Defamation of a Nation

A Proposed Legal Remedy for Disinformation

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Background: Law of Defamation
in context of the individual

Includes both libel (written defamation) and slander (oral defamation).

Defamation is a false statement of fact about the plaintiff that is communicated by the defendant to a third party and that harms the plaintiff's reputation in the eyes of "a substantial and respectable minority" of the community. The plaintiff in a defamation suit can be either a person or a business.

To Win a Libel Suit a Plaintiff Must Prove:

1. Publication. The libel was published. At least one person other than the plaintiff sees or hears the defamatory material.
2. Identification. Words were of and concerning the plaintiff, who can be identified by a name, nickname, photograph or through a report of circumstances.
3. Defamation. Material is defamatory. The plaintiff must prove that the words have lower his or her reputation. Negligence standard for ordinary claimants. Actual malice standard for public figures.
4. Falsity. Material is false. Truth is a valid defence.
5. Fault. Defendant was at fault.

What About Disinformation
which harms more than just the individual?

Problem: Without protection from disinformation, there is no informed public, which inhibits participation in democracy

Democracy

of the People	by the People	for the People

Executive and Legislative power is conferred by the consent of the people. The scope of their power is defined by law.
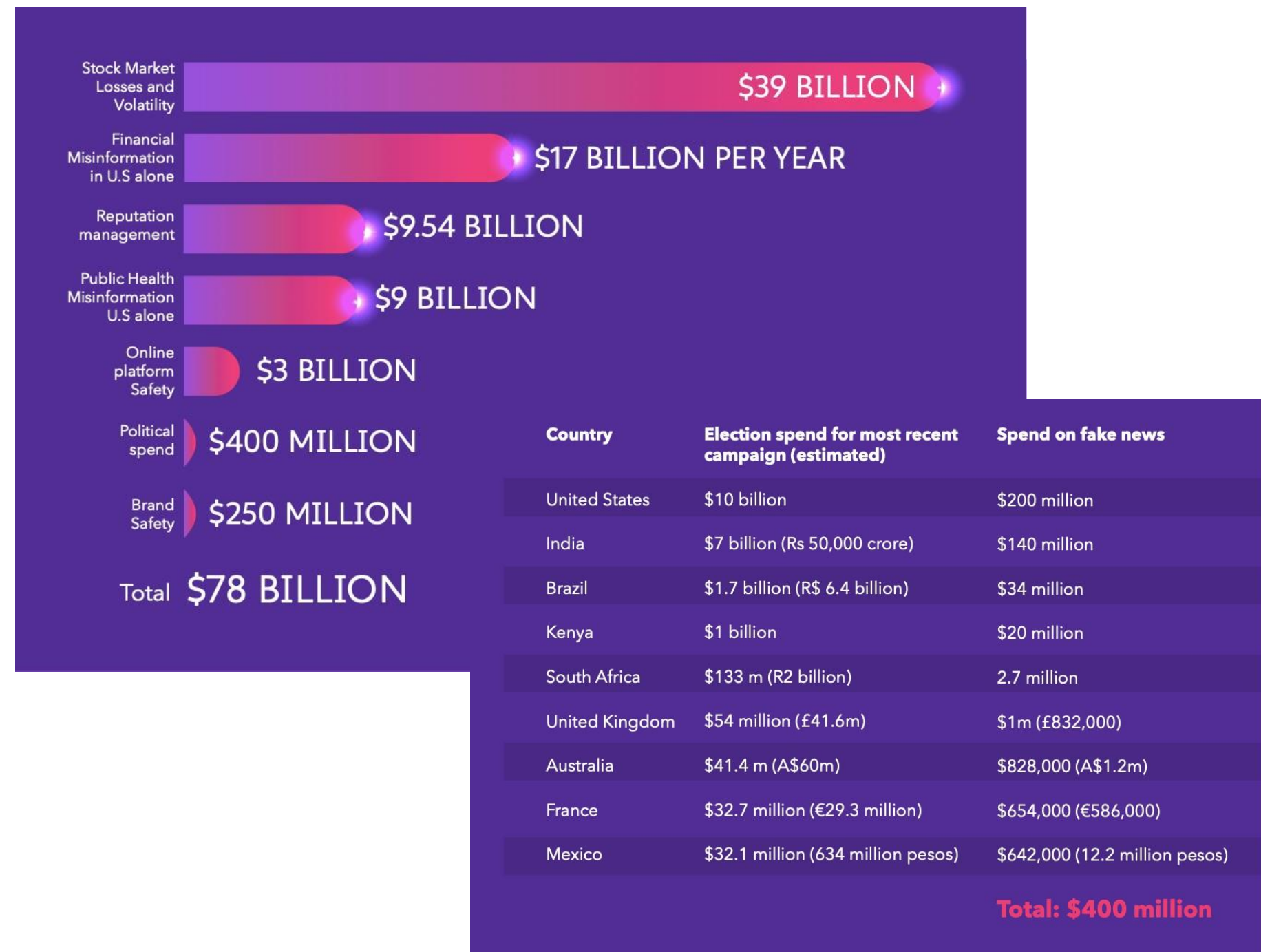
Freedom of speech is a fundamental right protected by the Constitution. Freedom of speech has its outer limits (for instance, defamatory speech is not protected).

Government accountability is designed to prevent corruption and ensure public officials remain answerable to the people they represent.

Disinformation defined (UK):

"The deliberate creation and sharing of false and/or manipulated information that is intended to deceive and mislead audiences, either for the purposes of causing harm, or for political, personal or financial gain." House of Commons, UK (Government Response to the Committee's Fifth Report of Session 2017–19, 23 October 2018, HC 1630).

Cost of Disinformation

Category	Cost
Stock Market Losses and Volatility	$39 BILLION
Financial Misinformation in U.S alone	$17 BILLION PER YEAR
Reputation management	$9.54 BILLION
Public Health Misinformation U.S alone	$9 BILLION
Online platform Safety	$3 BILLION
Political spend	$400 MILLION
Brand Safety	$250 MILLION
Total	$78 BILLION

Country	Election spend for most recent campaign (estimated)	Spend on fake news
United States	$10 billion	$200 million
India	$7 billion (Rs 50,000 crore)	$140 million
Brazil	$1.7 billion (R$ 6.4 billion)	$34 million
Kenya	$1 billion	$20 million
South Africa	$133 m (R2 billion)	2.7 million
United Kingdom	$54 million (£41.6m)	$1m (£832,000)
Australia	$41.4 m (A$60m)	$828,000 (A$1.2m)
France	$32.7 million (€29.3 million)	$654,000 (€586,000)
Mexico	$32.1 million (634 million pesos)	$642,000 (12.2 million pesos)
		Total: $400 million

Problem: Defamation
Does Not Currently Protect Large Groups

Defamation law arose from Common Law to serve a need to protect disinformation from harming an individual's reputation.

"By the dawn of the twentieth century, the policy behind the group defamation rule had been well established, with courts allowing claims to proceed where defamation targeted an individual, and denying [claims] where statements censured or satirized 'an entire class or body of individuals.'"

Moral Hazard

Analogy: Imagine a set of laws under which a murderer of a single victim can be found guilty. But, where a murder who commits a massacre killing hundreds, he or she is let free because there is no law covering mass killings.

When there is no legal solution from the legislation, then a solution can arise from the Common Law. In absence of meaningful legislation, the common law should allow for expansion of defamation law to cover grossly negligent disinformation which tends to harm the democratic process

Does anyone have standing to sue to remedy the harms of disinformation in the democratic process?

Attorney General represents the state and would have the best standing to sue.

Marks v. Stinson, 19 F.3d 873 (3d Cir 1994)

Morgan v Simpson [1975] UK

Democracy

| of the People | by the People | for the People |

Is there a current, effective legal recourse for grossly negligent disinformation in the democratic process?

Proposed Legal Remedy for Disinformation (US):

1. **In instances of grossly negligent disinformation**
2. which has the tendency to pervert the democratic process:
   A. Where grossly negligent disinformation was published by political candidate in close election the state Attorney General sues to rerun affected election in affected state.
   B. Where grossly negligent disinformation was published or republished by non-political candidate, the state Attorney General sues for damages.

   * I do not propose prior restraint.

Ball v Johnson ?
A private prosecution application against Boris Johnson. As Member of Parliament and Mayor of London, it was alleged he abused the public's trust in the 2016 Brexit referendum by repeatedly lying about the United Kingdom's spending on EU membership.

R (Wilson) v Prime Minister ?
A judicial review of the Brexit Referendum in 2016. The claimants argued that illegality through Russian interference, criminal overspending by Vote Leave, criminal investigation into the largest donor before and during the referendum undermined the integrity of the result and rendered the decision to leave void.

KGB, 25% of each officer's job was to come up with disinformation

Cambridge Analytica, the 2016 US Presidential Election and the Brexit

Working for the Trump presidential campaign and pro-Brexit groups, Cambridge Analytica created sophisticated psychographic profiles of voters to tailor campaign pitches to each person. Often, these tailored pitches were meant to disinform and/or divide. Information was collected through Facebook users' data.

"If you start to warp the perception of voters without their consent or knowledge… that is a fundamental denial of their agency and autonomy to make a free choice. Then you establish distrust and once they stop trusting the institutions, the media being one of them, you have now captured them." - Christopher Wylie, former research director at Cambridge Analytica
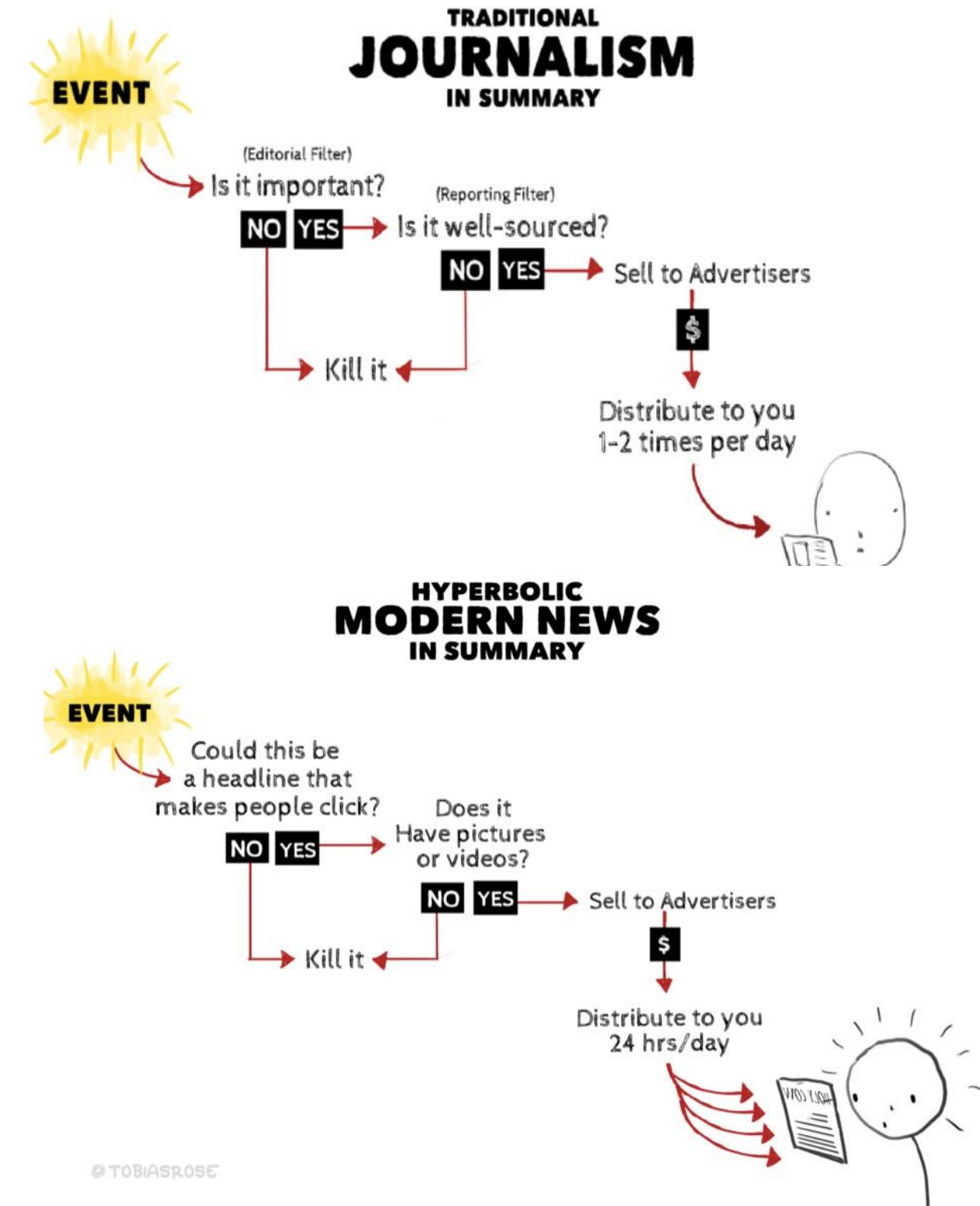
Why are algorithmic feeds like Facebook currently not able to be held accountable for republishing grossly negligent disinformation?
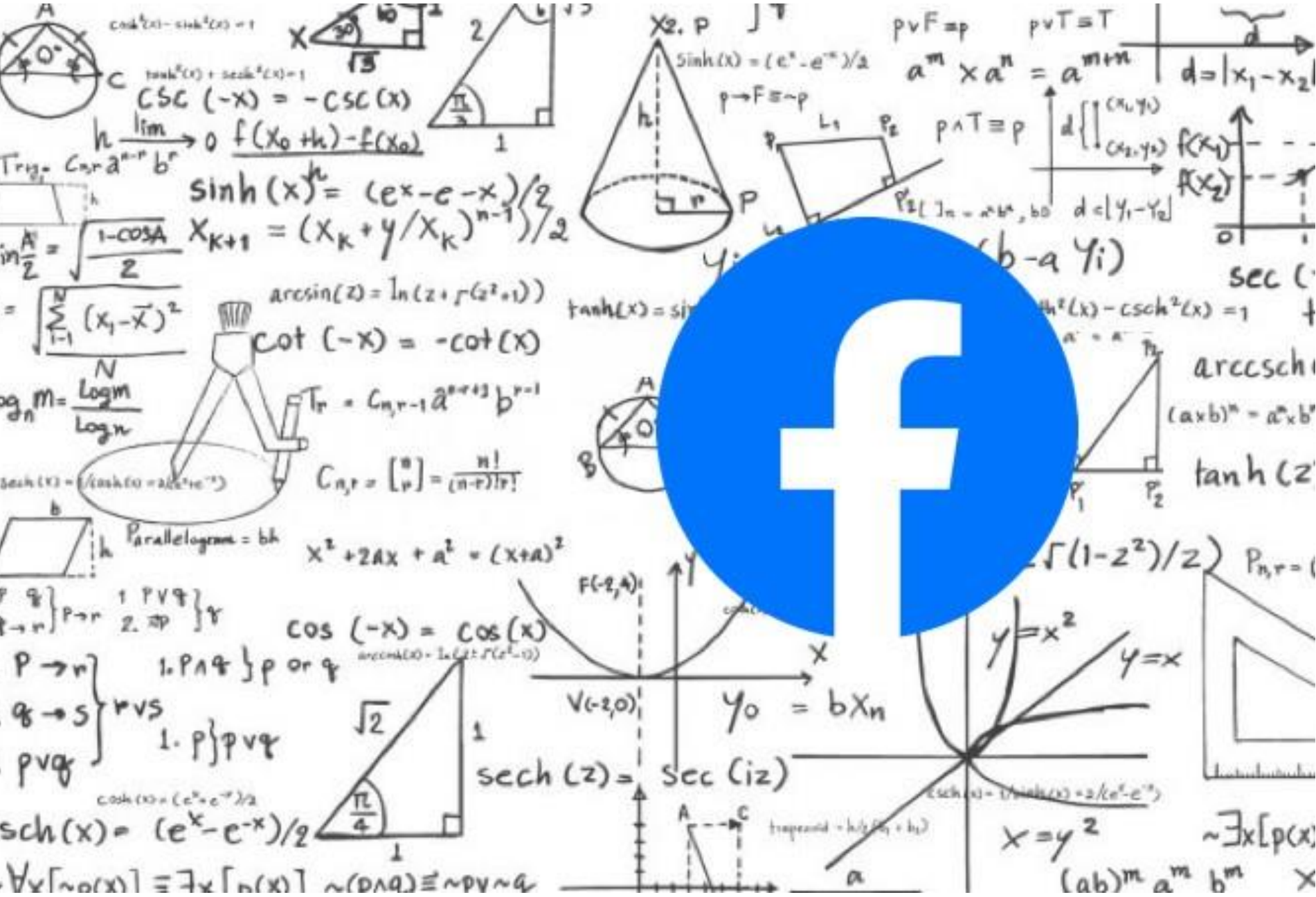
Section 230 of the Communications Decency Act

- Algorithmic social media feeds can block, demote and elevate posts.
- Users are more likely to see feeds that match their own psychographic profile.
- <u>Algorithmic social media feeds make thousands of editorial decisions per second.</u>

You will see
a post on facebook if...

P + **C** + **T** + **R**

POST **CREATOR** **TYPE** **RECENCY**
The post is engaging to other users like you | The creator has a history of engaging posts | It is the type of post you usually click on (photo, video etc.) | It was posted recently*

*Plus 1000's of other variables
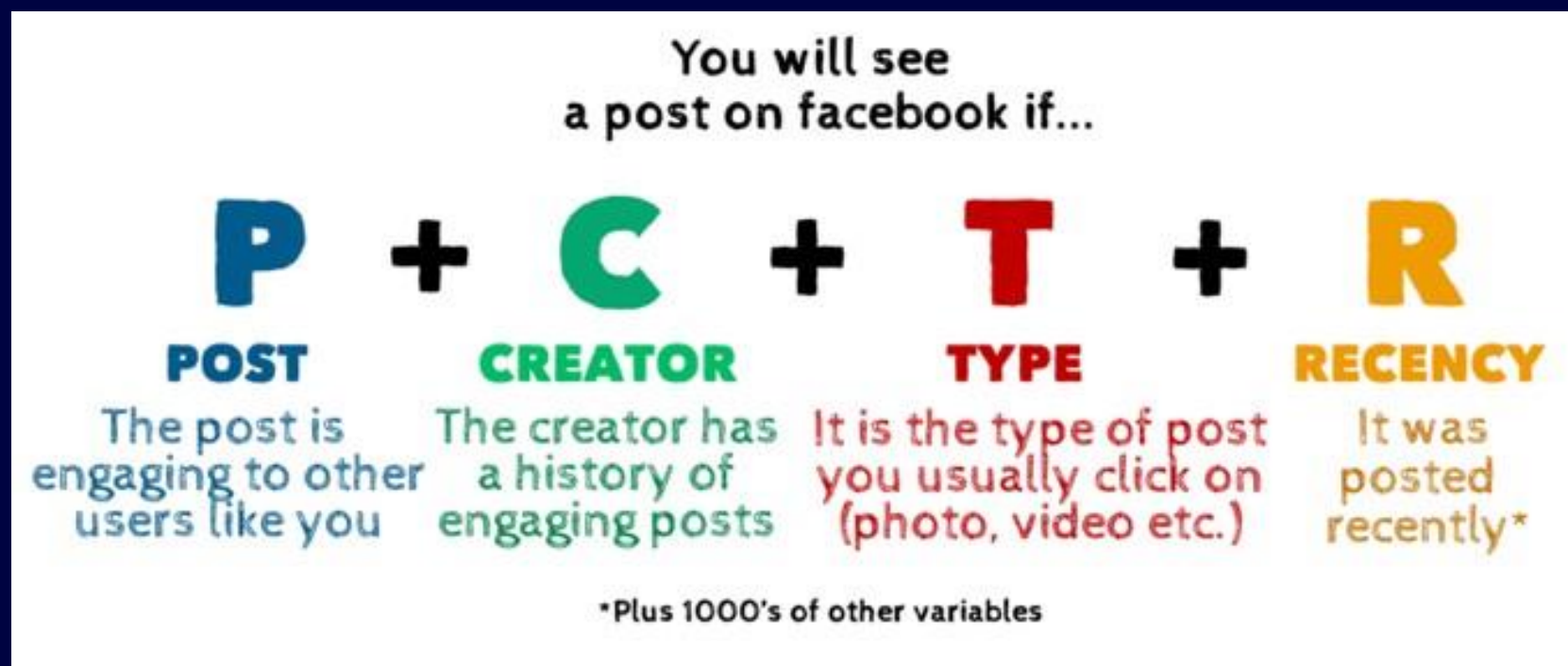
Basic decision-making process

TRADITIONAL **JOURNALISM** IN SUMMARY

EVENT

(Editorial Filter)
Is it important? (Reporting Filter)
NO YES → Is it well-sourced?
NO YES → Sell to Advertisers
$
Distribute to you 1-2 times per day
Kill it

HYPERBOLIC **MODERN NEWS** IN SUMMARY

EVENT

Could this be a headline that makes people click?
NO YES → Does it Have pictures or videos?
NO YES → Sell to Advertisers
$
Distribute to you 24 hrs/day
Kill it

@TOBIASROSE

Should social media be held liable for republished, grossly negligent disinformation?

If social media algorithms edit what users are able to see, such social media are publishers/republishers

Fair Housing Council of San Fernando Valley v Roommates,com

By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others

Do algorithmic feeds deserve safe harbour protection as mere portals?

Don't algorithms make complex decisions about what should be shown to social media users similar to decisions that newspaper editors make?

Aren't algorithms wholly controlled by social media platforms?

Delfi AS v Estonia

The European Court of Human Rights (ECtHR) ruled that Delfi AS, an Estonian news site liable for anonymous defamatory comments posted online from its readers. The Court ruled that it was not a violation of Art.10 of the European Convention on Human Rights' guarantees of the freedom of speech.

Possible Defences and the Outer Boundaries of Executive Privilege

Executive privilege affords an absolute privilege to high-ranking executive officers of state and federal governments <u>when acting within the scope of their constitutional duties</u>. As with the judicial privilege, executive privilege also <u>requires that the statements be relevant to the proceedings.</u> High-ranking executives include presidents, governors, cabinet members and people in similar positions. Kilgore v. Younger, 30 Cal.3d 770 (1982).

United States v Nixon

The Court held that executive privilege be limited to communication in furtherance of actual presidential responsibilities.

Clinton v Jones

CLINTON VS JONES, 1997
Jones sued Clinton for allegedly exposing himself to her in a hotel room in 1991. The Jones suit, which went all the way to the Supreme Court, was ultimately dismissed by a judge on the grounds Jones could not show damages. While it was on appeal.
By:Tasfia Jamil

The United States Constitution does not automatically grant the President of the United States immunity from civil lawsuits based upon his private conduct unrelated to his official duties as President.
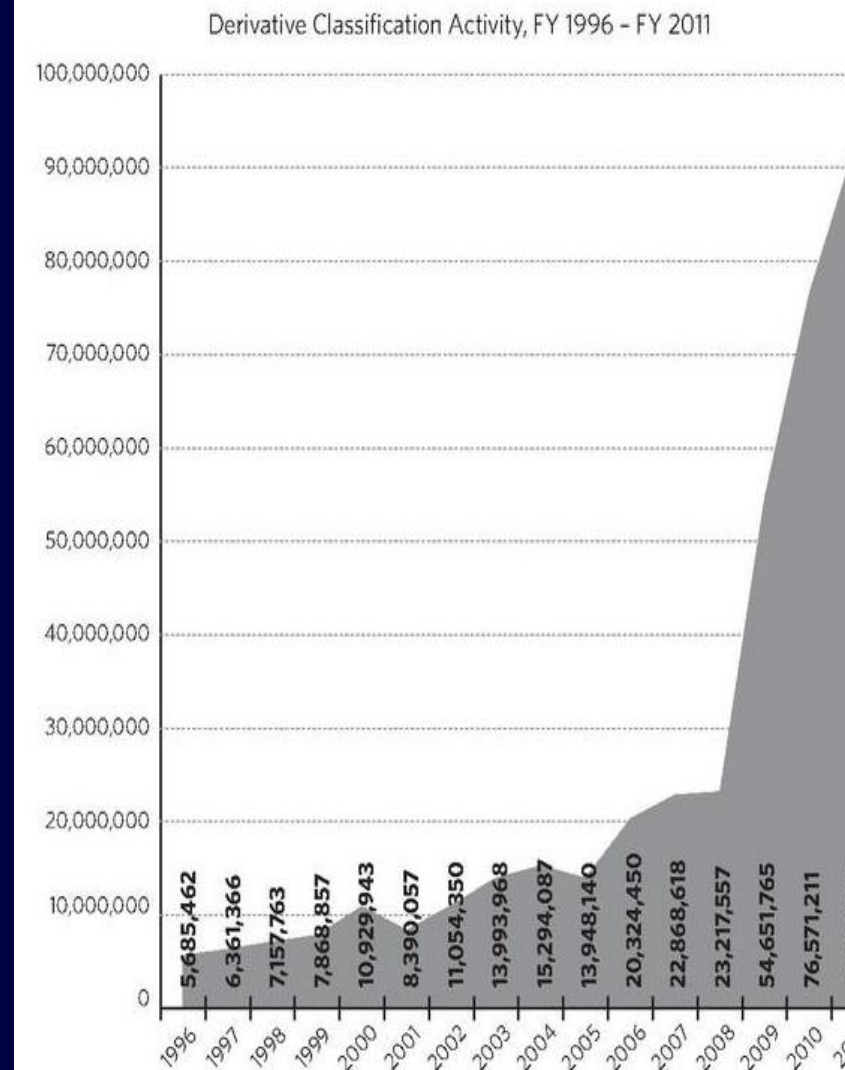
Other Issues: Overclassification of State Secrets; Omission for Political Purposes
(compare to libel by omission, a rarely used cause of action in the United States)

where the principal reason to classify is not national security, but concealment of government misconduct

"The opaque nature of the classification system can give the government a unilateral and almost insurmountable advantage when it is engaged in an adversary encounter with one of its own citizens, an advantage that is just too tempting for many government officials to resist."

former ISOO director J. William Leonard, before the House Committee on Oversight and Reform, 2016.

Derivative Classification Activity, FY 1996 – FY 2011

5,685,462 6,361,366 7,157,763 7,868,857 10,929,943 8,390,057 11,054,350 13,993,968 15,294,087 13,948,140 20,324,450 22,868,618 23,217,557 54,651,765 76,571,211

Mueller Report and Redaction Report on the Investigation into Russian Interference in the 2016 Presidential Election

Volume I presented an incomplete picture because of the encrypted and deleted statements. Volume II addressed obstruction of justice.

The investigation did not charge nor exonerate President Trump for committing a crime.

PM accused of cover-up over report on Russian meddling in UK politics

No 10 refuses to clear release of report into Russian political interference before election

"The protocols are quite clear. If the prime minister has a good reason for preventing publication he should explain to the committee what it is, and do it within 10 days of him receiving the report. If not, it should be published."

Dominic Charles Roberts Grieve QC PC,
Chair of the Intelligence and Security Committee, Member of Parliament for the Conservative Party

Overclassification Continued: Gulf of Tonkin, Pres. Lyndon Johnson and Vietnam War

Documents and tapes released in 2005 and 2006 provided new insights into the 2 August 1964 attack on the USS Maddox (DD-731) by three North Vietnamese patrol torpedo boats (above) and established that there was no follow-up attack against the destroyer, along with the USS Turner Joy (DD-951), on the night of 4 August.

NAVAL HISTORICAL CENTER

The Truth About Tonkin

Questions about the Gulf of Tonkin incidents have persisted for more than 40 years. But once-classified documents and tapes released in the past several years, combined with previously uncovered facts, make clear that high government officials distorted facts and deceived the American public about events that led to full U.S. involvement in the Vietnam War.

By Lieutenant Commander Pat Paterson, U.S. Navy

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