

Free Speech and the Case for Regulating Online Reviews of Professional Services in the United States

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Abstract

The relevance of online reviews to businesses is increasing exponentially. Firms have been forced to recognise that online reviews have become a necessary method of attracting new consumers. In contrast to traditional advertising, however, businesses do not control online reviews; instead, individual consumers control them. The involuntary relinquishment of this control is especially problematic to providers of professional services simply because the assessment of professional services is complicated. The primary issues stem from the inherent characteristics of services – intangibility, variability, perishability and inseparability – combined with the asymmetry in the review process. These factors contribute to a significant imbalance, where negative reviews disproportionately impact businesses, often with minimal accountability for the reviewer. This disparity is exacerbated by the permanence and widespread dissemination of online reviews, which can continue to affect a business long after the initial issue has been resolved. Notwithstanding their defective nature and their very significant negative impact on individuals and markets, online reviews are afforded the status of protected free speech. This article argues that the traits of reviews of professional service specifically resemble those of the non-rebuttable type of speech included in the categories of unprotected speech. As such, this article argues that online reviews of professional services should be regulated to safeguard the reputation and livelihood of professionals from unscrupulous, undiscerning reviewers.

Keywords: Online reviews; professional services; regulation; free speech; NWoM.

1. Introduction

It certainly matters online, where word of mouth is so very, very powerful. You know, if you make a customer unhappy they won't tell five friends, they'll tell 5,000 friends.¹

Online reviews refer to evaluations and opinions made by consumers about products, services, or businesses; they are commonly found on review platforms, business websites and social media, usually taking the form of testimonials, written comments, evaluations, ratings and scores that reflect the customers' level of satisfaction.² Sharing personal feedback on products and services is not an exclusive digital-era phenomenon. However, the simplicity of leaving an online review and the ubiquity and easy access for those seeking to read them significantly amplify their impact on consumer decisions.³

¹ Bezos, "Jeffrey P. Bezos."

² Dixon, "Topic"; Hennig-Thurau et al., "Electronic Word-of-Mouth via Consumer-Opinion Platforms."

³ Chen, "The Impact of Online Reviews on Consumers' Purchasing Decisions."



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In the early days of e-commerce, feedback consisted primarily of direct comments to sellers or simple word-of-mouth. As the internet became more interactive in the late 1990s and early 2000s, websites such as Amazon and eBay introduced review mechanisms, enabling customers to leave public feedback on their purchases for other potential buyers to see. The expansion of review platforms has continued with the rise of services such as Yelp, TripAdvisor and Google Reviews, transforming how potential customers interact with businesses. This has marked a significant shift towards transparency and consumer empowerment in online shopping to the point where the majority of potential customers read a review before the acquisition of a product or service.⁴

The role of online reviews has expanded beyond mere evaluations. They are now a form of social proof that businesses showcase to attract new customers.⁵ Positive reviews can significantly enhance search engine optimisation (SEO), increase visibility and drive more traffic to a business's website.⁶ Conversely, negative reviews can deter potential customers and damage a business's reputation quickly.⁷

Given the increasing significance of online reviews for businesses, a dilemma arises for them. In contrast to traditional advertising and other forms of one-way communications, which are controlled by businesses, online reviews provide a crowd-sourced assessment of a firm's quality, reliability and customer service. The greater the perceived control of a company over its own reviews, the lower the credibility consumers will attribute to them when shaping their opinions.⁸ Therefore, businesses must balance the need to manage and respond to reviews effectively without appearing to manipulate or excessively influence the feedback. Furthermore, research shows that in some industries, negative reviews have a larger impact on hurting the business than positive reviews help them.⁹

Additionally, mostly due to time pressure when purchasing online, the top review component influencing consumer decision is the aggregated star rating, not the review text itself or the company reply,¹⁰ adding to the imbalance between consumers' opinions and companies' responses. On top of all this, unethical practices such as writing fake reviews are becoming increasingly common, and their prevalence continues to rise, significantly impacting the success of those businesses reviewed.¹¹ Hence, the conundrum companies face on the effects of reviews on their businesses.

Notwithstanding the increasingly growing import of online reviews and their positive and negative consequences, the activity has remained wholly void of regulation due to free speech rationales. This article first presents the characteristics and significance of online reviews for services and then argues for regulation of these reviews within the contours of existing free speech principles. While the analysis presented here focuses on the regulation of online reviews of professional services, it is important to acknowledge the existence of commissioned false positive or negative reviews, which can also distort consumer perceptions. However, the Federal Trade Commission (FTC) has already addressed this through its 2024 rule¹² prohibiting the buying, selling or creation of fake reviews, targeting deceptive practices by businesses.¹³ Given that regulatory framework, this article centres on the challenges of regulating authentic customer-generated but potentially harmful negative reviews, particularly in the context of professional services, where subjective experiences are difficult to evaluate objectively.

At this point, it is crucial to differentiate between online reviews and formal complaints, with each offering a distinct avenue for consumer feedback with its own characteristics and consequences for businesses. Negative online reviews typically are shared in public forums, such as review sites or social media, allowing consumers to broadcast their dissatisfaction to a wide audience.¹⁴ This form of feedback is informal and often driven by emotional reactions, such as venting frustration or warning others.¹⁵ Formal complaints, on the other hand, are directed privately to the business through more structured channels such as customer service, insurance providers, professional boards and other entities of the same formal kind.

⁴ Gafni, "The Influence of Negative Consumer Reviews in Social Networks."

⁵ Alzate, "Online Reviews and Product Sales"; Ishii and Kikumori, "Word-of-Mouth in Business-to-Business Marketing."

⁶ Riddall, "How Google Reviews Impact Map Pack & Organic Search Rankings."

⁷ Ribeiro, "Four Decades of Negative Word-of-mouth and Negative Electronic Word-of-mouth."

⁸ DeAndrea, "How People Evaluate Online Reviews."

⁹ Basuroy, "How Critical are Critical Reviews?"

¹⁰ Johnson, "Using Eye-Movements to Assess Underlying Factors in Online Purchasing Behaviors"; Wan, A Sentiment Analysis of Star-Rating; Yu, "A New Multi-Attribute Decision Making Method for Overvalued Star Ratings Adjustment and Its Application in New Energy Vehicle Selection."

¹¹ For example, Barbado, "A Framework for Fake Review Detection in Online Consumer Electronics Retailers"; He, "Detecting Fake-Review Buyers Using Network Structure"; Mohawesh, "Fake Reviews Detection"; Yu, "Graph Learning for Fake Review Detection."

¹² FTC, "16 CFR Part 465."

¹³ Atleson, "We'll Pay You to Give Our New Rule a Good Review."

¹⁴ Magnani, "The Economic and Behavioral Consequences of Online User Reviews."

¹⁵ Teng, "Examining the Impacts of Electronic Word-of-Mouth Message on Consumers' Attitude."

The reach and influence of these two feedback methods differ significantly. Online reviews can have a wider impact by shaping the opinions of potential customers who may not have any prior interaction with the business.¹⁶ In contrast, formal complaints are limited in scope, are addressed directly to the business and are seldom widely distributed. While both complaint forms can damage a service provider's reputation, negative online reviews tend to carry more weight in shaping consumer behaviour as they are often viewed as more authentic and unbiased than information provided through direct company channels.¹⁷

Furthermore, formal complaints often follow structured procedures with clear rules and oversight, ensuring a certain level of fairness in handling grievances. Online reviews, however, operate in a largely unregulated, 'free-for-all' environment, where feedback is freely given without checks or standards. This lack of oversight underscores the need to address the broader impact of online reviews – not only on service providers but also on markets and other consumers. It raises important questions about how to create a system that ensures accurate information and fair reviews, benefiting both businesses and consumers while maintaining the integrity of feedback platforms.

Finally, it is important to note that although the effects of online reviews on businesses are seen globally, the legal analysis in this article focuses on the regulatory framework and principles of free speech within the United States, where the legal protections extended to online reviewers and the limitations on regulating these reviews are rooted in US First Amendment jurisprudence. However, the analysis presented here may offer valuable insights for other jurisdictions where similar free speech rights are protected, potentially informing broader discussions on the regulation of online reviews of professional services.

2. The Complexity of Evaluating Services

2.1 Characteristics of Services

Services possess unique characteristics that significantly distinguish them from durable goods, impacting how they are offered by companies and evaluated by customers.¹⁸ Different from durable goods that consumers can evaluate before or after purchase based on physical characteristics (such as quality, durability, and features), services are intangible – that is, they cannot be seen, touched or stored before consumption.¹⁹ Hence, services are inherently intangible and experiential. This intangible nature of products such as insurance, legal services, accounting, healthcare, education, travel and many others makes it almost impossible for customers to test or inspect them before purchase, rendering customers without other options than relying on the opinions and experiences of others who have already purchased and utilised those service.²⁰

Furthermore, services are unavoidably variable,²¹ and their quality changes depending on who provides them, when, where and other circumstances. In contrast to physical products, which are manufactured in a controlled setting before reaching the customer, services are produced and consumed concurrently. This co-production process necessitates direct interaction between the consumer and the service provider's resources, introducing variability and making the service quality more reliant on the context and the consumer's participation.²² This makes reviewing services more problematic, as the experience of a service can vary significantly depending on personal expectations, context and subjective factors. Clear examples can be found on websites such as TripAdvisor, where the same hotel may have disparate reviews, in some cases unrelated to aspects that were not under the company's control.²³ This heterogeneity inherent to service delivery can result in customer dissatisfaction, which may manifest in negative reviews, and in turn can damage the service provider's reputation, ultimately impacting customer loyalty and profitability.²⁴

The perishability of services means they cannot be stored for future use. For example, empty seats in a plane that has departed, unoccupied hotel rooms on a particular night or service providers' idle hours cannot be stored and sold the day after. Careful attention is required from service providers to avoid over-capacity, when unused resources are wasted, or under-capacity, when a business cannot meet demand.²⁵ From the customer's perspective, a service provider's inability to meet demand during peak

¹⁶ Sun, "The Valence of Online Consumer Reviews and Purchase Decision."

¹⁷ Lee, "The Effect of Negative Online Consumer Reviews on Product Attitude."

¹⁸ Hartman, "Consumer Evaluations of Goods and Services."

¹⁹ Parasuraman, "A Conceptual Model of Service Quality and Its Implications for Future Research."

²⁰ Levitt, "Marketing Intangible Products and Product Intangibles"; Rushton, "The Marketing of Services."

²¹ Hoffman, *Essentials of Services Marketing*, 113.

²² Grönroos, "Marketing Services."

²³ Jeong, "Assessing Brand Performance Consistency from Consumer-Generated Media."

²⁴ Hogueve, "The Service-Profit Chain."

²⁵ Lovelock, "Whither Services Marketing?"

times can lead to frustration and dissatisfaction, and in turn impact their perception of the business, resulting in negative reviews.

Durable goods are produced, distributed, acquired and used at different times. On the other hand, service rendering and consumption are inseparable, requiring certain interactions between the business and the customer during the service delivery.²⁶ The inability to separate the provision and consumption of a service can lead to immediate or real-time feedback, in some cases resulting in more emotional and less-reflective reviews.²⁷ Furthermore, and unrelated to the final product, a positive interaction between the service provider and the customer may lead to favourable reviews. At the same time, a negative interaction can immediately transform into dissatisfaction and critical reviews.²⁸ In other words, any shortcomings in service delivery become immediately noticeable, leading to immediate customer dissatisfaction; moreover, an unpleasant interaction with the service provider may amplify the negative view of a customer.

The evaluation of durable goods is often based on tangible attributes. For example, when purchasing a car, the customer knows the average miles per gallon, maximum acceleration, design, dimensions and other characteristics that make it easy to evaluate its compliance with expectations. Research shows that when evaluating durable goods, customers usually focus on the product features. However, when evaluating a service, they usually focus on the interface with the service provider or the logistics involved in the process.²⁹ Furthermore, unlike a product that can be tested, returned, replaced or refunded if faulty, services are transient and cannot easily be replicated or compensated in the same way. These differences make reviewing services more problematic, as the experience of a service can vary significantly depending on personal expectations, context and subjective factors.

Services' intangibility, variability, perishability and inseparability from the provider, combined with their reliance on human interaction and situational variables, further complicate the objectivity of reviews and, as a result, make them more challenging for consumers to evaluate prior to purchase, strengthening the importance of online reviews in guiding their decisions.

2.2 The Asymmetry of the Review Process

Unlike traditional word of mouth (WoM), which is ephemeral, online reviews exist and persist in an online 'space' that can be accessed, linked and searched.³⁰ This permanent and perpetual existence in a virtual environment emphasises how negative reviews may influence consumers over extended periods of time, even after the business has corrected or addressed the bad instance.³¹ Furthermore, while traditional WoM is usually given or sought, online reviews are often passed, with a few clicks enabling the internet to spread the word, diminishing the business's capability to respond.³² This is compounded by the uneven behaviour of consumers, where those who have had a negative experience demonstrate a greater tendency to express their dissatisfaction through critical online reviews, coupled with the observation that customers who have had a positive experience often do not leave any feedback. This leads to a potential skew in online reviews, resulting in an over-representation of negative sentiments towards businesses.³³

Additionally, reviewers' anonymity in certain contexts can potentially create new challenges, as it may embolden individuals to disseminate intentionally misleading or decontextualised information without fear of repercussions or accountability.³⁴ An analysis of reviews posted after an anonymity policy change reveals that anonymous reviews tend to have lower ratings and exhibit more negative emotions compared with non-anonymous reviews, potentially influencing subsequent reviewers to leave more negative feedback.³⁵

Moreover, while it was found that the overall star rating matches the title and content of reviews, it is the first one that mostly influences customers' evaluations.³⁶ Due to limited cognitive capacity, customers look at the star ratings and the overall number

²⁶ Sierra, "Service Providers and Customers."

²⁷ Bitner, "The Service Encounter."

²⁸ Bowen, "Development of a Taxonomy of Services"; Tsai, "Determinants and Consequences."

²⁹ Abdou, "The Use of the UTAUT Model"; Li, "The Effect of Online Reviews on Product Sales."

³⁰ Litvin, "Electronic Word-of-Mouth in Hospitality and Tourism Management."

³¹ Cheung, "The Impact of Electronic Word-of-Mouth Communication."

³² Chu, "Determinants of Consumer Engagement in Electronic Word-of-Mouth (eWOM)."

³³ Kim, "Who is an Evangelist?"

³⁴ Dellarocas, "The Digitization of Word of Mouth"; Litvin, "Electronic Word-of-Mouth in Hospitality and Tourism Management."

³⁵ Deng, "Impact of Anonymity on Consumers' Online Reviews," 6.

³⁶ He, "Application of Social Media Analytics."

of reviews to simplify the evaluation process.³⁷ This makes any business response to a review less relevant or with less weight as the review itself.

This asymmetry in the review process presents significant challenges for businesses. On the one hand, they are seeking customer reviews to validate their quality of service. On the other hand, the dialogue established after a bad review is practically immaterial, leaving them with little recourse for arguing their case. Hence, a strategic approach must be developed to protect their reputation. There is a growing need for regulation, establishing clear guidelines and standards that can help protect businesses from unfair and damaging reviews, holding those misleading reviewers to account while maintaining the integrity and reliability of the review process.

3. Regulation of Online Reviews and Free Speech

As stated above, online reviews now play an extremely important role in the life of a business: 92 per cent of consumers are deterred from using a business that has received a negative review;³⁸ businesses shut down or under-perform due to negative online reviews;³⁹ 40 positive reviews are necessary to undo the harm caused by only one negative review.⁴⁰ It is important to note that while star ratings play a significant role in consumer decisions, research suggests that negative reviews often carry greater emotional weight, disproportionately influencing perceptions.⁴¹ Even if the overall rating remains high, a particularly harsh negative review may stand out and require multiple positive experiences to counterbalance its effect on trust and decision-making.⁴² This reflects the psychological impact rather than a purely mathematical change to the star average.

Despite such shocking statistics, for the most part the area of online reviews remains unregulated because reviews are generally considered opinions, and opinions are protected by the US First Amendment's right to free speech.⁴³ Additionally, the legality of online reviews has also partly been affirmed by the Consumer Review Fairness Act, 15 U.S.C. § 45 *et seq.* (2016) (CRFA). The CRFA safeguards individuals' fundamental right to publicly express their truthful opinions and assessments regarding the products, services or conduct of a business entity by prohibiting sellers from including contractual language that interferes with such rights.⁴⁴

While the CRFA does permit businesses to request the removal of reviews that are libellous, unrelated to the business, clearly false or misleading, or that contain confidential information (15 U.S.C. § 45b [b][2][C][ii–iii]), it is very often challenging to prove that a review violates any of those standards.⁴⁵ Furthermore, and most importantly, the CRFA is not only very limited in its application, but its exceptions also fail to consider the principal problem with reviews of professional services: opining on the quality of professional service requires some level of expertise on the subject. This difficulty often leaves questionable reviews intact, complicating efforts to maintain accurate online reputations. The CRFA therefore fails to protect professional services businesses from the principal cause of the potential harm of online reviews.

This article's fundamental legal question is whether online reviews of *professional services* should be considered protected speech, and therefore remain unregulated, or considered unprotected speech, and thus subject to regulation by tailored legislation. The need for this specific inquiry derives from the confluence of the complexity of evaluating professional services and the material impact of *negative* reviews. Left unabated, the unchecked spread of negative reviews can result in significant harm not only to individual professionals, but also to the markets for professional services as a whole, akin to a public reprimand that lingers and grows over time. Under such circumstances, government intervention is arguably warranted but is thwarted by free speech rights.

3.1 Marketplace of Ideas

The US Supreme Court's free speech doctrine *starts* with the fundamental presumption that the truth is more likely to be attained through a process of dialogue in which competing ideas engage in intellectual debate.⁴⁶ Under this doctrine, the

³⁷ Baek, "Differential Effects of the Valence and Volume of Online Reviews"; Khare, "The Assimilative and Contrastive Effects of Word-of-Mouth Volume."

³⁸ Murphy, "Local Consumer Review Survey 2020."

³⁹ Barnes, "The Good, the Bad, and the Ugly of Online Reviews."

⁴⁰ Thomas, "The Secret Ratio That Proves Why Customer Reviews are So Important."

⁴¹ Lu, "Online Shopping Consumer Perception Analysis."

⁴² Thomas, "The Secret Ratio That Proves Why Customer Reviews are So Important."

⁴³ *Milkovich v Lorain Journal*.

⁴⁴ FTC.gov, "Consumer Review Fairness Act," para 1.

⁴⁵ Myers, "Online Reviews and Organizational Reputation."

⁴⁶ *Abrams v. United States*.

discovery of truth rests on the establishment of a competitive marketplace of ideas along with the continual protection of speech that contributes to such an institution.⁴⁷

Under such principles, generally the only type of speech that contributes to the marketplace of ideas is speech that promotes or allows counter-speech – that is, more speech.⁴⁸ If a type of speech cannot be questioned, debated or stopped by further speech, the marketplace fails as an institution.⁴⁹ Consequently, generally speech should be protected only if its propositions, including the potential harms that may flow from it, can be countered or prevented by other speech and not, for example, by force: “It is not plausible to uphold the right to use words as projectiles where no exchange of views is involved.”⁵⁰

Based on this fundamental idea, the Court has divided speech into protected and unprotected speech.⁵¹ As discussed below, unprotected speech consists of categories of speech that the Court opines do not generally contribute to the marketplace of ideas.⁵² On the other hand, speech not falling into any such categories is, at least at the outset, given the benefit of some level of protected speech status.⁵³

The Court recently discussed regulatory attempts by the states of Florida and Texas aimed at curtailing social media platforms’ discretion to post or exclude third-party content – including, arguably, online reviews.⁵⁴ Although the case does not regard the free speech rights of third parties posting content on such platforms as consumer reviewers, but rather the free speech of the platforms themselves, the Court ostensibly leaves open the path to regulation of *platforms* when dealing with consumer reviews. While the Court did not reach the merits of the case (it remanded it to lower courts), it made it clear that platforms compiling third-party speech are themselves engaged in protected speech *only* if they use such speech for the purpose of expressing their specific message.⁵⁵ Justice Alito concurs that:

not all compilations ... have this expressive characteristic. Suppose that the head of a neighborhood group prepares a directory consisting of contact information submitted by all the residents who want to be listed. This directory would not include any meaningful expression on the part of the compiler. Because not all compilers express a message of their own, not all compilations are protected by the First Amendment.⁵⁶

Furthermore, ‘passive receptacle[s]’ of third-party speech or ‘dumb pipes’ that merely post what third parties input communicate no message of their own; accordingly, their conduct does not merit First Amendment protection.⁵⁷

Platforms typically do not edit, curate or compile online reviews for the platforms’ specific expressive message. Accordingly, as the neighbourhood group directory mentioned above, platforms posting online reviews are merely ‘passive receptacles’ and should not be entitled to First Amendment protection. Consequently, platforms may be regulated when it comes to their online review collection activity. Therefore, this article’s main inquiry remains only about the regulation and free speech rights of online reviewers.

3.2 Protected Speech

As stated above, if speech does not fall into an unprotected speech category, it has the potential of being deemed protected speech.⁵⁸ Speech falling outside such categories is not divided into any formal hierarchy; it is generally reviewed on a case-by-case basis, which permits the Court to decide which speech (e.g. political, ideological, commercial) deserves protection and how much.⁵⁹

The standard of review applied by the Court is principally dispositive of the constitutionality of laws attempting to regulate speech. The review will typically consist of identifying and probing the sufficiency of the governmental interest and the

⁴⁷ Gertz v. Robert Welch, Inc. at 339–40.

⁴⁸ Volokh, “In Defense of the Marketplace of Ideas,” 97, 595.

⁴⁹ Tribe, American Constitutional Law, 837.

⁵⁰ Tribe, American Constitutional Law, 890.

⁵¹ Cohen v California.

⁵² Virginia v Black.

⁵³ Calvert, “Curing the First Amendment Scrutiny Muddle?”

⁵⁴ Moody v NetChoice, LLC.

⁵⁵ Moody v NetChoice, LLC at 14.

⁵⁶ Moody v NetChoice, LLC at 17.

⁵⁷ Moody v NetChoice, LLC at 18.

⁵⁸ Kitrosser, “Containing Unprotected Speech.”

⁵⁹ Calvert, “Curing the First Amendment Scrutiny Muddle?”

regulation's scope. For example, speech that warrants greater protection, such as political speech, will be reviewed under severe judicial examination – that is, the strict scrutiny standard – thereby making the regulation of such speech less likely to survive. Speech that deserves some protection – for example, commercial speech – will be reviewed under moderate judicial examination – that is, the intermediate scrutiny standard – thereby giving the regulation a good chance of survival.⁶⁰ However, this paradigm should not be mistaken for a formal order of protection. For example, the government may prohibit false or deceptive commercial speech without the need to meet the intermediate scrutiny standard.⁶¹

3.3 *Unprotected Speech*

Unprotected speech is generally more clearly defined. The Court explicitly identifies specific categories of speech that it considers presumptively not worthy of First Amendment protection: obscenity, defamation, fraud, incitement, fighting words, true threats, speech integral to criminal conduct and child pornography are categories of speech that do not contribute to the marketplace of ideas, and therefore are not protected speech.⁶² In essence, the Court deems the ideas presented in such categories of speech inadequately rebuttable by additional speech. Accordingly, any proposed government regulation of speech falling within one or more of these categories is subject to no First Amendment scrutiny at all, or a lenient standard of judicial review – that is, rational basis review – thereby making it more likely that the regulation will be found constitutional, and thus enforceable.⁶³

While each category presents its specific standards (a discussion of which is well beyond the scope of this article), succinctly put, the underlying rationale common to most of the categories is that the speech included in such categories does not present the time or manner necessary for counter-speech.⁶⁴ For example, under the categories of 'incitement', 'fighting words' and 'true threats', the possible imminent physical danger presented by such speech may not allow sufficient time to abate the danger with more words;⁶⁵ in the 'defamation' category, more speech is not efficacious because it places more attention on the false statements thereby exacerbating the defamatory statement's harm⁶⁶; and in "obscenity" category, speech is typically found to be deprived of any redeeming social importance and any rebuttal would constitute its emphasis.⁶⁷

3.4 *The Characteristics of Online Reviews of Professional Services are More Like Those of Unprotected Speech*

This article argues that the nature of online reviews shares more attributes with unprotected speech than it does with protected speech. Paradoxically, despite the seemingly unlimited time and space allowed for counter-speech, the marketplace of ideas fails to function for the same rationales offered for unprotected speech. While online reviews superficially appear to be a mere written expression of an idea easily rebuttable by a written response – that is, more speech – they are not. In fact, the new technological advances that enable online reviews present new and troublesome characteristics along with those of traditional unprotected speech.

3.4.1 *No Context*

Human communication is based on emotional and cognitive empathy, which in turn is a derivative of context. Accordingly, the true meaning of words is not derived from stand-alone definitions but from surrounding context; to communicate, one must have social cognisance.⁶⁸ Online reviews do not afford the reader sufficient social cognisance to make the review intelligently rebuttable.

For example, in a hypothetical medical doctor review, the reader would need knowledge of the surrounding context to permit a judgement of the review's validity. The necessary social cognisance might include, among other things, knowledge of the reviewer's relationship with the doctor (i.e. patient, employee, competitor), expertise, experience, educational level, profession/trade, age, when and where the service was rendered, the type of service rendered and the basis of the rationale for a negative review, to name a few. Only with such information can the reader begin to learn whether to lend credibility to the review.

⁶⁰ Central Hudson Gas & Elec v Public Svc Comm'n.

⁶¹ Virginia Pharmacy Board v Virginia Consumer Council at 748, 771–72.

⁶² For example, RAV v City of St Paul.

⁶³ Kitrosser, "Containing Unprotected Speech."

⁶⁴ Volokh, "Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny."

⁶⁵ Brandenburg v Ohio; Chaplinsky v New Hampshire.

⁶⁶ Delgado, "Words That Wound"; Gertz v Robert Welch, Inc.

⁶⁷ Roth v United States.

⁶⁸ Wittgenstein, Philosophical Investigations, 20.

Under typical circumstances, debating sides ‘size each other up’ through knowledge of each other and the surrounding context. Online reviews, on the other hand, present no possibility for such preliminaries. The truth contemplated by free speech principles cannot be reached by debate under circumstances detached from surrounding reality; by definition, the truth is real and can only be based on social cognisance.

3.4.2 *No Labour or Risk*

The lack of context and empathy in many online reviews is reflected in their raw, unfiltered presentation.⁶⁹ Often brief, devoid of detailed rationale and posted anonymously, these reviews occur without any direct or contemporaneous interaction between the reviewer and the subject.⁷⁰ This issue is compounded by the fact that online reviews are frequently driven by emotional impulses, with users rarely taking the time to consider the long-term effects of their comments on businesses.⁷¹ This separation erodes accountability, as there is little incentive for reviewers to conduct the background research that would foster more informed and balanced assessments. As noted by Haidt,⁷² the structure of digital platforms exacerbates this dynamic by amplifying emotional reactions rather than thoughtful discourse. The anonymity of online reviews, combined with the absence of personal risk, encourages impulsive feedback that, in some cases, borders on toxic behaviour. Such conditions can enable individuals with hostile intentions to exploit the system, resulting in reviews that are not merely apathetic but, in some instances, malicious or even reflective of more disruptive psychological traits. In this fragmented digital landscape, accountability and proportionality are often lost, leaving businesses vulnerable to attacks lacking context or fairness.

3.4.3 *Incompetent and/or Malicious*

Online reviews regarding professional services – or, as defined by Darby and Karny,⁷³ ‘credence services’ – are most often done by the typical consumer, who generally lacks the necessary proficiency in the area of expertise they are assessing. Under most circumstances, a layperson cannot accurately evaluate the expediency of credence services.⁷⁴ Having said that, while certain technical aspects of professional services, such as the efficacy of a medical procedure or legal strategy, require specialised knowledge to assess, many laypeople are well equipped to evaluate other important factors, such as the clarity of communication, transparency of costs and overall customer service experience.

Moreover, a review may be made in bad faith or with outright malicious intent. A professional may be tarred and feathered by a disgruntled employee or a consumer who simply dislikes a doctor’s bedside manner⁷⁵ or a lawyer’s interpersonal skills,⁷⁶ regardless of the professional outcome. A well-rounded approach to online reviews should consider both expert insight and the broader customer experience.

Whether due to a lack of specialised knowledge or occasional ill-intent, negative online reviews of professional services often stem from opinions that may not be fully informed. While open discourse is a vital element of free speech, certain types of feedback – especially those involving technical aspects of professional services – require a level of expertise that laypeople may not possess. In these cases, the marketplace of ideas may struggle to foster productive debate between experts and non-experts, as the complexity of such issues is not easily distilled through generalised opinions. Therefore, advancing meaningful discussions in these contexts often depends on contributions from those with the necessary expertise to evaluate the nuances involved.

3.4.4 *Too Fast and Free*

Reviews are posted and made readable to the world in an instant; any harm is instantly caused. Mass delivery of information is not new; it has been carried out by newspapers, magazines, books, TV, radio (and now the internet) for ages. However, unlike today’s reviews, all such modes of communication had filters such as editors, legal counsel, costs, debates and dissenting voices, all resulting in a more distilled and refined premise that, regardless of its merit, was first deeply contemplated. These filters, together with the context described earlier, provide cognitive empathy. Accordingly, rebutting such speech with further speech is ineffective and counterproductive since the mere existence of a contemplated response lends more credibility to the un contemplated review.

⁶⁹ Liu and Fan, “Exploring the Impact of Managerial Responses to Online Reviews in the Sharing Economy.”

⁷⁰ Min, Lim, and Magnini, “Factors Affecting Customer Satisfaction in Responses to Negative Online Hotel Reviews.”

⁷¹ Fan et al., “Quantifying the Effects of Online Review Content Structures on Hotel Review Helpfulness.”

⁷² Haidt, “Why the Past 10 Years of American Life Have Been Uniquely Stupid.”

⁷³ Darby, “Free Competition and the Optimal Amount of Fraud.”

⁷⁴ Lantzy, “Credence Services.”

⁷⁵ Bhaumik, “How Exposure to Patient Narratives Affects Stereotyped Choices”; Goshtasbi et al., “Patients’ Online Perception and Ratings of Neurologists”; Liu et al., “‘But His Yelp Reviews are Awful!’”; Velasco et al., “Online Ratings and Reviews of American Orthopaedic Foot and Ankle Surgeons.”

⁷⁶ Bogomolov, “Consumer Perceptions of Online Legal Service Providers.”

3.4.5 *Too Vast in Time and Space*

Referring to online reviews, never has one person had so much access to so many. Today, the traditional means of mass communication mentioned before are in the hands of online reviewers at any time, anywhere and at no cost. The resulting review has no limitations in time and space; it is virtually indelible and has no national boundaries. If sought, it is ubiquitous and perpetual. This power in the hands of incompetent or malicious reviewers is beyond the machinations contemplated by protected speech. Moreover, while the subject of the review presumably has the same power, as stated above, using it is prevented since it would exacerbate the negative message. This inequality destroys the presumed underlying forces of the marketplace of ideas.⁷⁷

3.4.6 *Disproportionate*

Research has consistently shown that people tend to pay more attention to and be more impacted by negative news compared with positive news. This phenomenon, known as negativity bias, suggests that negative information – especially extremely negative news – prompts greater attention and cognitive processing.⁷⁸ Studies have found that media coverage with a negative tone leads to higher perceived importance of the issue, as negative incidents capture attention more effectively than positive ones.⁷⁹ Furthermore, research indicates that negative news is more emotionally impactful on audiences, contributing to higher engagement levels.⁸⁰ Similarly, research shows that reviews with negative valence have a higher influence on customers than positive reviews.⁸¹ Some estimate that it requires approximately 40 positive customer accounts to counteract the impact of a single negative review.⁸² Research further supports that negative reviews carry more emotional weight and are perceived as more informative, making them disproportionately influential.⁸³ Consumers frequently engage in ‘venting’ behaviours – using negative reviews as a means of emotional release. This can create a feedback loop where the initial negative sentiment continues to spread, making it harder for brands to counteract the damage through rebuttals.⁸⁴

Consequently, more speech will not work to rebut a negative review. The marketplace of ideas fails because the exchange rate between positive and negative reviews is too high, creating unprecedented inequalities between reviewers and businesses. The market becomes disproportionately suited to negative reviews.⁸⁵

4. The Harms of Online Reviews

Historically, tarring and feathering were used as a form of vigilante justice to punish and humiliate individuals perceived to have committed wrongdoing.⁸⁶ In a modern context, negative online reviews can have a similarly disproportionate effect, with a single review causing widespread and lasting damage to a professional’s reputation.

4.1 *Harm to Individual Professional*

Negative online reviews do not need a mob or public spectacle; one person may provoke the same effect with minimal effort. One single negative review will reach a vast audience, remain visible for an extended period and inflict significant harm, such as damaging a service provider’s livelihood. Negative online reviews cause businesses to under-perform or close,⁸⁷ and testimonials abound about how third-party review platforms are unresponsive and ineffective when it comes to weeding out those harmful reviews for the most part.⁸⁸ A Harvard Business School study looking into Yelp reviews found that in the case of restaurants, ‘the posting of a single negative review online could cause business revenues to plummet about 25 percent or more’.⁸⁹ For professional service-oriented businesses, this suggests that even a single negative review could have a significant impact on a professional’s reputation and income, placing their livelihood at risk.

⁷⁷ Greenawalt, “Free Speech Justifications,” 119–55.

⁷⁸ Laaksonen, “Brand as a Cognitive Mediator.”

⁷⁹ Van Der Meer, “Mediatization and the Disproportionate Attention to Negative News.”

⁸⁰ Dhiman, “Consumer Adoption of Smartphone Fitness Apps: An Extended UTAUT2 Perspective.”

⁸¹ For example, Bo, “The Impact of Contradictory Online Reviews”; Ji, “Reviewers’ Identity Cues in Online Product Reviews”; Tsao, “The Asymmetric Effect of Review Valence on Numerical Rating.”

⁸² Thomas, “The Secret Ratio That Proves Why Customer Reviews are So Important.”

⁸³ Khoo, “Consistency of Online Consumers’ Perceptions of Posted Comments”; Lu, “Online Shopping Consumer Perception Analysis.”

⁸⁴ Huang, “An Empirical Research”; Lee, “Effects of Medical Disputes on Internet Communications.”

⁸⁵ Greenawalt, “Free Speech Justifications,” 119–55.

⁸⁶ Maloy, “Tarring and Feathering.”

⁸⁷ Barnes, “The Good, the Bad, and the Ugly of Online Reviews.”

⁸⁸ Levin, “Customers are Leaving More Negative ‘Revenge’ Reviews”; Taylor, “Google’s Power is Extraordinary”; Volna, “How One Negative Review Can Knock You Out of Business Forever.”

⁸⁹ Law360, “Fake It Until You Make It?”

4.2 Harm to Public

As mentioned before, reviews of professional services tend to be less than accurate; the public thus receives inaccurate information when it assesses the quality of such services by reading reviews. The Court has previously addressed, in the very context of free speech regulation, the importance of accurate information to the consumer and the free market:

So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable ... And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision making in a democracy ... we could not say that the free flow of information does not serve that goal.⁹⁰

Given their increasing relevance and their disproportionate impact, their aggregate effect of reviews is likely to impact overall market forces of services; demand and supply will conversely fluctuate along with negative online reviews. The result of this effect may be a reduction of viable businesses and thus the creation of anti-competitive or even monopolistic market conditions. The problem of fake reviews compounds this issue. The World Economic Forum⁹¹ estimates that ‘the direct influence of fake online reviews on global online spending is \$152 billion’. A paper recently presented to the National Bureau of Economic Research by Akesson et al.⁹² estimates that the cost to consumers is an extra US\$0.12 for each dollar spent due to fake reviews.

4.3 Harm to Conduct: The Reduction of Competent Conduct

As discussed earlier, the First Amendment doctrine presumes that truth is more likely to be attained through intellectual battle; hence, protection of speech is essential. In the end, though, the result of this battle is most useful when the ensuing truth is eventually implemented – the true intended purpose of the protection of speech. However, online reviews may lead to a result that is antithetical to this ultimate purpose; they may have a tendency to discourage the implementation of conduct not based on professional standards but on the much lower bar created by the expectation of the incompetent reviewer. For example, a doctor concerned with a string of negative reviews may resist suggesting alternative solutions to a widely accepted practice, even when such a decision would be less than reasonable under particular circumstances;⁹³ a lawyer may agree to bring a case to trial in fear that a client who disagrees will disparage him online, leading them to make decisions that prioritise avoiding negative publicity, even if it means proceeding with a trial against their better judgement.⁹⁴ This conclusion turns on its head the anticipated end-product of free speech.

4.4 Harm to Speech Itself: The Reduction of Further Speech

A final paradoxical corollary of inaccurate negative online reviews is that the subjects of such reviews are generally better served by not responding – that is, not rebutting speech with speech. Research shows that, to be effective, responses to negative online reviews need to contain ‘an apology, an explanation and a pledge to correct the problem identified in the review’,⁹⁵ putting the business in a conundrum to apologise and own a problem that may not have existed from the beginning. Like defamatory statements, the harm of negative reviews cannot usually be nullified by more speech; in fact, rebutting a negative review places greater attention on the original review and enhances its negative impact. The opportunity for a reasoned response may be limited in this context, making it difficult to counterbalance the initial criticism fully: “Once the cat is out of the bag, it cannot be put back in.”⁹⁶ The more discussion that arises around the professional’s alleged deficiency, the more their reputation may suffer. Consequently, with a reluctance to add speech, the marketplace of ideas ceases to function.

5. Proposed Regulation

When combined, the characteristics described above undermine the basic rationale for the protection of dialogue to attain truth. The attributes of online reviews of professional services suggest that such reviews should be considered unprotected speech. However, even once the hurdle presented by constitutional protections is surpassed, what remains is the arduous task of formulating regulations that would balance the interests of reviewers, consumers, and businesses.

⁹⁰ Virginia Pharmacy Board v Virginia Consumer Council.

⁹¹ World Economic Forum, “Fake Online Reviews Cost \$152 Billion a Year.”

⁹² Akesson, “The Impact of Fake Reviews on Demand and Welfare.”

⁹³ Atherton, “Online Patient Feedback”; Yang, “Understanding the Influence of Professional Status.”

⁹⁴ Elbers, “Exploring Lawyer–Client Interaction”; Meng, “O2O Business Strategy Analysis.”

⁹⁵ Zinko, “Responding to Negative Electronic Word of Mouth.”

⁹⁶ Tribe, American Constitutional Law, 890.

Presently, the principal laws specifically regarding online reviews do not regulate the content of reviews. Section 230 of the Communications Decency Act, 47 U.S. Code § 230 (1996), has been used to protect *platforms* such as Yelp, Google and others from liability for content posted by third parties. The CRFA, as stated above, protects *reviewers* and *consumers* by prohibiting businesses from imposing contractual limitations on the ability of consumers to post reviews. In essence, these laws protect platforms and consumers; neither law protects businesses from unfettered speech. Furthermore, current antitrust laws and unfair business practice regulations are seemingly not equipped to deal with this type of activity; they are intended to protect consumers and employees from sellers and employers. Regulation of online reviews requires, among other things, protection of businesses from consumer-reviewers, something not generally addressed by existing regulation (usually, it is the other way around).

While a full discussion of the content of any such regulation is beyond the scope of this article, the following is worthy of mention. Any regulation of online reviews of professional services should include requirements that, once fulfilled, would help nullify the deficiencies of online reviews enumerated above. The regulation should start with the comprehensive goal of creating real-life *context*. The regulation should implement a verification process where reviewers must provide proof of service use, and while maintaining some level of privacy, reviewers must be required to register their real identities on the platform.

To improve the credibility of online reviews, regulatory frameworks could be designed to promote transparency by encouraging the disclosure of more relevant contextual information. For example, reviewers could be asked to provide details such as their relationship with the service provider, the specific type of service they received and any prior experience with similar services. This would allow for a more balanced and nuanced evaluation of the review, helping readers distinguish between subjective experiences and more objective, well-informed feedback. By focusing on these contextual factors, the review process becomes more credible and transparent. Additionally, such disclosures would enhance the reliability of reviews by mitigating the influence of anonymous or poorly informed critiques, ensuring that readers can better assess the validity and relevance of the opinions being shared.

The review should then not be posted until the subject of the review is first afforded the opportunity to interact with the reviewer; the regulation should set forth a mandatory response window of time that allows businesses to address negative reviews before they are made public. Lastly, any resulting negative review should be removable within a specified period – for example, 12 months. This context would encourage greater personal accountability, prompting reviewers to reflect more deeply before posting. Increased cognitive and emotional empathy, as well as a more thoughtful approach, would reduce the prevalence of malicious or uninformed reviews. With a better understanding of the real-world impact of their feedback, reviewers would be less likely to act impulsively or incompetently, diminishing the disproportionate influence they currently wield. As research suggests, when reviews are driven by emotional reactions rather than careful consideration, the quality of feedback suffers, often leading to unfair or harmful critiques.⁹⁷

6. Conclusions

As established in the previous sections, online reviews are a double-edged sword; while they serve as vital sources of information for consumers, they also possess the potential to inflict undue harm, particularly to businesses and professionals. Notwithstanding this, the use and relevance of online reviews are increasing exponentially; most purchases are consummated only after a survey of reviews by consumers. Businesses have been forced to recognise that online reviews have become a *necessary* method of attracting new consumers.

In contrast to traditional advertising, however, businesses do not control online reviews; instead, they are controlled by individual consumers. The *involuntary* relinquishment of this control is especially problematic to providers of professional services due to the inherently complex nature of service evaluation. The primary issues stem from the inherent characteristics of services. Unlike goods, they cannot easily be quantified or judged by objective features. Their intangibility, variability, perishability and inseparability from the provider, coupled with the subjective nature of consumer experiences and expectations, make them far more difficult to assess. These complexities, along with the inherent asymmetry between the provider's expertise and the layperson's understanding, create significant challenges in the review process, often leading to evaluations that do not capture the full scope of the service provided, contributing to a significant imbalance, where negative reviews disproportionately impact businesses – often with minimal accountability for the reviewer. This disparity is exacerbated by the

⁹⁷ Ghose, "Estimating the Helpfulness and Economic Impact of Product Reviews"; Purnawirawan, "Balance and Sequence in Online Reviews"; Lee, "Roles of Negative Emotions in Customers' Perceived Helpfulness"; Fan, "Quantifying the Effects of Online Review Content Structures."

permanence and widespread dissemination of online reviews, which can continue to affect a business long after the initial issue has been resolved.

Moreover, the anonymity afforded to reviewers can lead to the propagation of misleading or unfair reviews, further complicating the landscape for businesses trying to maintain their reputations. The lack of context and the ease with which reviews can be posted, often without careful consideration or appropriate knowledge, add to the potential for unjust damage to professional reputations.

Notwithstanding their flaws and the considerable negative impact they can have on individuals and markets, online reviews are afforded the status of protected free speech. However, the rationales upon which such privilege stands do not justify such protection; the traits of reviews of professional service resemble the non-rebuttable type of speech included in the categories of unprotected speech. As such, online reviews of professional services should be regulated to safeguard the reputation and livelihood of professionals, as well as the integrity of the markets for such services from unfair or uninformed reviews. Given these complexities, there is a compelling argument for regulatory intervention. This should aim to balance the protection of free speech with the need to safeguard businesses from unjust harm while also ensuring that customers are not misled away from reputable service providers. This could involve establishing clear guidelines for the content and context of reviews, ensuring that reviewers are accountable for their statements, and providing mechanisms for businesses to address and mitigate the impact of negative reviews on service providers and other customers.

Online reviews are a valuable tool for consumers, providing insights into both the quality of services and the customer experience. However, the complexity of certain professional services may require a more nuanced understanding, particularly when it comes to technical or specialised aspects of the service. Regulatory frameworks should aim to preserve the accessibility and openness of online reviews while ensuring that they accurately reflect both consumer experiences and professional expertise. This balance will help protect businesses from unjust reputational harm while still empowering consumers to make informed decisions. Furthermore, the goal of any regulatory framework should be to enhance the reliability and integrity of online reviews, thereby protecting consumers and businesses alike. By introducing measures that promote transparency, accountability, and fairness, it is possible to uphold the fundamental principles of free speech while mitigating the detrimental effects of unregulated online reviews. This approach not only protects the interests of businesses but also enhances the overall trust and efficacy of online review systems, ultimately benefiting the entire market ecosystem.

Finally, while this article centres on the US regulatory framework, the implications of online reviews of professional services resonate well beyond US borders. The analysis of the intersection between free speech and professional reputation, as discussed here, is particularly pertinent to legal systems that prioritise the protection of free expression. As jurisdictions worldwide confront the regulatory challenges posed by online reviews, the principles underlying US First Amendment jurisprudence may provide a valuable foundation for broader regulatory frameworks. Understanding how the United States navigates the balance between safeguarding free speech and protecting businesses from undue reputational harm offers important insights for other legal systems. As online reviews continue to expand in global influence, the call for well-crafted regulation that upholds both the right to free expression and the integrity of professional services will become ever more pressing.

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