Holmes' metaphor would go on to become an important part of free speech reasoning, crystallizing in its current formulation in the 1965 case *Lamont* v. *Postmaster General*.[67] The problems presented by *Schenck* and *Abrams* also get to the heart of the idea of reevaluating speech concerns as changing conditions demand. Unlike decisions in which free speech merely conflicts with some other interest, the decisions of *Schenck* and *Abrams* concern how free speech is weighed during a certain, significantly different period - here, wartime. We might disagree today with the outcomes of those cases, but we cannot deny that our values need clarification as times change. The claim that values which we give up under conditions of stress are no values at all mischaracterizes the situation: during certain times certain values gain weight relative to other values and so come to win out in conflicts with those displaced values.

These cases also mark the end of an era. In 1833 the Court had ruled in *Barron* v. *Baltimore* that the Bill of Rights applied only to the federal government.[68] Thirty-five years later,

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[67] Lamont v. Postmaster General, 381 U.S. 301 (1965). Justice Brennan writes in a concurring opinion: "It would be a barren marketplace of ideas that had only sellers and no buyers." We will focus on the marketplace of ideas in depth in chapter three.

[68] Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

in 1868, the Fourteenth Amendment was passed, extending those protections to the state level as well. However, it was not until the twentieth century that First Amendment protections were officially recognized as applying to the states. The year was 1925 when the Supreme Court finally incorporated First Amendment protections through the due process clause of the Fourteenth Amendment.[69] Benjamin Gitlow was a Socialist living in the U.S. just after the First Red Scare. Gitlow had published a "Left Wing Manifesto" encouraging "revolutionary mass action" to overthrow the government and was convicted of criminal anarchy. *Gitlow* v. *New York* provided the Court a chance to comment on the extent of speech protections post-Red Scare.

Though the Court upheld Gitlow's conviction, reasoning that the state is justified in suppressing speech which directly advocates the unlawful overthrow of the government, the Court's opinion opened up room for more expansive free speech protections in the years to come. Justice Sanford explicitly incorporated the First Amendment through the Fourteenth Amendment in the majority opinion, writing: "we may and do assume that freedom of speech and of the press - which are protected by the First Amendment from abridgment by Congress - are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." Holmes dissented again, as he had in *Abrams*, arguing that Gitlow's speech was unlikely to attract a large, receptive audience capable of carrying out a revolution and therefore presented no substantial danger. This point is particularly important for considering speech online today, but analysis of this will have to wait. For the moment, we need only note that considerations of potential audience play a role in balancing rights.

In 1931 Floyd Olson, a politician who would go on to be governor of Minnesota, filed

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[69] Gitlow v. New York, 268 U.S. 652 (1925).

a complaint under the Public Nuisance Law of 1925 against Jay Near and his business partner, Guilford, for their claims in their Minneapolis newspaper, *The Saturday Press*.[70] The law provided for those engaged in the business of either producing or distributing "a malicious, scandalous and defamatory newspaper, magazine or other periodical" to be punished not only with fines or imprisonment but with permanent enjoinment of further publishing in the same vein, thus functioning as a prior restraint on speech.[71] A number of articles in that newspaper expressed the sentiment that public officials, Olson among them, were aiding gangs to harm the city either through deliberate aid or through incompetency. Near contested the constitutionality of the Minnesota statute, arguing that it abridged freedom of the press rights guaranteed by the First Amendment via the Fourteenth Amendment. The Court found the Public Nuisance Law "to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment," thus overturning the Minnesota Supreme Court ruling.

Near v. *Minnesota* provided the Court with an opportunity to examine content-based restrictions on the press. The statute, as the Court notes, "'is not directed at threatened libel but at an existing business which, generally speaking, involves more than libel.' It is aimed at the distribution of scandalous matter as 'detrimental to public morals and to the general welfare,' tending 'to disturb the peace of the community' and '[to] provoke assaults and the commission of crime.'" The specific claims Olson filed complaint for regard the actions of public officials. Thus, regardless of their truth or falsity, they are sure to bring about some public scandal which might "disturb the peace of the community." Indeed, Near's partner Guilford was shot shortly

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[70] Near v. Minnesota, 283 U.S. 697 (1931).

[71] Prior restraints on speech are very rarely tolerated in our legal regime. They prevent speech from being heard in the first place, rather than punishing a speaker for any negative effects of his or her speech. The *Near* case was one of the first cases in Court history to address the issue of prior restraint. It set the precedent for our stance on prior restraint today.

after the pair published their first issue.[72] The question before the Court was whether this statute's restrictions concerning scandalous material properly respect the liberty of the press.

The Court does a good job of drawing up hypothetical situations which would result either in deterring valuable speech or in convictions under the Public Nuisance Law which do not respect the freedom of the press.[73] These situations alone warrant disposing of the statute, but let us consider the case before us to understand what is at stake in overturning such a law. It is entirely conceivable that the allegedly defamatory material is in fact true. However, supposing that the material is false - that is, that none of the officials named were in any way aiding gangs to harm the city - what would we be tolerating? Accusations of official misconduct are serious business and can result in both damaged reputations and damaged offices. While enabling such speech certainly keeps officials on their toes, it also opens up a floodgate of criticism which might easily cause serious harm. The Court suggests that "Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guarantee is that even a more serious public evil would be caused by authority to prevent publication."

Limitations which prevent the publication of material which tends "to disturb the peace of the community" undoubtedly restrict valuable public scrutiny. It is the interest in public scrutiny which the Court is weighing against the interest in protecting reputations and offices. It

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[72] "Former Editor is Slain by Gunmen," *Lawrence Journal-World*, September 7, 1934, http://news.google.com/newspapers?nid=2199&dat=19340907&id=LYBYAAAAIBAJ&sjid=vUMNAAAAIBAJ&pg=1068,4034688. Guilford was eventually killed for his publishing activities.

[73] Justice Hughes writes in the majority opinion: "If we cut through mere details of procedure, the operation and effect of the statute, in substance, is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter -- in particular, that the matter consists of charges against public officers of official dereliction -- and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship."

is tempting to say that public scrutiny should win out over these protections because it potentially affects a greater number of people. But reputations and the offices held by people work only as integral parts of society, and harms done to them thus have an important effect on society at large. The better argument for valuing the former value over the latter is that reparation of social harms caused from the lack of the latter are more easily made than reparations for social harms caused from the lack of the former. When one individual's reputation is damaged, we replace him or her with another individual whose reputation is not damaged in the office previously occupied by the damaged individual. When we remove public scrutiny, we struggle to even make positive changes because our ability to identify problems is significantly reduced.

However, this formulation of the balancing equation is not the only one available and does injustice to the value of protecting reputations. Considered from the standpoint only of social harms the value of public scrutiny cannot fail to win out over the value of reputation protection. The balance might significantly change when we consider these values from the standpoint of individual harms. What the Court does in deciding in favor of Near is favor the balancing equation from the standpoint of social harms over the balancing equation from the standpoint of individual harms. Though balancing in this way can often happen without significant harm to the individual, as we shall see with increasing frequency as we approach contemporary times, prioritizing social harms over individual harms often comes at the expense of the individual.

Not only has the characterization of the balancing equation come into question, but the outcome of that equation has changed as well. Reparations of harms caused by defamatory speech are much more difficult to carry out today. The internet not only increases the speed at

which information travels but drastically increases the audience size as well. Recall how easily Wonkette increased the size of the audience to Jessica Cutler's blog. Thus, the extent of the harms caused by defamatory material to reputations is much larger in today's online context than at the time *Near* was resolved. This extension of the harms drastically increases the difficulty of repairing reputational harms by increasing the area over which material must be removed and the size of the population which has access to such material. Furthermore, the internet problematizes reparation by increasing the transferability of information. In earlier times one needed to make a sizable effort to publish material and distribute it. Today, one can simply create a blog, copy and paste information, and then post online. This aspect of the online world works both to increase the proliferation of information and increase the number of active publishers online. So the outcome of the balancing equation has actually changed in modern times as well.

As the first half of the twentieth century came to a close, new types of First Amendment conflicts came to the fore. Cases concerning political speech had dominated the First Amendment adjudication history up to that point. But the latter half of the twentieth century brought increasing numbers of problems concerning nonpolitical speech before the Court. The tension between these types of cases and the aforementioned trend towards prioritizing social harms heightens concerns over that balancing process. Certainly, there is a set of cases for which it is reasonable to weigh social harms more heavily than individual harms. The political cases of the early twentieth century were, it could be argued, of this kind. As the cases of the latter half of the twentieth century will show, though, such a balancing process is not always appropriate. The reasons why the Court continued to weigh interests in this way are up for grabs. Perhaps it was easier to garner support for decisions written from the standpoint of the society at large, or maybe one could work more easily off of the preexisting case history. Or it could be simply that

the Court took that balancing process for granted and failed to analyze changing circumstances.

In 1957 a major free speech case concerning nonpolitical speech reached the Supreme Court. Samuel Roth was convicted under a federal statute criminalizing the mailing of material deemed obscene for mailing advertising and a publication containing both nude photography and smut literature. Roth suggested that his distribution of obscene materials was protected under the First Amendment rights of freedom of speech and of the press.[74] The question presented, then, is whether or not "obscene" material is considered part of the realm of protected speech included under First Amendment rights. The Court held that it is not, reasoning that obscenity is "utterly without redeeming social interest" and therefore "'is clearly outweighed by the social interest in order and morality.'" In affirming Roth's conviction under the statute the Court characterized the proper test for obscenity as asking "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest," holding that the lower courts did in fact adhere to this correct standard.

Roth v. *United States* provided the Court with a chance to define to some extent the purposes for which we have freedom of speech and of the press. Additionally, through its use of an obscenity test, this case enables us to see how the Court addresses issues of public morality. Traditionally the government has distanced itself at least nominally from questions of morality, withholding judgment on the grounds that the federal government has no proper place in resolving questions of morality.[75] The obscenity test the Court embraces exemplifies how this is

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[74] Roth v. United States, 354 U.S. 476 (1957).

[75] I say nominally because the decisions the Court has made shape the public morality. When the Court decides one way or another, they endorse a certain set of values whether they intend to or not. One of the fears of individuals proposing regulations for reputation protection is that they will be making a decision of public morality. The point here is that these decisions cannot help but to touch on questions of public morality. So accusations that reputation protections are *mere* developments of public morality do not function as criticism. They merely point out one aspect of our decision-making process.

done by relying on community standards in its determination of obscenity. However, the test itself produces a number of problems. The Court did not carry out the test but simply characterized the lower courts' determinations as relying on the proper obscenity test. In the trial court it was stated: "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach." Again we see the significance of identifying the potential audience for resolving these conflicts. The test continues: "In other words, you determine its impact upon the average person in the community." Though the latter sentence adheres to the proper test as embraced by the Court the former does not appear to do so.

Asking the effect of material upon "all those whom it is likely to reach" is not the same as asking the effect upon the "average person in the community." A decision made by the first standard will have to account for the marginal case, which, in an obscenity case, would be a child. This will certainly result in more "obscene" verdicts reached than if the latter test were used. The Court was surely aware of this when they approved of the trial court's obscenity tests, so their endorsement suggests a desire for stricter obscenity standard. It might be suggested that a child is unlikely to be purchasing books from a catalogue containing obscene material and so the material is unlikely to reach a child. However, the advertising was distributed through the mail and it is likely to reach children who fetch and peruse the mail. A further problem arises with the latter test when we ask which community is relevant.

What the Court does in equalizing the two questions is suggest a certain standard for the community. By phrasing the test in a way which appears to rely on community standards they maintain the appearance of neutrality towards public morals. By endorsing the trial courts' test which relies on the standards of the marginal case, however, the Court establishes a certain set

of morals as *the* public morals. Thus what is at stake in this case are the readily available sets of values among which individuals can choose. It is possible that a certain set of values will become dominant, and the Court's decision appears to reflect a fear over which values these will become. The Court's decision favors a certain set of values which might be amenable to a large group of individuals. Certainly, though, it is not the set of values which would be selected by everyone. A decision favoring broader free speech guarantees produces a more diverse market in which to choose values. Whether or not this is more desirable depends on the further commitments of the nation.

Attempts to determine the audience which certain material will reach are today even more difficult than they were in 1957. Though Roth's publications had the potential to reach the children of individuals to whom the material was mailed, the distribution of his obscene material was limited by the zip codes he placed on his mailings. Today our publications can reach anyone with internet access.[76] This means that we should be both weary of establishing a narrow set of standards for our online practices and be weary of being too lax with our online practices. While it is true that many would suffer with strict regulations on online conduct, it is equally true that many would and do suffer for having unregulated internet practices. The internet should not be like the Wild West, if it is to be a place for genuine communal interaction.[77]

On March 29, 1960, the New York Times ran an advertisement entitled "Heed Their Rising Voices" which sought to raise money to support the legal defense of Martin Luther King, Jr. and aid the civil rights movement. The ad described an event in Montgomery, Alabama, among others, in which several false claims were made. It was asserted that "truckloads of police

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[76] This number is estimated to be over two billion people. See "World Internet Usage Statistics News and World Population Stats," Internet World Stats, http://www.internetworldstats.com/stats.htm.

[77] For an account of the metaphors used to describe the online world see Alfred C. Yen, "Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace," *Berkeley Tech Law Journal* 17 (2002).

armed with shotguns and tear-gas ringed the Alabama State College Campus," and that the students' "dining hall was padlocked in an attempted to starve them into submission," when, in fact, neither of these claims was true.[78] The police did not *ring* the campus, nor did they, or anyone else, padlock the Alabama State dining hall to starve the students. Any padlocking that went on was the result of standard security protocol.

L. B. Sullivan, one of three elected Commissioners of the City of Montgomery at the time, did not take kindly to the advertisement. Though he was not named in the ad, Sullivan felt that he had been libeled. Any accusations of police irresponsibility or brutality, Sullivan contended, reflected on him in his capacity as supervisor of the police department. A jury in Montgomery found in favor of Sullivan, awarding him $500,000 in damages. The Supreme Court of Alabama quietly affirmed this decision. However, the U.S. Supreme Court reversed this judgment in 1964, holding that "the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct."

This case provided the Court with a chance to comment on speech critical of public officials which is known to be false. Not only had material been published by other news organization that disproved some of the claims made in the advertisement, but The New York Times had itself previously published material which dealt with the issues described, and no attempt was made by the Advertising Department to check the accuracy of the facts either against that material or against the material of other sources. Thus the question before the Court is whether false speech critical of public officers is protected under First Amendment

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[78] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

rights. There are a number of things to take in consideration when making a decision here: misinformation, speech interests, and reputation protection.

First, the Court does not want to encourage the deliberate spreading of misinformation, especially in a field so important to society. Second, the Court does not want to risk chilling valuable speech by proscribing all misinformation regarding official conduct. Individuals might possess important truths but be unsure of their veracity and so hold off from publishing that information. Or individuals might have good reason to believe their facts to be true when they are in fact not. Restrictions prohibiting false speech regarding public matters might deter valuable speech and unfairly penalize individuals. Third, the Court does not want to unfairly penalize individuals by enabling unfettered reputational harm. We can surmise from the Court's determination that the second consideration of chilled speech carried a heavy weight in the balancing process. The weights of the other considerations are harder to determine, but the test which the Court formulates for subsequent legislation gets at these issues.

What the Court found is that criticism of public officials should be allowed unless it can be shown that such criticism was made with "actual malice," that is, "that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false." The Times' Secretary claims that he had found the advertisement to be "substantially correct," and so the ad fails to meet the first condition for "actual malice." Debate turns, then, to what it means to publish with "reckless disregard" for the veracity of a statement. It was clearly within the capacity of the New York Times to discover whether or not their ad was factually correct - they had previously published material which would have afforded them material for this fact-checking. If this fact does not meet the standard for "reckless disregard," then it is hard to imagine what would. That is precisely the problem with the "actual malice" standard - it is

extraordinarily difficult to meet.

Sullivan stands as a warning of the sort of regulations which will prove ineffective in deterring harmful speech. While the case certainly is a triumph of the free speech tradition, it also serves as a reminder of the importance of understanding the language we use to describe things and the harm that can result from the usage of poor language. The choice to rely on "actual malice" as a standard has drastically influenced the case history since *Sullivan*. We cannot rely on determinations of intent for our regulations because we have no reliable access point to an individual's intent. When we consider potential regulations for reputation protection we must be careful in the language that we choose to use.

A year later a major case appeared in which the restrictions on speech challenged were much more like the ones we face today. In 1965 the Supreme Court struck down the Postal Service and Federal Employees Salary Act of 1962, a statute requiring addressees of communist propaganda to indicate their intent to receive such material or else suffer not having that material delivered.[79] The Court reasoned that restrictions on speech can work from both the speaker and audience sides. Justice Brennan, writing in a concurring opinion, expressed the idea best: "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." This formulation of Holmes' position from years before stands as one of the strongest metaphors for explaining free speech theory in our First Amendment history. Its uses have varied much, though, and it is not always invoked for the purposes it was in *Lamont* v. *Postmaster General*.

Lamont expanded speech protections by recognizing the broader context within which

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[79] Lamont.

speech works. It is true the that the statute which the Court struck down did not disable any speech from being published and in a different time the Court might easily have found no harm in it. But speech without an audience, as Brennan points out, is without value. By examining and protecting the further realm necessary for valuable speech the Court signals its willingness to explore conflicts that result from speech restrictions of a different kind than had traditionally been dealt with. This broader take on the context of speech went hand in hand with another important broadening of our free speech understanding - expanding the borders of speech itself. In 1968 the Court addressed the issue of symbolic speech in *United States* v. *O'Brien*.[80]

David Paul O'Brien burned his draft card in front of a crowd gathered at the South Boston Courthouse. He was convicted under an amendment prohibiting the knowing destruction or mutilation of Selective Service. He claimed that he did so in order "that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider [his] position." The public nature of the destruction as well as the expressive content of the act confirm O'Brien's contention that his act was indeed symbolic speech, or 'speech plus.' O'Brien argued against the amendment on the grounds that its intent was the abridgment of speech. The Supreme Court found that "because [the amendment]...condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction."

In addition to the amendment prohibiting knowing destruction, there was already in place

[80] United States v. O'Brien, 391 U.S. 367 (1968).

a law which required individuals to carry their draft cards readily available for inspection.[81] O'Brien could have been convicted under this law but was not. His conviction under the amendment thus enabled the Court to deal with the issue of speech plus directly. The Court had the opportunity to examine how substantial governmental interests outside of speech stack up against the public interest in free speech. We know that speech has its lawful limits; this case allows us to see where those limits are and to understand why those limits are considered reasonable. This case is uniquely suited to elucidate those limits because O'Brien's speech is of undeniable political and social value as a comment on the justness of the Vietnam War and the Selective Service. Traditionally it has been just that speech of political and social value which has been protected most under the First Amendment.

Of course, the speech act which O'Brien engaged in is in opposition to the stance taken by the federal government towards the Vietnam War. This might explain one reason for the Court's position, but it hardly explains the entirety of the position. Perhaps the better reason for the Court's position is that O'Brien's position relies so heavily on determinations of intent: did the legislators intend to proscribe speech acts like O'Brien's; and was O'Brien's act intended as an expressive act? There are concerns over the choice to void legislation because the acts proscribed by them can be characterized as speech acts. The fear is that individuals will then strategically characterize their acts as speech acts in order to void legislation. Additionally, the legislators' intent is irrelevant from the standpoint of whether or not a law is good. If the amendment was motivated by a desire to prevent speech acts like O'Brien's but instead functions to preserve valuable property, then the intent of the legislators is hardly a reason for condemning the legislation. But are these concerns enough to override our interest in free speech?

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[81] This law made it criminal for eligible individuals to be without their draft cards if requested. O'Brien could easily have been convicted for not having his draft card rather than for burning it.

The fear over strategic claims of "speech acts," when examined in the context of this situation, seems an unreasonable fear. O'Brien's speech act falls within a category of readily recognizable valuable speech - antiwar protests. There is a history to acts like burning draft cards which does not extend to all speech. It is easy to demarcate speech like O'Brien's from the class of unreasonable claims made that acts are "speech acts" purely for the purposes of voiding legislation under the First Amendment; however, when legislators make law they must do so at a level of generality which makes delineating the class of reasonable claims from the class of unreasonable claims nearly impossible. What is at stake in this case is the ability of the government to remain content neutral in their prohibitions on speech. Were the Court to decide in favor of O'Brien, who clearly makes a legitimate claim that the amendment abridges his free speech, the Court would need to allow that certain speech is more valuable than others. While this certainly may be true, the Court would have to sacrifice neutrality in a realm where free speech might better be protected by neutrality than by content-based distinctions.

Furthermore, the awkwardness of the Court's reasoning confirms the Court's recognition of the value of expressive conduct as speech. When Justice Warren defends the Court's decision by arguing that it "condemns only the independent noncommunicative impact of conduct within its reach" he implicitly accepts that such conduct has a communicative aspect as well. Thus, while the Court's decision seems an abridgement of our free speech rights, its recognition of new conduct under the heading 'speech' opens up room for the expansion of free speech rights. Three years later in 1971 the Court would affirm this expansion by overturning the conviction of a man for disturbing the peace by wearing a jacket reading "Fuck the Draft" inside the Los Angeles Courthouse.[82] Such decisions account for much of why we have such robust free speech

[82] Cohen v. California, 403 U.S. 15 (1971).

protections in place today.

Throughout the seventies and eighties a number of cases reached the Court which expanded speech protections even further. However, whereas previous expansions of speech protections had worked to increase the autonomy of the individual, many of these new expansions effectively worked to weaken the autonomy of the individual.[83] These new cases were now concerned not only with the presence of speech and its recipients but were concerned with the quality of speech as well. The Court was no longer asking whether a right to speech was abridged but were asking instead about the actual effectiveness of speech. Concerns shifted to whether or not individuals were being provided the means for meaningful speech. This meant recognizing that *Lamont* was not enough - that the speaker and audience model did not adequately account for our free speech ideal.

In 1976, for example, in *Buckley* v. *Valeo* the Court recognized the immense role money plays in facilitating speech during election campaigns.[84] One could see this as a reason for cutting down campaign finance regulations, as they limit the speech of agents operating under these regulations. This appears to be the position of those who claim that 'money is speech.' Or one could see this as a reason for having campaign finance regulations, as unregulated campaign financing will work to preclude the speech of the less wealthy when avenues of communication are scarce. The Court recognizes both of these arguments, upholding a law which sets campaign finance regulations but striking down certain provisions of that law under the view that spending money on electioneering is protected speech. The confusion perpetuated by such a decision

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[83] See Owen Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Boulder, CO: Westview Press, 1996) for arguments about how free speech "expansions" have lessened the freedom of individuals. Fiss discusses how avenues of communication are scarce and how this plays into the capacity for individuals to communicate. He suggests a shift within the free speech tradition from the idea of the soap-box orator to the idea of media networks like CBS.

[84] Buckley v. Valeo, 424 U.S. 1 (1976).

highlights one of the major problems with our free speech tradition: the borders are not clearly defined. While we can and should celebrate the expansion of free speech protections to include things like symbolic speech in *O'Brien* and electioneering in *Buckley*, the reasoning behind these decisions also opens up room for serious problems within the First Amendment tradition.

Two years later in *First National Bank of Boston* v. *Bellotti* the Court struck down a rule prohibiting corporations "from making contributions or expenditures 'for the purpose of...influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.'"[85] This extension of free speech rights to corporations within a limited context - when non-candidate elections are up for voting - presents a number of problems. On the one hand, it is true that corporations are legally defined as persons, so the First Amendment appears to apply them. Yet other protections which have traditionally been assigned to persons, such as protection from self-incrimination under the Fifth Amendment, have been found not to apply to corporations, and for good reason. Here the fear over extending speech rights to corporations is that doing so will enable corporations to drown out the voices of the less wealthy.

Later case law and legislation recognized this concern. The Court ruled in 1990 in *Austin* v. *Michigan Chamber of Commerce* that a campaign finance regulation statute which proscribed the use of corporate funds in supporting or opposing candidates in elections was constitutional, reasoning that "corporate wealth can unfairly influence elections."[86] In 2002 the Bipartisan Campaign Reform Act (BCRA), or McCain-Feingold Act, was passed, banning corporate funding of issue advocacy ads which mention a candidate during the days leading up to an election. This Act came under fire during subsequent years but was upheld by the Court.

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[85] First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

[86] Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

However, in 2010, the opinion of the Court changed in a case which upsets the understanding of speech promulgated by earlier decisions which recognized the scarcity of avenues of communication.[87]

Citizens United, a non-profit corporation, sought to air commercials for a film critical of then-presidential candidate Hillary Clinton during the 2008 presidential campaign. The District Court for the District of Columbia ruled that the commercials violated the BCRA and therefor should not be allowed to air. *Citizens United* v. *Federal Election Commission* ended up reaching the Supreme Court, where the prohibition on independent expenditures by corporations was struck down, overruling *Austin*. The corporations are free to spend as they wish to influence elections today. Justice Kennedy wrote for the majority: "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."

The valorization of the First Amendment

The twentieth century brought a lot of changes to our understanding of the First Amendment, many of which were not for the good of the individual and some of which were largely harmful to the individual. *Citizens United*, for instance, enables corporations to use their wealth to drown out the voices of the less wealthy during election campaigning. While the decision at least nominally expands speech protections, its actual effect is to displace the voices of ordinary persons. That Justice Kennedy can claim that this decision fits within the First Amendment tradition is disturbing; that the rhetoric used can sit well with the public perception of the First Amendment is more disturbing. These two points understood generally are the crux

[87] Citizens United.

of the First Amendment backdrop which must be dealt with in order to understand what portions of the tradition are and are not relevant in dealing with the problems social media present today.

How can a decision like *Citizens United* be part of the same tradition as *Austin*, in which the negative effects of corporate speech on speech overall were recognized? The simple answer is to point to differences in the composition of the Court between the two cases and to argue that these decisions merely reflected their different political preferences. Or one could say that as the Court gained new knowledge its opinion on corporate speech during political campaigning changed. The first suggestion attributes developments in our history made through the Court to the whims of a handful of justices. I would not deny that the individual preferences of the members of the Court have played a role in their decision-making, but a view of completely unprincipled decision-making fails to explain how those preferences come to hold weight. When the justices make their decisions it is not as if they simply agree to uphold or overturn rulings without any reasoning; they provide explanations for their decisions, and the political preference view fails to do justice to the feasibility of their written opinions.

The second suggestion that the Court has simply gained more knowledge and so the *Citizens United* decision is simply a development and not an anomaly appears, at least initially, more plausible. Certainly, the Court's opinion has changed over time on certain issues and their newer decisions often are developments informed by better reasoning or awareness of the concerns addressed. Some of the earlier opinions of the twentieth century are of this kind. Holmes' change in opinion from *Schenck* to *Abrams*, for instance, appears to be this kind of shift. In both cases the question of how to address rebellious speech during wartime is raised. In the former Holmes supported restrictions on speech because of the danger presented to the war effort. In the latter Holmes dissented from the majority opinion because he recognized

the inadequacy of the 'clear and present danger' test presented in *Schenck*. But the difference between *Austin* and *Citizens United* is unlike the difference between *Schenck* and *Abrams* in that the arguments of *Austin* are still valid. There have been no good reasons provided to suppose that corporate wealth will not "unfairly influence elections" today.

My alternative to these suggestions is that the expansions to speech protections made under the First Amendment during the twentieth century created gaps in the tradition from which entirely different conclusions can be reached. These gaps are often the result of broad, vague, or over-inclusive terminology. The arguments in earlier decisions could often be resolved by checking whether the conditions described were accurate. For instance in *Schenck* it was found that the government could regulate speech if it presented a 'clear and present danger.' This was, of course, up for grabs, but when Holmes shifted his opinion in *Abrams* his decision was informed by the fact that a kind of speech which he had argued to regulate previously did not in fact present the danger he thought it would. The Michigan statute upheld in *Austin* could have been evaluated against the influence of corporate wealth on the electoral process in other states, but this would not have settled the issue for *Citizens United* because the terms comprising the balancing equation were up for grabs. In *Austin* wealth was a condition for meaningful speech, and so should be regulated to enable the meaningful speech of more individuals. In *Citizens United* wealth was speech, and so regulations on that wealth were unconstitutional limitations on speech.

The gaps in the tradition which produce such problems were rooted in genuine concerns for the state of free speech in America. The expansion of speech protections post-1950 were of a different kind than those pre-1950. These new protections recognized broader contexts for speech. *Lamont* acknowledged the necessity of an audience in having meaningful speech.

O'Brien expanded speech to include symbolic speech. *Buckley* recognized one of the necessary conditions for effective communication in political campaigning. All of these decisions recognized the necessity of exploring the broader context within which speech occurs to ensure that speech is adequately protected. These decisions, however, also created openings for interpretations which severely departed from the purposes for which they were created. This is how both *Austin* and *Citizens United* can arise from an insight gleaned from *Buckley*, itself a decision of mixed opinion toward the role of wealth in political campaigning.

Our First Amendment doctrine, then, is a mess. We are weighed down by precedents which do not work to produce a coherent, helpful narrative but instead make progress in speech practices extraordinarily difficult. The story told in *Austin* is not easily resolved with the story told in *Citizens United* and there have been no good reasons provided within the tradition to suppose that this is alright. Our First Amendment tradition does not guide us in our practices but limits any forward movement. Not only does working within the First Amendment tradition pose a formidable challenge but working in fields which touch the First Amendment becomes increasingly difficult. This is very important, as it prevents developments in fields which must confront the issue of speech regulation. Here, where our issue of concern is to be protecting personal reputation online, the First Amendment tends to preclude talk about limiting harmful speech online. When so much is at stake does this barrier seem appropriate?

Yet the First Amendment still has broad support among the public at large. How can this be? Let us return to the rhetoric which Justice Kennedy invokes in *Citizens United*: "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." Kennedy, of course, characterizes corporations as "association of citizens," garnering sympathy, but the real work here is done by concealing

the use of corporate wealth under the term ‘speech.’ These decisions which come at the expense of the average citizen can be characterized in positive ways because of the gaps created by the broadening of speech protections during the twentieth century. Thus, it is not that the public is ignorant of our First Amendment tradition but that the public’s attention is drawn to confusing details. Furthermore, the associations created by using insights gleaned from cases beneficial to the average citizen heightens public support for the First Amendment.

When we talk about the First Amendment, it is with a sense of pride. *Near* v. *Minnesota*, *New York Times Co.* v. *Sullivan*, *Lamont* v. *Postmaster General* - these were triumphs of our free speech principles. Yes, there were problems even among these - the ‘actual malice’ test, for example, from *Sullivan* - but overall these cases are paradigms of what we consider valuable about the First Amendment. Today, the concerns which are before us are very different from those we faced in the aforementioned cases, and the First Amendment doctrine we have today is not equipped to face these problems. How do we deal with the fact that our online doppelganger - on which potential jobs, insurance, credit, etc. are dependent - is constructed from a variety of factors, speech facilitated by social media included? Is it okay to regulate speech online when it is costing Americans their livelihoods, often unbeknownst to them? Can we do anything to protect the reputations of individuals online?

The First Amendment tradition lacks answers to these questions. These questions simply have not arisen before, so it is to be expected. Yet when we do raise these questions the First Amendment rises to confront us as if it could provide answers; it derails the conversation. We see now that there is no reason to let it prevent us from discussing these new issues. It is not merely that these concerns are new and that the First Amendment needs some time to adjust; the First Amendment doctrine is muddled by conflicting precedents and vague language. Carrying

out a remediation of these problems would be a massive undertaking, one not worth taking in our narrow focus on protecting personal reputation online today. Instead we should take note of the failures of the tradition and do our best to work around them, knowing that any invocation of the tradition as a response to proposed speech regulations should not deter us from our goals.

It is silly to let outdated thinking - thinking unresponsive to today's challenges - prevent us from considering any restrictions online. I think we can do better. We must; so much rides on this. If we intend to continue to develop and maintain a genuine online community, we need to start to think differently about speech online. We need not and should not dismiss the First Amendment tradition, but we should be aware of where the pitfalls are. The case history tells a convoluted tale with some breakthroughs and some mishaps, but there are certain insights, Holmes' metaphor of the marketplace of ideas among them, which remain with us today, guiding our thoughts about speech and how it should be treated online. This metaphor is the dominant tool for addressing speech practices today, appearing in a wide range of areas. It has been used to promote both laissez faire and highly interventionist attitudes towards speech practices.[88] It has appeared in descriptions of debates and university practices.[89] And it has been used to describe the realm of speech in the online world.[90] Because it is such a powerful tool in debates over speech practices, we need to consider its usage.

To this metaphor and other important guiding assumptions we turn in the next chapter.

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[88] A laissez faire attitude is encouraged in the invocations we have seen so far in the case history in *Abrams* and *Lamont*. Today, however, debate has congregated around the metaphor and has skewed the language of arguments over speech practices toward economic language. We see interventionist attitudes in more modern invocations of the metaphor, where individuals make arguments about the scarcity of avenues of communication, suggesting that regulation might actually produce more freedom.

[89] See Louis Menard, *The Marketplace of Ideas: Reform and Resistance in the American University* (New York: W.W. Norton & Company, 2010).

[90] Invocations of the metaphor to describe the online world are often less focused than invocations in other realms, like the description of educational policies. Here it appears that part of its attractiveness as a metaphor stems from the similarity between neutrality towards identities online and in the economic world.

These include the distinction drawn between adult and child in both the on- and offline worlds and the pervading attitude toward personal reputation harms. Each of these three tools are generated by plausible concerns in the offline world. Regardless of whether or not they work there, though, we need to consider their effectiveness when we transfer them to the online world. Does the metaphor of the marketplace of ideas work in the online and offline worlds? Should we draw the same age-distinctions online that we do offline? And is our common careless attitude towards personal reputation harms offline appropriate when considering personal reputation harms online? To these considerations we now turn.

Chapter 3: Paths to Avoid

Guiding assumptions

We approach problems with certain background thoughts taken for granted. Doing so allows us to draw on past experiences which we find productive. In fact, it seems extraordinarily difficult to *not* approach problems with a set of accepted notions. We would have no guidance or ability to evaluate the circumstances before us were there no thoughts available for us to draw from. As these assumptions guide our decision-making concerning problems of great import, we should be careful to ensure that they are both appropriate to the circumstances into which we carry them and are correct or productive in the concerns which they generate. We have seen in the previous chapter that assumptions about our First Amendment tradition are, at best, misguided. Now we will consider certain significant, common intuitions guiding current attitudes towards protecting personal reputation online, judging them by the two aforementioned standards: relevance and productiveness.

Some of these intuitions stem from our First Amendment tradition, as they emerge out of concerns for free speech. Holmes' metaphor of the marketplace of ideas - the dominant tool for addressing speech practices today - works to explain why restrictions on speech are bad from either a political or an epistemological viewpoint. This metaphor suggests that the more speech the better, that false or bad speech will 'lose out' in competition with true or good speech. Other intuitions are the result of long-held beliefs about the autonomy of the individual. These

assumptions focus on the ability of the individual to overcome hardship. For example, one common response to the cries of victims of reputational harm is to 'get over it.' Is this attitude appropriate? Are the harms caused by reputational damage the sorts of harms for which simply "getting over it" is the solution? And, finally, other intuitions work on the basis of distinctions created between persons. These include the line drawn between adults and children in protections afforded them both online and offline.

The importance of these guiding assumptions for crafting policy to address reputation protection online cannot be overstated. Decision-makers might not even take the idea of personal reputational harm seriously because it appears a trivial, adolescent problem. This attitude might be explained by elucidating just what is at stake when personal reputation is damaged. It might be perpetuated by distinctions drawn between age groups and the protections afforded each. If decision-makers do decide that reputational harm is a problem worth addressing, then when they weigh their options, they still might decide that any restrictions on speech are bad because, in the long run, the marketplace of ideas guarantees that the right speech will displace or counter harmful speech. We need to make sure that these guiding assumptions are correct and relevant to the decision-making process.

Supposing that we do find these ideas to be productive and relevant, we will have good reason to suppose that our decision-making process regarding protecting reputation online is at least well-informed. This will be no guarantee that the best decisions are made, but it will indicate that the assumptions behind our policies are much better than the assumptions behind our broad, uncritical First Amendment support. Furthermore, identifying what is good about these assumptions will enable us to draw further insights and perhaps link up to other unconsidered ideas which might aid in protecting reputation online. However, if we find that the

guiding assumptions here are as ill-formed as those behind the First Amendment we will need to consider why that is and what we can do to address these issues properly. Most likely there will be flaws and insights both to take from these guiding assumptions. If nothing else, the elucidation of these ideas should bring into focus relevant distinctions between the on- and offline worlds.

'Get over it'

Many people want to dismiss harms to personal reputation as an unimportant concern for any regulatory body, arguing that the reparations for the damage done by harmful speech are not of the kind needing any sort of legislation or endorsement by a governing body.[91] These individuals are not of the opinion that speech cannot be harmful but simply think that harms to personal reputation can and should be remedied by a different course of action: getting over it. This attitude can be explained by pointing out that this has been an accepted way to deal with harms to personal reputation in ordinary, offline life. When we were insulted by our peers as children the most common response to our complaints was to 'get over it.' Sure, we might have sought aid from our parents and teachers and received a forced apology from the bully, but this was not thought to have solved the problem. The real solution to the harm came when it was recognized by our peers that the aggressor's speech was either false or meaningless. The forced apology was simply a way of discouraging future aggressive behavior and providing the victims an avenue for justice.

If the real solution comes from peer recognition, then why does telling the child to 'get over it' appear as the right response? There are a number of reasons: restoring the child's

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[91] Some of these individuals characterize the harms in a way comparable to the assessment in *Near* v. *Minnesota*, where the social harms were shown to outweigh the individual harms.

reputation among peers is beyond our means; the harm itself is inconsequential because peer recognition has already occurred; or the harm is thought insignificant because personal reputation is not considered important for the continued success of our daily interactions. The attitude is explained, then, either by an inability to deal with harms to personal reputation or a belief in the insignificance of the harms. The latter belief can be either because restoration of personal reputation is guaranteed by the structure of social interactions in which the victim is situated or because there is seen to be no connection between a damaged personal reputation and meaningful interaction with others. All of these beliefs need to be understood in their original context - that of the child/bully interaction - so that we can compare this context with the online world in order to see if this attitude is appropriate for considering harms to personal reputation online.[92] We will not comment on whether the 'get over it' response is the best one for the child/ bully interaction but will simply show why it appears reasonable as a response in that context.

The first belief that we are not equipped to repair or prevent harms to personal reputation through speech deals with the tools available to us for addressing personal reputation. In drawing our parallel between the child/ bully interaction and the online world we should consider the parents/teachers/guardians as the equivalent of any official body appealed to for aid in the online world. This parallel is appropriate as both groups are not peers of those involved in reputational harm and exist as authority figures, fitting within an accepted structure that designates them as appropriate rule creators and enforcers. The first element of this description - the non-peer character of the guardians - goes a long way in explaining why parents or teachers might not be

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[92] The comparison might be phrased in a narrower way: one might ask whether our attitude toward the child/bully interaction offline carries over to our attitude toward adult interactions online. The child/bully interaction is meant here to be understood only as an instance of reputational harm offline. The focus is thus not on the age of the victim. I present the child/bully interaction simply because it is an instance of reputational harm we readily identify with. If we did not suffer interactions with a bully as a child we most likely know someone who did.

equipped to deal with the personal reputational harm of the child. When the guardian attempts to address the reputational harm of the child, he or she approaches this harm from the standpoint of an outsider with a different set of evaluative criteria than those used by the peers of the child. This means that attempts to reinstate the child's reputation through reevaluation often fall on deaf ears - the child's peers often find that the guardian's evaluation does not trade in the terms of value present in the peer group.

Here is where the authority status of the guardian comes into play. Just as the access point for the parent or teacher to the peer group is shaped by their outsider character, it is also shaped by the authority-status of the parent or teacher. While the guardian's evaluation of the victim of harmful speech might work in a different way from those supplied by the child's peers, this does not mean that the parent or teacher's evaluation holds no weight for the child's peers. As an authority figure, the guardian expresses an opinion which the peers must deal with, at least in the presence of that authority figure. However, the parent or teacher cannot always be around to protect the child. So the child's guardian might feel ill equipped to deal with personal reputational harm because he or she is an outsider to the child's interaction and is not omnipresent.

The second belief that restoration of the child's personal reputation, if appropriate, will simply arise from the continued interaction of the child and his or her peers is premised on the view that the child can directly influence to a large degree his or her reputation. This view holds that we shape our reputations by our actions and speech and that good actions and speech can counteract bad ones. This might mean that the reputational harm caused by a bully was not actually harm, i.e. that no one believed the insult, or that, despite initial negative consequences, the victim can correct the harm without aid. The first option is fairly common in situations like

the child/bully context where the peers of the child already know to a large extent the character of that child. The latter option often occurs because the child's peers can match up speech about the child with the child's actions, as they interact with the victim on a daily basis. Additionally, the passage of time enables harmful speech to be forgotten and displaced by the positive actions and speech of the child. While there is no guarantee that the child's reputation will be restored simply by further interaction, as negative speech is often more memorable than positive speech or action, there is a realistic possibility that the child can positively shape his or her reputation through his or her own actions.

The third belief that a damaged personal reputation does not inhibit meaningful interaction presumes that meaningful interaction with peers is guaranteed by or likely to be caused by some other mechanism distinct from personal reputation, such as professional reputation or a structure which forces interaction between individuals. Children do not possess professional reputations but do work within a structure which forces interaction regardless of personal preferences - school. In the classroom the child must interact with his or her peers whether or not he or she wants to. Of course, a damaged personal reputation might weaken or strain these interactions, but it will not prevent them from occurring, thus allowing the second belief about the individual's restoration of his or her own reputation to take its course. Furthermore, the reputation of a child is thought to be in a constant state of flux as the child is in what is considered a developmental stage. This means that harms done to the child's personal reputation, whether they line up with the child's behavior or not, are often overlooked because it is presumed that the child is not fully responsible for his or her actions. So harms to a child's personal reputation may be overlooked because the structures they inhibit guarantee interaction or because they are given leeway due to the fact that they are developing.

We have several reasons, then, for presuming that 'get over it' is an understandable response to personal reputational harm in the context of the child/bully interaction: the authority figure cannot adequately respond because the authority lacks a certain connection to the victim's peer group and is not omnipresent; the victim's harm will be alleviated because of the developmental status of the victim; the aggressor's speech does not actually function as harm because the aggressor's speech only reaches the ears of those who know the victim well enough to evaluate the speech's significance and veracity; the victim's continued interaction with his or her peer group is guaranteed by mechanisms external to personal reputation; and this interaction will enable the victim to restore his or her reputation. Do these reasons still apply when we consider personal reputational harm in the online world?

The first issue about lacking the tools to address reputational harm is easily dealt with. Online, the context within which speech occurs remains with the speech itself, meaning that we do not face the same difficulty an authority figure offline faces when attempting to restore a child's reputation.[93] Damaging speech online will most often be framed by a context which enables us to understand what is at stake and to verify the conditions of the situation. Certainly, both the teacher and the authority online function in ways that stand outside the situation, but at least within the online context the authority can view the situation as it actually happened and come to a better understanding of it. And authority online can be omnipresent. This does not entail online patrols looking for reputational harm; websites can be structured in such a way as to

[93] By this I mean that defamatory material online occurs within a certain framework. For instance, if someone posts harmful speech about you on Facebook, you have access to the surroundings within which this speech occurs. If it occurs in conversation with someone on their wall, we can look to their Facebook wall to better understand the defamatory speech.

limit certain conduct.[94] These restrictions can be internal to the technology rather than externally imposed.[95] If we choose not to pursue regulations of this form we at the very least can be made aware of reputational harms that occur outside of the watchful eye of an authority figure, as material online is published rather than just spoken.

Another aspect of the online world which changes the game for reputational harm is its ability to mask the identities of participants. In many cases it will be unclear from the available material online how old a speaker or subject is or in what capacity the speaker publishes. This means that speech which describes an individual will not be overlooked because of the early age of the individual, as the victim's age is often unknown. Thus, though the online world has the ability to maintain the context of the speech itself for all to view, it often lacks the ability to reveal the broader context of the individuals speaking. In some instances the online world succeeds: for instance, when harm arises on Facebook one can often see the actual social structure within which the reputational harm is committed, as the network of friends is right there for all to see. On blogs, forums, and other websites, however, individuals can post anonymously, avoiding identification and liability.[96]

Material online, because of its permanence and the ease with which it can travel, also undermines the assumptions about the identities of recipients of reputation-damaging

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[94] Consider Facebook privacy settings. In the earlier story about Ashley Payne we noted that her privacy settings were set to a high level of protection. Facebook has the option to modify these privacy settings to influence the way we approach material online. Current default privacy settings, for instance, do not do much to protect the individual from harm. A simple shift in the default settings could greatly alter this.

[95] See Joel R. Reidenberg, "Lex Informatica: the Formulation of Information Policy Rules Through Technology," Texas Law Review 76 (1998) for an account of advantages to restrictions built into technology. See Helen Nissenbaum, "Securing Trust Online: Wisdom or Oxymoron?," *Boston University Law Review* 81 (2001) for an account of detrimental effects of technology use as Reidenberg might envision.

[96] Some individuals have proposed ways to work around this aspect of cyberspace. See Lior Strahilevitz, "Pseudonymous Litigation," *University of Chicago Law Review* 77 (2010) for a proposed situation in which individuals could pursue litigation without revealing their identities.

information. Just as we often do not know the identities of speakers and subjects online, we do not know the identities of those on the receiving end either. Speech meant for a very narrow group of people might reach the ears of those it was not intended for. We cannot assume that speech which would not be harmful offline because of the awareness of a subject's peers will not be harmful online because we cannot predict whose eyes and ears the communication will reach. Furthermore, because we cannot predict the audience, we cannot ensure that meaningful interaction will occur between the victim and those who view damaging information online. Without this interaction, the victim has no chance at restoring his or her reputation.

Even were the individual to have a shot at meaningful interaction it would be extraordinarily difficult for him or her to repair the harm done as the online world creates a large distance between speech and action. Offline, one could check to see whether an individual's actions lined up with his or her conduct. But we lose this ability online. We are stuck only with the material communicated and not the substance of the events themselves. So the game is changed entirely by being moved online. None of the assumptions listed before about personal interaction offline hold when we consider personal interaction online. They are irrelevant for determining our online practices. The reputational harms facilitated by speech online are not of the sort for which 'getting over it' is the proper response.

The child/adult distinction

Do youth deserve more reputation protection online than do adults? This is a legitimate question to ask, and it is motivated by plausible concerns. These range from worries about children's knowledge of when to self-censor, awareness of social norms, and ability to identify safe locations online. However, when the question has been asked up to this point it has been

phrased more like this: do adults deserve less reputation protection online - do they even need personal reputation protection? This unfortunate phrasing is the result, again, of transferring assumptions about behavior in the offline world to the online world. The distinction between child and adult in the offline world is thought to be the same as the distinction between child and adult in the online world. When we point out that children are less aware of social norms we are also saying that we, as adults, are well aware of social norms and operate with them in mind and so do not need the same protections that a child might. Is there good reason to think that the differences between the two are the same in both worlds?

Before a dinner party Jane pulls her youngest son aside and tells him not to talk about certain things: his dad's job status, her age, etc. She does not even think to tell her older sons not to talk about these things - presumably they are old enough to sort out what is and what is not appropriate for dinner conversation. In attendance at the party are family friends, one of whom is a Southern Baptist preacher. At the party Jane serves beer to her friends with the exception of the preacher, who must abstain because of religious beliefs. The sons are all well behaved with the youngest hardly making a noise after being prohibited from talking about so much. Just as the dinner is ending and people are about to leave their seats Jane tells everyone to stay put - she just got a new camera and wants to take a picture of everyone to remember the evening by. Everyone smiles, she takes the photo, the guests are off, and the family relaxes. A night well done, she thinks, and thanks her youngest son for his behavior. As everyone is heading to bed she hooks up her camera to her computer and uploads the photos to her blog.

Several days go by uneventfully, but later in the week Jane receives an email from a layperson at her preacher friend's church asking her to verify that that is the preacher in her photos. Indeed, it is, and what a great evening everyone had. Later on that same day Jane gets a

call from her preacher friend who is deeply upset, saying that he has received notification from his church that he is under investigation for religious misconduct. It turns out that the angle of the photo and the seating arrangement made it appear as if he was drinking beer. The woman sitting beside the preacher was left-handed, and her drink sat, unfortunately, right in front of the preacher's drink. Jane attempts to console him, apologizes for the mistake, saying she couldn't have known it would cause a problem, takes down the photo, and contacts the church to set the facts straight. They listen and say that they understand, but it turns out that one of the kids at the local high school saw the photo and sent it to his devout Southern Baptist parents. They had already forwarded the picture to most of their fellow churchgoers. Regardless of whether or not the preacher had been drinking it appeared that he had been, and because the preacher is the most important role model in the church, it didn't look likely that he'd keep his job.

This story seems both silly and unfortunate. It took a strange series of events to produce a horrible outcome which should have had a remedy but, because public perception is so important in certain fields, did not. The account is fictional, but things like this happen all the time.[97] Recall the story of Ashley Payne, the Georgia high school teacher who was forced to resign after a picture of her holding two alcoholic drinks on a trip through Europe was discovered by a parent of one of her students. Or Rachel North, the blogger who was on an attacked train during the 7/7 suicide bombings in London and had her account of the attack transformed into a conspiracy theory. These adults could not predict how their communications online would affect them. They were unaware of the norms of the internet world and for good reason: there aren't any, at least, yet.

To point out that children deserve more protections online because they are unaware of

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[97] I use a fictional account to deal with details which would not be filled out in traditional news reporting. The difference in norm awareness between children is not a normal part of news reporting.

social norms is to miss that they could not be aware of social norms. Neither could we. They cannot know when to self-censor perhaps for different reasons than us, but we cannot know when to either, because we cannot predict how far our information will travel. Sure, we can err on the side of caution and refuse to post anything about ourselves or others. This would make for a very uninteresting internet, though, one which few people would choose to participate in. The idea that children are least likely to be able to identify 'safe' locations is perhaps correct, but the difference between their ability and our's is not large enough to warrant denying ourselves reputation protection. The teacher who was fired for her photo remarked that she thought her privacy settings on Facebook were at an appropriate level.[98] Furthermore, youth are oftentimes some of the most aware of internet practices.[99] With the rise of the digital native, one who has grown up his or her entire life with this technology, it is often the adults who are more at risk.

The problem is not a trivial one. Harms to personal reputation are real harms with significant consequences. Drawing a distinction between children and adults for the purposes of constructing different sets of reputation protection online does not make much sense, at least in the present day.[100] Until we have instantiated a desirable set of norms into the laws and/or technology guiding reputation protection it does not make sense to draw this distinction in this context. It simply does not carry over from the offline world. However, drawing this distinction in other online contexts does make sense.[101] The point here is simply that recognition of the need for additional protections for children should lead us to the recognition of the need for additional

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[98] Downey, "Court rules against Ashley Payne in Facebook case."

[99] See Urs Gasser, "Generation Internet. They're young, they're networked and they were born into a world of computers. What we can learn from Digital Natives," *BMW Magazine*, 2010 for an account of the level of immersion youth have in the online world.

[100] Consider the Children's Online Privacy Protection Act (COPPA) of 1998. This act defines the precautions websites must take for preteen viewers.

[101] Age distinctions might make sense, for instance, in determining access to obscene material online.

protections for adults as well. The distinction, then, is productive in the concerns it generates, but it would be wrong to transplant it into the online world in this context.

The marketplace of ideas

There is confusion over the meaning of the marketplace of ideas. We have an intuitive understanding of what the metaphor might mean but ambiguities surrounding key elements give rise to rival interpretations. We might, for instance, invoke the metaphor in an epistemological sense as an explanation of one process of attaining the truth. The argument here would be that the truth will arise out of competition among ideas. Or we might invoke the metaphor in a political sense as an argument for a decision-making process appropriate to democracy. Here the explanation would be that the idea which wins in the marketplace - that which attracts the most adherents - should be the idea embraced by the body politic. Of course, both invocations would require some clarification and further elucidation, but the point is that it is not clear at first glance how we can resolve the interpretations or whether we are even speaking of the same thing when we talk of the marketplace of ideas.

When we attempt to resolve debates over interpretations in general, we typically appeal to some common core which lies at the bottom of our various, disparate interpretations. This is how we deal with disagreements over interpretive concepts such as justice or equality. Our disagreements in these realms are limited in scope. We tend to agree on relevant considerations but disagree over the distribution of value among these considerations; or we agree on some set of standard cases but disagree as to why those cases fall into that set. What appears at first to be irresolvable conflict oftentimes can be shown to follow from disagreement over the correct hierarchy of aspects comprising the concept. Disagreement over such interpretations, then, is not

indicative of some deeper confusion.

We find that concepts which lack this 'deeper' confusion can be employed for contradictory purposes without losing their philosophical power. The term 'equality' works in this way: we can use it to justify both laissez faire and highly regulated market systems. More importantly, not only *can* we employ it for these purposes but we *will* employ it for these purposes because of its persuasive power. We latch onto terms like 'equality' both for their philosophical and rhetorical power. In debates, arguments cluster around such terms due to their strength both to explain and to persuade. The metaphor of the marketplace of ideas is similarly a concept around which arguments cluster and which is likewise employed for conflicting purposes. But can the confusion surrounding the metaphor be explained in the same way as that surrounding interpretive concepts; that is, is the confusion surrounding the marketplace of ideas limited to disagreement over the significance of its aspects or does the confusion extend to the aspects of the marketplace itself?

Up this point one might have contested that it is of little use to make comparisons between interpretive concepts and the metaphor of the marketplace of ideas, for the metaphor is just that - a metaphor - and not an interpretive concept. However, the question is an important one as it reveals whether or not the metaphor of the marketplace of ideas has both philosophical and rhetorical power. The point of the comparison is not to draw out interpretive concepts as an ideal type which metaphors need approach but rather to show that certain types of confusion do not inhibit debate or action and to ask whether or not the confusion which surrounds the metaphor is of this type. We will examine the marketplace of ideas first through its original invocation by Justice William Brennan in a free speech case to see what confusion surrounds the metaphor. Then we will briefly note other uses for which the metaphor has been invoked

to see how they line up with our understanding of the marketplace as formulated in relation to Brennan's opinion. If we find that our various conceptions of the marketplace of ideas can be resolved by reference to some agreed upon set of premises then we will have reason to believe that the metaphor is not mere rhetoric and will need to provide a way of evaluating the various interpretations of the marketplace. If we find, however, that the confusion over the marketplace of ideas is deeper then we will need to explain its persuasive power and why we latch onto it as an important term in debates.

The first use of the phrase the 'marketplace of ideas' appears in a free speech case from 1965, *Lamont* v. *Postmaster General*. The issue before the Supreme Court was the constitutionality of a federal statute requiring addressees of "communist political propaganda" to express their intent to receive such material prior to its delivery. At the time of the case, if one did not agree to receiving such material it would be returned and no further propaganda would be sent to the individual. The Court struck down the statute ruling that it functioned as an unconstitutional limitation of First Amendment rights by imposing an affirmative obligation on the individual receiving speech. Justice Brennan, in his concurring opinion, writes: "It would be a barren marketplace of ideas that had only sellers and no buyers."[102] Here he draws attention to the fact that free speech requires more than mere distribution of ideas.

Does Brennan's invocation of the metaphor add anything to his argument against the statute? Brennan's conception of the metaphor holds that there are both sellers and buyers in the marketplace of ideas. It is clear for the argument in this specific case why Brennan draws attention to the necessity of both distributors and recipients in a system of free speech. He wants to claim that a system of free speech which, by imposing an obligation on recipients to

[102] Lamont.

officially claim their intent to receive stigmatized material, closes off access to information from the recipients' side is just as little a system of free speech as that which closes off access to information in the traditional way - from the distributors' side. However, this point was already established in the majority opinion. Additionally, it remains unclear why Brennan would use the specific language of the marketplace were he just wanting to bring our attention to this aspect of free speech.

A cursory glance at the remainder of Brennan's opinion and at the majority opinion suggests that there is no other direct appeal made to the marketplace within the Court's opinions. Perhaps there are historical reasons that Brennan appeals to the metaphor of the marketplace of ideas, but, if so, those reasons would do little to explain why we, ignorant of those reasons, find the marketplace of ideas at the very least to be an appealing way to describe a system which should obtain under conditions of free speech. It is here that our intuitions are to be put to use. Justice Brennan's metaphor operates on the basis of our intuitive understanding of the connection between the marketplace and free speech.

We default to the marketplace of ideas as a reason for thinking that more speech is better than less speech in producing an informed society. Empirical studies have given us reason to think that this might not be the case and we easily understand how. The presentation of more false ideas is hardly a guarantee of truth, and the presentation of both speech and counterspeech tends to lead less to skepticism and rigorous argumentation and more to rigid, more extremist positions.[103] Yet the metaphor maintains its hold on our thinking. Difficulty arises when we

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[103] See Cass Sunstein, On Rumors (New York: Farrar, Straus and Giroux, 2009), on how people attempt to reduce cognitive dissonance by denying beliefs which contradict their own; on informational cascades, which is particularly applicable to the marketplace of ideas; on group polarization; on how presenting balanced information results in more intense beliefs; and Sunstein's claim: "it must be acknowledged that this particular marketplace sometimes works poorly,"

choose to take the metaphor seriously. Some of us find it wrong to suppose that the marketplace could produce truth in any normal sense of the word and so take the metaphor in a political sense as a way of explaining a decision-making process. Others find that formulations similar to the marketplace better explain the social and political points emphasized by the former thinkers and believe that the specific terminology of the 'marketplace of ideas' lends itself to an epistemological understanding requiring an alternative conception of truth. The position taken by those who invoke the metaphor to defend free speech uninhibited by governmental restrictions could go either way.

In *Lamont* the question is: is Brennan invoking the metaphor as an explanation for a process of attaining the truth or as an explanation of some situation required by our political stance? He does write just prior to his invocation of the marketplace: "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them."[104] It seems that he is speaking, then, of speech as instrumental to some goal. Yet that goal is not specified. It could easily be that Brennan meant the accomplishment of ideas as producing truth through competition. It could also very easily be that Brennan was expressing the much more moderate position that ideas cannot produce change without the realistic possibility of them being received openly.

Consider the marketplace of ideas in an epistemological sense. While we know that the claim entails some reference to truth, it remains to be seen what role the marketplace plays in relation to truth. Is the claim about truth production or the maximization of truth-possession? Were we to assume that actors in the marketplace did not possess reason it seems highly unlikely that the selection process of the free market of ideas would produce anything like the truth,

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[104] Lamont.

unless we defined truth in some trivial sense as that which is produced in the marketplace. Not only would this conflict with our common understanding of the truth, but also it would destroy any justificatory power which the metaphor possessed by depriving the truth of any value. So we must assume some baseline level of rationality for participants in the marketplace.

If the claim is intended as one about truth-production it's unclear how a social process enhances the baseline rationality of actors within the marketplace. Could it be simply that actors in the marketplace possessing a minimal amount of rationality have a limited scope of ideas available to them and so that expanding this scope leads to more actors with better beliefs? If that's the case then this claim blurs into the previous claim about maximizing truth-possession, which appears to be a more feasible interpretation of what the marketplace of ideas does. This understanding of the marketplace of ideas makes no claim to produce truth in all or even in most cases but holds instead that relative to other systems of speech it produces the highest level of truth-possession within a group. It is debatable whether this aspect of the marketplace, if true, is even meaningful, for what often matters in a society is not the number of adherents to true beliefs but the possession of truths by members of decision-making groups. Nonetheless we will examine the claim and see if it follows from our understanding of the marketplace of ideas.

When the metaphor is invoked in defense of free speech uninhibited by governmental restrictions, the marketplace is to be understood as a free market. Justice Brennan certainly held strong views on uninhibited free speech as expressed in his famous opinion a year before in *New York Times Co.* v. *Sullivan* "that debate on public issues should be uninhibited, robust, and wide-open."[105] And, though the first use of the actual phrase 'marketplace of ideas' is attributed to Brennan, the origins of the metaphor lie in an opinion by Justice Oliver Wendell Holmes,

[105] New York Times.

who writes in the 1919 case *Abrams* v. *United States* that "the ultimate good desired is better reached by free trade in ideas."[106] Of course, other very similar ideas have been seen throughout history, but the specific economic language of the metaphor has its roots in that opinion. So our marketplace of ideas is to be understood as a free market.

Economic theory does not hold that a free market will produce the 'best' item, at least when that term 'best' is understood as some quality of an item defined independently of the market, like truth-value. Rather, it holds that the levels of output for each type of good relative to the production possibilities of producers and the preferences of consumers will reach efficient levels under competition. Veracity is an intrinsic quality of an idea and, as such, has no role as a concept of the market. This means that a free market will not necessarily produce the truth; this will only happen if there is demand for truth. So we do not have good reason to think that the marketplace of ideas will lead to higher truth-possession by a society, unless there is an expressed strong preference for truth. As it stands today this hardly seems the case.

Does this mean that we can rule out epistemological claims about the marketplace of ideas as genuine options for Brennan's position? There certainly may be other formulations of the marketplace of ideas understood in an epistemological sense. Holmes' appears to express one of these positions himself when he writes, "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[107] I do not think that we can rule out the marketplace understood in this sense entirely, as there is something intuitive about the claim. But it seems that an examination of an alternative understanding of the marketplace of ideas might lead us to a better understanding of Brennan's position, especially when we consider the tools with which Supreme Court justices work.

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[106] Abrams.

[107] Ibid.

Political understandings of the marketplace of ideas provide the primary opposition to epistemological understandings of the metaphor. These claim no access to truth as some objective quality of an idea but stress the importance of the majority view. This might be for democratic purposes or it might be an attempt to prevent or quell rebellion. The metaphor here works on the basis of the thought that an idea which 'wins' in the marketplace is simply the one which attracts the most adherents. So embracing the winning idea means endorsing the view of the majority. For purposes of suppressing rebellion, the metaphor works by suggesting that we endorse the winning idea so as to have the position embraced by the largest group. The hope is that the larger group will be more capable of suppressing upheaval by the smaller group. In a democracy, on the other hand, holding up proposals for voting is one method of decision-making, though it is hardly the only way to make decisions within a democracy.

The democratic understanding of the marketplace of ideas hinges on the assumption that leaders do not have privileged access to the right policies to follow. It works by suggesting that we embrace the view which has the most adherents. One interesting feature of this formulation of the marketplace of ideas is that it levels the playing field in one significant way - the votes of experts in a field count the same as the votes of everyday individuals. This, of course, accords with our understanding of democratic behavior. However, the marketplace does not level the playing field in an even more significant way when it comes to who speaks there. This aspect of the marketplace is something which is alluded to by the economic language and is an important part of why the marketplace of ideas takes hold of our thought. This is something to which I will return later to explain the persuasive power of the metaphor, but the for the time being it is necessary only to note that this aspect of the marketplace threatens claims of democratic legitimacy by those who invoke the metaphor for democratic purposes. In Brennan's capacity

as a Supreme Court justice he must work closely with the problems which plague any attempt at democracy. So it would hardly be off the mark to suggest that Brennan's invocation of the metaphor is an attempt to draw our attention to democratic concerns.

Still, the choice of economic language seems more apt in the epistemological interpretation of the marketplace than in the democratic interpretation. What is gained by speaking about the marketplace of ideas rather than of democracy? The major advantage of speaking in this way is that it connotes a lack of non-free market regulations. It suggests that the ideal of free speech is to have only restrictions placed by the market mechanism. This claim is appealing in the abstract, because it brings to mind the image of a marketplace of ideas in which we debate freely and openly, much like in Brennan's previous formulation of the "uninhibited, robust, and wide-open" public debate. However, Brennan's previous formulation does not draw our attention to what limitations there will be on speech, whereas the metaphor of the marketplace of ideas hinges on an awareness of the limitations placed on speech.

It is important to note two things about the metaphor here: first, that the metaphor draws our attention to those limitations on speech as limitations interior to the market, and, second, that the metaphor does bring an image to mind. The first point has been hinted at with our observation earlier that the marketplace does not level the playing field in regards to speakers. A significant part of the work done by the metaphor, it turns out, is in obscuring the topic at hand so that we come out in favor of certain outcomes which we would be much less likely to embrace were those obscured fields brought to light. The second point concerning images is a traditional component of metaphorical language and aids in explaining the persuasive power of the metaphor. These are two aspects to which I will return in explaining how the metaphor works, but, for now, we need only keep them in mind as we examine the pathways available to someone

facing the choice of how to interpret the metaphor as understood in Brennan's text.

Our interpreter has two primary ways of understanding the metaphor before her. She can understand the marketplace of ideas as an epistemological claim about maximizing truth-possession. If she does so, then Brennan's justification for free speech becomes focused on the value of having a population with a higher number of adherents to true beliefs than societies where free speech conditions do not obtain. Thus, free speech can be seen as instrumental to a more educated populace. Presumably, the argument from there would be that a more educated populace produces better decisions. Or our interpreter could choose to understand the metaphor in a democratic sense as a claim about the proper ideas to endorse, not because of their truth-value, but because of their status as chosen by the majority. If she does so, then Brennan's justification for free speech becomes focused on the process of decision-making proper to democracy.

Each of these interpretations are appealing but for very different reasons. This is precisely the point: if we do not find the first appealing perhaps we will find the latter. Part of the persuasive power of the metaphor lies in its ambiguity, in its ability to produce different explanations for different individuals. One might suggest that we take a look at the rest of Brennan's opinion or to Brennan's background to see if there are good reasons to prefer one interpretation over the other. Certainly Brennan himself preferred one explanation to the other. But this misses the point; his reasons for preferring one over the other do not lie in the metaphor itself. His reasons instead will have to do with further ideological commitments. Regardless of whether or not Brennan did endorse a specific interpretation his invocation of the metaphor does more work than that one specific interpretation is capable of.

We see invocations of the marketplace of ideas in many more areas than in Supreme

Court cases. It is has been invoked as a suggested diplomatic policy, cleverly connecting a proposal for proper foreign relations with the democratic understanding of the metaphor.[108] It has been used to illuminate the commodification of ideas in branding.[109] It has been used to describe an ideal perhaps attainable only in cyberspace, connecting democratic ideals with the online world.[110] Most interestingly, though, the metaphor has been invoked in the name of free speech precisely to suggest non-market regulations in the market, despite the metaphor's apparent connection to free market ideology. Much discussion of the marketplace of ideas today centers around this issue.[111] Participants in this discussion tend to carry out their debate in economic terms. Why has this come about? And, as a more general formulation of the question which arises in Brennan's case, how has the metaphor done so much work?

Answering these question requires looking to what the marketplace of ideas is - a metaphor. We noted earlier that the metaphor is capable of producing the outcomes it does by obscuring certain aspects of the field in which it is invoked. Alone this characteristic is hardly a condemnation of the metaphor, for narrowing our focus and excluding certain concerns from our view are important parts of any tool of thought. However, if it turns out that the metaphor obscures essential considerations in the traditional fields within which it is invoked then we will have good reason to believe that the confusion surrounding the metaphor is deeper than the

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[108] Nat Ives, "Branding USA: Gov't seeks pair to boost travel, improve image," Advertising Age, June 27, 2011. http://adage.com/article/news/government-seeks-duo-improve-image-brand-usa/228424/.

[109] Rob Walker, "Branding transparency," NY Times, January 14, 2011. http://www.nytimes.com/2011/01/16/magazine/16fob-consumed-t.html.

[110] John Schwartz, "When no fact goes unchecked," NY Times, October 31, 2004. http://www.nytimes.com/2004/10/31/weekinreview/31schw.html.

[111] See Keith Berner, "Misconceptions on internet control (editorial)," The Washington Post, May 29, 2010; Michael Samaras, "If you go down to the AWU, better not think aloud," The Australian, Februrary 25, 2011. http://theaustralian.newspaperdirect.com/epaper/viewer.aspx; Tom Shales, "Michael Powell and the FCC: Giving away the marketplace of ideas," The Washington Post, June 6, 2003. http://www.commondreams.org/views03/0602-03.htm.

confusion which appears when we use interpretive concepts. We will have good reason to be careful when we approach or invoke the metaphor of the marketplace of ideas.

My hypothesis is that the discussion today clustering around the role of non-free market mechanisms in the marketplace of ideas has arisen because of the illumination of one of the facets which the metaphor originally obscured. We noted earlier that the marketplace levels the playing field in one way by counting all 'votes' as equal while not levelling the marketplace in a more serious way by leaving access to speech avenues up to market considerations. From the standpoint of the marketplace this description makes sense: leaving access to speech avenues up to market considerations *is* levelling the playing field. But from the empirical recognition of our situation this is far from levelling the playing field. Despite the supposed democraticization of speech avenues by the internet, the field of communication remains one defined by scarcity of effective speech avenues, meaning that the 'producers' of ideas who contribute the most resources to accessing those speech avenues will determine which ideas we have access to.

Metaphors work by drawing our attention away from distracting features and toward important features which less figurative speech is incapable of doing. The metaphor of the marketplace of ideas calls to mind a free market in which we engage in open, reasoned debated untouched by the realities which actually make rational debate so difficult. When we invoke the metaphor in discussions of free speech we undervalue the positive possibilities of intervention in the marketplace. The image of the marketplace of ideas is idealistic, yet the rhetoric surrounding it suggests that it is attainable. So we find ourselves ignoring the empirical realities which the metaphor obscures and hoping for the best - an idealistic marketplace in which all speakers can present their ideas and in which the best idea, the truth, will win out. As the metaphor began to be invoked for disparate purposes this obfuscation became apparent. The question then is how

the metaphor could be employed for such conflicting purposes.

The metaphor of the marketplace of ideas obscures certain characteristics of its central components - producers, goods, and consumers. The first trick is done by getting us to talk in this way about speakers, ideas, and recipients, respectively. By enabling us to speak in this way we distance ourselves from the crucial differences between economic concepts and participants in a speech system. Speakers do not 'produce' ideas in the way that producers produce goods; oftentimes there is no deliberate act to create when a speaker presents an idea. Ideas are not like traditional goods. They do function similarly to non-rival goods; that is, 'consumption' of an idea by one individual does not reduce its availability to other individuals. There, though, we already see the difficulty of speaking about ideas as goods and recipients as consumers, because we struggle to understand how ideas are 'consumed' in any normal sense of the word. And the recipients of ideas do not typically pay the 'producers' for their goods, though they do often pay for access to the avenues of communication, such as television and the internet.

By speaking in this way about producers, goods, and consumers, we start to make connections to economic theory which, when translated into the terms 'speakers,' 'ideas,' and 'recipients,' do not hold. We have already discussed within the context of an epistemological understanding of the metaphor how free market theory does not guarantee the production of truth within the marketplace of ideas. Now our intuitive acceptance of the metaphor in the face of evidence to the contrary makes sense. The translation between terms obscures what would actually occur in a marketplace of ideas: we begin to equivocate between 'best' as understood in the market and 'truth' as understood philosophically. Not only that, but the point of translation opens up the way for alternative interpretations of the metaphor surrounded by confusion rooted in this gap between economic and everyday terminology. We find that specifying what

is meant by the marketplace of ideas requires reference to our other beliefs, rather than to some philosophical power found within the metaphor itself.

So the marketplace of ideas is an intuition pump, working off of our individual intuitions about the connection between the free market and speech. This is why today we can have individuals who invoke the marketplace to support governmental intervention in the realm of free speech despite its original invocation for purposes of preventing governmental intervention. Not only that, but individuals who invoke the metaphor for one purpose knowingly or unknowingly bring to mind the associations of the alternative conceptions of the marketplace. Thinkers have taken advantage of the metaphor's ability to produce incompatible interpretations, using the metaphor for more than it is worth. This does not mean that the metaphor is useless or empty; it simply means that we need to clarify our usage of the key elements of the marketplace of ideas when we invoke it. This need to clarify might lessen the impact of the metaphor, as part of its strength comes from how easily we construct an image which corresponds to our own intuitive understandings. If we find that that is the case, we can choose simply to avoid invoking the metaphor.

The confusion surrounding the marketplace of ideas is unlike the confusion surrounding interpretive concepts. Whereas the confusion we have over interpretive concepts can be explained in terms of differences in evaluating components of the concepts, the confusion over the metaphor extends to the understanding of the components themselves. It might seem that we are forgetting one major feature of the metaphor: that the marketplace of ideas is indeed a metaphor. Such close analysis might seem to do injustice to the figurative language employed. This claim can be addressed by pointing out that it works as a critique only if it is the case that the metaphor does no argumentative work. We find that this is not the case, that the metaphor is

not used merely as an illustrative tool supplementing arguments. It is, in fact, the most dominant tool for addressing free speech practices in modern times and is often invoked in place of actual arguments. The concerns which the metaphor generates are unproductive, as they mislead the reader into thinking that true speech will win out over false speech.

Future tasks

We have used these three guiding assumptions because we lack a framework of chosen norms for online interaction to work within. The failures of these assumptions suggest that our current attitude towards online reputation protection is inappropriate. Reputational harms are not the sort of problem you can just 'get over.' Nor are they merely adolescent problems, whatever that may mean, because adults are just as susceptible to them and oftentimes have more at stake in issues of reputation. And there is no guarantee that these problems will work themselves out in the marketplace of ideas, so we need some sort of intervention to prevent this issue from causing further harm. In deciding what course of action to pursue we should consider what the failures of these assumptions mean for protecting reputation online.

These failures highlight certain key characteristics of the online world that we need to take into account when we decide which values and norms to instantiate in the protections we develop: the permanence of material online, the ease with which information travels, the difficulty of ascertaining identity online, and the lack of mechanisms in place to guarantee that true speech wins out over false speech. All of these areas are manipulable. They do not cover the entirety of the regulable realm online but represent a sizable set of concerns to be dealt with. They suggest that we need a set of norms for online behavior. Developing these norms is a central task for anyone seeking to create reputation protections in the future. One standard

option available is to make individuals aware of these aspects of the online world and hope that adequate precautions will be taken. This is unlikely to happen, as we must resort to using the internet for so much of our daily activities. Pursuing ways to shape online norms is an important course of action for future research.

This paper works primarily to eliminate the barriers to serious discussion of the issue of protecting personal reputation online in a legal manner. In this first chapter we showed how the standard conceptualization of reputation is incoherent and works to produce inadequate protections. This, we suggested, is because protections developed on that model of reputation focus too much on the social interactions which they seek to protect. We found also that private attempts to protect reputation will fail because they are reactionary and must work on the basis of a relatively clearly defined set of ideal reputations. From here we recognized that any future attempts to deal with the problem of reputational harm must be all-encompassing: that is, they need to exist in the form of regulations. We need legal protections for reputation.

In chapter two we looked at how the most formidable barrier to developing legal regulations for protecting reputation - the First Amendment - is inadequate as a response to calls for legal developments. We examined how the First Amendment tradition has its own troubles and showed how the history of that tradition is not isolated from many of the concerns that people perceive it to be. Questions of morality have come into the First Amendment case history time and time again. Regulations which shape the speech avenues available to individuals have always been a part of the free speech tradition. The legal regulations we develop to protect reputation in the future should take into account the tradition we have and should carefully consider the way in which they shape speech avenues. But talk of the issue should not stop because these protections inevitably shape speech avenues.

In this final chapter we have examined a common set of assumptions which guide our development of reputation protections. It has been shown that some of our most powerful intuitions fail to work when transplanted into the online world. The best way to avoid these troubles is to examine at each point the difference in contexts between the on- and offline worlds. When the norms which govern the offline world do not line up with behavior in the online world, a warning bell should go off. At this point in the history of the internet the disconnect between the two is sure to be broad. We do not yet possess a clear set of accepted norms for the online world. This explains to some degree our weariness to engage in discussion of online reputation protections. We do not yet have a clear enough understanding of the world in which those protections would be set. There is room for work.

We now have a much improved understanding of the problem and the avenues towards a solution are much clearer. We no longer have an excuse to hold out on serious discussion of legal protections for reputation. The material that needs to be filled out to inform this discussion stretches across numerous fields, but much of that material would consist in simply making links between already completed work. Extensive work has been done on investigating online behavior, but because it has not been linked to viable processes for altering these behaviors, that work has not led to changes in the reputation protections we develop. Once that link is made, we can begin to weigh the options within the legal field for dealing with reputational harms. Aside from these links perhaps the most important work that can be done lies in restoring value to reputation in a way not tied to specific sets of social interactions. I would suggest tying reputation to an ideal online community, the sort that we see approached in the Arab Spring revolutions or in the citizen media in Mexico, but there are many ways to go about doing this.

Personal reputation protection is a worthy cause. The online world, despite its formidable

difficulties, is open for development. I have made suggestions for expanding our knowledge of cyberspace that will lend themselves directly to the cause of protecting personal reputation. I have also, I hope, contributed something to that body of knowledge which can be used to improve our understanding of reputation and ease the discussion of potential legal regulations.

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