The Mindful First Amendment

Gary Myers

Recommended Citation
Available at: https://digitalrepository.unm.edu/nmlr/vol53/iss2/5

This Article is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the New Mexico Law Review website: www.lawschool.unm.edu/nmlr
THE MINDFUL FIRST AMENDMENT

Gary Myers*

“When angry, count ten, before you speak; if very angry, an hundred.”
- Thomas Jefferson, Letter to Thomas Jefferson Smith, February 21, 1825.¹

“It’s the people not like us who make us grow.”
- Lord Jonathan Sacks, Morality: Restoring the Common Good in Divided Times.²

“Say what you wanna say, and let the words fall out, honestly...

- Sara Bareilles, Brave.³

INTRODUCTION

The mindfulness movement has begun to play an expanding role in personal well-being and in society more generally. Although there is an active push for mindfulness in law, its primary focus is on ways in which mindfulness techniques can help lawyers in their personal and professional lives. This article explores the possible contributions of mindfulness to the widely recognized challenges facing freedom of speech and freedom of the press in an era of severe cultural and political polarization.

WHAT IS MINDFULNESS

There are many meanings and nuances to the term “mindfulness.” Mindfulness can be “the basic human ability to be fully present, aware of where we

* Earl F. Nelson Professor of Law, University of Missouri School of Law. The author wishes to thank the terrific participants at the faculty exchange at the University of Oklahoma School of Law, who provided insightful comments on an earlier draft of this article, as well as the worldwide participants in the Free Speech Discussion Group organized by Professor Russ Weaver. I appreciate research support from the University of Missouri Law School Foundation and very helpful research assistance from Connor Young. Finally, I thank Jennifer Kinsley for her thoughtful insights and contributions to this article.


3. SARA BAREILLES, Brave, on THE BLESSED UNREST (Epic Records 2013).
are and what we’re doing, and not overly reactive or overwhelmed by what’s going on around us.”

According to the American Psychological Association, mindfulness is “a moment-to-moment awareness of one’s experience without judgment. In this sense, mindfulness is a state and not a trait. While it might be promoted by certain practices or activities, such as meditation, it is not equivalent to or synonymous with them.”

Mindfulness expert Jon Kabat-Zinn offers the following general definition:

Mindfulness is awareness, cultivated by paying attention in a sustained and particular way: on purpose, in the present moment, and non-judgmentally. It is one of many forms of meditation, if you think of meditation as any way in which we engage in (1) systematically regulating our attention and energy (2) thereby influencing and possibly transforming the quality of our experience (3) in the service of realizing the full range of our humanity and of (4) our relationships to others and the world.

The Mindfulness in Law Society defines mindfulness as “the ability to be in the present moment fully, intentionally, and non-judgmentally.”

This article focuses on the external aspects of mindfulness—the interaction with others and with society—to assess whether its techniques might assist in changing the tenor and tone of today’s discourse. Mindfulness has brought many people greater quality of life in measurable and demonstrable ways. The question posed by this article asks whether it can also lead to improvements in legal doctrine and legal compliance practices, focusing on First Amendment considerations in the realm of speech and press.

THE PROBLEM

Modern political discourse is broken. The evidence for this state of affairs comes from many sources and perspectives. Starting with polling, consider this summary from the Pew Research Center, which focuses on American’s frequent avoidance of political conversations because of the harsh state of public discourse: “[l]arge majorities say the tone and nature of political debate in the United States has become more negative in recent years—as well as less respectful, less fact-based and less substantive.”

7. MINDFULNESS IN L. SOC’Y, https://www.mindfulnessinlawsociety.org [https://perma.cc/B4EW-8382]. This site notes that a mindfulness practice can help to develop skills such as “the ability to focus and concentrate, recognize and let go of distractions, manage stress and other emotions, and accept others openly, compassionately, and authentically.” Id.
Association of American Law Schools President Erwin Chemerinsky, who also serves as Dean of the University of California, Berkeley School of Law, recently stated:

It always is difficult to assess our time during the present moment, but few would deny that this is a particularly fraught and troubling time in our nation’s history. The country is more deeply politically divided than at any time since Reconstruction. The problems seem beyond the capacity of government to solve. At the same time, the vitriol in public rhetoric continues to grow.9

Most people agree that respect is a two-way street, but consider this startling and symmetrical survey result from the Pew Research Center:

Majorities in both parties say it is very important that elected officials treat their opponents with respect. But while most Democrats (78%) say it is very important for Republican elected officials to treat Democratic officials with respect, only about half (47%) say it is very important for officials from their party to treat Republican politicians with respect. There is similar divide in the opinions of Republicans; 75% say Democrats should be respectful of GOP officials, while only 49% say the same about Republicans’ treatment of Democratic officials.10

This state of affairs is not without historical precedent. One of the most contentious eras in American history took place as soon as it became apparent that President George Washington was not seeking a third term in office. A fierce rivalry formed between the Federalists (led initially by John Adams) and what were then known as Republicans (the Democratic Republicans, led initially by Thomas Jefferson), with a fractured press largely taking sides and rarely offering objective or professional news coverage.11

Similarly, brutal vitriol from supporters of both John Quincy Adams and Andrew Jackson marked the election of 1828.12 As the 1800s continued, questions of slavery and federalism ripped the nation asunder in the time leading up to the deadly Civil War.13 Fears of communism gripped the nation in the 1920s and again

---

in the 1950s. The Vietnam War and Civil Rights issues divided the nation in the 1960s and 1970s. Watergate changed the nature of political discourse, as did the Clinton scandals of the 1990s.

Whether things are worse now is a question beyond the scope of this article, which assumes that there is considerable room for improvement in civil discourse. But the United States is probably more polarized today than ever before. Most of our previous conflicts—such as Vietnam and the Civil Rights Movement—did not lead to the polarization that exists today. Instead, the current polarization has taken place over a longer time, involves deeper conflicts, and is more complicated than the past situations. As psychologist Peter Coleman notes, “We are in the grip of a more than fifty year escalating trend of political, cultural, and geographic polarization, and it is damaging our families, friendships, neighborhoods, workplaces, and communities to a degree not previously seen in our lifetime.”

The effects of this polarization are demonstrable. Coleman notes that “83 percent of Americans find the future of the country to be a ‘significant source of stress’—the highest ever reported—which leads to an increased likelihood of chronic health problems.” These health problems include anxiety, depression, and suicide—as well as the threat of violence on both sides of the political spectrum: “when voters were asked to imagine the loss of the presidency in 2020, 22 percent of Democrats and 21 percent of Republicans said that partisan violence could be justified. This is the noxious state of our union.” Coleman notes that this tribalism is not unique to the United States and indeed seems to be a trend throughout the world.

The decline of organized religion provides one explanation for the decline in positive political discourse. And the steady movement away from those grand concepts that once moved Western civilization—metaphysics, eternal principles, the

17. PETER T. COLEMAN, THE WAY OUT: HOW TO OVERCOME TOXIC POLARIZATION 3–5 (Colum. Univ. Press 2021) (noting that although many ascribe the polarization to President Trump, the polarization long precedes him and indeed has continued unabated after his presidency came to an end).
18. Id. at 3–4.
19. Id.
20. Id. at 4.
21. Id. at 6 (footnotes omitted).
22. Id. at 7.
23. Id.
great tragic texts—has moved younger generations to embrace much smaller concepts, namely, politics. Thus: “individuals now defend their political viewpoints to the death, engaging in great, vitriolic debates with those who raise ideas contrary to their own politically correct opinions.” Whether or not the decline in religious adherence is the cause remains uncertain, but it provides a plausible explanation for the current state of affairs.

Part of the blame also lies with the conventional news media. The “newsview” screen on DirectTV provides the perfect illustration of the fractured nature of modern journalism. “Newsview” allows split-screen viewing of CNN, Fox News, MSNBC, and BBC World. Watching only an hour of coverage readily demonstrates to any viewer that the view and coverage of American politics as depicted by the three U.S. cable network news channels are entirely different and divergent—unlike the United States-focused networks, BBC World offers much more globally oriented coverage. Those three American networks’ selection of news topics, speakers, and emphasis are entirely different, with each channel offering material to appeal to their respective market base. Not surprisingly, one cannot get a fully informed view by watching only Don Lemon, Rachel Maddow, or Sean Hannity. Consider examples of how the major news networks would provide divergent coverage of various topics, such as the events at the Capitol on January 6, 2021, or the “defund the police” movements.

Strikingly, divergent viewpoints are not only reflected in personal editorial and commentator statements but also in straight news coverage. Contrast this with the Society of Professional Journalists’ Code of Ethics. The Code offers four principles that straight news coverage—as opposed to opinion pieces like editorials and op-eds—should follow: (1) seek truth and report it; (2) minimize harm; (3) act independently; and (4) be accountable and transparent. “The Society declares these as the foundation of ethical journalism and encourages their use in its practice by all people in all media.” Thus, an important element of professional news reporting is this one: “Label advocacy and commentary.” Yet many media reports seemingly do not follow this essential journalistic rubric or the Code itself.

Despite the application of ethics canons to all journalists, one can find comparable echo chambers and ignorance of the Code in most of the print media. It seems no medium provides respite for those seeking objective news coverage. As Coleman aptly observes, “the more media we consume, including newspapers, social

---

25. Id.

26. Id.

27. Though I had thought of this as a somewhat original observation, Coleman makes this same point in his book, See COLEMAN, supra note 17, at 5–6.


30. Id.

31. Id.
media, talk radio, and local news, the more our views become divorced from reality."

Jennifer Kinsley, in her thoughtful article, “Therapeutic Expression,” discusses the flawed modern marketplace of ideas as often imagined by First Amendment purists. The theory behind the marketplace posits that good ideas can develop over bad ones, but practically speaking “in the age of social media and government by tweet, the free speech marketplace looks more like a messy, undefined pendulum, shifting perpetually back and forth from one idea to another without ever landing anywhere at all.”

Perhaps this was not always the case. Historically, the Federal Communications Commission (“FCC”) promulgated the Fairness Doctrine, which required broadcast licensees to devote some time to discussing public issues and give each side of these issues fair coverage. The Supreme Court upheld the constitutionality of the Fairness Doctrine in its 1969 decision in *Red Lion Broadcasting Co. v. Federal Communications Commission*. The Court based its unanimous decision on the scarcity rationale, which required the presentation of opposing viewpoints given that the FCC limited the number of available broadcast licenses.

The Supreme Court in *Red Lion* focused first on the broadcaster’s statutory obligation to operate in the public interest. Justice White reasoned that “broadcast frequencies are limited, and, therefore, they have been necessarily considered a public trust. Every licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias.” Addressing the constitutional challenge by broadcasters, Justice White first focused on the pervasiveness of the broadcast media at the time:

> Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others.

32. Coleman, *supra* note 17, at 4. Coleman notes that people are paying less attention to the merits of issues like health care, immigration, and gun control, and instead “follow what we are told by our party leaders.” *Id.*


34. *Id.*


37. *Id.* at 400–01.

38. *Id.* at 383–84.

39. *Id.* at 383 (quoting JOHN O. PASTORE, EQUAL TIME AMENDMENT TO COMMUNICATIONS ACT OF 1934, S.Rep. No. 86-562, at 9 (1959)).

40. *Id.* at 387 (citing Associated Press v. United States, 326 U.S. 1, 20 (1945)).
As to scarcity, the Court noted that with regard to the First Amendment, “those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens.” 41 The Court further noted that the First Amendment does not preclude the FCC “from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.” 42

Thus, the Court made this seminal point: “Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.” 43 Although that scarcity allows for regulation of broadcasters, the goal is to promote and protect the rights of the audience: “It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.” 44 The Court noted that the FCC had other options beyond licensing a limited number of broadcasters: “the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far.” 45 Instead, the FCC only required the airing of opposing viewpoints. 46

Importantly, the Court later declined to extend the scarcity rationale to the print media in Miami Herald Publishing Co. v. Tornillo. 47 The Court overturned a Florida state law requiring newspapers to allow equal space in their publications for political editorials and candidate endorsements. 48 Acknowledging that many local newspapers in that time period possessed a type of “monopoly” on local print reporting, the Court noted that, with regard to a right of reply, “the implementation of . . . an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment. . . .” 49 The Court noted that it previously identified the problem of forced access in Associated Press v. United States. 50 In that case, the Court “carefully contrasted the private ‘compulsion to print’” which was found in the Associated Press bylaws, with the provisions of the lower court order, which did not “compel AP or its members to

41. Id. at 389.
42. Id.
43. Id. at 390.
44. Id. at 390 (emphasis added) (citing FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940)).
45. Id. at 390–91.
46. Id.
48. See id. at 258.
49. Id. at 254.
50. Id.
permit publication of anything which their ‘reason’ tells them should not be published.”

Technological change and the dramatic growth of other types of media outlets such as cable, satellite, and Internet, eventually undermined the scarcity rationale found in Red Lion. The FCC abolished the doctrine, and any renewed effort to impose today the doctrine by governmental fiat would likely be struck down as unconstitutional under the First Amendment. For example, in an article written in 2010, several commentators persuasively argue that Red Lion is not relevant to the modern communications age. They contend that “the scarcity doctrine was never valid and was merely a thinly veiled political excuse to regulate communications while skirting the First Amendment.” The authors further state that, “There is no basis for distinguishing media content by the roads it travels. Today that exercise has become a fool’s errand. Is the New York Times transmitted via a Sprint 3G network to a Kindle deserving of the newspaper freedoms, or is the public interest dictated by frequency scarcity?”

In addition to the print and news media, internet, and social media bear much of the responsibility for the current state of affairs. People largely follow and view content that confirms their own views, biases, and feelings. Algorithms further feed and reinforce the same viewpoint. Social media—though often the primary source of information for many—“does not offer much space for promoting reflective listening and mutual understanding. In other words, the underlying algorithms on which the major social media platforms are currently based are actively pitting us against each other.” In fact, the origins of social media itself suggest that mindfulness was never the intended goal. Coleman elaborates:

Consider, for instance, the legendary (but disputed) origin story of Facebook. In 2003, nineteen-year-old, 5 ft. 7 in., Harvard sophomore Mark Zuckerberg gets jilted by a girl and then goes to his room, drinks beer with his friends, and builds a website called “Facemash,” which invites viewers to compare photos of fellow Harvard classmates and choose which one is “hotter.”

Users of the Internet are often (somewhat) anonymous or at least at a distance with regard to normal direct human interaction. As Lord Jonathan Sacks notes, “in the 1990s and gathering pace ever since, came the technological revolution: the internet, tablets, smartphones, and their impact on the global economy and the way we communicate with one another. Social media in particular has

51 Id. at 254 (quoting Associated Press v. United States, 326 U.S. 1, 20 n.18 (1945)). In Associated Press, the Court noted that “Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.” Associated Press, 326 U.S. at 20.
52 See generally Thomas W. Hazlett, Sarah Oh & Drew Clark, The Overly Active Corpse of Red Lion, 9 NW. J. TECH. & INTELL. PROP. 51 (2010).
53 Id. at 94.
54 Id.
55 COLEMAN, supra note 17.
56 Id.
changed the nature of interpersonal encounter.” The distance this interface provides often leads to people writing or saying things they would never express “IRL”—in real life.

These technologies are not without their benefits—the ability of personal expression is far more expansive today than it ever has been in human history. Thus, the hold that traditional media outlets had on discourse has been broken. But these modern technologies also permit people to express thoughts and respond to others almost immediately. In the days of the Founders, it would take some time and effort to respond to an offensive article or letter, while today it can be done quickly, thoughtlessly, and sometimes quite harmfully. Often these conversations have the potential to quickly deteriorate in ways that do not contribute to reasoned discourse, let alone civil disagreement. Thus, the traditional news media and the internet have created or at least exacerbated the problem of harsh discourse and deep political division.

BUT WHAT DOES MINDFULNESS HAVE TO SAY ABOUT THE FIRST AMENDMENT?

As the Supreme Court stated in the landmark 1964 case, New York Times Co. v. Sullivan, the United States has “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” In R.A.V. v. City of St. Paul, the Court unanimously held that even “hate speech” is protected by the First Amendment. The Court struck down the St. Paul Bias-Motivated Crime Ordinance, overturning the conviction of a teenager for burning a cross on the lawn of an African-American family. More recently, in Matal v. Tam and Iancu v. Brunetti, the Court struck down limitations on federal registration of trademarks that might be deemed disparaging, scandalous, or immoral. The Court has thus given a wide berth to a variety of speech that can be offensive, hurtful, or injurious.

The expansive view of the First Amendment largely accepted by all current Justices on the United States Supreme Court is both warranted and good for society. A robust free speech and free press are fundamental bulwarks of democracy and the American way of life. As Jefferson wrote, “our liberty depends on the freedom of

57. JONATHAN SACKS, MORALITY: RESTORING THE COMMON GOOD IN DIVIDED TIMES 13 (2020); see also Kinsley, supra note 33, at 960.
60. See id. at 391.
62. See 139 S. Ct. 2294, 2302 (2019). I have written on both of these landmark trademark and First Amendment cases. See generally Gary Myers, It’s Scandalous! – Limiting Profane Trademark Registrations after Tam and Brunetti, 27 J. INTELL. PROP. L. 1 (2020); see also Gary Myers, Trademarks & The First Amendment After Matal v. Tam, 26 J. INTELL. PROP. L. 67 (2019). Other authors have commented on these cases. See generally Rebecca Tushnet, The First Amendment Walks into a Bar: Trademark Registration and Free Speech, 92 NOTRE DAME L. REV. 381 (2010); see also Ned Snow, Free Speech & Disparaging Trademarks, 57 B.C.L. REV. 1639 (2016)
the press, and that cannot be limited without being lost.” The question becomes what should individuals, companies, unions, the media, and other entities do with those powerful rights? Do those rights come with any responsibilities—not through governmental fiat or decree—but through self-imposed, voluntary restraint in expressing views and in considering the views articulated by others (particularly those with whom we disagree)?

No doubt, First Amendment rights should be exercised and protected from governmental restraint, but the central message of this article is that principles of mindfulness should guide how to engage in robust, uninhibited, and constitutionally protected debate. This is not a call for self-censorship but a reminder to consider the effects of speech on others and on their responses to that speech. Rather than lashing out against those who express views that diverge from their own, principles of mindfulness suggest that listeners should exercise restraint.

A. Self-Restraint & Mindfulness

The fact that someone has a right to engage in speech does not mean that they should elect to do so. *Cohen v. California* established that people have the right to wear a t-shirt that states “Fuck the Draft.” *Brunetti* recognized that a business can register clothing using the word “FUCT.” *Tam* held that an Asian-American band is entitled to register their chosen moniker, “the Slants.” All these cases have upheld the right to say offensive or horrible things. The Framers themselves recognized the importance of protecting politically unpopular speech—“[t]he very existence of the United States arose from the ability of colonists to organize around anti-taxation and religious freedom ideals.” At the same time, the Framers recognized that there are limits to free speech.

The Framers gifted us with broad protections, but we can also choose not to wear t-shirts with offensive messages or words. For example, after the 2017 Supreme Court ruling regarding registration of the “Slants” in *Tam*, a Washington football team effectively won its long-running battle to preserve its right to register the term “Redskins” as its team name despite arguments that it was disparaging toward Native Americans. Yet only a few years later, in 2020, the team chose voluntarily to relinquish that name.

The point can be restated as the difference between the terms “should” and “must.” Recently, responding to a reporter’s question about Twitter, White House

---


64. See 403 U.S. 15, 26 (1971).

65. See *Brunetti*, 139 S. Ct. at 2302.


68. See id. (stating that the framers were reluctant to tolerate speech discrediting the new American government just for the sake of free speech generally).


70. Id.
Press Secretary Karine Jean-Pierre stated “that social media platforms have a ‘responsibility’ to ‘take action’ on ‘misinformation’ and ‘hate.’”71 As Nico Perrino correctly observes,

“The White House is free to make the argument that Twitter should police ‘misinformation’ and ‘hate speech’ on its platform. But it has no legal basis to say that Twitter must do so.”72 He correctly notes that most speech that might be deemed “misinformation” or “hate speech” is protected by the First Amendment.73 There is no “must,” only a could or should, at least under our Constitution, as Perrino explains: “The government cannot punish Twitter—a private company—because it refuses to censor offensive speech. The corollary is that Twitter is not bound by the First Amendment when it makes content moderation decisions, and the public, including government officials, are free to criticize those decisions.”74 But there can be a “should” regarding difficult decisions Twitter might make: “that’s not a debate about First Amendment law. That’s a debate about free speech culture.”75

One of the freedoms the First Amendment provides is the right to decide not to speak and consequently the right not to offend.76 Perhaps it even provides the right to listen. Individuals, the traditional media, and social media can all improve their conduct using these specific rights. For individuals, it might involve recognition that just because people disagree with one’s political views does not make them evil, less human, or depraved. Thomas Jefferson’s admonition is appropriate: “When angry, count ten before you speak; if very angry, an hundred.”77

In 1910, Teddy Roosevelt declared that those who refuse to engage in healthy civil discourse are only encouraging the eventual collapse of the nation:

In a republic to be successful we must learn to combine intensity of conviction with a broad tolerance of difference of conviction. Wide differences of opinion in matters of religious, political and social belief must exist if conscience and intellect alike are not to be stunted, if there is to be room for healthy growth.78

The choice to engage in offensive speech rather than tolerance lies atop a slippery slope. During an interview in March 2021, the actor Matthew McConaughey noted that both sides of the aisle have lost “trust” in one another, which leads to losing “trust in ourselves,” which, he said, could eventually lead to “anarchy.”79 As

---

72. Id.
73. Id.
74. Id.
75. Id. (emphasis added).
78. Holmquist, supra note 24.
79. Interview by Hugh Hewitt with Matthew McConaughey on the “Hugh Hewitt Show” (Nov. 18, 2020).
Jennifer Kinsley observes: “Despite the ancient sticks-and-stones adage, which boldly proclaims that words lack the power to cause bodily injury, it is beyond dispute that speech has the power to inflict emotional and psychological harm.”

Even simple word-of-mouth expressions can have profound effects on brand preferences. And more ominously, expression can be used as an effective tool to radicalize vulnerable groups into extremist ones, where radical expression becomes commonplace—"[i]t is true, then, that the spread of negative information, uninformed opinion, and hateful rhetoric can lead to social disruption." Thus, although robust speech and debate are societal values that should be cherished, it is also important to consider the impact of individual speech on listeners and society as a whole.

Sometimes, choosing to listen to others can avoid the negative effects of certain kinds of speech. A long line of Supreme Court cases highlights and recognizes the importance of the right to listen as part of the protections of the First Amendment. In Kleindienst v. Mandel, the Court noted: “In a variety of contexts this Court has referred to a First Amendment right to ‘receive information and ideas’: ‘It is now well established that the Constitution protects the right to receive information and ideas.’” As Kinsley notes, “[t]he dual components of the right of free speech—the right to speak on the one hand and the right to listen on the other—are therefore mutually reinforcing and critical to both personal development and social stability.”

As Justice White noted in the unanimous decision upholding the FCC’s “fairness doctrine” in Red Lion:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

The Court has reaffirmed the right to listen in a variety of contexts. These settings include union advocacy in Thomas v. Collins, holding that a state law requiring organizers to register before soliciting union membership violated the labor union organizer’s right to speak and the rights of workers “to hear what he had to say.” Similarly, the Court recognized the right to receive information through the

---

80. Kinsley, supra note 33, at 947. Kinsley goes on to detail the evidence of this in her article. Id. (“In the interpersonal context, the harsh words of others can undoubtedly influence a person’s self-image and emotional well-being. Indeed, the literature on cyberbullying is replete with harrowing accounts of mental illness, self-injury, and suicide caused in large part by speech-related aggression.”).

81. Kinsley, supra note 33, at 948.

82. Id.

83. 408 U.S. 753, 762–63 (1972).

84. Id. (citing Martin v. City of Struthers, 319 U. S. 141, 143 (1943); Stanley v. Georgia, 394 U. S. 557, 564 (1969)).

85. Kinsley, supra note 33, at 964.


87. 323 U.S. 516, 534 (1945).
United States mail in *Lamont v. Postmaster General*, holding that a statute imposed an unjustifiable burden on the recipient’s First Amendment rights when it permitted the government to hold “communist political propaganda” arriving in the mails from abroad unless the addressee affirmatively requested in writing the mail’s delivery.88

Given the Court’s recognition of vast constitutional freedoms, there might be value for people on both sides of the aisle to spend more time listening to one another, hearing differing viewpoints, and revisiting friends with whom they have differed on political issues. Mindfulness is partly about listening and hearing what others have to say but also doing so without judgment. Mindfulness can simply be “behavior often associated with being considerate—people sometimes joke ‘oops, that wasn’t very mindful of me!’ when what they mean is that they’ve been accidentally thoughtless or hurtful.”89

Justice Brandeis referred to this process in terms of “reason as applied through public discussion” in *Whitney v. California*.90 Justice Brandeis’ majestic discussion of the value of speech is worth full quotation:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . .91

He further discussed what in this article is called mindfulness, and the importance of civil discourse to society and democracy, as recognized by the Founders:

> They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones.92

As Justice Marshall has noted:

> [T]he right to speak and hear—including the right to inform others and to be informed about public issues—are inextricably part of that process. The freedom to speak and the freedom to hear are

---

90. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
91. Id. at 375.
92. Id.
inseparable; they are two sides of the same coin. . . . The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the "means indispensable to the discovery and spread of political truth." 93

On an individual level, the ability to engage in self-expression can provide a meaningful outlet that prevents destructive feelings from leading to destructive behavior. 94 In other words, as Emerson once noted, being able to engage in speech permits people to "let off steam." 95

Listening does not require agreeing with the speakers or endorsing their views, but it does enable more fully developed opinions. Every trial lawyer knows that anticipating the other side’s arguments is a key to successful advocacy. If people engage in deep listening and pause to breathe before reacting to statements with which they disagree, modern political and cultural discourse could be at least incrementally improved. This process—the ability to express views and speak and the concurrent ability to listen and consider different viewpoints—is the one so aptly described by Justice Brandeis and Justice Marshall above.

For the traditional media, the divisive events of the last decade have led to a real balkanization, and it might be time to be more mindful of the traditional role of modern journalism—the attempt at least to report news objectively and fairly. Commentators regularly speak, but they often do not listen. The traditional media needs to return to the idea of making balanced presentations. As noted earlier, a new governmentally imposed Fairness Doctrine would likely be struck down as a violation of the First Amendment, but media outlets should voluntarily adopt policies that contain the best elements of the Fairness Doctrine. 96 Just as the entertainment industry engages in a form of self-regulation in developing a movie-rating system, the media should adopt policies that permit the dissemination of differing views on important matters of public policy. 97

For example, the Society of Professional Journalists’s Code of Ethics, as noted earlier, includes the practice of “[d]iligently seek[ing] subjects of news coverage to allow them to respond to criticism or allegations of wrongdoing.” 98 It further states that ethical journalists “[s]upport the open and civil exchange of views, even views they find repugnant” and that they “[b]oldly tell the story of the diversity and magnitude of the human experience.” 99

Or alternatively, the media could return to the early days of the party press, where news outlets honestly proclaimed their political affiliations, rather than purporting to be objective while slanting the news in one or another direction. In

94. Kinsley, supra note 33, at 964.
95. Id. at 975 (“Where speech is uttered as a form of therapy and as, in the words of Thomas Emerson, a way to ‘let off steam,’ its therapeutic qualities may forestall more harm than they engender. The debate between speech safety advocates and free speech purists can find common ground in this conclusion.”).
96. See generally Hazlett, supra note 52.
98. SPJ Code of Ethics, supra note 29.
99. Id.
those days, for example, the Gazette of the United States was founded in 1789 as a major political organ of the Federalist Party. Although an honest proclamation of political affiliations might not necessarily lead to less acrimonious debate, it would increase the transparency of the discourse. Essentially media outlets would be stating their perspective, viewpoint, and biases to their readers, who can assess the content accordingly.

One vital ingredient of the right to listen is the right of association. This ingredient holds central importance in the context of education. The Court, through a series of cases, upheld rights of free speech and association in the context of schools and universities. Shelton v. Tucker held that a law that compelled teachers to disclose their membership in any association or organization infringed on their freedom of association, a right closely related to freedom of speech and “a right which, like free speech, lies at the foundation of a free society.” In Sweezy v. New Hampshire, which involved a government investigation into the content of a professor’s lectures and his political associations, the Court held that “there unquestionably was an invasion of petitioner’s liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread.”

Chief Justice Warren went on to connect the academic freedom rights upheld in the case with the rights of the people in general: “Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. . . . Exercise of these basic freedoms in America has traditionally been through the media of political associations.” Justice Frankfurter, in his concurrence, expressed a similar view: “In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority.”

In Keyishian v. Board of Regents, the Court struck down a statute requiring a loyalty oath for professors, citing the principle that academic freedom is an important component of the First Amendment: “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . .” Justice Brennan went on to state: “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” The classroom is peculiarly the “marketplace of ideas.”

104. Id.
105. Id. at 266 (Frankfurter, J., concurring).
108. Id.
future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues, (rather) than through any kind of authoritative selection.” 109

Finally, in Epperson v. Arkansas—a case brought by an Arkansas public school teacher—the Court struck down an Arkansas “anti-evolution” statute, which made it unlawful for a teacher in any state supported school or university to teach or to use a textbook that teaches “that mankind ascended or descended from a lower order of animals.”110

For educational institutions, ensuring free speech has traditionally been a key tenet of academic freedom. In order to have robust dialogue and academic inquiry in the classroom and research settings, professors, teachers, and students need to have the freedom to speak, to question, and to disagree. As the Supreme Court observed in Sweezy: “The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth.” 111 Moreover, “[s]cholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”112

For state-supported institutions, the First Amendment serves as a backstop requiring continued support for this principle. For private entities, the picture is less clear. Many schools have adopted various versions of the University of Chicago Free Speech Principles. 113 This includes the idea that “debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed.”114 Instead, “[i]t is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose.”115 More than eighty institutions of higher learning have adopted the Chicago principles, 116 though it is surprising that the acceptance of these principles has not been universal.

Academic freedom continues to be important, yet institutions often seek to balance these considerations with values they deem equally important. Whether they strike that balance in a mindful and appropriate way is beyond the scope of this essay.

109. Id.
112. Id.
115. Id.
The Chicago Principles provide a useful guidepost, observing that freedom to debate is not unlimited. Under the Principles, a University may restrict unlawful expression, defamation, threats, harassment, invasions of privacy or confidentiality, and speech that threatens the functions of the University or disrupts the ordinary activities of the University.\(^{117}\) But universities must be careful not to overextend these principles to protected speech.

A recent episode at Yale Law School provides a valuable illustration of the problems that arise from the university balancing act. The Law School’s Federalist Society invited Kristen Waggoner of the Alliance Defending Freedom to campus to debate Monica Miller, a lawyer for the progressive American Humanist Association, discussing a current Supreme Court civil liberties case.\(^{118}\) More than one hundred students gathered to protest the presence of a conservative speaker at their ivy-covered academic institution.\(^{119}\) The protesters violated multiple Yale free speech policies by holding signs that blocked the speaker, making loud noises, and blocking access to the hallway outside.\(^{120}\)

Two weeks later, Yale Law School Dean Heather K. Gerken stated that the disruption did not violate the University’s free expression policy but acknowledged that the conduct was “unacceptable,” “violated the norms of [the] Law School,” and “interfere[d] with others’ efforts to carry on activities on campus.”\(^{121}\) Stressing the importance of deliberative and mindful responses, Dean Gerken stated:

> Learning involves speaking and listening, through iterative conversations in smaller settings with mentors and peers. That has always been our teaching model, and that is the only way that our norms can be understood and internalized. Although these conversations are not visible to outsiders, they are taking place here now, and the institution will be the better for it.\(^{122}\)

> Placing the problem in a broader context, she stated: “[t]he deeper issues embedded in this event are not unique to Yale Law School—they plague our democracy and institutions across the country.”\(^{123}\)

The challenge of maintaining mindful practices is probably greatest for social media. Many people now receive much of their news from these sources. In 2020, a Pew Research Center analysis found that about one in five adults in the United States obtained their news primarily from social media; more recent data suggest even higher figures: “a sizable portion of Americans continue to turn to these

---


119. Id.


122. Id.

123. Id.
sites for news. A little under half (48%) of U.S. adults say they get news from social media “often” or “sometimes.” Facebook, now incorporated as Meta, has established an Oversight Board, which seems to be at least an effort to provide for review of Facebook content decisions. The challenge for social media is enabling users to engage in robust discourse while preventing these conversations from going over the line. Unlike the types of dialogue that most frequently occur over social media, mindful dialogue “is a process of open and reflective speaking, hearing, learning, and discovery that is unfamiliar to most of us. It is more like what you would hear at a Quaker meeting or an AA meeting.”

The recent acquisition of Twitter by Elon Musk provides a fascinating and ever-developing illustration of the problems and challenges faced by a society where social media platforms have an enormous role in public discourse. Nico Perrino, in an insightful blog post discussing free speech culture, Elon Musk, and Twitter, begins his commentary with a quote from Benjamin Franklin. Franklin—replying to a question about the outcome of the 1787 Constitutional Convention—is said to have told the delegates that they established a republic, “if you can keep it.”

Perrino’s observations about the Musk-Twitter developments focus on free speech culture—a point this article seeks to expand upon—as it relates to Franklin’s thought:

The same sentiment holds true for free speech culture: To be sure, we need the law, but it’s the culture that will keep it. Unfortunately, polling indicates support for free speech is selective and declining. That means we’re not doing a good enough job of explaining the importance of free speech, despite seeing visceral examples of what the world can look like without it in Russia, China, and Iran. If American culture doesn’t support free speech, how long can we hope the law will continue to protect it?

The concept of free speech culture is fundamentally important, as it goes beyond what is mandated by law.

**LEGAL AVENUES FOR A MINDFUL FIRST AMENDMENT**

By its nature and purpose, the First Amendment does not address, let alone encourage, mindfulness. As already noted, the Supreme Court has protected curse words in *Cohen* and *Brunetti*, disparaging terminology in *Tam*, hate speech in *R.A.V.*, and defamatory content in the *New York Times v. Sullivan* line of cases. Yet there may be legal doctrines or policies that could facilitate mindfulness without running

---


126. COLEMAN, supra note 17.

127. Perrino, supra note 71.

128. Id.

129. See id.
afoul of the rules against government censorship. Earlier, this article focused on free speech culture, but there may also be changes in free speech law that can lead to more mindful outcomes.

A. Retraction as a Mindful Remedy for Defamation

One area in which significant legal reform might lead to more mindful discourse is the field of defamation law. Defamation law usually arises when media and other entities (and speakers) express or disseminate information that turns out to be false and defamatory. New York Times v. Sullivan and its progeny have outlined elaborate rules for whether and when this can be actionable in a manner consistent with freedom of speech and of the press. The Supreme Court based these rules on the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.”

The Court’s signature holding in Sullivan was that the Constitution “prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” That showing must be made with “convincing clarity,” or, as stated in a later formulation, by “clear and convincing proof.”

According to the Court, freedom of expression requires “breathing space,” and the relatively high burden of proof furnishes that space for errors that may occur in the ordinary course of news reporting.

The standards of New York Times v. Sullivan apply not only in cases involving public officials but also when a “public figure” brings a defamation claim. Private plaintiffs in defamation cases, on the other hand, do not need to meet this high threshold, though they are required to prove at least negligence or fault, in accordance with the Court’s holding in Gertz v. Robert Welch: “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”

131. Id. at 279–80.
132. Id. at 285–86.
135. See Wolston v. Reader’s Digest Ass’n, Inc., 443 U.S. 157, 163–65 (1979); see also Curtis Publishing Co. v. Butts, 388 U.S. 130, 162, 170, 172 (1967) (Warren, C.J., concurring); id. at 170 (Black, J., concurring in part and dissenting in part); id. at 388 U.S. 172 (Brennan, J., concurring in part and dissenting in part). The Supreme Court, in Gertz v. Robert Welch, Inc., noted that “it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.” 418 U.S. 323, 345 (1974). Generally, a public figure has “assumed roles of especial prominence in the affairs of society.” More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.” Id.
Even when private figures are involved, the constitutional protections for free speech and press supersede the common law’s presumptions as to damages when the speech involves matters of public concern. Accordingly, the Court in *Gertz* expressly held that, although a showing of simple fault was sufficient to allow recovery for actual damages, a private-figure plaintiff was required to show actual malice in order to recover presumed or punitive damages.\(^\text{137}\)

Justice Powell noted that, in balancing free speech and press considerations against the strong and legitimate state interest in compensating private individuals for injury to reputation, the state’s interest extends no further than compensation for actual injury.\(^\text{138}\) Justice Powell goes on to explain:

> Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion, rather than to compensate individuals for injury sustained by the publication of a false fact.\(^\text{139}\)

As a result, the Court found that states have no substantial interest in awarding defamation plaintiffs damage awards that exceed any actual injury.\(^\text{140}\) The Court in *Gertz* also found no basis for allowing awards of punitive damages against publishers and broadcasters, noting that these awards are unpredictable, are unrelated to the actual harm caused, and may be used to punish expressions of unpopular views.\(^\text{141}\) Thus, the Court held that the states may not award presumed or punitive damages unless the award is based on a showing of knowledge of falsity or reckless disregard for the truth.\(^\text{142}\)

The Court then considered constitutional constraints on suits for defamation involving not only a private-figure plaintiff but also speech of purely private concern. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,\(^\text{143}\) a plurality of the Court concluded that the showing of actual malice needed to recover presumed and

---

\(^\text{137}\) See *id.* at 348–50. As noted in *Gertz*, “[s]tates may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.” *Id.* at 349.

The Court later clarified that this rule only applied where the speech involved concerned a matter of public concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (“In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages — even absent a showing of ‘actual malice.’”).

\(^\text{138}\) *Gertz*, 418 U.S. at 348–49.

\(^\text{139}\) *Id.* at 349.

\(^\text{140}\) *Id.*

\(^\text{141}\) *Id.* at 349–50.

\(^\text{142}\) *Id.* at 348–50.

punitive damages as found in Gertz was inapplicable in cases involving only private concerns: “In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest [in protecting reputation] adequately supports awards of presumed and punitive damages—even absent a showing of ‘actual malice.’” 144

The Court also defined the burden of proof as to falsity based on constitutional considerations. Starting with Sullivan, 145 the Court had clearly found that public officials and public figures must show the falsity of the statements at issue in order to prevail in a suit for defamation. In Garrison v. Louisiana, 146 the Court found that a public official can obtain a damage remedy for defamation “only if he establishes that the utterance was false.” 147

The Court eventually adopted a similar requirement for private plaintiffs where the material involved a matter of public concern. In Philadelphia Newspapers v. Hepps, the Court held that the Constitution required the plaintiff to bear the burden of showing falsity and fault in order to recover damages, contrary to the common law requirement that the defendant bears the burden. 148 The Court highlighted that this requirement shifts the risk of error onto the plaintiff and away from a defendant engaged in expressive activity on matters of public concern: “There will always be instances when the factfinding process will be unable to resolve conclusively whether the speech is true or false; it is in those cases that the burden of proof is dispositive.” 149 Therefore, the Court found that “[t]o ensure that true speech on matters of public concern is not deterred, we hold that the common law presumption that defamatory speech is false cannot stand. . . .” 150

Aside from these constitutionally mandated rules, however, states can fashion appropriate remedies and mechanisms for addressing instances of libel and slander. Basically, the Court’s holdings establish minimum standards for finding liability, awarding compensatory damages, and granting presumed or punitive damages—depending upon the type of statement involved and the notoriety of the defamation plaintiff. However, states are otherwise free to fashion remedies or to restrict the ways in which defamation claims can be asserted.

Retraction statutes can serve as a way to increase the level of mindfulness in cases of defamation. 151 Generally, under a retraction statute, the plaintiff must seek

---

144. Id. at 761; see id. at 764 (Burger, C.J., concurring in the judgment); id. at 774 (White, J., concurring in the judgment).
147. Id.; see also Herbert v. Lando, 441 U.S. 153, 176 (1979) (“[T]he plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability on the part of the publisher.”).
149. Id.
150. Id. at 776–77.
151. For commentary on retraction statutes see generally John C. Martin, The Role of Retraction in Defamation Suits, 1993 U. CHI. LEGAL F. 293 (1993); George E. Frasier, An Alternative to the General Damage Award for Defamation, 20 STAN. L. REV. 504 (1968); Dale M. Cendali, Of Things to Come—The Actual Impact of Herbert v. Lando and a Proposed National Correction Statute, 22 HARV. J. LEG. 442 (1985). See also W.
a retraction from the defendant before the case can proceed.\textsuperscript{152} If the defendant retracts the statement, typically economic damages are the only form of damages a jury or court may award. After all, as Rod Smolla notes, “in most libel litigation, the real sting of the libelous statements has nothing to do with money; the real damage is of a more intangible nature—the humiliation, shame, injured feelings, and sense of personal invasion that comes from a well-published lie.”\textsuperscript{153}

The Uniform Correction or Clarification of Defamation Act (“UCCDA”), promulgated by the Uniform Law Commission in 1993,\textsuperscript{154} provides a good example of a retraction statute. It allows a person to bring a defamation claim only when he or she has made a timely and adequate request for correction or clarification from the publisher or speaker. Under the Uniform Act, “[i]f a timely and sufficient correction or clarification is made, a person may recover only provable economic loss, as mitigated by the correction or clarification.”\textsuperscript{155} As the Commission notes in contrast to other types of injury, “lost reputation can be repaired by correction or clarification of the information that is defamatory—if the publication of the correction or clarification reaches the same audience or public as the original defamation did. In fact, restoration of reputation by correcting or clarifying the original publication may be the best remedy.”\textsuperscript{156} The goal of the UCCDA is “to encourage the correction or clarification of a defamation where it is appropriate to do so.”\textsuperscript{157} Under the Act, a correction or clarification changes none of the elements of a defamation claim, and an unsuccessful request for correction or clarification has no effect on a plaintiff’s right of recovery—the defaming publisher remains fully subject to liability.\textsuperscript{158}

Only a very small handful of states have enacted the Uniform Act—North Dakota, Washington, and Texas.\textsuperscript{159} The Texas law is illustrative. Known as the Defamation Mitigation Act (“DMA”), enacted in 2013,\textsuperscript{160} its purpose “is to provide a method for a person who has been defamed by a publication or broadcast to mitigate any perceived damage or injury.”\textsuperscript{161} The statute defines “person” as “an individual, corporation, business trust, estate, trust, partnership, association, joint

---

\textsuperscript{152} See generally UNIF. CORR. OR CLARIFICATION OF DEFAMATION ACT § 3 (NAT’L. CONF. OF COMM’RS ON UNIF. STATE L. 1993).

\textsuperscript{153} RODNEY A. SMOLLA, SUING THE PRESS 108 (Oxford Univ. Press 1986).

\textsuperscript{154} See UNIF. CORR. OR CLARIFICATION OF DEFAMATION ACT (NAT’L. CONF. OF COMM’RS ON UNIF. STATE L. 1993).

\textsuperscript{155} Id. § 5.

\textsuperscript{156} Enactment Kit, UNIF. CORR. OR CLARIFICATION OF DEFAMATION ACT: A SUMMARY, https://www.uniformlaws.org/viewdocument/enactment-kit-87? [https://perma.cc/7VNN-D968].

\textsuperscript{157} Id. at 2.

\textsuperscript{158} UNIF. CORR. OR CLARIFICATION OF DEFAMATION ACT § 1 cmt. (NAT’L. CONF. OF COMM’RS ON UNIF. STATE L. 1993).

\textsuperscript{159} See Correction or Clarification of Defamation Act, UNIF. L. COMM’N., https://www.uniformlaws.org/committees/community-home?CommunityKey=6ba5d1ed-8924-48aa-81e9-1ed0f7a0f47d [https://perma.cc/3VW3-VKTV].

\textsuperscript{160} See Civ. Prac. & Remedies Code § 73.051–062 (effective June 14, 2013).

\textsuperscript{161} Id. § 73.052.
venture, or other legal or commercial entity.” 162 But the statute excludes “a government or governmental subdivision, agency, or instrumentality.” 163 The provision has broad applicability to any “claim for relief, however characterized, from damages arising out of harm to personal reputation caused by the false content of a publication.” 164 It also applies to any form of communication, “including writings, broadcasts, oral communications, electronic transmissions, or other forms of transmitting information.” 165

One of the law’s key operative provisions requires the request for a retraction before a plaintiff can pursue a defamation claim—a defamation claim can be brought only if “the person has made a timely and sufficient request for a correction, clarification, or retraction from the defendant” before the expiration of the statute of limitations. 166 This provision also indicates the form that the request should take. 167 Section 73.057 of the DMA identifies what constitutes a timely and sufficient retraction. The defendant must publish the retraction in the same or similar manner as the original publication, such that it reaches substantially the same audience, and the retraction must acknowledge that the statement was false, defamatory, and erroneous. 168 Once again, if a timely and sufficient retraction is made, section 73.059 provides that “a person may not recover exemplary damages unless the publication was made with actual malice.” 169 Section 73.060 addresses republication: “A timely and sufficient correction, clarification, or retraction made by a person responsible for a publication constitutes a correction, clarification, or retraction made by all persons responsible for that publication but does not extend to an entity that republished the information.” 170

Although only a small number of states have enacted the Uniform Act, about half have some form of a retraction statute. The state-specific laws are often narrow in scope, for example by limiting coverage to particular media entities or types of defamatory statements, as illustrated by the California statute. 171 By its terms, the California statute only applies to radio broadcasts (not television

162. Id. § 73.053.
163. Id.
164. Id. § 73.054.
165. Id.
166. Id. § 73.055.
167. TEX. CIV. PRAC. & REMEDIES CODE § 73.055 states:
   (d) A request for a correction, clarification, or retraction is sufficient if it:
   (1) is served on the publisher;
   (2) is made in writing, reasonably identifies the person making the request, and is signed by the individual claiming to have been defamed or by the person’s authorized attorney or agent;
   (3) states with particularity the statement alleged to be false and defamatory and, to the extent known, the time and place of publication;
   (4) alleges the defamatory meaning of the statement; and
   (5) specifies the circumstances causing a defamatory meaning of the statement if it arises from something other than the express language of the publication.
168. Id. § 73.057. Section 73.058 addresses disputes regarding the timeliness and sufficiency of the retraction. See TEX. CIV. PRAC. & REMEDIES CODE § 73.058.
169. Id. § 73.059.
170. Id. § 73.060.
programs) and to daily or weekly news publications, the latter of which presumably refers to traditional newspapers and magazines.\footnote{172}

Florida’s law is also restrictive in its application to traditional media entities, like an article or broadcast.\footnote{173} For more examples of statutes limited to traditional print and broadcast media, Idaho law provides: “In any action for damages for the publication of a libel, in a newspaper, or of a slander or libel by radio or television broadcast, plaintiff shall recover no more than actual damages unless a correction be demanded and be not published or broadcast, as hereinafter provided.”\footnote{174} Indiana’s law seems to apply only to newspapers and news services: “a full and fair retraction of a factual statement alleged to be false and defamatory was published in a regular issue of the newspaper or transmitted to its members or subscribers by the news service.”\footnote{175} Iowa’s provision, by its terms, applies to newspapers, shopping guides, and radio or television stations.\footnote{176} Some statutes have limited applicability,\footnote{177} but courts have yet to interpret them to apply to other types of outlets, such as wire services and magazines.

Some statutes—though not adopting the Uniform Act—may have sufficiently analogous provisions. For example, Georgia has statutes regarding a “newspaper or other publication,”\footnote{178} and a “broadcast.”\footnote{179} The Supreme Court of Georgia, in Mathis v. Cannon,\footnote{180} addressed whether the term “publication” found in Section 51-5-3 of the Georgia Code Annotated should apply to an online publication. The plaintiff, Thomas Cannon, sued for allegedly libelous comments made by the defendant in an Internet chat room.\footnote{181} Cannon sought to invoke the retraction statute to prevent the plaintiff from receiving punitive damages while the defendant argued that the retraction statute applied only to newspapers and print media—not to statements he made in an internet chat room.\footnote{182} The Georgia Supreme Court held that the retraction statute’s use of the term “other publication” encompassed any

\footnotesize{172. See id. (referring to retraction “in a regular issue thereof published or broadcast”).
173. See FLA. STAT. ANN. § 770.02 (1980).
176. IOWA CODE ANN. § 659.2 (1967). See also ALA. CODE § 6-5-184 (1975) (“The defendant in an action of slander or libel may prove under a general denial in mitigation of damages that the charge was made in good faith by mistake or through inadvertence or misapprehension, and that he has retracted the charge in the same medium of publication as the charge was originally promulgated and in a prominent position therein.”); MONT. CODE ANN. § 27-1-818 (1979) (applying to “any newspaper, magazine, periodical, radio or television station, or cable television system . . . ”); NEV. REV. STAT. ANN. § 41.336 (1975) (applying to newspapers and to radio or television broadcasts); OKLA. STAT. ANN. tit. 12, § 1446a (1941) (“In an action for damages for the publication of a libel in a newspaper or periodical, if the evidence shows that the article was published in good faith and that its falsity was due to an honest mistake of the facts, and the question of ‘honest mistake’ shall be a question of fact to be determined by a jury, unless a jury be waived by the parties, the plaintiff shall be entitled to recover actual damages only unless a retraction be requested and refused as hereinafter provided.”).
177. See, e.g., MISS. CODE ANN. § 95-1-5 (1962) (provision, by its terms, applies to newspapers and to radio or television stations, with some subject matter exceptions).
179. Id. § 51-5-12.
181. Id. at 16.
182. Id. at 16, 25.
communication made to a third person, regardless of the medium: “[i]t acknowledges that the legislature extended the retraction defense originally created for newspapers, magazines, and periodicals to include newspapers and ‘other publications.’”

As the court noted, the law gives private citizens the same protection as traditional media, and it avoids the need to draw lines on what parties are protected “in an age of communications when ‘anyone, anywhere in the world, with access to the Internet’ can address a worldwide audience of readers in cyberspace.” As the Georgia court made clear, the retraction provision strikes an important balance between the right of the defamed individual and the interest in free speech and free press.

Some states have unique provisions, such as Connecticut, where the statute effectively does not apply if the plaintiff shows “malice in fact.” Kentucky seems to differentiate between print and broadcast media. Its provision for print media is similar to the Connecticut law in that it requires the plaintiff to “allege and prove publication with legal malice and that the newspaper, magazine, or periodical failed to make conspicuous and timely publication of a correction after receiving a sufficient demand for correction.” But in contrast to the Connecticut statute, Kentucky’s broadcast provision does not include a “legal malice” exception.

Minnesota law includes an unusual provision applicable only to newspapers, with various caveats related to fault and subject matter. Maine provides for retraction as a basis for mitigation of damages. Michigan law precludes the award of exemplary and punitive damages if a retraction is made in the

183. Id. at 28.
184. Id. at 29.
185. Id.
186. CONN. GEN. STAT. ANN. § 52-237 (2003). See also NEB. REV. STAT. ANN. § 25-840.01 (1987) (allowing recovery of special damages only if a retraction is made, but the limit does not apply “if it is alleged and proved that the publication was prompted by actual malice, and actual malice shall not be inferred or presumed from the publication”); N.J. STAT. ANN. § 2A:43-2 (1937) (“The defendant, in an action for libel against the owner, manager, editor, publisher or reporter of any newspaper, magazine, periodical, serial or other publication in this state, may give proof of intention; and plaintiff, unless he shall prove either malice in fact or that defendant, after having been requested by plaintiff in writing to retract the libelous charge in as public a manner as that in which it was made, failed to do so within a reasonable time, shall recover only his actual damage proved and specially alleged in the complaint.”); N.C. GEN. STAT. ANN. §§ 99-2(a) –99-2(b) (1943) (if it is shown that an article or broadcast "was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within 10 days after the service of said notice a full and fair correction, apology and retraction was published . . . or broadcast by or over such radio or television station . . . then the plaintiff in such case, if a civil action, shall recover only actual damages . . . ").
188. See KY. REV. STAT. ANN. § 411.061 (1956).
189. See MINN. STAT. § 548.06 (1987).
same manner as the original defamatory statement. South Dakota law is similar on this point.

Nearly half the states do not have retraction statutes, including Alaska, Arkansas, Colorado, Delaware, Hawaii, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Missouri, New Hampshire, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, Washington, and Wyoming, as well as the District of Columbia. But some of these jurisdictions have case law that suggests that a retraction can serve to mitigate the damages to be awarded in defamation cases.

For those states that have not yet adopted the Uniform Act or a similar provision, adoption of the Uniform Act, or some version of it as adapted to individual state law (for example, to account for state constitutional access to courts and right to remedy provisions), would be a step towards incorporating mindfulness principles in this area of the law. As the commentary to the Uniform Act notes, “unlike personal injuries, harm to reputation can often be cured by other than money damages. The correction or clarification of a published defamation may restore the person’s reputation more quickly and more thoroughly than a victorious conclusion to a lawsuit.”

Moreover, the Uniform Act can be seen as a mindful way to resolve disputes involving alleged libel and slander. If parties make use of this mechanism, it fulfills both the interest in reputation and the interest in free expression. For those who have been defamed, the provision offers timely and satisfying vindication of their reputation. For speakers and publishers, the Uniform Act provides a low-cost and rapid way to correct or clarify alleged mistakes while avoiding costly litigation. In some ways, this potential solution can be seen as analogous to medical providers offering an apology for malpractice.

---

192. See S.D. CODIFIED LAWS § 20-11-7 (1979) (“Before any action for libel can be brought against a newspaper or the publisher, editor, or manager thereof, the party aggrieved must at least three days before the commencement of such action serve a notice on the person or persons against whom said action is to be brought specifying particularly the statement or statements claimed to be false and defamatory. If on the trial it appears that such statement or statements were written or published in good faith and with the belief founded upon reasonable grounds that the same were true, and a full and fair retraction of the erroneous matter correcting any and all misstatements of fact therein contained was published in the next issue of the paper, or in the case of a daily paper within three days after the mistake was brought to the attention of the publisher, editor, or manager in as conspicuous type as the original statement and the same position in the paper, the plaintiff will be entitled to recover no punitive damages. But if the libel is against a candidate for office the retraction must also be made editorially in the case of a daily paper at least three days and in the case of a weekly paper at least ten days before the election.”); see also S.D. CODIFIED LAWS § 20-11-8 (1939).
194. UNIF. CORR. OR CLARIFICATION OF DEFAMATION ACT PREFATORY NOTE (NAT’L. CONF. OF COMM’RS OF UNIF. STATE LAWS 1993).
“can provide the aggrieved party with a sense of satisfaction and closure, resulting in faster settlements and lower demands for damages. Words of empathy are also important because they provide emotional and psychological advantages to both the offender and the victim.”\(^{196}\) A large percentage of malpractice plaintiffs decided to file suit at least in part to get explanations for what happened and recognition of responsibility from the medical provider.\(^{197}\) Both sides receive benefits from avoiding litigation while achieving what might otherwise be seen as contradictory and opposing goals. The Uniform Act provides a similar remedy in libel and slander suits.

### B. Robust Privacy Policies as a Mindful Remedy for Privacy Rights

The internet, websites, search engines, and social media all have the ability to constantly gather vast amounts of personal and private data and information about users. The price to consumers for using seemingly “free” services—such as Facebook or Google search—is providing these enormous companies with a treasure trove of personal information, which they monetize through the sale of advertising to third parties.\(^{198}\) Although the First Amendment does protect various forms of speech even if it involves private information, the question is whether there can be a mindful limitation on how that information is gathered and utilized.

The European Union’s General Data Protection Regulation (“GDPR”) requires businesses to inform users on how they collect, secure, use, and share their personal data and grants users some control over these actions.\(^{199}\) The GDPR requires disclosure of what information businesses collect, who is gathering the data and for what purposes, the duration of data storage, the transfer of data to third parties and internationally, the rights of users, and the method for notifying users of policy changes.\(^{200}\) Although there is no United States counterpart to the full range of rights and obligations in the GDPR, some states have adopted somewhat analogous provisions, and some subject-specific federal statutes offer some comparable protections to consumers, patients, and users.

Thus far, five states—California, Colorado, Connecticut, Utah, and Virginia—have enacted various versions of a consumer data privacy law. These consumer privacy laws generally include two broad components. The first is a right to obtain access to and to delete personal information. The second is a right to opt out of the sale of personal information. Other common provisions require business websites or online services to post their privacy policies, to describe what information they share with third parties, and to inform consumers how to request changes.

---

196. Id. at 32.
197. Id.
199. See Ben Wolford, What is the GDPR, the EU’s New Data Protection Law?, GDPR.EU, https://gdpr.eu/what-is-gdpr/ [https://perma.cc/ABS3-M66M].
200. Id.
The California Consumer Privacy Act of 2018 ("CCPA")\textsuperscript{201} is a comprehensive consumer privacy law with detailed requirements and expansive rights for consumers. Section 1798.100 describes some of a business’ obligations under the CCPA. These include the right to request that a business that collects a consumer’s personal information disclose to that consumer the categories and specific pieces of personal information the business has collected; businesses must inform consumers as to the categories of personal information to be collected and the purposes for which the categories of personal information shall be used.\textsuperscript{202} These rights impose general duties on businesses that collect personal information, including informing the consumer of what information is collected and whether that information is sold or shared; informing the consumer of sensitive personal information collected and what purposes for which it is used; and the length of time the information will be stored.\textsuperscript{203} Section 1798.100 further requires that businesses only collect “reasonably necessary and proportion[al]” data, ensure that data shared with a third party meets specific requirements, and ensure that data is protected through adequate security measures.\textsuperscript{204}

\begin{footnotesize}
\begin{enumerate}
\item[201.] \textit{CAL. CIV. CODE} §§ 1798.100–1798.199.100 (West 2022).
\item[202.] \textit{See} \textit{CAL. CIV. CODE} § 1798.100 (West 2023).
\item[203.] \textit{Id}.
\item[204.] \textit{Id} (a) A business that controls the collection of a consumer’s personal information shall, at or before the point of collection, inform consumers of the following:
\begin{itemize}
\item[(1)] The categories of personal information to be collected and the purposes for which the categories of personal information are collected or used and whether that information is sold or shared.
\item[(2)] If the business collects sensitive personal information, the categories of sensitive personal information to be collected and the purposes for which the categories of sensitive personal information are collected or used, and whether that information is sold or shared. A business shall not collect additional categories of sensitive personal information or use sensitive personal information collected for additional purposes that are incompatible with the disclosed purpose for which the sensitive personal information was collected without providing the consumer with notice consistent with this section.
\item[(3)] The length of time the business intends to retain each category of personal information, including sensitive personal information, or if that is not possible, the criteria used to determine that period provided that a business shall not retain a consumer’s personal information or sensitive personal information for each disclosed purpose for which the personal information was collected for longer than is reasonably necessary for that disclosed purpose.
\item[(b)] A business that, acting as a third party, controls the collection of personal information about a consumer may satisfy its obligation under subdivision (a) by providing the required information prominently and conspicuously on the homepage of its internet website. \ldots
\item[(c)] A business’ collection, use, retention, and sharing of a consumer’s personal information shall be reasonably necessary and proportionate to achieve the purposes for which the personal information was collected or processed, or for another disclosed purpose that is compatible with the context in which the personal information was collected, and not further processed in a manner that is incompatible with those purposes.
\item[(d)] A business that collects a consumer’s personal information and that sells that personal information to, or shares it with, a third party or that discloses it to a service provider or contractor for a business purpose shall enter into an agreement with the third party, service provider, or contractor, that: \ldots [setting forth five requirements in this situation]
\item[(e)] A business that collects a consumer’s personal information shall implement reasonable security procedures and practices appropriate to the nature of the personal information to protect the personal information from unauthorized or
\end{itemize}
\end{enumerate}
\end{footnotesize}
Section 1798.105 of the CCPA sets forth a consumer’s right to delete personal information and Section 1798.106 provides a consumer’s right to correct inaccurate personal information.\footnote{CAL. CIV. CODE §§ 1798.105–106 (West 2020).} Section 1798.110 sets forth a consumer’s right to know what personal information is being collected, and section 1798.115 requires disclosure of what personal information is sold or shared and to whom it is being given.\footnote{CAL. CIV. CODE §§ 1798.110, 115 (West 2020).} Section 1798.120 establishes a consumer’s right to opt out of the sale or sharing of personal information, and Section 1798.121 gives consumers a right to limit the use and disclosure of sensitive personal information.\footnote{CAL. CIV. CODE §§ 1798.120–.121 (West 2023).} In addition, the California Office of the Attorney General has issued regulations to implement the obligations under the CCPA.\footnote{See CCPA Regulations, STATE OF CALIFORNIA DEPARTMENT OF JUSTICE, https://oag.ca.gov/privacy/ccpa/regs [https://perma.cc/QK32-PW5R].}

In Connecticut, the legislature passed “An Act Concerning Personal Data Privacy and Online Monitoring” (“CTDPA”).\footnote{2022 Conn. Acts P.A. 22-15 (Reg. Sess.).} This law creates a framework for controlling and processing personal data; provides duties and privacy protection requirements for data collectors; and gives consumers the right to access, correct, delete, and obtain a copy of personal data, and to opt out of the processing of personal data.\footnote{See id. §§ 4, 6, 7.} It takes effect on July 1, 2023.\footnote{Id. §§ 1–11.}

Utah enacted the Utah Consumer Privacy Act.\footnote{UTAH CODE ANN. §§ 13-61-101 to -404 (West 2023).} Utah’s Consumer Privacy Act gives consumers the right to know what personal information a business collects,\footnote{Id. § 13-61-302.} how the business uses it,\footnote{Id. § 13-61-201.} and whether the business sells the personal information.\footnote{See id. §§ 13-61-202 to -203, -302.} It also gives consumers the right to gain access to and to delete personal information, and to opt out of the collection and use of this information.\footnote{Id. §§ 13-61-101 to -404.} Finally, it requires businesses to safeguard personal information, to provide notice about the use of personal information, and to comply with consumer requests to delete or stop selling personal information.\footnote{VA. CODE ANN. §§ 59.1-577 to -579 (West 2023).} The effective date is December 31, 2023.\footnote{Id.}

Finally, the Virginia Consumer Data Protection Act creates a framework for controlling and processing personal information; provides duties and privacy protection requirements for data collectors; and gives consumers the right to access, correct, delete, and obtain a copy of personal data and to opt out of the processing of personal data.\footnote{Id. §§ 13-61-202 to -203, -302.} It takes effect on January 1, 2023.\footnote{Id. §§ 13-61-101 to -404.}

Regardless of the merits of whether the United States should adopt a full-blown version of the GDPR, mindfulness principles suggest that data collecting
companies should—by contract (i.e., terms of use)—provide consumers, patients, and users with many of the protections found in that law. Apple, for example, has often highlighted its privacy protections and options as a strong selling feature of the iPhone. “Privacy means peace of mind, it means security, and it means you are in the driver’s seat when it comes to your own data,” notes Apple’s Senior Vice President of Software Engineering.219 “Our goal is to create technology that keeps people’s information safe and protected. We believe privacy is a fundamental human right, and our teams work every day to embed it in everything we make.”220

If other companies and entities were to emulate Apple’s polices, consumers and users would be better protected and more informed. Once again, the goal is for data collecting companies to be mindful of the privacy rights of individuals without interfering with legitimate expressive activity. Awareness of the privacy concerns of users, patients, and consumers is ultimately beneficial to society and desirable for the companies and other entities gathering this information. Although this suggestion involves no legal compulsion and instead depends upon voluntary action, self-restraint, and self-regulation, doing so could well be in the best financial interest of many companies. As Monica Nickelsburg has observed, “Microsoft and Apple have long positioned themselves as privacy good guys while their younger tech industry peers stumble from one data scandal to the next. Now they’re increasingly using that reputation as a reason for businesses and consumers to use their services.”221

Axel, a privacy and security-focused tech company, has similarly commented on this point in a different way: “If someone only watched Big Tech advertisements, they’d believe that these massive conglomerates are bastions of digital privacy. In the past few years, companies like Facebook and Google have inundated the airwaves with ads that highlight the companies’ efforts to protect user privacy.”222 Apple is clearly a technology company that has focused its efforts on ensuring a secure and private ecosystem, and other companies are seeking to join this bandwagon.223 In effect, businesses can compete on the basis of mindfulness—in the form of offering superior privacy protections—drawing more users or consumers to their products and services.

C. A Mindful Section 230: Dispute Resolution Mechanisms

Section 230 of the Communications Decency Act224 is one of the most widely debated provisions governing the internet. Under Section 230, “[n]o provider

---


220. Id.


223. See id. (“Today, digital privacy is being marketed like a new product, and every company is claiming to value and protect your data.”).

or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” In practical effect, it shields from most types of liability any intermediary—not only Internet Service Providers (“ISPs”) but also any “interactive computer service providers,” that is, any online service that publishes third-party content. Although the law has promoted online innovation and free speech, it also has drawbacks.

Section 230 has been the subject of considerable debate, with both scholars and commentators suggesting a variety of reforms. The question for this article is whether mindfulness principles can help to address some of the problems and challenges that the public faces with regard to online platforms in ways that would maintain the benefits of Section 230.

Those who believe Congress should abolish Section 230 argue that the Internet has changed drastically since Congress enacted Section 230 in 1996. Some believe that a wholly unregulated internet is no longer necessary to preserve the current internet economy. For example, Benjamin Volpe argues that although Section 230 protected the growth of Internet-based technology and communications methods for years, the time has come to narrow Section 230 because the Internet has evolved. Elizabeth Carney observes that Section 230 produced negative consequences, like the ease of facilitating sex trafficking, and the modern internet no longer needs the same protections it once required. Others have argued that although the time to abolish Section 230 is not yet here, it is fast approaching.

Multiple members of Congress have introduced legislation to abolish Section 230. For example, the Abandoning Online Censorship (“AOC”) Act, introduced by Rep. Louie Gohmert (R-Texas), calls for a complete repeal of Section 230 of the Communications Act. The 21st Century Foundation for the Right to Express and Engage in Speech Act (also known as 21st Century FREE Speech Act), proposed by Sen. Bill Hagerty (R-Tennessee), would also repeal Section 230 and replace it with a common carrier model.

Platforms that were covered under Section 230 would be reclassified as common carriers. These common carriers would be required to “furnish the interactive computer service to all persons upon reasonable request.” The common carriers would not be allowed to discriminate, give unreasonable preference, or

---

225. Id. § 230(c).
226. Id.
232. Id. § 232(c)(1)(A).
subject any person or persons to unreasonable prejudice or disadvantage.\textsuperscript{233} With the new legislation, providers will still not be “treated as the publisher or speaker of any material provided by another content provider,” although there are exceptions, e.g., “promoting, recommending, . . . or restricting access to or availability of material provided by another information content provider.”\textsuperscript{234} The bill does not hold providers liable for actions “taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, promoting self-harm, or unlawful, whether or not such material is constitutionally protected.”\textsuperscript{235}

Some commentators argue that Section 230 should not be abolished but that it should be significantly narrowed. Lauren Rundall argues that narrowing the protections of Section 230 and making stricter guidelines for how to implement it will prevent massive social media companies from exerting too much power and having too large an influence on what content users consume.\textsuperscript{236} Natalie Annette Pagano contends that Section 230 must be narrowed in order to ensure protection for users of social media platforms.\textsuperscript{237} Nicholas Conlon—though not advocating the repeal of Section 230—does want to narrow the scope and interpretation of the statute.\textsuperscript{238}

Several commentators believe modification is necessary to bring it up to date with our ever-increasing digital era but would not go as far as narrowing or abolishing Section 230. Michael Daly Hawkins and Matthew J. Stanford suggest modifying Section 230 as an affirmative defense to tort or defamation claims or alternatively enacting a separate, less serious cause of action.\textsuperscript{239} Madeline Byrd and Katherine Strandburg propose a reform of the “treated as a publisher” definition, limited immunity for services capable of substantial nonactionable uses, and full immunity from secondary liability not based on publishing third-party content.\textsuperscript{240} There is also an argument to be made that while Section 230 has many flaws, abolishing it would only cause more problems, and modifying it must be done with caution. Jordan Francis makes this point, arguing that a narrow reform could mitigate unintended harms of Section 230 and that any reforms must be done carefully and cautiously.\textsuperscript{241}

\textsuperscript{233} Id.
\textsuperscript{234} Id. § 232(e)(1)(B)(ii) – (iii).
\textsuperscript{235} Id. § 232(e)(2)(A)(i).
\textsuperscript{236} Lauren Rundall, Don’t Break the Internet: § 230 and its Role Within Today’s Modern Internet Era, 5 BUS. ENTREPRENEURSHIP & TAX L. REV. 50, 59–63 (2021).
\textsuperscript{238} See Nicholas Conlon, Freedom to Filter Versus User Control: Limiting the Scope Of § 230(c)(2) Immunity, 2014 U. ILL. J.L. TECH. & POL’Y 105, 105 (2014) (arguing that courts have interpreted the language of Section 230(c)(2) too broadly, immunizing providers who block material to serve their own interests, and contravening Congress’s objective of maximizing user control).
\textsuperscript{239} Michael Daly Hawkins & Matthew J. Stanford, Uproot or Upgrade? Revisiting Section 230 Immunity in the Digital Age, 2 CHI. L. REV. ONLINE, 1–6 (2020).
\textsuperscript{240} Madeline Byrd & Katherine Strandburg, CDA 230 for a Smart Internet, 88 FORDHAM L. REV. 405, 436–38 (2019).
The “Me Too” movement and harassment issues have also sparked calls for modification of the statute. Alexandra Lotty argues that Congress should modernize Section 230 to allow victims of sexual assault to hold online services accountable.\(^\text{242}\) Lotty notes that, in at least three situations, the courts have generally relucated to entertain lawsuits based on online content leading to actual threats or assaults: (1) when an individual created a fake personal profile on a dating service, which included an actor’s telephone number and home address, leading to threats of harassment and threats of sexual violence; (2) when a thirteen-year-old created a profile on a popular social networking website, claimed that she was eighteen years old, and thereafter met an adult in person, who sexually assaulted her; and (3) when an ex-boyfriend posted a fake profile on a dating app including the subject’s location, leading to more than 1,400 men arriving in person at the ex-girlfriend’s home and workplace.\(^\text{243}\) In addition to Lotty, Kira M. Geary contends that Congress should use the Fight Online Sex Trafficking Act to allow harassment victims the right to hold interactive computer services accountable, taking away their current near-total civil immunity.\(^\text{244}\)

There is also the issue of the property rights that users of ISPs have—their personal data. Some have called to modify Section 230 by taxing internet companies for using personal data to generate revenue. For example, Ellen L. Weintraub and Thomas H. Moore propose legislation that would require companies to pay users for the privilege of using their personal data.\(^\text{245}\)

Finally, some worry that leaving Section 230 as-is will only further promote an age of online terrorism. Jaime M. Freilich, for instance, notes that social media companies have no incentive to develop tools to mitigate online terrorist recruiting because they are virtually immune under Section 230.\(^\text{246}\) To address this, they support an amendment that will combat online terrorism, while simultaneously helping lawsuits move past the motion to dismiss stage.\(^\text{247}\)

Just as numerous commentators have suggested modifications to Section 230, members of Congress from both sides of the aisle have proposed various reforms to the law. The Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (“SAFE TECH”) Act is a bill proposed by Senators Mark Warner (D-Virginia), Mazie Hirono (D-Hawaii), Amy Klobuchar (D-Minnesota), and Tim Kaine (D-Virginia).\(^\text{248}\) The bill calls for amendments to Section

---


\(^\text{243}\) \textit{Id.} at 886–87.


\(^\text{247}\) \textit{Id.} at 698–99.

limiting the scope in which companies can use Section 230 as a defense.\textsuperscript{249} If the provider has accepted payment to make an advertisement or other content available, said company cannot use Section 230 as a defense.\textsuperscript{250} A computer service provider also cannot use Section 230 to prevent injunctive relief from the failure to remove, restrict access to or availability of, or prevent dissemination of material that is likely to cause irreparable harm.\textsuperscript{251} Section 230 would also not be a valid defense under this act in cases involving antitrust, civil rights, human rights, stalking and harassment, and wrongful death.\textsuperscript{252}

Rep. Tom Malinowski (D-New Jersey), proposed the Protecting Americans from Dangerous Algorithms Act.\textsuperscript{253} The goal of this bill is not to repeal Section 230, but rather to limit the scope of Section 230(c), preventing immunity for interactive computer services for certain claims.\textsuperscript{254} At the end of Section 230(c), the Act would add a paragraph taking away platforms’ rights to use Section 230 as a defense if the companies use algorithms to disseminate and amplify the content at issue in cases related to civil rights violations and terrorist acts.\textsuperscript{255} There are exceptions to this rule. If the information delivery is given or sorted in a way that is obvious, understandable, and transparent to a reasonable user, the conditions for a claim are not met, and interactive computer services have a defense.\textsuperscript{256} Exemptions are also given to small businesses (interactive computer services with 10,000,000 or fewer monthly viewers in at least 3 of the last 12 months), and internet infrastructure (providers of interactive computer services being used for web hosting, domain registration, content delivery networks, caching, data storage, and cybersecurity).\textsuperscript{257}

A number of bills propose to add new requirements for companies seeking to invoke Section 230. The Protecting Constitutional Rights from Online Platform Censorship Act, proposed by Rep. Scott DesJarlais (R-Tennessee),\textsuperscript{258} seeks to amend the Good Samaritan section of Section 230. It would make it unlawful for a platform to restrict access or availability to protected content.\textsuperscript{259} More specifically, the bill would make it unlawful for internet platforms to take any “action to restrict access to or the availability of protected material of a user of such platform.”\textsuperscript{260} The bill defines “protected material” as “material that is protected under the Constitution or otherwise protected under Federal, State, or local law.”\textsuperscript{261}

The Curbing Abuse and Saving Expression in Technology (“CASE-IT”) Act was introduced by Representatives W. Gregory Steube (R-Florida), Madison

\textsuperscript{249} \textit{Id.} § 2.  
\textsuperscript{250} \textit{Id.}  
\textsuperscript{251} \textit{Id.}  
\textsuperscript{252} \textit{Id.}  
\textsuperscript{254} \textit{Id.}  
\textsuperscript{255} \textit{Id.} § 2.  
\textsuperscript{256} \textit{Id.}  
\textsuperscript{257} \textit{Id.}  
\textsuperscript{259} \textit{Id.} § 2.  
\textsuperscript{260} \textit{Id.}  
\textsuperscript{261} \textit{Id.} § 2.
The goal of the bill is to limit the immunity of providers and users of interactive computer services. The bill starts by adding a section making exceptions relating to illegal, exploitive, and harmful content. Section 230 defenses would not apply to providers which knowingly permit or facilitate an adult having contact with an individual that such adult knows or believes to be a minor if such contacts involve sexual desires or sexual conduct. The same exceptions apply to content that is indecent, obscene, or otherwise harmful to minors. Companies that are also dominant in their market—those that have gained substantial, sustained market power over competitors—must make content moderation decisions that are reasonably consistent with the First Amendment. If their content moderation policies or practices are not consistent with the First Amendment, they cannot use Section 230 as a defense.

The See Something, Say Something Online Act of 2021 is a bill introduced by Senators Joe Manchin (D-West Virginia) and John Cornyn (R-Texas). The bill explains that the drafters of Section 230 never intended to provide legal protection for websites or interactive computer services that do nothing after becoming aware of terrorism, serious drug offenses, and violent crimes. The bill calls for mandatory reporting of suspicious transmissions. These providers would have to take reasonable steps to prevent and address suspicious transmissions on their websites. According to the Act, "[a] suspicious transmission means any public or private post, message, comment, tag, transaction, or any other user-generated content or transmission that commits, facilitates, incites, promotes, or otherwise assists the commission of a major crime." If a provider fails to report a suspicious transmission, it will not be able to assert Section 230 as a defense.

The Platform Accountability and Consumer Transparency ("PACT") Act is a bill introduced by Senators Brian Schatz (D-Hawaii) and John Thune (R-South Dakota). First, the Act starts by calling for transparency and process requirements. Providers of interactive computer services must publish acceptable use policies in a location that is easily accessible to the user. These policies are required to inform users about the type of content used, be clear that the content is in compliance with acceptable use policy, provide procedures for users to notify the platform of

---

263. Id.
264. Id. § 2.
265. Id.
266. Id.
267. See id.
268. Id.
270. Id. § 2.
271. Id. § 4.
272. Id. § 5.
273. Id. § 3(6).
274. See id. § 3(f).
276. See id. § 5(a)(1).
potentially policy-violating content, illegal content, or illegal activity, and provide transparency through a quarterly report.\textsuperscript{277} Second, the Act requires that providers provide complaint systems where users can submit complaints and track the status of the complaint.\textsuperscript{278} Third, the Act requires users to establish call centers with live representatives to assist users.\textsuperscript{279} Finally, the PACT Act requires these new obligations for providers if they want to receive Section 230 immunity.\textsuperscript{280}

The Stop Shielding Culpable Platforms Act is a bill introduced by Rep. Jim Banks (R-Indiana).\textsuperscript{281} The goal of this bill is to amend Section 230 in order to clarify that the section does not prevent a provider from being treated as the distributor of information provided by another information content provider and for other purposes.\textsuperscript{282} The proposed legislation expressly clarifies that Section 230 is continually misinterpreted to incorrectly apply distributor immunity as well as publisher immunity to online platforms.\textsuperscript{283} Currently, Section 230 has been interpreted to grant immunity in these situations even when a company distributes content that it knows is illegal.\textsuperscript{284} To solve this, the Act calls to add a subparagraph that says that “nothing in subparagraph (A) \cite{285} of Section 230(c)(1)] shall be construed to prevent a provider or user of an interactive computer service from being treated as the distributor of information provided by another information content provider.”\textsuperscript{285}

There are several arguments in favor of strengthening and maintaining Section 230, despite a large number of critical commentaries and the bipartisan effort to amend or even repeal the statute. Eric Goldman has made the argument that Section 230 provides internet services with substantive and procedural benefits that the First Amendment cannot provide.\textsuperscript{286} He argues that Section 230 substantively protects more speech than the First Amendment, enables early dismissals, and is more predictable for litigants than the First Amendment.\textsuperscript{287} Others have taken it one step further, contending that Section 230 is required by the First Amendment.\textsuperscript{288}

Some are concerned with the consequences that might come from repealing Section 230, contending that the government might strip immunities from companies based on a disagreement over the content they provide.\textsuperscript{289} Others acknowledge that

\begin{enumerate}
\item[] 277. \textit{Id.} \textsuperscript{[a]}(2).
\item[] 278. \textit{See id.} \textsuperscript{[b]}.
\item[] 279. \textit{See id.} \textsuperscript{[a]}(2)(C)(i).
\item[] 280. \textit{See id.} \textsuperscript{[a]}(2)(C)(i).
\item[] 281. \textit{See Stop Shielding Culpable Platforms Act, H.R. 2000, 117th Cong. (2021).}
\item[] 282. \textit{See id.}
\item[] 283. \textit{Id.} \textsuperscript{[a]}(2).
\item[] 284. \textit{See id.}
\item[] 285. \textit{Id.} \textsuperscript{[a]}(2).
\item[] 286. \textit{See Eric Goldman, Why Section 230 is Better Than the First Amendment, 95 NOTRE DAME L. REV. REFLECTION 33, 36, 39 (2019).}
\item[] 287. \textit{See id.} at 39–43.
\item[] 288. \textit{See Note, Section 230 as First Amendment Rule, 131 HARV. L. REV. 2027, 2032 (2018) (finding that imposing defamation liability on internet intermediaries is unconstitutional under case law).}
\end{enumerate}
Section 230 is not perfect, but that current attempts to modify the statute will only make matters worse. Ashley Johnson, for example, contends that internet intermediaries may be less willing to remove bullying and misinformation content because Section 230 would no longer explicitly protect them from lawsuits for removing such content.290

This article does not propose a wholesale reassessment of Section 230, but it offers two suggestions. First, entities protected under Section 230 should engage in mindful self-regulation. The motivation for this restraint is to avoid amendments to Section 230 that might harm free speech and innovation. For example, internet companies can change their algorithms to incorporate a diversity of viewpoints and to prevent users from only viewing information and content that reinforces their preexisting views and biases. It is clear from the bipartisan nature of the discontent with the current legal environment that self-restraint and self-regulation would be a less onerous alternative to legislative action.

The Brookings Institution has issued a detailed report discussing best practices for addressing bias in online algorithms. The report notes, for example, that “because machines can treat similarly-situated people and objects differently, research is starting to reveal some troubling examples in which the reality of algorithmic decision-making falls short of our expectations. Given this, some algorithms run the risk of replicating and even amplifying human biases, particularly those affecting protected groups.”291

Self-regulation may also entail granting consumers more freedom in what they choose to consume. In a recent article, Urbano Reviglio and Claudio Agosti argue for algorithmic sovereignty in social media—essentially that users and consumers should have the right to control what they see.292 They state: “we intend the moral right of a person to be the exclusive controller of one’s own algorithmic life and, more generally, the right and capacity by citizens as well as democratic institutions to make self-determined choices on personalization algorithms and related design choices.”293

This article’s second suggestion is in fact a legislative tweak to address recent concerns regarding the use and abuse of Section 230. The proposed


292. See Urbano Reviglio & Claudio Agosti, Thinking Outside the Black-Box: The Case for “Algorithmic Sovereignty” in Social Media, 6 SOCIAL MEDIA & SOCIETY 1, 5 (2020).

293. Id. (“Until now this premise—essentially that it matters whether people control personalization and its algorithms—has never been seriously commented, stated, or even discussed by social media platforms.”).
modification would only apply to entities with more than a set number of users or customers—perhaps nearly three billion active social media users. Based on 2022 data, this would cover Facebook, Youtube, Whatsapp, Instagram, TikTok, Facebook Messenger, Snapchat, Pinterest, Twitter, Reddit, and Quora in the social media space.\footnote{Stacy Dixon, Most Popular Social Networks Worldwide as of January 2023, Ranked by Number of Monthly Active Users, STATISTA (Fed 14, 2023), https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/ [https://perma.cc/2TKW-XGY6].} These large entities would be obligated to establish and fund streamlined dispute resolution mechanisms for customers, users, and third parties in order to continue to rely upon the protections of Section 230. The entities are large enough to adequately fund such mechanisms, and this solution would ensure that they ameliorate the harmful effects of their vast operations. These entities could model the dispute resolution mechanism on the “notice-and-takedown” provisions of the Digital Millennium Copyright Act (“DMCA”),\footnote{See Digital Millennium Copyright Act, Pub. L. No. 105-304, §§ 201–02, 112 Stat. 2877–78 (1998) (codified as amended at 17 U.S.C. § 512(c)).} which are designed to balance the interests of Internet sites and their users with the interests of copyright owners.

The DMCA’s notice-and-takedown process allows copyright holders to remove copyright infringing material posted by users.\footnote{Id. at 2877–2881.} To make use of this process, a copyright owner can send a takedown notice to any service provider requesting the provider to remove infringing material.\footnote{Id.} A service provider can include traditional internet service providers (such as a cable internet company), web hosting services, operators of websites, or search engines like Google.\footnote{Id. at 2886.} Once a takedown notice has been sent to a service provider, the provider takes down the content and informs the user, subscriber, or other person responsible for the alleged infringing activity.\footnote{Id. at 2881.} If the alleged infringer does not agree that the material is infringing, the user can send a counter-notice to the service provider identifying their grounds for disputing the takedown notice.\footnote{Id.} If that takes place, the service provider must send the counter-notice to the copyright owner.\footnote{Id. § 512(g)(2)(B).} The service provider must then wait ten to fourteen days to determine if the copyright owner sued the alleged infringer in a copyright infringement action. If the copyright owner files suit, the material can continue to be off-line.\footnote{Id. § 512(g)(2)(C).} If no suit has been filed, the service provider can then return the material to its site.\footnote{Id. § 512(g)(2)(A)–(C). See also section 512 of title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System, U.S. COPYRIGHT OFF., https://www.copyright.gov/512/ [https://perma.cc/NY6H-SUFJ].}

The copyright owner who files a takedown notice would be analogous to an individual who objects to online material for any of a variety of reasons. Some of
those reasons might be legitimate, while others might be an invalid basis for a takedown. Just as the copyright system provides a forum for addressing this question, a similar approach for service providers could address the disputes within the internal takedown process. If this process does not lead to a resolution, some form of dispute resolution then becomes necessary.

The notice-and-takedown process is certainly not without its critics who express various grounds for disputing its effectiveness and its potential to chill legitimate discourse and fair use. Indeed, the criticisms of this provision are numerous, they include a ceiling effect on posting content because of the potential for a takedown notice, a reduction in innovation in user-generated content, and an impact on fair use of copyrighted material. And yet the notice-and-takedown process has several advantages. One commentator calls the DMCA “the law that saved the web.” First, it enables copyright owners to remove infringing material without resort to litigation. Second, it has certainly fostered the robust development of the Internet without the chilling effect of potential liability for users who frequently post infringing material. Third, it provides a process by which users can challenge takedown notices in situations in which they feel that their material in good faith does not infringe on the rights of copyright owners. In short, it provides a way to balance the interests of both copyright owners and the users and providers of Internet services. Although disputes inevitably arise in public discourse, a takedown provision would provide a mechanism for resolving at least some of these

---


305. David Kravets, 10 Years Later, Misunderstood DMCA is the Law that Saved the Web, WIRED (Oct. 27, 2008, 3:01 PM), https://www.wired.com/2008/10/ten-years-later [https://perma.cc/867K-5HYJ].

306. See Digital Millennium Copyright Act (DMCA) – Why is it Important?, WP LEGAL PAGES (June 10, 2021), https://wplegalpages.com/blog/digital-millennium-copyright-act/ [https://perma.cc/T7RB-YR9Y] (“The Digital Millennium Copyright Act (DMCA) is one of the most significant laws affecting the internet and technology today. Without the facility of the DMCA’s safe harbors from crippling copyright liability, most of the services we rely on would not exist.”).

307. See S. REP. 105-190, at 21 (1998) (stating that Section 512 is designed to “balance the need for rapid response to potential infringement with the end-users legitimate interests in not having material removed without recourse”).
questions without resorting to litigation, while also protecting the rights and interests of both parties.

Applying a notice-and-takedown process in Section 230 disputes would enable users to post material, social media sites to remove material upon proper notice, and users to then engage the counter-notice process if they dispute the grounds on which the material was removed. All of this can take place without litigation, and large social media sites could resolve any remaining disputes by establishing and funding an alternative dispute resolution process. Thus, the notice-and-takedown process brings mindfulness considerations into the Section 230 sphere.

CONCLUSION

In sum, it is worth turning to another definition of mindfulness as an “awareness that emerges from paying attention on purpose, in the present moment and non-judgmentally.” A mindfulness practice can lead to more thoughtful and collegial improvements in modern political and cultural discourse. This article suggests several ways in which society might attain a more mindful First Amendment. The first is through self-awareness and self-regulation. Just because the First Amendment, current privacy law, or Section 230 allows people and entities to engage in certain types of speech does not mean that they should elect to do so. Having some circumspection and solicitude toward the reactions and feelings of others can produce incremental improvement in the quality of political and cultural discourse. Similarly, listeners should take a pause before reacting to expression. In particular, listeners should not assume that those who articulate views that differ from their own do so in bad faith.

In addition to self-regulation by the media and other online entities, there can also be legal mechanisms and policies that enable more mindful political and cultural discourse. This article discusses three changes. First, state legislatures should enact comprehensive retraction statutes to allow for the mindful and mutually beneficial resolution of disputes involving defamation. Second, companies and other entities should adopt privacy policies that provide greater privacy protections for consumers and users. Finally, large social media entities, particularly those receiving the benefits of protection from content liability under Section 230, should establish a robust and rapid dispute resolution system to enable aggrieved parties to resolve their disputes in a neutral and fair manner.

Big problems require big solutions. And while there is certainly cause for concern, there is always cause for hope. Coleman, despite his valid concerns about polarization, finds potential hope in the news that “most Americans are miserable.” He cites a study conducted after the 2016 election which found that “67 percent of more moderate Americans on both sides of the divide—a group the authors of the study call the ‘exhausted majority’—were fed up with our state of

309. Coleman, supra note 17, at 9.
dysfunction, despised our contemptuous condition of polarization, and were eager to find ways to talk, compromise, and work together again.”

A quote from Lord Jonathan Sacks’s book, *Morality: Restoring the Common Good in Divided Times*, is instructive:

> There exists, within nature and humanity, an astonishing range of powers to heal what has been harmed and mend what has been broken. These powers are embedded within life itself, with its creativity and capacity for self-renewal. That is the empirical basis of hope. Nature favors species able to recover, and history favors cultures that can do so.

Once, when undergoing a check-up, a doctor put me on a treadmill. “What are you measuring?” I asked him. “How fast I can go, or how long?”

“Neither,” he replied. “What I want to measure is, when you get off the machine, how long it takes your pulse to return to normal.” I realized that health is not a matter of never being ill. It is the ability to recover.

310. *Id.*

311. SACKS, *supra* note 57 at 12.