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“FALSEHOOD FLIES, AND THE TRUTH COMES LIMPING AFTER”: COMBATting ONLINE DISINFORMATION IN THE SHADOW OF CUSMA

Justin Monahan*

ABSTRACT

We live in an era of online disinformation. In the blink of an eye, any person can share a lie online with hundreds of people; within hours, that lie may have been seen by thousands or millions. Though the threat of online “echo chambers” has been exaggerated, the danger of online disinformation to informed voting has not. Each Canadian voter has a *Charter* right to be reasonably informed about candidates running for election, but online disinformation is threatening that right. The government of Canada may have a positive duty to protect this right; at the very least, it is a matter of good governance to counteract online disinformation. This obligation, however, is complicated by Canada’s ratification of CUSMA. Under article 19.17(2) of CUSMA, Canada has agreed to not pass laws that hold thirty-party platforms liable for content, including disinformation, posted on their websites. Article 19.17(2), however, must be interpreted narrowly in order to protect section 3 rights: though Canada cannot pass laws that hold thirty-party platforms liable for user-generated content, it may create laws that hold such platforms liable for failure to remove user-generated disinformation. There are several tools the Canadian government may utilize to enforce such laws and combat disinformation generally.

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INTRODUCTION

Jonathan Swift's observation that "falsehood flies, and the truth comes limping after"¹ is just as relevant today as it was in 1710. In the internet age, information can be shared across the world incredibly quickly; unfortunately, this information is often false, which can have negative effects on the democratic process. Under section 3 of the *Charter of Rights and Freedoms*,² every Canadian has the right to be reasonably informed about the platforms of political candidates and parties before voting.³ But two online phenomena may be threatening this right: "echo chambers" and disinformation. Within an online "echo chamber," a group of people repeat and reinforce their shared ideology to one another. Research suggests, however, that the threat of echo chambers has been greatly exaggerated. Not so for the second phenomenon, online disinformation, which presents a real danger to informed voting. The threat posed by online disinformation may potentially be heightened by Canada's international trade commitments unless Parliament takes appropriate action to combat it. In the *Canada-United States-Mexico Agreement* ("CUSMA"), Canada has promised to not hold third-party platforms liable for user-generated content.⁴ But this promise must be interpreted in accordance with the Government of Canada's possible *Charter* duty to protect informed voting from the dangers of online disinformation. Interpreting CUSMA through a *Charter* lens should disallow Canada from holding third-party platforms civilly liable for user-generated content but allow Parliament to impose liability on such platforms for failing to take reasonable action to detect and remove disinformation.

This paper will explore Canada's obligations under section 3 of the *Charter* in relation to the threats of online echo chambers and disinformation. Given the threat that disinformation, in particular, may pose to an individual's right to cast

¹ Jonathan Swift, "Political Lying," *The Examiner* No. XIV (November 9, 1710), online: <www.bartleby.com/209633.html>.

² *Canadian Charter of Rights and Freedoms*, s 3, Part 1 of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

³ *Figueroa v Canada (AG)*, 2003 SCC 37 at paras 35, 54 [*Figueroa*].

⁴ *The Canada-United States-Mexico Agreement*, 30 November 2018, art 19.17(2) (entered into force 13 March 2020) [*CUSMA*].

an informed vote and Canada's obligations under CUSMA, it will be argued that the Government of Canada may have a positive duty to protect informed voting. Whether or not such a duty exists, the Government still should, as a matter of good governance, take action to protect informed voting. To that end, this paper will explore the various tools Canada's Parliament could use to protect informed voting from online disinformation, including the different architectural models the government could, via legislation and regulation, impose upon the online sphere. These tools, however, will be most successful if they combine the resources of the government and the ingenuity of private industry.

THE RIGHT TO INFORMED VOTING

Section 3 is a broad *Charter* right. It guarantees the right of each Canadian citizen "to vote in an election of members of the House of Commons or of a legislative assembly," and the right to be a candidate for such positions.⁵ However, section 3 includes additional rights beyond what this straightforward text might suggest. The Supreme Court of Canada (SCC) has read the section purposively, expanding its meaning to include more than simply the right to vote and to be a candidate. In *Figueroa v Canada (AG)*, the SCC was asked to determine whether federal legislation that restricted political parties from accessing certain benefits unless they nominated candidates in fifty electoral districts violated section 3.⁶ The SCC determined that section 3, as a *Charter* right, demands a "broad and purposive approach" and held that section 3 includes "the right of each citizen to play a meaningful role in the electoral process."⁷

The right to meaningful participation has also been interpreted as including an informational component. In *Figueroa*, the SCC held that each voter has the right to be "reasonably informed" about each candidate, because voters cannot properly vote if they are not informed about the candidates' platforms.⁸ In *Harper v Canada (AG)*, while determining whether spending limits on electoral advertising

⁵ *Charter*, *supra* note 2, s 3.

⁶ *Figueroa*, *supra* note 3.

⁷ *Ibid*, at paras 20, 25.

⁸ *Ibid*, at paras 35, 54.

violated section 3, the SCC built on this holding. The Court held that “to be well-informed, the citizen must be able to weigh the relative strengths and weakness of each candidate and political party” and to understand the differences between such parties “where they exist.”⁹

ONLINE DISRUPTIONS OF INFORMED VOTING¹⁰

Disruption #1—The Echo Chamber

There are, however, two online phenomena that may be threatening Canadians’ ability to cast informed votes. The first of these phenomena is the online “echo chamber.” The echo chamber emerges from the social theory of “homophily,” which observes that people form relationships with those who share their “interests and values.”¹¹ The “echo chamber” is a social setting that results from such homophilic relationships. In the chamber, the only “ideas, information and beliefs” shared are those that accord with the ideology of the group. Therefore, people “only encounter things they already agree with,” never searching for alternative perspectives.¹²

Echo chambers are antithetical to political knowledge and engagement. Whereas those who seek out different opinions are “more informed and [engage] society in healthy deliberation,” those engrossed in “inwardly focused groups” lose the ability to “challenge their own views,” settling instead for their existing

⁹ *Harper v Canada (AG)*, 2004 SCC 33 at para 71 [*Harper*].

¹⁰ Note that the sources in this paper regarding the existence of echo chambers and online disinformation are primarily American. There is a paucity of studies on these subjects in the Canadian context. For that reason, I have proceeded on the assumption that Canadians’ consumption of online news is similar to Americans’. While Canadians do use online platforms like Facebook, Instagram, and Twitter, they are also able to access news sources that are not accessible in the United States.

¹¹ Catherine Grevet, Loren Terveen & Eric Gilbert, “Managing Political Differences in Social Media” in *CSCW 2014—Proceedings of the 17th ACM Conference on Computer Supported Cooperative Work and Social Computing* (Baltimore: Association for Computing Machinery, 2014) 1400 at 1400.

¹² Elizabeth Dubois & Grant Blank, “The echo chamber is overstated: the moderating effect of political interest and diverse media” (2018) 21:5 *Information Communication & Society* 729 at 729.

beliefs.¹³ Indeed, studies have shown that echo chambers, where they do exist, cause people to misperceive important facts regarding current events.¹⁴ Therefore, those not caught in echo chambers are more likely to cast an informed vote, while those inside echo chambers are less likely to do so.

Nevertheless, there is debate as to whether online echo chambers have become a widespread phenomenon with the potential to disrupt informed voting. Social media platforms have the potential “to expose individuals to more diverse viewpoints,” but also “to limit exposure to attitude-challenging information.”¹⁵ While this potential is so apparent as to be indisputable, studies have disagreed as to which potential these online platforms have realized.

Studies Supporting the Existence of Online Echo Chambers

Numerous studies have concluded that echo chambers are present online. For example, Barberá et al analyzed the content of Twitter conversations relating to twelve “[political and non-political] events and issues” that occurred during 2011 and 2012.¹⁶ The study used a method that “[generated] valid estimates of the ideological positions” of specific social media users to determine whether individuals were “retweeting” those who shared or did not share their ideology.¹⁷ Barberá et al found that though individuals may receive information from ideologically-diverse sources, they are much more likely to retweet information conforming with their own ideology, suggesting that echo chambers are present online.¹⁸

Williams et al also found evidence supporting the existence of online echo chambers. They collected data on five Twitter hashtags related to climate change and analyzed “the distribution of attitudes amongst users utilizing each study

¹³ Grevet, Terveen & Gilbert, *supra* note 11 at 1400.

¹⁴ Eytan Bakshy, Solomon Messing & Lada A Adamic, “Exposure to ideologically diverse news and opinion on Facebook” (2015) 348:6239 *Science* 1130 at 1130.

¹⁵ *Ibid.*

¹⁶ Barberá et al, “Tweeting from Left to Right: Is Online Political Communication More Than an Echo Chamber?” (2015) 26:10 *Psychological Science* 1531 at 1533.

¹⁷ *Ibid* at 1532.

¹⁸ *Ibid* at 1540.

hashtag.”¹⁹ They found that individuals discussing climate change were “embedded within communities of like-minded users.”²⁰ Similarly, Grevet, Terveen, and Gilbert found that although people may converse and have friendships with people of diverse ideologies, these relationships tend to dissolve in the face of political disagreement.²¹ Furthermore, in yet another study, researchers observed echo chambers forming in “clusters” around “popular individuals, celebrities, [and] organizations.”²² More specifically, they found that Twitter communities coalesced around Donald Trump and Hilary Clinton before the 2016 election, and that “certain opinion leaders were responsible for creating homogenous communities on Twitter.”²³

Studies Disputing the Existence of Online Echo Chambers

There are also, however, numerous studies contending that the presence of online echo chambers has been overstated. Shore, Baek, and Dellarocas found that typical Twitter users retweet articles that, on average, are more centrist than the articles they normally read online.²⁴ Likewise, a study of 50,000 online news consumers found that “when presented with a mixture of one- and two-sided news stories, the typical user did not choose information that only complied with their beliefs at the expense of the other article.”²⁵ It also found that Facebook does not “screen out” articles that may conflict with a user’s ideology; to the contrary, “more than one in five political stories” users saw on their newsfeed did not conform with their beliefs.²⁶

¹⁹ Williams et al, “Network analysis reveals open forums and echo chambers in social media discussions of climate change” (2016) 32 Elsevier Science 126 at 126, 129.

²⁰ *Ibid* at 135.

²¹ Grevet, Terveen & Gilbert, *supra* note 11 at 1406.

²² Lei Guo, Jacob A Rhode & H Denis Wu, “Who is responsible for Twitter’s echo chamber problem? Evidence from 2016 election networks” (2020) 23:2 Information Communication & Society 234 at 236.

²³ *Ibid* at 246.

²⁴ Jesse Shore, Jiye Baek & Chrysanthos Dellarocas, “Twitter is Not the Echo Chamber We Think It Is” (2018) 60:1 MIT Sloan Management Rev 1 at 2.

²⁵ R Kelly Garrett, “The ‘Echo Chamber’ Distraction: Disinformation Campaigns are the Problem, Not Audience Fragmentation” (2017) 6:4 J Applied Research Memory & Cognition 370 at 371.

²⁶ *Ibid*.

Dubois and Blank suggest that certain studies find evidence of online echo chambers by using an artificially narrow scope that focuses on single online platforms.²⁷ According to Dubois and Blank, internet media is often polarized on a piecemeal basis, resulting in “partisan news websites, blogs, and some social media.”²⁸ These single-platform studies fail, however, to recognize that internet users rarely seek political news from a single platform. Instead, they visit multiple media sources to obtain different reports and perspectives.²⁹ Indeed, users consume a media diet consisting not only of online news sources, but also of offline sources such as television, newspapers, and even “face-to-face conversations with friends.”³⁰ Therefore, although discussions on Twitter and other social media platforms may be polarized, when Dubois and Blank analyzed “the entire media environment,” they found “little apparent echo chamber.”³¹

While a fulsome exploration of Canadian voters’ media consumption is beyond the scope of this article, and most of the available studies are focused on the effects of echo chambers in the United States, the evidence suggests that online echo chambers may not be a serious threat to Canadians’ ability to cast informed votes. As Dubois and Blank observe, although localized echo chambers may exist on specific websites or in specific online communities, most people venture outside such chambers in search of different perspectives and reports.³² It ought to be noted, however, that patterns in media consumption could change, which is underscored by the ongoing consolidation and concentration of media sources in Canada.³³ Whether and to what extent Canadian voters are exposed to sources of information outside of online echo chambers remains to be seen.

²⁷ Dubois & Blank, *supra* note 12 at 740.

²⁸ *Ibid* at 732.

²⁹ *Ibid* at 732-33.

³⁰ *Ibid* at 732.

³¹ *Ibid* at 740.

³² *Ibid* at 732.

³³ See Dwayne Winseck, “Media and Internet Concentration in Canada, 1984-2019” (16 December 2020), online (pdf): *Canadian Media Concentration Research Project* <www.cmcrcp.org/wp-content/uploads/2021/01/Media-and-Internet-Concentration-in-Canada-1984%E2%80%932019-07012021.pdf>.

Disruption #2—Disinformation

The online spread of disinformation poses a more significant threat to informed voting. Different interested parties, including “political strategists, private interests, and foreign powers,” may spread disinformation “for political gain.”³⁴ Of course, as Garrett observes (and as Jonathan Swift made clear in the eighteenth century) political manipulation through lies is nothing new.³⁵ But the advent of the internet has dramatically recontextualized this political strategy. Although the internet has increased our ability to share and access factual information, it has also made spreading falsehoods easier than ever, with little to no investment of finances or effort required.³⁶ And as the main meeting places of the internet, social media websites such as Twitter and Facebook are prime platforms for spreading disinformation. The danger of online disinformation may be difficult to overstate: it has the potential to allow for foreign interference in elections and has even undermined COVID-19 vaccination efforts.³⁷

Before discussing the possible effects of disinformation, it may be useful to set out some definitions. “Disinformation”—commonly referred to as “fake news”—is “content that is intentionally false and designed to cause harm.”³⁸ People create and spread disinformation for many reasons, including for pecuniary and ideological purposes. Those motivated by profit understand that viral news items on social media platforms can entice users to follow the attached link, bringing them to the website hosting the article and increasing the site’s advertisement revenue.³⁹ Others may use that same ability to advance the interests

³⁴ Garrett, *supra* note 25 at 372.

³⁵ *Ibid.*

³⁶ Michael Karanicolas, “Subverting Democracy to Save Democracy: Canada’s Extra-Constitutional Approaches to Battling ‘Fake News’” (2019) 17:2 CJLT 200 at 201.

³⁷ See Zapan Barua et al, “Effects of Misinformation on COVID-19 Individual Responses and Recommendations for Resilience of Disastrous Consequences of Misinformation” (2020) 8:100119 Progress in Disaster Science.

³⁸ Claire Wardle, “Misinformation Has Created a New World Disorder” (1 September 2019), online: *Scientific American* <www.scientificamerican.com/article/misinformation-has-created-a-new-world-disorder/>.

³⁹ Hunt Allcott & Matthew Gentzkow, “Social Media and Fake News in the 2016 Election” (2017) 31:2 J Economic Perspectives 211 at 217.

of particular political ideologies or candidates.⁴⁰ Wardle, however, contends that most disinformation is not designed to change political opinions *per se*, but rather “to cause confusion, to overwhelm and to undermine trust in democratic institutions from the electoral system to journalism.”⁴¹ In either case, the spread of disinformation has the potential to damage Canadians’ ability to cast an informed vote.

Disinformation is most dangerous when it becomes misinformation. “Misinformation” is disinformation that is “shared by a person who does not realise it is false or misleading.”⁴² Therefore, as disinformation is “shared” on Facebook or “retweeted” on Twitter, it becomes misinformation. Although the average Facebook or Twitter user may not believe a stranger’s post or tweet, the ultimate goal of those who create disinformation is that at least some users will share disinformation with their “friends” or “followers.” In doing so, these individuals “use their own social capital to reinforce and give credibility to the original message,” thus increasing the chance their online community will believe it.⁴³ The post is then shared again, and the cycle continues, broadening in scope and influencing more and more people.

Social media platforms are ideal locations for sharing disinformation. Creating websites that host misleading or false news articles is easier than ever.⁴⁴ But the creators of disinformation need to post links to their sites on popular social media platforms, such as Facebook and Twitter, to generate traffic and exposure for their disinformation.⁴⁵ Sixty-two percent of Americans obtain a portion of their news from social media platforms.⁴⁶ Given the cultural similarities between Americans and Canadians in terms of access to social media platforms, that number is likely similar in Canada. Furthermore, as discussed

⁴⁰ *Ibid.*

⁴¹ Wardle, *supra* note 38.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Allcott & Gentzkow *supra* note 39 at 214.

⁴⁵ *Ibid.* at 214-15.

⁴⁶ *Ibid.* at 223.

below, these platforms have not yet provided reliable tools to more easily enable users to identify disinformation.

The Effects of Disinformation

The data produced by different studies suggest that individuals are regularly exposed to disinformation on social media platforms. Allcott and Gentzkow examined all articles containing disinformation about Donald Trump and Hilary Clinton on Snopes and Politifact, two fact-checking websites, along with a compiled list of “fake news” articles from Buzzfeed.com.⁴⁷ They then determined how many times each piece of disinformation “was shared on Facebook as of early December 2016”—that is, before and after the election.⁴⁸ The results were startling. They determined that, in total, social media users shared the disinforming articles 38 million times, translating into approximately “760 million visits, or about three visits per US adult.”⁴⁹ They also found that the most popular “fake news” stories on Facebook were shared more than the most popular mainstream stories, and that many people who read “fake news” stories believe them.⁵⁰

The effects of online disinformation exposure are both collective and individual. Allcott and Gentzkow found that the most discussed “fake news” stories surrounding the 2016 American election favoured Donald Trump, leading to the suggestion that Trump may not have won the election without “the influence of fake news.”⁵¹ While Allcott and Gentzkow’s conclusions are qualified, their findings nevertheless suggest that where the majority of disinformation favours a certain candidate, disinformation campaigns could influence and potentially decide a close election.

Although echo chambers may not threaten the *Charter* rights of Canadians, online disinformation has more potential to do so. The online dissemination of disinformation threatens the right of every Canadian to cast an informed vote.

⁴⁷ *Ibid* at 219.

⁴⁸ *Ibid* at 219.

⁴⁹ *Ibid* at 225.

⁵⁰ *Ibid* at 212.

⁵¹ *Ibid*.

Factual news is still available, but the danger of disinformation is that voters do not know what is true and what is false. As Chen, Conroy, and Rubin state, “with so many sources of varying quality, it becomes difficult for readers to evaluate the credibility and trustworthiness of what they see on the internet.”⁵² Disinformation can render readers of online news suspicious of all online information, whether it be factual or false. Thus, voters are handicapped in their efforts to determine “the true state of the world” and “which electoral candidate they prefer.”⁵³ For this reason, the remainder of this paper will analyze possible government action against disinformation.

GOVERNMENT ACTION

Canada’s Possible Duty to Protect the Informed Vote

Although online dissemination of disinformation may be disrupting Canadians’ ability to cast informed votes, it is unclear whether the Government of Canada has a *Charter* duty to do anything about it. The caselaw surrounding section 3 is indeterminate on this issue. In *Harper*, the SCC decided that government action protecting the right to “vote in an informed manner” was constitutional.⁵⁴ And in *Figueroa*, the SCC stated that section 3 imposes a negative duty on Parliament to not interfere with this right.⁵⁵ But no court has decided whether section 3 imposes a positive duty on Parliament to protect Canadians’ section 3 rights when they are threatened, as they may be by online disinformation.

The caselaw regarding positive Parliamentary duties under section 2 of the *Charter*, however, suggests that such a positive duty may exist.⁵⁶ In *Dunmore v Ontario (AG)*, Ontario had excluded agricultural workers from its statutory labour

⁵² Yimin Chen, Niall J Conroy & Victoria L Rubin, “News in an Online World: The Need for an ‘Automatic Crap Detector’” (2016) 52:1 Proceedings Assoc Information Science & Technology 1 at 1.

⁵³ Allcott & Gentzkow, *supra* note 39 at 212.

⁵⁴ *Harper*, *supra* note 9 at para 68-71.

⁵⁵ *Figueroa*, *supra* note 3 at para 51.

⁵⁶ *Charter*, *supra* note 2 (enumerating the fundamental freedoms Canadians enjoy under the *Charter*, s 2).

relations regime. In response, a group of agricultural workers brought an action arguing that the exclusion infringed their section 2(d) right to freedom of association.⁵⁷ The issue of the case was whether section 2(d) contained a positive component requiring Parliament and provincial legislatures to include certain groups in their statutory labour regimes. The SCC held that such a positive duty may exist in specific situations and established the process for determining when this duty exists.⁵⁸ This process, or “test,” was succinctly summarized by the SCC in *Baier v Alberta*:

First, [a court] must consider whether the activity for which the claimant seeks s. 2(b) protection is a form of expression. If so, then second, the court must determine if the claimant claims a positive entitlement to government action, or simply the right to be free from government interference. If it is a positive rights claim, then third, the three *Dunmore* factors must be considered [...] These three factors are (1) that the claim is grounded in a fundamental freedom of expression rather than in access to a particular statutory regime; (2) that the claimant has demonstrated that exclusion from a statutory regime has the effect of a substantial interference with s.2(b) freedom of expression, or has the fundamental freedom. If the claimant cannot satisfy these criteria then the s.2(b) claim will fail. If the three factors are satisfied then s.2(b) has been infringed and the analysis will shift to s.1.⁵⁹

In lieu of a positive duty test for section 3, I will adapt this section 2(d) test to the language of section 3 and use it to determine whether section 3 may impose a positive duty on the government to intervene against the spread of disinformation.

Although there is no way to definitively determine whether a court would find that this duty exists, a hypothetical application of this hybrid test suggests that it may. We have already determined the answers to the first two parts of the test: informed voting is a component of the right to vote, and our hypothetical claimant will be seeking positive government action to protect this right. In the third step of the test, to establish a positive duty, the claimant may satisfy the court that all three of the (altered) *Dunmore* factors were fulfilled. First, the

⁵⁷ *Dunmore v Ontario (AG)*, 2001 SCC 94.

⁵⁸ *Ibid* at paras 39, 41-43.

⁵⁹ *Baier v Alberta*, 2007 SCC 31 at para 30.

claimant would have to prove the claim was not grounded in access to a statutory regime but in a fundamental freedom included in section 3. Here, the claim is grounded in the right to vote in an informed manner, which is guaranteed by section 3, not by statute. Second, the claimant would have to demonstrate that exclusion from a statutory regime had interfered with her right to cast an informed vote. In this scenario, this step would likely not be relevant as it is not exclusion from a particular regime that leaves the right to informed voting unprotected, but government inaction generally.

Third, the claimant would have to demonstrate that government inaction has caused a substantial interference with her right to cast an informed vote. This third factor would be the most difficult to satisfy. As discussed above, in the absence of government action, disinformation has pervaded social media and has misled voters about the ideologies and platforms of political candidates. But it is private parties, not the Canadian government, who are spreading disinformation and damaging informed voting. Nevertheless, there are two arguments the claimant could make at this step. First, the claimant could argue that section 3, unlike section 2, inherently requires positive action from the State: the government would certainly infringe section 3 if it did not take the positive action of holding an election, for example. Second, the claimant could argue that the government has a duty to regulate social media platforms because, although they are owned by private companies like Facebook and Twitter, these platforms are the new marketplace of ideas, where much of our political discussion occurs. Thus, the claimant could argue that the government has a duty to intervene and ensure that trustworthy information, not disinformation, guides political discussions.

There is no definitive way to determine whether a court would find that this positive duty exists. Nevertheless, even if it does not, it may be a matter of good governance to counteract online disinformation for the reasons discussed above.

SECTION 230 AND *CUSMA*

Before discussing how the government could counter disinformation, we must first discuss Section 230 of the American *Communications Decency Act*. Section 230 insulates online third-party platforms, such as Facebook and Twitter, from liability for the content their users may post or share on their platforms.⁶⁰ Through ratifying CUSMA, Canada has agreed to implement a version of Section 230 in Canada and not pass laws that hold third-party platforms liable for the content, including disinformation, posted on their websites. More specifically, article 19.17(2) requires that all signatories, including Canada, not

adopt or maintain measures that treat a supplier or user of an interactive computer service as an information content provider in determining liability for harms related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has, in whole or in part, created, or developed the information.⁶¹

Canada, then, must meet two goals. The government must fulfill its CUSMA obligation by passing laws and regulations that disallow courts from holding third-party platforms liable for user-generated content, including disinformation, but the government must do so in such a way as to respect the protection of informed voting. In other words, Canada's promise under CUSMA must be interpreted in a fashion that allows the government to protect informed voting.

Analyzing the American version of section 230 gives some indication of what a Canadian version may look like. The premise of America's Section 230 is that "the mistakes caused by liability are worse than the mistakes caused by immunity."⁶² If platforms could be held liable for user-generated content, they would likely protect themselves from such liability by removing too much

⁶⁰ 47 U.S.C. § 230 (2012).

⁶¹ *CUSMA*, *supra* note 4, art 19.17(2).

⁶² James Grimmelman, "To Err Is Platform" (6 April 2018), online: *Knight First Amendment Institute* <knightcolumbia.org/content/err-platform>.

content.⁶³ Thus, the logic goes, it is better to allow too much to remain online than to limit users' free expression by removing too much.

In the United States, Section 230 effectively removes liability from platforms that allow disinformation to be posted and remain on their websites. Online disinformation blends into other user-generated content on social media platforms, and as discussed above, users then “engage with and amplify” this disinformation. Third-party platforms have the most control over user-generated content and thus the most ability to combat disinformation; yet, they “remain inoculated from liability for its effects,” and thus have little incentive to do so.⁶⁴ In this way, “Section 230 effectively underwrites” user-generated content meant to mislead and disinform the public.⁶⁵

In her discussion of the regulation of third-party platforms, Klonick holds that, because these platforms effectively protect free speech in America, they do not require further regulation.⁶⁶ She contends that companies such as YouTube, Facebook, and Twitter are “economically and normatively motivated” to regulate themselves as necessary, and therefore do not require government interference.⁶⁷ Klonick, writing from an American legal perspective, believes that these platforms will “reflect the democratic culture and free speech expectations of their users” by protecting their ability to exercise free speech.⁶⁸

But protection of free speech is not enough in Canada. Whereas the United States has a rich history of free speech protection, Canada has already shown its unwillingness to sacrifice informed voting for the sake of unfettered political speech. In *Harper*, the SCC determined that spending limits on third-party

⁶³ *Ibid.*

⁶⁴ John Bowers & Jonathan Zittrain, “Answering Impossible Questions: Content Governance in an Age of Disinformation” (2020) 1:1 Harvard Kennedy School Misinformation Rev 1 at 4.

⁶⁵ Olivier Sylvain, “Discriminatory Designs on User Data” (1 April 2018), online: *Knight First Amendment Institute* <knightcolumbia.org/content/discriminatory-designs-user-data>.

⁶⁶ Kate Klonick, “The New Governors: The People, Rules, and Processes Governing Online Speech” (2017) 131:1598 Harv L Rev 1599 at 1603.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

electoral advertising were a justified limit on free speech (in part) because they prevented wealthy parties from dominating political discourse, thus allowing voters to be informed about all political parties instead of just those with the most money.⁶⁹ If Canada, allows third-party platforms to focus only on protecting free speech, it will also enable the continued dissemination of political disinformation. It is not enough that American companies self-regulate to protect free speech; Canada must also ensure that they regulate to protect informed voting.

Therefore, the Canadian version of Section 230 must be written and interpreted more narrowly than the American version in order to actualize the full meaning of section 3. Article 19.17(2) of CUSMA holds that no signatory will create or maintain laws that hold third-party platforms liable for information shared on their platforms by internet users.⁷⁰ The narrow interpretation of this Article, which still allows the Canadian government to protect informed voting, is one that does not hold third-party platforms liable for the civil damages associated with user-generated content; it may, however, hold them liable for failure to take reasonable efforts to remove such content.

This interpretation accords with Prime Minister Trudeau's intentions. As Hedger observes, the Prime Minister has signalled that he will begin to regulate online third-party platforms in ways not required by the American Section 230.⁷¹ In Trudeau's "Mandate Letter" to his Minister of Canadian Heritage, Steven Guilbeault, the Prime Minister states that his government will be crafting "new regulations for social media platforms," including a requirement that they "remove illegal content, including hate speech, within 24 hours."⁷² The letter makes no mention of action against disinformation but does suggest a willingness to regulate platforms like Facebook and Twitter, where disinformation is often disseminated.

⁶⁹ *Harper*, *supra* note 9 at paras 91, 105-7.

⁷⁰ *CUSMA*, *supra* note 4, art 19.17(2).

⁷¹ Patrick Hedger, "USMCA Won't Protect Tech from Trudeau" (last modified 16 March 2020), online: *Competitive Enterprise Institute* <cei.org/blog/usmca-wont-protect-tech-trudeau>.

⁷² Prime Minister Justin Trudeau, "Minister of Canadian Heritage Mandate Letter" (13 December 2019), online: *Justin Trudeau, Prime Minister of Canada* <pm.gc.ca/en/mandate-letters/2019/12/13/minister-canadian-heritage-mandate-letter>.

Prime Minister Trudeau's desire to regulate online third-party platforms without imposing direct liability for user-generated content upon them is emblematic of a larger shift in Canadians' attitude towards such platforms. Section 230 emerged from the "Rights Era," during which society was concerned with protecting the burgeoning capitalistic potential of internet development from burdensome government regulation.⁷³ However, as third-party platforms such as Facebook and Twitter became powerful corporations, public opinion shifted into the "Public Health Era," during which people became concerned with the harms third-party platforms were causing by, among other things, enabling the spread of disinformation.⁷⁴ Trudeau's actions place him in the current era: the "Process Era." In this current era, Canadian society is developing tools that both maintain the rights of third-party platforms and protect Canadians from the harmful effects of such platforms, including the spread of disinformation.⁷⁵

Tools for Combatting Disinformation Online and Protecting the Right to Vote

The protection of informed voting will require a joint effort between corporations and the government. Process-era solutions, because they respect public rights and private interests, may best use solutions that "assign platforms new duties" while also "delegate[ing] important aspects of the content governance process outside of the platforms themselves," presumably to public agencies.⁷⁶ More specifically, the most successful methods for combatting disinformation are those that use the guidance of the public sector and the resources and abilities of third-party platforms.

I have organized these methods according to the "collection of tools" society possesses "for affecting constraints upon behaviour."⁷⁷ Lessig separates these tools into four categories: law, marketplace, social norms, and architecture.⁷⁸

⁷³ Bowers & Zittrain, *supra* note 64 at 2.

⁷⁴ *Ibid.*

⁷⁵ *Ibid* at 3.

⁷⁶ *Ibid* at 5.

⁷⁷ Lawrence Lessig, "The Law of the Horse: What Cyberlaw Might Teach" (1999) 113:2 Harv L Rev 501 at 502.

⁷⁸ *Ibid* at 507.

Although I have separated these recommendations into different categories, they may interrelate. Many may be more effective if used together, and a solution may fall primarily into one category but feature aspects of another. For example, nearly all of the solutions below have a legal dimension in that they would require some form of legislative action from the government.

Tool #1—Law

Law regulates behaviour by “order[ing] people to behave in certain ways” and “threatening punishment if they do not obey.”⁷⁹ Law-making is perhaps the most direct form of behavioural control: the State tells us what we cannot do.

Section 91(1) of the *Canada Elections Act* is an excellent example of the most direct use of law to combat disinformation. The section penalizes those who, “with the intention of affecting the results of an election,” make false statements about a candidate during the election period.⁸⁰ The benefit of this law, and others like it, is its simplicity: it punishes those who fulfill its *actus reus* and *mens rea* elements. But its simplicity has downsides. First, it does not assign any responsibility to third-party platforms to detect or report such disinformation, and thus uses none of their resources. Additionally, it attacks the dissemination of disinformation on a case-by-case basis rather than stemming it at its source. Furthermore, the section only applies during the election period, and so anyone outside this period can publish and spread disinformation about a political candidate without consequence. And the section cannot address disinformation coming from outside the country if Canada does not have an extradition agreement with the offender’s country of residence. These limitations are evident in the law’s record: so far, no one has been charged with an offence under section 91(1).⁸¹

A more effective use of legal tools may be a law that holds platforms liable for failing to detect and remove disinformation. This method would not hold platforms civilly liable for user-generated disinformation itself, but liable to the

⁷⁹ *Ibid.*

⁸⁰ *Canada Elections Act*, SC 2000, c 9, s 91(1).

⁸¹ Karanicolas, *supra* note 36 at 204.

government for failing to take action to remove user-generated disinformation in a timely manner. In other words, third-party platforms would not be liable for another's actions, but for their own inaction. Germany uses a form of this method: the government fines "social media companies if they fail to remove 'obviously illegal' content within 24 hours upon receiving a complaint."⁸² To borrow language from CUSMA Article 19.17, such laws do not treat third-party platforms as the "information content provider," but as platforms with responsibilities related to monitoring the content hosted by such providers.

Bowers and Zittrain's recommendation of legislating "a fiduciary duty between platforms and their users" is another legal tool that may prove effective at fighting disinformation.⁸³ Under this method, because they have vastly more information and power, third-party platforms would owe their users a fiduciary duty.⁸⁴ This approach would not hold platforms civilly liable for disinformation spread by their users. Instead, it would set specific fiduciary duties—that is, "set standards for content governance"—requiring platforms to detect and remove disinformation.⁸⁵ Platforms would not be liable for the disinformation itself but for allowing the disinformation to remain on the platform, and would be open to civil suit from users for breaching this duty.

A fiduciary duty, however, may not be a practical way of combatting disinformation. Although it may encourage third-party platforms to monitor and remove disinformation, the threat of an actual lawsuit is minimal: absent a class action suit, few individuals would be able to sue Facebook or Twitter with hope of success. Furthermore, the point of disinformation is that most people do not realize it *is* disinformation, begging the question of how users would know a third-party platform has breached its fiduciary duty.

⁸² Hacıyakupoglu et al, "Countering Fake News: A Survey of Recent Global Initiatives" (7 March 2018), online: *S Rajaratnam School of International Studies* <www.rsis.edu.sg/rsis-publication/cens/countering-fake-news-a-survey-of-recent-global-initiatives/#.Xn4SmYhKjIU> 1 at 3.

⁸³ Bowers & Zittrain, *supra* note 64 at 6.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

The State can also use “jawboning” to encourage third-party platforms to remove disinformation. “Jawboning” is a form of “moral suasion,” in which the State applies “pressure through informal threats of regulation, as opposed to issuing formal and legally binding orders.”⁸⁶ To borrow Karanicolas’s example, the government could “make public statements expressing displeasure” with the online dissemination of disinformation “and warn that, if nothing is done to address the problem voluntarily, they will pass costly and restrictive new laws to bring the company to heel.”⁸⁷ Jawboning would encourage platforms “to get ahead of potential government regulation” by instituting their own methods of combatting disinformation.⁸⁸ This method may prove a win-win for private and public interests. First, it removes the government’s political burden to impose the legal solutions discussed above. Second, it allows third-party platforms, who understand how to use their technology to detect and remove disinformation better than anyone, to craft a solution tailored to their platforms.

Tool #2—Marketplace

Markets “regulate by price”⁸⁹ and (more or less) regulate themselves. To that end, and as discussed above, Klonick suggests third-party platforms are capable of regulating themselves as regards the removal of online disinformation in America.⁹⁰ That said, the Canadian federal government could intervene with the market to reduce the dissemination of disinformation. More specifically, it could pass legislation penalizing advertisers who, upon receiving notice of disinformation, fail to remove their ads from websites that host disinformation. Under this system, the government could create an agency to detect and report disinformation, or the government could rely on citizen reports of possible disinformation. This method does not hold advertisers liable for disinformation itself, but would prevent them from profiting from its dissemination.

⁸⁶ Karanicolas, *supra* note 36 at 9.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ Lessig, *supra* note 77 at 507.

⁹⁰ Klonick, *supra* note 66 at 1603.

Admittedly, this market-based solution has limitations. It will not combat Facebook or Twitter posts that share false information without linking to another website. Furthermore, it may be difficult to force foreign advertisers to remove advertisements posted within Canadian borders. Lastly, and perhaps most importantly, this measure would only dissuade financially-motivated, and not ideologically-motivated, disseminators of disinformation.

Tool #3—Social Norms

The government could also institute policies that create or strengthen certain social norms that combat online disinformation. Social norms are communal expressions of values shared by members of the same society. For example, social norms control “where you smoke” and how you “behave with members of the opposite sex.”⁹¹

Many academics have suggested using education initiatives to instill social norms regarding the identification of disinformation. Garrett, for example, suggests that educating individuals on how to spot disinformation could drastically reduce the number of people who believe and act upon such disinformation.⁹² Likewise, Wardle suggests that online users should be “taught to develop cognitive ‘muscles’ in emotional skepticism and trained to withstand the onslaught of content designed to trigger base fears and prejudices.”⁹³ Neither Garrett nor Wardle mention exactly who should do the teaching, but it is safe to assume that education initiatives would fall under the government’s purview. Indeed, countries such as Italy, Taiwan, and even Canada are “introducing school curricula that teach children to discern between false and credible information.”⁹⁴

Using education to create social norms regarding the detection of disinformation may prove a valuable tool in fighting disinformation. Still, it cannot be the only tool. Educating adults on how to detect disinformation would be difficult, if not impossible. Education initiatives require a dedicated

⁹¹ *Ibid.*

⁹² Garrett, *supra* note 25 at 372.

⁹³ Wardle, *supra* note 38.

⁹⁴ Hacıyakupoglu et al, *supra* note 82 at 7.

audience—in this case, school-aged children. Even if schools could effectively educate children on how to spot disinformation before they became adults, disinformation would still threaten the remainder of voting-age people’s ability to cast an informed vote.

Tool #4—Architecture

The government could also curb disinformation by regulating the cyber architecture of third-party platforms. Third-party platforms regulate how users behave within their corner of cyberspace by constraining what users can do and how they do it.⁹⁵ For example, Facebook and Twitter allow their users to “share” or “retweet” posts with their friends and the people who follow them. As mentioned, these posts often contain disinformation or links to disinformation. Many believe that this cyber architecture cannot be regulated because it is fixed and unchangeable, but that is not true: cyber architecture is code, and code is eminently changeable.⁹⁶ The government cannot hold platforms liable for user-generated disinformation, but it could impose regulations requiring that they use certain architecture that reduces the presence of disinformation.

The government should work with third-party platforms to develop these regulations and architectures. Third-party platforms, via the architecture of their websites, have “near-total control of users’ online experience,” and can “administer their platform in obscure or undisclosed ways that are meant to influence how users behave on their site.”⁹⁷ The State should work with third-party platforms to maximize this ability. And for the reasons mentioned in the “jawboning” discussion above, these platforms have good reason to participate in such discussions.

Furthermore, whatever strategy the State does employ, it should use algorithmic programs to detect disinformation. These algorithmic fact-checkers

⁹⁵ Lessig, *supra* note 77 at 507.

⁹⁶ *Ibid* at 506.

⁹⁷ Sylvain, *supra* note 65.

are “computer programs that automatically detect disinformation,”⁹⁸ and may use both linguistic and network approaches. The linguistic approach analyzes word “frequency sets,” deep-syntax analysis, and semantic analysis to detect falsehoods online.⁹⁹ By contrast, the network approach uses linked data to compare factual statements against “findable statements about the known world” in order to determine which factual statements are untrue. This approach can help analyze social network behaviour to determine the veracity of specific statements.¹⁰⁰

The Canadian state could use regulation to impose different architectural models upon third-party platforms. There are three such architectural models, which I will now discuss below.

Model #1—The Correction Model

Platforms have been experimenting with a correction model to combat disinformation. Facebook, for example, has begun “fact checking websites [to] debunk deceptive information” and “flagging” articles to alert users that they contain disinformation.¹⁰¹ These developing fact-checking initiatives use both algorithmic tools and human oversight.¹⁰²

The correction model, however, has a serious shortcoming. An MIT study found that Facebook users “assume that if some articles have [disinformation] warnings, those that don’t must be accurate.” The study called this phenomenon the “implied truth effect.”¹⁰³ Facebook could solve this problem by increasing the number of people reviewing potential pieces of

⁹⁸ Stephan Lewandowsky, Ulrich KH Ecker & John Cook, “Beyond Misinformation: Understanding and Coping with the ‘Post-Truth’ Era” (2017) 6:4 J Applied Research Memory & Cognition 353 at 363.

⁹⁹ Niall J Conroy, Victoria L Rubin & Yimin Chen, “Automatic Deception Detection: Methods for Finding Fake News” (2015) 52:1 Proceedings Assoc Information Science & Technology 1 at 1-2.

¹⁰⁰ *Ibid* at 3.

¹⁰¹ Hacıyakupoglu et al, *supra* note 82 at 11.

¹⁰² *Ibid* at 3-4.

¹⁰³ David Gilbert, “It’s Official: Facebook’s Fact-Checking Is Making Its Fake News Problem Even Worse” (5 March 2020), online: *Vice* <www.vice.com/en_ca/article/epgqxa/its-official-facebooks-fact-checking-is-making-its-fake-news-problem-even-worse>.

disinformation or by improving their algorithm—but whether they will do either remains to be seen.

Even if platforms can detect all pieces of disinformation, it may still not be enough. Studies have shown that “mere exposure to conspiratorial discourse, even if the conspiratorial claims are dismissed, makes people less likely to accept official information.”¹⁰⁴ In other words, once they have read disinformation, after-the-fact corrections are not effective at changing people’s minds.¹⁰⁵ Indeed, when confronted with corrections, people are sometimes liable to believe the falsehood even more.¹⁰⁶ This reaction may occur because users believe that third-party platforms, such as Facebook, regulate to reflect their own biases or to benefit themselves.

Corrections to false articles can be effective but rendering them effective en masse may be impracticable. According to Lewandowsky, Ecker and Cook, for corrections to be effective, they must accomplish two things. First, “they must not directly challenge peoples’ worldviews” and instead they must “[affirm] the self-worth of the recipients.” Second, they “must explain why the disinformation was disseminated in the first place or ... provide an alternative explanation of the relevant event.”¹⁰⁷ These requirements may be so cumbersome as to be unworkable on a large scale. At worst, producing a correction that does not challenge each user’s worldview, that affirms each user’s self-worth, and that explains why disinformation is disseminated may be impossible; at best, it will require a lengthy article explaining the correction in detail. But most news on third-party platforms is consumed passively and quickly. Many people scroll their newsfeeds reading only headlines and bylines, following the attached link to the main body of the article only occasionally, and thus would not benefit from a correction. Furthermore, for a correction to be effective, it must be noticed, but there is no guarantee someone who saw the original article will notice a correction. Even if a platform like Facebook ensures wide distribution of the correction in respective newsfeeds, people may still scroll past it.

¹⁰⁴ Lewandowsky, Ecker & Cook, *supra* note 98 at 355.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

Model #2—The Removal Model

Outright removal of disinformation from third-party platforms is another possible method. Under this model, Facebook and other platforms would use algorithms and human ability to detect and remove disinformation. This method, however, has two problems. First, although removing content may prevent more people from reading disinformation, it fails to inform those who have already read disinforming articles that they were false and provide them with corrections. Second, removal may cause the “Streisand effect,” which is when “deleting content increases audience attention on it.”¹⁰⁸ Censorship, when reported, can garner attention for the item censored, and even lend the item an aura of legitimacy. The near impossibility of removing something from the online sphere further exacerbates the “Streisand effect.” Nothing is ever really “gone” from the internet. Once a third-party platform removes an item, it can be reposted by the original poster (perhaps even under a different name) or by someone else claiming to share the supposed censored truth.

Model #3—The Pre-Screening Model

Given the flaws of the flagging and removal methods, I suggest another: the pre-screening method. Under this method, third-party platforms would use two methods for detecting potential disinformation. The platform would filter all user-generated content, as it was posted, through an algorithm designed to detect disinformation. The algorithm would then place anything identified as potential disinformation in a queue for review by human fact-checkers, who would then determine if the item contained political disinformation or not. Until reviewed by a fact-checker, the post would not be visible to anyone other than the creator of the post. Alternatively, other users could report posts as possible disinformation.

This method has the potential to annoy platform users whose posts are mistakenly flagged for review, even though they do not contain disinformation. Although such mistakes will almost certainly arise as the method is implemented, the algorithm could be continuously revised to avoid such mistakes in the future.

¹⁰⁸ Hacıyakupoglu et al, *supra* note 82 at 8.

The Government of Canada could provide the human architecture required to oversee third-party platforms as they implement this new cyber architecture. As Bowers and Zittrain observe, for any anti-disinformation program to be effective and trusted, the “platform policy” must be “transparent.”¹⁰⁹ A government agency that monitors and assists in the screening of social media posts for disinformation could lend the program a sense of legitimacy and transparency. This agency could also work with third-party platforms in the development of their disinformation-detecting algorithms.

Admittedly, some Canadians could be suspicious of the State intervening in their speech in this manner. Walking the thin line between protecting citizens from the proliferation of disinformation and censoring citizens sharing legitimate information online would be difficult. How the government may do so effectively is beyond the scope of this paper. Suffice it to say that the involvement of a democratically-elected government in the fight against online disinformation may be preferable to trusting third-party platforms to handle this crisis on its own.

JUSTIFYING SOLUTIONS UNDER SECTION 1

Any government-mandated action taken to combat disinformation will be a limit on free expression and thus a *prima facie* violation of section 2(b) of the *Charter*.¹¹⁰ Disinformation attempts to convey meaning under section 2(b), and the purpose of government action to remove disinformation is to restrict the expression of such meaning.¹¹¹ Whether such a violation would be justified under section 1 of the *Charter*¹¹² is highly dependent upon the legislation’s wording and application.

That said, there are reasons to believe that such an infringement would be justified under section 1. First, depending on the legislation itself and the context, the legislation would likely have valid objectives of protecting informational

¹⁰⁹ Bowers & Zittrain, *supra* note 64 at 7.

¹¹⁰ *Charter*, *supra* note 2, s 2(b).

¹¹¹ *Irwin Toy Ltd. v Quebec (AG)*, [1989] 1 SCR 927 at para 42, 48, 58 DLR (4th) 577.

¹¹² *Charter*, *supra* note 2, s 1.

equality.¹¹³ The SCC discussed the objective of informational equality in *R v Bryan*.¹¹⁴ In that case, the issue on appeal related to section 329 of the *Canada Elections Act*, which prohibited news agencies from broadcasting election results until polling stations had closed everywhere in Canada.¹¹⁵ The court had to determine whether this infringement of the appellant's freedom of expression could be justified under section 1.¹¹⁶ In its decision that the infringement was justified, the Court held that informational equality, which is seeking to ensure that "all voters will receive the same information where possible," is an important objective in section 1 analyses.¹¹⁷ Online disinformation may disrupt informational equality because, as discussed above, it may cause voters to receive entirely different information about current events and political platforms. Thus, following this logic, if the government uses the methods discussed above to prevent situations in which "some voters have general access to information that is denied to others" and to protect informational equality, it will likely be pursuing a valid section 1 objective.¹¹⁸

Second, and perhaps more importantly, disinformation is contrary to many of the factors important to freedom of expression under a section 1 analysis: it disrupts each reader's search for truth and political self-actualization, and has the potential to disrupt the political process generally.¹¹⁹ Therefore, the court would likely find that the government's fight against disinformation is an important objective worthy of deference under a section 1 analysis, greatly increasing the legislation's chances of being judicially approved as constitutional.

¹¹³ *Ibid.*

¹¹⁴ *R v Bryan*, 2007 SCC 12 [*Bryan*].

¹¹⁵ *Ibid* at para 1; *Canada Elections Act*, *supra* note 80, s 329, as repealed by *Fair Elections Act*, SC 2014, c 12, s 73.

¹¹⁶ *Bryan*, *supra* note 114 at paras 1, 2.

¹¹⁷ *Ibid* at paras 23, 53. See also *Harper*, *supra* note 9 at para 47.

¹¹⁸ *Bryan*, *supra* note 114 at para 14.

¹¹⁹ *R v Keegstra*, [1990] 3 SCR 697 at paras 92, 194, 94, 77 Alta LR (2d) 193.

CONCLUSION

Online disinformation poses a serious threat to Canadians' ability to cast an informed vote. To accommodate protection of the right to an informed vote, we must interpret Canada's obligations under CUSMA narrowly. Under this restrictive interpretation, although the government cannot hold third-party platforms civilly liable for user-generated content, many tools remain for encouraging or forcing third-party platforms to act against disinformation. Both private and public interests should be involved in crafting and implementing these tools. While the government is best suited to provide both a sense of public legitimacy and guidance on what these tools need to accomplish, private interests have the technological resources to fashion these tools according to the stated goals. In the time of the internet, lies are more dangerous and fly more quickly than ever. It is up to our private and public leaders to clip their wings.