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Justin Hyland

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Conspiracy Speech: Reimagining the First Amendment in the Age of QAnon

JUSTIN HYLAND*

* University of Connecticut School of Law, J.D., 2021; Fordham University, B.A., 2014. I would like to thank Professor Hillary Greene for her guidance and direction throughout the writing process. Tremendous gratitude is also due to Emily Horne, An Le, Carlos Trejo, and the entire CommEnt Law Journal for their diligent work on this article. Finally, I would like to especially thank James Hyland, Lucille Hyland, Qing Wai Wong, and Archie for their unwavering support and encouragement. All errors and omissions are my own.

TABLE OF CONTENTS

I.	INTRODUCTION	3
II.	DEFINING CONSPIRACY SPEECH	5
III.	DOCTRINAL HISTORY	8
	A. Unlawful Advocacy	8
	B. False Speech.....	12
IV.	CONSPIRACY SPEECH ISSUES UNDER THE FIRST AMENDMENT	14
	A. Doctrinal Problems	14
	1. Unlawful Advocacy	14
	2. False Speech	17
	B. Marketplace of Ideas	19
V.	EXISTING SCHOLARSHIP	26
	A. Judicial Solutions	26
	1. Overrule Brandenburg	26
	2. Maintain Brandenburg	29
	B. Legislative.....	30
VI.	PROPOSED SOLUTION	32
	A. Proposed Model	32
	1. Intentional Proliferation.....	32
	2. Factual Falsity.....	35
	3. History of Violence	37
	B. Areas of Concern	38
VII.	CONCLUSION	40

I. INTRODUCTION

In November of 2020, Neely Petrie-Blanchard journeyed from Kentucky to Florida on a very specific mission.¹ She was to meet with a man named Christopher Hallett.² A mother of two, Petrie-Blanchard had lost custody of her twin daughters for reasons that remain unclear. Hallett had promised to get them back.³

In the intervening years, between when Petrie-Blanchard lost custody and her trip to Florida, she had come to blame the government for the breakdown of her family.⁴ Her misgivings, however, were not typical criticisms of the American justice system. She was not preoccupied with burdensome legal realities—the onerous process and structural inequity—that come to frustrate many litigants. There was something deeper at play. Rather, Petrie-Blanchard believed that the government was actively *conspiring* to keep her children from her.⁵ And this conspiracy threatened more than custodial deprivation. Under government watch, anything could happen to her children. They could be starved, abused, even trafficked.⁶ This fear of government—indeed, fear of what the government would do to her children—drove Petrie-Blanchard to extreme ends. Even before travelling to Florida, she had been arrested for abducting her daughters from their grandmother’s house.⁷ Out on bail, and at the end of her line, Petrie-Blanchard turned to Hallett.

Hallett was a self-proclaimed legal expert—an internet charlatan holding himself out as a skilled child-custody advocate.⁸ He had amassed a considerable reputation in Florida through offering dubious legal services to desperate mothers like Petrie-Blanchard.⁹ Hallett ran his business by convincing these women that they were “sovereign citizens.”¹⁰ This theory holds that individuals are not answerable to statutes or court orders, but rather their own interpretations of the common law.¹¹ Further, he claimed that former President Trump had charged him creating a separate legal

1. Will Sommer, *QAnon Mom Arrested for Murder of Fringe Legal Theorist*, DAILY BEAST (Nov. 17, 2020, 9:01 PM), <https://www.thedailybeast.com/qanon-mom-arrested-for-murder-of-fringe-legal-theorist-in-florida>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Kevin Roose, *What Is QAnon, the Viral Pro-Trump Conspiracy Theory?*, N.Y. TIMES (Sept. 3, 2021), <https://www.nytimes.com/article/what-is-qanon.html>.

7. Sommer, *supra* note 1.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Sovereign Citizens Movement*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/sovereign-citizens-movement> (last visited May 9, 2021).

system to help parents regain custody of their children.¹² Despite the universal failure of his legal services, he continued to amass clients.¹³

Petrie-Blanchard would turn out to be his last. At some point during their meeting, the interaction turned fatal.¹⁴ Indeed, Petrie-Blanchard had come to believe that Hallett was actually working *for* the government, rather than against it.¹⁵ She perceived him as directly involved in the plot to keep her children away from her.¹⁶ When this realization dawned on her, Petrie-Blanchard resorted to violence. She shot Hallett multiple times in the back until he died.¹⁷

While this appears to be the tragic tale between two Americans citizens, the story's true protagonist is the cyber conspiracy QAnon. QAnon posits that an elite network of entrenched government actors runs a child sex-trafficking ring.¹⁸ Although the theory has no grounding in objective reality, it has inspired and mobilized countless individuals toward political extremism and violence.¹⁹ Indeed, both Hallett and Petrie-Blanchard were staunch believers in the theory.²⁰ Faith in QAnon warped their worldviews, brought them together, and ultimately catalyzed their violent encounter. Their story is far from unique.

Conspiracy theory is now a daily aspect of American life.²¹ The advent of the internet has allowed misinformation, masquerading as fact, to proliferate at an unprecedented clip. Some theories are basically innocuous outside their capacity to cause confusion. Others, such as QAnon, inspire tremendous harm. The dissemination of such expression has been linked to numerous instances of violence, including the Capitol Riots in January 2021.²² This article will explore these emerging online conspiracies as they relate to the First Amendment. Despite the breadth of free speech jurisprudence, little has been written on the subject of conspiracy. My position is that First Amendment doctrine, as it stands, is inadequate to

12. Sommer, *supra* note 1.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. Roose, *supra* note 6.

19. Lois Beckett, *QAnon: A Timeline of Violence Linked to the Conspiracy Theory*, GUARDIAN (Oct. 16, 2020, 10:00 PM), <https://www.theguardian.com/us-news/2020/oct/15/qanon-violence-crimes-timeline>.

20. Sommer, *supra* note 1.

21. Max Fisher, 'Belonging Is Stronger than Facts': *The Age of Misinformation*, N.Y. TIMES (May 7, 2021), <https://www.nytimes.com/2021/05/07/world/asia/misinformation-disinformation-fake-news.html>; Rachel Hope Cleves, *Why Americans Turn to Conspiracy Theories*, WASH. POST. (Oct. 21, 2019), <https://www.washingtonpost.com/outlook/2019/10/21/why-americans-turn-conspiracy-theories/>.

22. Olivia Rubin et al., *QAnon Emerges as Recurring Theme of Criminal Cases Tied to US Capitol Siege*, ABC NEWS (Jan. 19, 2021, 4:31 PM), <https://abcnews.go.com/US/qanon-emerges-recurring-theme-criminal-cases-tied-us/story?id=75347445>.

address concerns posed by this speech. Despite its capacity for social harm, conspiracy speech currently finds protection within the free speech landscape. As these cyber conspiracies continue to pose new and unique problems, First Amendment law must evolve in kind to regulate such speech.

My argument will proceed as follows. Part II will define “conspiracy speech” as it is imagined in this article. Specifically, the speech at issue is empirically-presented, disseminated online, and associated with violent action. Part III assesses where conspiracy speech fits into contemporary First Amendment doctrine. In particular, online conspiracy theory will be measured against the modern standards for unlawful advocacy and false speech. Part IV explores new First Amendment concerns posed by conspiracy speech. Here, I argue that conspiracy speech triggers various “market failures” within the marketplace of ideas. Contending that market failure sets the stage for regulation, this section claims that government intervention is necessary to curb conspiracy speech. Part V provides a topography of recent academic treatment in the field of electronic incitement. Finally, in Part VI, I offer a novel judicial test for regulating online conspiracy speech.

II. DEFINING CONSPIRACY SPEECH

Before assessing where conspiracy theories fit within First Amendment law, it is important to clarify how this article defines “conspiracy speech.” Conspiracies exist in various shapes and forms. Not beholden to any particular viewpoint, they transcend ideology and political leaning. Sometimes these theories are relegated to the far corners of social thought, operating sub rosa amongst ideological minorities. Other times, they occupy a prominent place in the public discourse, captivating the attention of mainstream audiences. Many conspiracies are relatively benign, characterized more by their eccentricity than their capacity for social injury. The Flat Earth and staged lunar landing theories seem to fit this category.²³ Others, such as Holocaust and Sandy Hook denial, are blatantly destructive and cause immense psychic harm to survivors and family members.²⁴

23. Rob Picheta, *The Flat-Earth Conspiracy Is Spreading Around the Globe. Does it Hide a Darker Core?*, CNN (Nov. 18, 2019, 10:37 AM), <https://www.cnn.com/2019/11/16/us/flat-earth-conference-conspiracy-theories-scli-intl>; Richard Godwin, *One Giant...Lie? Why So Many People Still Think the Moon Landings Were Faked*, GUARDIAN (July 10, 2019, 10:00 PM), <https://www.theguardian.com/science/2019/jul/10/one-giant-lie-why-so-many-people-still-think-the-moon-landings-were-faked>.

24. Adam G. Klein, *How to Fight Holocaust Denial in Social Media—With the Evidence of What Really Happened*, THE CONVERSATION (Dec. 3, 2020, 1:39 PM), <https://theconversation.com/how-to-fight-holocaust-denial-in-social-media-with-the-evidence-of-what-really-happened-150719>; Susan Svrluga, *First, They Lost Their Children. Then the Conspiracy Theories Started. Now, the Parents of Newtown are Fighting Back*, WASH. POST. (July 8, 2019), <https://www.washingtonpost.com/local/education/first-they-lost-their-children-then-the-conspiracies->

This article takes a narrower approach. Rather than assess the First Amendment's relation to conspiracy theory generally, I will focus on the recent phenomena of QAnon and Pizzagate. At a high level, both theories claim that high-ranking political elites belong to a global cabal of child sex predators.²⁵ Pizzagate emerged from a Clinton campaign email hack, which was subsequently published by Wikileaks in November 2016.²⁶ Proponents of the theory believed that the emails contained coded messages linking Democratic Party operatives to human sex trafficking.²⁷ This conjecture proliferated on online message boards, eventually identifying the Comet Ping Pong pizzeria in Washington D.C. as a place of ritual abuse.²⁸ Believing this to be true, Edgar Welch traveled from North Carolina to the nation's capital intending to liberate the trafficked children.²⁹ Upon arrival, Welch fired an AR-15 assault rifle into Comet Ping Pong.

QAnon also posits the existence of pedophilic network of elites, but its claims are more widespread.³⁰ Followers not only believe that these elites conduct a Satanic sex-trafficking ring, but that they also direct global politics, transnational media conglomerates, and sites of cultural production, such as Hollywood.³¹ Unique to QAnon is the role played by ex-President Trump. Followers believe Trump was chosen by military operatives to expose the evil cabal's wrongdoing.³² This day of reckoning—known as the “Storm”—is said to culminate with the public arrest, imprisonment, and execution of thousands of cabal members, subjecting them to military tribunals and martial law.³³ Information pertaining to the Storm is revealed through a series of cryptic online messages by an anonymous poster named “Q”³⁴ Believing Q to possess government secrets, followers analyze and interpret these “Q drops” in search of hidden meanings.³⁵ While QAnon theories originated on the anonymous imageboard, 4Chan, it has since spread to mainstream websites such as Twitter and Facebook.³⁶ The similarity

started-now-the-parents-of-newtown-are-fighting-back/2019/07/08/f167b880-9cef-11e9-9ed4-c9089972ad5a_story.html.

25. Michael E. Miller, *Pizzagate's Violent Legacy*, WASH. POST (Feb. 16, 2021), <https://www.washingtonpost.com/dc-md-va/2021/02/16/pizzagate-qanon-capitol-attack/>.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Roose, *supra* note 6.

31. *Id.*

32. *Id.*

33. *Id.*

34. Q is a reference to Q clearance, the security clearance required to access Top Secret government information.

35. Adrienne LaFrance, *The Prophecies of Q*, THE ATLANTIC (June 2020), <https://www.theatlantic.com/magazine/archive/2020/06/qanon-nothing-can-stop-what-is-coming/610567/>.

36. *Id.*

between the two theories is far from coincidental, as Pizzagate is generally considered to have morphed into QAnon over time.³⁷ More generally, both theories borrow heavily from anti-Semitic tropes and inspire a near-religious dedication amongst their followers.³⁸

I focus on these theories for a few reasons. First, recent events—most prominently the Capitol Riots—reveal these theories to be an emerging social threat. QAnon has been broadly linked to the riots, with some perpetrators claiming the theory incited their behavior.³⁹ Second, these conspiracies raise unique First Amendment concerns. Understanding the nature of these theories—in particular the characteristics that set them apart from other conspiracies—will better inform their treatment under current free speech doctrine.

“Conspiracy Speech,” for the purpose of this article, is categorized by three basic criteria. (1) The speech is presented empirically rather than ideologically.⁴⁰ Put another way, conspiracies such as QAnon and Pizzagate are asserted as factual in nature. Rather than advocate a particular viewpoint, they lay claim to objective reality, purporting to describe things as they actually are.⁴¹ Unlike ideology, therefore, these conspiracies can be factually rebutted as false. Additionally, in more cases than not, these theories are fairly easily disproven. QAnon and Pizzagate do not lay claim to nebulous factual realms where a statement’s validity is difficult to prove either way.⁴² Instead, as David Han describes, such theories exist in the “realm of demonstrable falsity.”⁴³ (2) The speech is associated with violent action. As stated above, several violent crimes have been linked to QAnon, Pizzagate, and similar theories.⁴⁴ These theories produce real-world harms that transcend psychological or informational injury. This violent potential distinguishes these conspiracies from their less-threatening counterparts. While the speech itself may cause abstract injury—such as obfuscating truth or injuring the democratic process⁴⁵—it is most dangerous when

37. Miller, *supra* note 25.

38. Rachel E. Greenspan, *QAnon Builds on Centuries of Anti-Semitic Conspiracy Theories that Put Jewish People at Risk*, INSIDER (Oct. 24, 2020, 6:00 AM), <https://www.insider.com/qanon-conspiracy-theory-anti-semitism-jewish-racist-believe-save-children-2020-10>; Nina Burleigh, *#Pizzagate Resurfaces an Old Anti-Semitic Slander*, NEWSWEEK (Dec. 6, 2016, 1:58 PM), <https://www.newsweek.com/pizzagate-resurfaces-anti-semitic-slander-528950>.

39. Rubin et al., *supra* note 22.

40. See David S. Han, *Conspiracy Theories and the Marketplace of Facts*, 16 FIRST AMEND. L. REV. 178, 184 (2017).

41. *Id.* at 184.

42. *Id.* at 182.

43. *Id.*

44. Beckett, *supra* note 19; Brian Stelter, *Fake News, Real Violence: ‘Pizzagate’ and the Consequences of an Internet Echo Chamber*, CNN BUS. (Dec. 6, 2016, 9:30 AM), <https://money.cnn.com/2016/12/05/media/fake-news-real-violence-pizzagate/index.html>.

45. Daniela C. Manzi, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 FORDHAM L. REV. 2623 (2019).

inciting followers to lawlessness. Stated differently, these theories have a demonstrated propensity to cause violent conduct. (3) The speech is primarily disseminated in online fora. As several commentators have noted, the internet has profoundly changed the ways in which people communicate.⁴⁶ While technological advances have historically raised a broad spectrum of First Amendment concerns, the free speech considerations regarding online conspiracy speech are particularly acute. Taken together, these criteria inform the proposed judicial solution presented in Part VI.

III. DOCTRINAL HISTORY

Conspiracy speech of the type conducted by QAnon and Pizzagate followers implicates two distinct realms of First Amendment doctrine: (1) unlawful advocacy and (2) false speech. Part A examines the historical evolution of the unlawful advocacy doctrine, including a close examination of the modern standard set forth in *Brandenburg v. Ohio*.⁴⁷ Part B focuses on recent developments in False Speech jurisprudence, notably the Supreme Court's decision in *United States v. Alvarez*.⁴⁸

A. UNLAWFUL ADVOCACY

The First Amendment limits the government's ability to pass laws abridging the freedom of speech and expression.⁴⁹ While the right to unfettered speech is not absolute, it is commonly understood to receive broad protection in both courts of law and courts of public opinion. Although the First Amendment has assumed a supreme place within our hierarchy of constitutional values, free speech doctrine only began receiving significant judicial treatment about one hundred years ago.⁵⁰ Throughout the past century, many theoretic assumptions that underlie the free speech doctrine have become canonical. These philosophical underpinnings—including the “marketplace of ideas”⁵¹ and the democratic necessity of a well-informed polity—will be explored in greater detail in Part IV.

46. See Mark Tushnet, *Internet Exceptionalism: An Overview from General Constitutional Law*, 56 WM. & MARY L. REV. 1637 (2015); See also Alan K. Chen, *Free Speech and the Confluence of National Security and Internet Exceptionalism*, 86 FORDHAM L. REV. 379 (2017).

47. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

48. *United States v. Alvarez*, 567 U.S. 709 (2012).

49. U.S. CONST. amend. I.

50. See *Dennis v. United States*, 341 U.S. 494, 503 (1951) (plurality opinion) (“No important case involving free speech was decided by this Court prior to *Schenck v. United States* [in 1919].”).

51. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”).

One of the earliest First Amendment issues the Supreme Court decided involved the unlawful advocacy of violence. Although the government had historically enacted repressive speech legislation—particularly during periods of national emergency—its constitutional ability to do so avoided Supreme Court scrutiny until World War I.⁵² In *Schenk v. United States*, the Court was tasked with deciding whether the Espionage Act of 1917, which proscribed certain forms of “otherwise protected speech,” ran afoul of Constitutional guarantees.⁵³ The Defendant Charles Schenck, a member of the U.S. Socialist Party, had been charged with distributing leaflets declaring that the civilian draft violated the Thirteenth Amendment’s prohibition against involuntary servitude.⁵⁴ While the leaflets did not call for violent action, they were said to obstruct military recruitment and advocate general insubordination.⁵⁵ In a unanimous opinion authored by Oliver Wendell Holmes, the Court held that the key question in unlawful advocacy cases was whether “the words used are used in such circumstances and are of such a nature as to *create a clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent.”⁵⁶ Justice Holmes clarified this standard, famously stating that First Amendment protection did not extend to speakers who falsely shouting “fire” in a crowded theater.⁵⁷ While the “clear and present danger” test appeared, on its face, to grant extensive protection to unlawful advocacy, in practice it was hardly an onerous standard. Not only did the Court uphold Schenck’s conviction, it extended the “clear and present danger” analysis to uphold numerous prosecutions under the Espionage Act 1917 and Sedition Act of 1918.⁵⁸

In the intervening years, the Court’s treatment of unlawful advocacy has fluctuated. Deference for government suppression reached its high watermark in *Gitlow v. New York*, where the Court upheld a New York law proscribing “Advocacy of Criminal Anarchy.”⁵⁹ The statute’s provisions were general—they did not require that defendants (1) call for definite or immediate acts of force, violence or unlawfulness; (2) use language reasonably and ordinarily calculated to incite certain persons to act of force, violence, or unlawfulness, or (3) direct violence at a specific person.⁶⁰ Despite these broad parameters, the Court adopted a prophylactic rationale, incanting ominously that “[a] single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive

52. DANIEL A. FARBER, *THE FIRST AMENDMENT* 66 (4th ed. 2014).

53. *Schenck v. United States*, 249 U.S. 47 (1919).

54. *Id.* at 50–51.

55. *Id.* at 49.

56. *Id.* at 52 (emphasis added).

57. *Id.*

58. FARBER, *supra* note 52, at 66–67.

59. *Gitlow v. New York*, 268 U.S. 652, 672 (1925).

60. *Id.* at 665–66.

conflagration.”⁶¹ This “bad tendency” analysis remained in vogue until after World War II.⁶² Reversing course in *Terminiello v. Chicago*, the Court applied a reinvigorated “clear and present danger” test to overturn a breach of speech conviction.⁶³ Justice Douglas’ opinion clarified that the clear and present danger of a substantive evil must rise far above “public inconvenience, annoyance, or unrest.”⁶⁴

Broad First Amendment protection would not last long, however. In lockstep with McCarthyism, the Court’s decision in *Dennis v. United States* again recalibrated the “clear and present danger” test toward government suppression.⁶⁵ Writing for the plurality, Chief Justice Vinson reimagined the standard as a simple balancing test. Finding the gravity of the evil—in this case, violent overthrow of the United States government—insufficiently discounted by the improbability that such overthrow would occur, the Court upheld Dennis’ conviction under the Smith Act.⁶⁶ As in *Gitlow*, the *Dennis* Court sanctioned the government’s capacity to take preventive measures. “If the ingredients of reaction are present,” Vincent wrote, “we cannot bind the Government to wait until the catalyst is added.”⁶⁷

The Court’s current stance regarding unlawful advocacy was set forth in *Brandenburg v. Ohio*.⁶⁸ There, the Court considered the prosecution of a local Ku Klux Klan leader under the Ohio Criminal Syndicalism statute for promoting violence as a means of political reform.⁶⁹ During a Klan rally held in Hamilton County, Ohio, Clarence Brandenburg gave a speech calling for “revengeance” on the federal government should they continue to “suppress the...Caucasian Race.”⁷⁰ The rally was later broadcast on local and national networks.⁷¹ In reversing the conviction, the Court eschewed the “clear and present danger” test in favor of a much broader First Amendment protection for criminal incitement. The per curiam opinion established the contemporary standard for unlawful advocacy as: the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.⁷² Importantly, the Court distinguished between “the mere abstract teaching of the...moral necessity for a resort to

61. *Id.* at 669.

62. FARBER, *supra* note 52, at 70.

63. *Terminiello v. Chicago*, 337 U.S. 1 (1949).

64. *Id.* at 5.

65. *Dennis v. United States*, 341 U.S. 494 (1951).

66. *Id.* at 510, 516–17.

67. *Id.* at 511.

68. 395 U.S. 444 (1969).

69. *Id.* at 444–45.

70. *Id.* at 446.

71. *Id.* at 445.

72. *Id.* at 447.

force and violence” and “preparing a group for violent action and steeling it to such action.”⁷³ Under this standard, violent advocacy is protected under the First Amendment absent a contextual showing of imminent harm. The *Brandenburg* test has turned out to be highly speech-protective in subsequent cases.⁷⁴

Before moving to False Speech, it is important to quickly examine the policy considerations which underlie unlawful advocacy doctrine. Although protection for criminal incitement has oscillated throughout the prior century—oftentimes reflecting broader sociopolitical contexts—the entire jurisprudence reveals an ongoing attempt to balance two fundamental concerns. On the one hand, the Court has sought to provide expressive room for political minorities to voice ideological dissent, even dissent that promotes violent upheaval and profound normative change. On the other, the Court has attempted to protect the citizenry from legitimate threats, particularly during times of war or heightened national security. Such balancing is reflected in each iteration of incitement jurisprudence, from the “clear and present danger” test to *Brandenburg*’s contemporary standard. Moreover, unlawful advocacy doctrine has evaded the Court’s standard two-tiered categorization, existing somewhere between the unprotected low-value speech of obscenity and fighting words, and pure political speech ensured full constitutional safeguard.⁷⁵ As it currently stands, the jurisprudence is skewed heavily toward speech-protection. This preference mirrors the presiding liberal First Amendment regime that favors more speech as opposed to less. Inherent within the prevailing dogma is the concept of the “marketplace of ideas.” First articulated by Justice Holmes’ dissenting opinion in *Abrams v. United States*, the “marketplace of ideas” essentially posits that, in the arena of public expression, valuable ideas ultimately will ultimately eliminate harmful ones.⁷⁶ Thus, the “marketplace of ideas” fundamentally resists government censorship, even censorship of dangerous or hateful expression. Instead, speech regulation is left to the democratic masses. While the “marketplace of ideas” will be examined in greater detail in Part IV, for now it suffices to say that *Brandenburg*’s narrow authorization for government intervention can be justified as a market failure. Central to *Brandenburg*’s holding is the imminence requirement. Indeed, the lawless action called for by the inciting speech must be on the verge of happening. In this context, counterspeech may not successfully diminish the incendiary potential of dangerous expression. Absent normal temporal conditions, the market fails and the harmful idea wins out.

73. *Id.* at 448.

74. Martin H. Redish & Matthew Fisher, *Terrorizing Advocacy and the First Amendment: Free Expression and the Fallacy of Mutual Exclusivity*, 86 FORDHAM L. REV. 565, 568 (2017).

75. Alan K. Chen, *Free Speech and the Confluence of National Security and Internet Exceptionalism*, 86 FORDHAM L. REV. 379, 386 (2017).

76. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

B. FALSE SPEECH

While the parameters of unlawful advocacy protection have been largely settled over the last one hundred years, the doctrinal history surrounding false speech is far less clear. Rather, than carving out a cohesive sphere within First Amendment law, false speech doctrine has emerged from disparate corners of the jurisprudence. It is evident, however, that the Court has harbored some level of suspicion for false statements since the onset of First Amendment jurisprudence. Indeed, Holmes' crowded theater example incorporates falseness as a central factor in defining unprotected speech.⁷⁷ *Gertz v. Robert Welch, Inc.* is even more clear.⁷⁸ There, the Court claimed that "[t]here is no constitutional value in false statements of fact."⁷⁹ Rather, such statements "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."⁸⁰ The Court has followed this reasoning in several contexts, limiting speech protection in cases of fraud,⁸¹ perjury,⁸² false commercial speech,⁸³ and, as in *Gertz*, defamation.⁸⁴

Yet, the Court has at other times provided some degree of protection to false statements. Usually, such falsehoods are tolerated to ensure a functioning marketplace of ideas. Thus, the "Breathing Space" rationale articulated in *New York Times v. Sullivan* protects erroneous statements when necessary to avoid chilling free and robust debate.⁸⁵

The Court most recently addressed false speech in *United States v. Alvarez*.⁸⁶ In that case, Xavier Alvarez was prosecuted under the Stolen Valor Act for dishonestly claiming to have received a congressional medal of honor.⁸⁷ The Act in question provided criminal sanctions for anyone who "falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States."⁸⁸ A fractured court struck down the Stolen Valor Act as a content-based restriction.⁸⁹ Central to the holding was the Act's failure to tie false speech to some tangible or legally-cognizable

77. *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in *falsely* shouting fire in a theatre and causing a panic.") (emphasis added).

78. *Gertz v. Robert Welch*, 418 U.S. 323 (1974).

79. *Id.* at 340.

80. *Id.*

81. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976).

82. *United States v. Dunnigan*, 507 U.S. 87, 97 (1993).

83. *Virginia Bd.*, 425 U.S. at 771.

84. *Gertz v. Robert Welch*, 418 U.S. 323, 340.

85. *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964).

86. 567 U.S. 709 (2012).

87. *Id.* at 713.

88. *Id.* at 716.

89. *Id.* at 729–30.

harm.⁹⁰ Writing for the plurality, Justice Kennedy clarified, that “falsity alone may not suffice to bring the speech outside the First Amendment.”⁹¹

Less clear, however, is the appropriate standard of review to be applied in false speech cases. The plurality found Alvarez’s statements to be fully protected speech, and thus struck the Stolen Valor Act under “exacting” scrutiny.⁹² Justice Breyer’s concurrence, on the other hand, distinguished between false statements regarding “philosophy, religion, history, the social sciences, [and] the arts” and statements that do not implicate these higher values.⁹³ In Breyer’s conception, laws targeting the former should be analyzed under strict scrutiny whereas laws concerning “false statements of easily verifiable facts that do not concern such subject matter”⁹⁴ should receive lesser protection. Because Alvarez’ statements fell within the latter category, Breyer concluded that the Court should have subjected the Act to an intermediate scrutiny standard.⁹⁵

Although the jurisprudence is far from a model of clarity, there are some general observations we can make about false speech doctrine. First, despite repeatedly categorizing untrue statements as constitutionally valueless, it is clear the Court affords false speech some level of First Amendment protection. Second, the level of protection seems roughly correlated to the speech’s capacity to produce social value. As the breathing space concept makes clear, false statements are sometimes intermingled with the expression of true ideas. Envisioned as a sort of expressive curtilage, breathing space recognizes the ability of erroneous statements to insulate high-value ideas from constitutional chill. Closely related is the truth-seeking function of the marketplace of ideas. In this context, even false speech makes a valuable contribution to public debate by serving as an illuminating foil to true ideas and cherished values. As false statements are conquered in the arena of public expression, the rationale holds, we come to a sharper understanding of the truth. Moreover, false speech may be valuable in various social settings, such as safeguarding individual privacy, shielding minority groups from prejudice, and diffusing tense or dangerous situations.⁹⁶ In these circumstances, false speech can actually produce more social utility than true statements. On the other hand, false speech protection is discounted when the speech causes concrete and tangible harms. While made explicit in *Alvarez*, the Court has voiced this preference in a variety of contexts. Again, cases involving fraud, defamation, and government impersonation are illustrative.

90. *Id.* at 719.

91. *Id.*

92. *Id.* at 724.

93. *Id.* at 731–32 (Breyer, J., concurring).

94. *Id.* at 732.

95. *Id.*

96. *Id.*

IV. CONSPIRACY SPEECH ISSUES UNDER THE FIRST AMENDMENT

With this jurisprudence in mind, we can begin to analyze how these conspiracies interact with existing free speech doctrine. Part A will explore the areas where conspiracy speech evades First Amendment categorization. Part B will provide an in-depth analysis of the marketplace of ideas and articulate why online conspiracies such as QAnon and Pizzagate often lead to market failure.

A. DOCTRINAL PROBLEMS

1. *Unlawful Advocacy*

A cursory analysis demonstrates that modern First Amendment doctrine is ill-suited to confront emerging challenges posed by QAnon and Pizzagate. The issue is primarily one of categorization. Conspiracy speech of the type imagined here does not conscribe neatly to unlawful advocacy or false speech jurisprudence. As courts attempt to assess injuries caused by QAnon and Pizzagate, they will be forced to assign the speech to either category. This type of doctrinal sorting implicates two basic problems. The first is substantive. Conspiracy speech includes elements of unprotected speech under both criminal incitement and false speech standards, but is left unregulated by either. The second is formal. Existing doctrine is ill-equipped to address the means by which the speech is disseminated. Specifically, the legal standards fail to account for the transformative quality of the internet. While our methods of communication have fundamentally changed, much speech doctrine has remained static. The likely result will be that conspiracy speech will receive protection and that injuries it causes will be left unredressed. This has less to do with the value produced by conspiracy speech and more with outmoded legal standards.⁹⁷

Beginning with unlawful advocacy, *Brandenburg* prohibits the government from regulating criminal incitement absent a highly speech-deferential showing. To meet this standard, the state must demonstrate that (1) the speaker intended to incite imminent lawless action; (2) the speech is likely to be successful in its incitement of unlawful action in the specific context; and (3) the illegal action must be likely, under these circumstances, to be imminent.⁹⁸ This reveals a disconnect between the law on the books and conspiracy speech in practice. Starting with the first prong, the degree to which conspiracy theories like QAnon and Pizzagate actually call for lawless action is questionable. While there is a documented causal link

97. In the realm of cyberterrorism, Martin Redish & Matthew Fisher have deemed this the fallacy of mutual exclusivity. Because cyberterrorism contains elements of both unlawful advocacy and true threats, it should be analyzed under its own legal framework rather than pigeonholed into one or the other. Redish & Fisher, *supra* note 74.

98. 395 U.S. 444, 447 (1969).

between these conspiracies and violent crimes,⁹⁹ the actual speech may operate by insinuation rather than explicit advocacy of action. Common among conspiracy theory message boards are vague appeals to vigilantism and abstract calls to “take back our country.”¹⁰⁰ Moreover, the Storm narrative, while manifestly violent, seems to hold that some combination of the military and ex-President Trump will expose the purported cabal.¹⁰¹ Put another way, the responsibility for action does not fall upon the average Q follower. Thus, conspiracy speech circulating online may be more likely to *inspire* lawless action than directly call for it. Unlike classic incitement or cyber terrorism, which predicates its ideological teachings and recruitment upon political revolution, conspiracy speech seems to operate by way of distortion. It is the representation of conspiracy as objective fact, the commingling of fiction and reality, that appears to catalyze followers to violence.¹⁰² It is therefore unsurprising that criminal defendants linked to both Pizzagate and QAnon claim to have been inspired by child safety concerns.¹⁰³ Believing their targets to be involved in child sex trafficking, action became a moral imperative.¹⁰⁴ How the First Amendment addresses this distortive quality is an open question.

The intent requirement poses additional problems. While intentionality should remain a prerequisite in any speech prohibition, the issue is complicated in online conspiracy speech by questions of identity and motivation. Regarding the former, it is unclear whether liability should fall upon the online speaker or the moderator who runs the forum. Common sense, as well as principles of individual autonomy, seem to indicate that the speaker should be held responsible. But the issue is not as straightforward as it first appears. Online moderators create the environment in which the dangerous speech proliferates. As touched upon later, it may not be a single, identifiable utterance that provokes lawlessness, but a critical mass of similar utterances by separate speakers over time. Whereas in prior decades, the inciting speaker may have also organized the hostile environment, in conspiracy speech the roles are often bifurcated. The question then becomes liability falls on the powder keg or the match.

Similarly, conspiracy speakers may have diverse motives when actually speaking. To illustrate this point simply, I will draw a distinction between two groups I label Disrupters and True Believers. Disrupters—comprised mostly of political operators, internet trolls, and media personalities—will

99. Beckett, *supra* note 19.

100. Roose, *supra* note 6.

101. *Id.*

102. LaFrance, *supra* note 35.

103. *Id.*

104. Several of these individuals were parents themselves. Beckett, *supra* note 19.

engage in conspiracy speech to further certain agendas.¹⁰⁵ For example, alt-right activists disseminated the Pizzagate theory as a means of tarnishing and delegitimizing the Clinton campaign.¹⁰⁶ Often times, Disrupters will partake in such speech with the active intention to create confusion about particular subjects and distort the worldviews of others.¹⁰⁷ It does not matter whether they actually find such speech veritable so long as it can be instrumentalized toward certain ends. In contrast, True Believers genuinely understand such conspiracies to reflect objective reality.¹⁰⁸ They engage in conspiracy speech to spread awareness about the actual state of things. Does this distinction matter for the purpose of First Amendment liability and should it? The exploitative quality of Disrupter speech appears to lend itself to greater culpability. At the same time, True Believers, by nature of their genuine feeling, may come across as more persuasive to active listeners, and therefore more effective at inciting violence. Again, *Brandenburg* has little to say about this distinction.

Finally, *Brandenburg*'s imminence prong is ill-fit to address the *nature* of online conspiracy speech. The imminence requirement is said to prevent suppression where the government's fears of speech's incendiary potential are exaggerated or misguided. By limiting regulation to speech on the cusp of conduct, the imminence prong prevents expressive chill. But many commentators have questioned whether the imminence requirement was ever an appropriate consideration in balancing free speech and public safety concerns.¹⁰⁹ Citing empirical evidence, this critique focuses on the corrosive potential of certain speech, arguing that courts have incorrectly prioritized immediately dangerous expression over the long-term effects of destructive ideologies.¹¹⁰ Put another way, systematic and enduring proselytization into a dangerous worldview is more likely to lead the speaker to violent action than any single utterance, no matter how fraught the environment in which that utterance occurs. Borrowing from Alexander Tsesis' scholarship, "[i]t is apparent that under certain circumstances there will be stepwise progression from verbal aggression to violence, from rumor to riot, from gossip to genocide."¹¹¹ Not only is this reasoning logical, it is particularly acute in the context of online conspiracy speech. The factual medium in

105. Jeremy W. Peters, *A Pro-Trump Conspiracy Theorist, a False Tweet and a Runaway Story*, N.Y. TIMES (June 10, 2017), <https://www.nytimes.com/2017/06/10/us/politics/comey-fake-news-twitter-posobiec.html>.

106. *Id.*

107. *Id.*

108. Tommy Beer, *Majority of Republicans Believe the QAnon Conspiracy Theory Is Partly or Mostly True, Survey Finds*, FORBES (Sept. 2, 2020, 6:03 PM), <https://www.forbes.com/sites/tommybeer/2020/09/02/majority-of-republicans-believe-the-qanon-conspiracy-theory-is-partly-or-mostly-true-survey-finds/?sh=505be57e5231>.

109. Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 VA. J.L. & TECH. 1, 10 (2002).

110. *Id.*

111. *Id.*

which conspiracies are presented is perhaps more likely to shape listeners' worldview over time than ideology.¹¹² What may first strike the reader as implausible, may take on the quality of verisimilitude when she is presented with greater "evidence." The compilation of evidence, in turn, creates a pressure cooker effect whereby listeners are inspired to act as their exterior realities appears increasingly desperate.¹¹³ QAnon demonstrates this effect. "Q Drops" are progressive—they are released over a series of months rather than unloaded all at once.¹¹⁴ Many such drops build anticipation for future events.¹¹⁵ This anticipation transforms into anxiety, stirring followers into a frenzy and inciting them to act in the real world.¹¹⁶ Limiting incitement doctrine to imminently dangerous expression fails to address these issues. Moreover, the online forums do not conform to the temporal realities of the era in which *Brandenburg* was decided. While message boards certainly may resemble an angry mob in some capacities, they may also lack essential qualities of a combustible crowd. Speakers may post—and listeners may read—different things at different times. This lack of simultaneous interaction makes it difficult to pinpoint exactly when incitement may have occurred.

2. False Speech

At first, modern false speech doctrine may seem better equipped to address online conspiracy theories. As noted above, the current jurisprudence (1) offers some protection for false speech; (2) protection correlates with the speech's ability to produce value; and (3) value—and thus protection—is discounted when the speech also produces concrete harms.¹¹⁷ Turning to the first criterion, there is an argument to be made that false statements of *fact*—the kind at play in conspiracy speech—receive less protection than false *ideas*. As both David Han and Frederick Schauer have touched upon, "the most notable expositors of the 'pursuit of truth' theory of free speech—from Mill to John Milton to Oliver Wendell Holmes—were primarily concerned with the ideological 'truth' produced by the marketplace of ideas rather than factual truth."¹¹⁸ Ideological truth implicates "debatable

112. Paris Martineau, *Internet Deception Is Here to Stay—So What Do We Do Now?*, WIRED (Dec. 30, 2020, 7:00 AM), <https://www.wired.com/story/internet-deception-stay-what-do-now/>.

113. EJ Dickson, *Former QAnon Followers Explain What Drew Them In—And Got Them Out*, ROLLING STONE (Sept. 23, 2020, 9:00 AM), <https://www.rollingstone.com/culture/culture-features/ex-qanon-followers-cult-conspiracy-theory-pizzagate-1064076/>.

114. Roose, *supra* note 6.

115. *Id.*

116. Ben Collins, *What is QAnon? A Guide to the Conspiracy Theory Taking Hold Among Trump Supporters*, NBC NEWS (Aug. 3, 2018, 6:18 AM), <https://www.nbcnews.com/tech/tech-news/what-qanon-guide-conspiracy-theory-taking-hold-among-trump-supporters-n897271>.

117. *See supra* Part III.

118. David S. Han, *Conspiracy Theories and the Marketplace of Facts*, 16 FIRST AMEND. L. REV. 178, 183 (2017); Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 902–08 (2010).

matters of religious, moral, and political truth-like the merits of Communism or the ways in which one should live one's life-rather than assertions of hard fact."¹¹⁹ While *Alvarez* makes clear that some false facts do receive constitutional protection, perhaps other considerations present in conspiracy speech can override that presumption.

Second, it seems fairly clear that conspiracy speech produces little social value. While one may argue that such conspiracies foster community, the toxic nature of those communities decidedly outweighs any marginal benefit. Similarly, the argument that false statements produce clearer conceptions of truth has little context here. Again, this is not a clash of ideologies by which we arrive at a higher understanding. Rather, conspiracy speech espouses manifestly false realities, mixing narrative with objectivity. The costs associated with dispelling false facts are far greater than any value created.¹²⁰

Third, the harms produced by conspiracy speech are tremendous. As stated earlier, the proliferation of this speech has been linked directly to violent action. People have been murdered, children kidnapped, and Capitols breached all in service of these false narratives.¹²¹ There have also been steep costs on followers. Setting aside individuals who have lost liberty from criminal sentencing, many followers have lost time, money, and familial connection due to their participation in the conspiracies.¹²² Further, followers have experienced psychological harms upon learning that their chosen theory was not true.¹²³ At a more abstract level, conspiracy speech has a deleterious effect on the democratic process. The dissemination of misinformation interferes with the public's capacity to make sound, rational choices.¹²⁴ Conspiracies regarding politicians also undermine trust in public officials.¹²⁵ On the flip side, conspiracy speech can be leveraged by self-interested actors for socio-political gain.¹²⁶ Abstracting even further, such speech can cause one to question the nature of objectivity wholesale. An inability to distinguish between what is real and what is not can have a destabilizing effect on individual psyches.

119. Han, *supra* note 118, at 183.

120. Eileen Brown, *Online Global Fake News is Costing Us \$78 Billion Globally Each Year*, ZDNET (Dec. 18, 2019), <https://www.zdnet.com/article/online-fake-news-costing-us-78-billion-globally-each-year/>.

121. Beckett, *supra* note 19; Rubin, *supra* note 22.

122. Greg Jaffe & Jose A. Del Real, *Life Amid the Ruins of QAnon: 'I Wanted my Family Back'*, WASH. POST (Feb. 23, 2021), <https://www.washingtonpost.com/nation/interactive/2021/conspiracy-theories-qanon-family-members/>.

123. *Id.*

124. Bethany Albertson & Kimberly Guiler, *Conspiracy Theories, Election Rigging, and Support for Democratic Norms*, RSCH & POLITICS (Sept. 2020), <https://journals.sagepub.com/doi/pdf/10.1177/2053168020959859>.

125. *Id.*

126. Peters, *supra* note 104.

Despite this calculus, it is far from certain that courts would prohibit conspiracy speech under the current standard. As Mark Tushnet and other commentators have noted, conspiracy speech, while factually false, is often “ideologically inflected.”¹²⁷ This means that the content of conspiracy speech—while plainly untrue and socially valueless—is often associated with certain ideological values that receive broad First Amendment protection.¹²⁸ For example, QAnon and Pizzagate contain several recognizable philosophies. Their admiration for ex-President Trump and deep mistrust of government exhibits libertarian and far-right-wing sympathies.¹²⁹ Their belief in the coming Storm, and the following social utopia, conjures evangelical Christianity.¹³⁰ Finally, their fear of an elite and powerful cabal is reminiscent of several conspiracy theories and contains deeply anti-Semitic undertones.¹³¹ David Han pushes this concept even further, arguing that belief in conspiracy theory is itself an ideological viewpoint. In Han’s conception, there is ideological import in the very act of taking an anti-establishment stance, in believing that things are not as they appear.¹³² Viewed this way, it is unlikely that courts permit regulation under the First Amendment. In fact, a majority of Justices on the *Alvarez* Court agreed that strict scrutiny should apply to false statements regarding “philosophy, religion, history, the social sciences, [and] the arts.”¹³³ If such statements include QAnon and Pizzagate conspiracy speech, any legislation limiting such speech will likely be struck down.

B. MARKETPLACE OF IDEAS

Acknowledging that existing doctrine is ill-suited to confront emerging conspiracy speech issues, a different inquiry becomes necessary. As stated above, the modern First Amendment regime is heavily influenced by the marketplace of ideas. Within this marketplace, it is claimed, diverse expressions meet, commingle, bastion one another and battle for supremacy. Through this dynamic process, the best ideas win out and society arrives at the greatest conception of truth. Because a functioning market filters harmful and untrue expression over time, government regulation of speech becomes unnecessary. In fact, the theory posits that suppressing speech—even harmful speech—is dangerous to the marketplace because (1) suppression may chill socially-useful expression; (2) the state may use suppressive measures to censor political minorities; and (3) the process by

127. Mark Tushnet, “*Telling Me Lies*”: *The Constitutionality of Regulating False Statements of Fact* 18 (HARV. L. SCH. PUB. LAW & LEGAL THEORY, Working Paper No.11-02, 2011).

128. *Id.*

129. Roose, *supra* note 6.

130. *Id.*

131. *Id.*

132. Han, *supra* note 40, at 190.

133. 567 U.S. 709, 731–32 (Breyer, J., concurring).

which truthful ideas conquer false ones actually produces more social value than had those ideas gone uncontested in the first instance. Thus, the proper remedy for harmful speech in normal circumstances is counterspeech. Government intervention is only warranted to combat market failures. Again, the *Brandenburg* standard illustrates this concept. The imminence requirement demonstrates that, in certain circumstances, counterspeech cannot effectively diffuse incendiary expression. This failure of persuasion means that the harmful idea wins a place in the market it otherwise should not have. In the incitement context, this can lead to social harms such as violent action and lawlessness.

This section will explore how conspiracy speech operates within the marketplace of ideas. My approach is instrumental rather than absolutist.¹³⁴ Although conspiracy speech does not fit neatly within unlawful advocacy or false speech doctrine, I argue that online conspiracies still trigger the types of market failures that contemporary First Amendment law attempts to correct. Because existing doctrine fails to address these market breakdowns, we must envision new solutions to confront these emerging problems.

Although the marketplace of ideas has theoretical origins in the writings of John Stuart Mill, John Milton, and James Madison, the conception first entered American constitutional jurisprudence in Justice Holmes' *Abrams* dissent.

[M]en . . . may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.¹³⁵

Although briefly described earlier, it is important to spend some time identifying the assumptions and commitments behind this theory.¹³⁶ Again, the central thesis is that society reaches the best conception of truth through the free trade of ideas in a competitive marketplace. Not only does competition ensure the most socially-valuable ideas will win out, but the competitive process reveals why certain ideas are more valuable than others. Thus, when harmful expression—such as hate speech, misinformation, and violent advocacy—enter the arena, the proper solution is to counter that speech with contrary expression. Relatedly, harmful expression can itself be

134. See generally David S. Han, *Brandenburg and Terrorism in the Digital Age*, 85 BROOK. L. REV. 85 (2019).

135. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

136. It is important to also clarify that the theory houses different philosophical strands. Justice Holmes' conception is essentially libertarian, focusing much attention on the rights of individual speakers. By contrast, Justice Brandeis was more concerned with democratic stability, noting the importance of free expression to a community's political health. FARBER, *supra* note 51, at 68–69.

valuable by serving as a social safety-valve.¹³⁷ Providing an expressive avenue to angry, bigoted, and hateful individuals ensures their frustrations do not morph into violent action. Conversely, allowing all ideas into the market safeguards political minorities from repressive ruling blocs. Read together, the marketplace is inherently maximalist; the more speech the better.

With this in mind, it is unsurprising that the marketplace of ideas is deeply suspicious of government speech suppression. Rejecting paternalism, proponents of the marketplace prefer that speech regulation occur via private ordering. Ensuring such decisions are made democratically prevents the state from censoring unpopular, but potentially valuable, opinions, and from prescribing certain orthodoxies upon the community. Thus, state intervention is only tolerated to ensure a working marketplace.

Despite these lofty goals, commentators have questioned whether the marketplace functions as advertised. As an initial matter, the theory ignores external factors that may contribute to an idea's widespread acceptance. For example, a particular theory may achieve supremacy within the marketplace because the speaker is politically powerful, has superior access to economic resources or communicative channels, or is uniquely persuasive in conveying her message.¹³⁸ These influences may be exercised completely independent of the speech's social or truthful value. Similarly, the marketplace suffers from a majoritarian problem. It is fairly evident that just because some ideas are widely accepted, does not mean that they are the most true or most socially beneficial.¹³⁹ The theory overlooks—or more perniciously, accepts—that some ideas become popular primarily because they serve the interests of powerful groups. Worse still, people may assume that consensus equates truth, leading to the long-term reproduction and survival of harmful expression. One only need look to the eugenics movement of the early 20th century to confirm this.¹⁴⁰ Relatedly, continuing legacies of white supremacy, gender discrimination, and homo/transphobia demonstrate the staying power of toxic ideas. Despite their odious content, the popularity of such expression within the political mainstream likely ensures their dominance in a competitive marketplace. At an abstract level, the marketplace can be seen as reproducing many of the problems associated with liberalism. The competitive spirit of the marketplace of ideas reveals an inherently capitalist viewpoint. Less generously, it can be viewed as Darwinian. Marketplace backers argue that, despite these pitfalls, the unfettered trade in ideas is still superior to government paternalism.¹⁴¹

137. FARBER, *supra* note 52, at 79.

138. Tsesis, *supra* note 109, at 12–16.

139. *Id.*

140. *Id.*

141. Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1167 (2015).

However, international law comparisons demonstrate that these paternalist fears may be unfounded.¹⁴²

More narrowly, some commentators believe that the marketplace theory was never meant to correct the type of misinformation disseminated by conspiracy theorists. Rather, the theoretical marketplace was conceived to address debatable matters of ideology, not issues of demonstrable and verifiable fact.¹⁴³ Indeed, nascent free speech doctrine of the first half of the twentieth century was primarily concerned with advocacy and not description.¹⁴⁴ It is possible that this doctrinal tradition implied that the power of the marketplace of ideas to select for truth was as applicable to factual as it is to religious, ideological, political, and social truth. But such concerns were never addressed explicitly. Thus, these scholars concede the marketplace's efficacy in the ideological realm, but question its applicability to questions of objective fact.¹⁴⁵

Despite these critiques, the marketplace of ideas has achieved a hegemonic status within modern First Amendment law. Ironically, the marketplace evidences its own functionality—the theory has won broad acceptance against competing ideologies over time. As the critical path is well-trodden, and because courts are unlikely to abandon the philosophy any time soon, my argument for regulating conspiracy speech operates within current jurisprudential parameters. Specifically, online conspiracy speech implicates several market failures that should be doctrinally and statutorily addressed.

First, a functioning marketplace presumes that expression serves as a social safety valve. Harmful speech is preferable to harmful action, so we allow negative expression to assuage whatever psychic tension the speaker might be feeling. In the context of QAnon, we tolerate the spread of conspiracy theory—such as the political elite running a child sex-trafficking ring—so that the speakers do not target individuals with violent action. As noted earlier, this rationale has not held in practice.¹⁴⁶ Several violent crimes have been directly or partially inspired by conspiracy speech. Moreover, if the Capitol Riots are any indication, conspiracy-inspired criminality has become more prolific and incendiary as speech has proliferated. What causes this market failure?

The answer likely has to do with the online format in which speech is disseminated. Mark Tushnet and other commentators have discussed the concept of internet exceptionalism, which argues that the *sui generis* nature

142. Tsesis, *supra* note 109, at 12–16.

143. Han, *supra* note 118; Ho & Schauer, *supra* note 141.

144. Han, *supra* note 118.

145. Dawn Carla Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1519, 1526 (2019).

146. Beckett, *supra* note 19; Rubin, *supra* note 22.

of online speech justifies greater speech regulation.¹⁴⁷ These scholars point to three criteria: (1) Amplification—online speech can be communicated broadly and instantaneously; (2) Cost—online communication is much less expensive than traditional modes of speech; and (3) Anonymity—not only can individuals mask their real-world identities when participating in online speech, they can concoct entirely new personas.¹⁴⁸ This allows online speakers to act without inhibition, engaging in behaviors and performing fantasies that might otherwise bring them social opprobrium. While internet exceptionalism is true of any online expression, the characteristics identified are especially volatile in the context of conspiracy speech. In particular, the propensity of online speech to proliferate quickly tests the limits of the safety valve theory. This is because the safety valve theory assumes a cooling period—the rationale only holds if negative expression is released into a neutral environment. When, however, that expression is met instantaneously with agreement or increasingly hostile versions of the same sentiment, the effect is cumulative rather than dissipative. Not only that, some online communities prioritize particularly virulent forms of speech, and may actually reward the most provocative content with increased distribution.¹⁴⁹ This phenomenon, along with the anonymous nature of online expression, results in destructive echo chambers, whereby negative speech and emotion continuously intensifies.¹⁵⁰ As Cass Sunstein has noted, this effect “can dramatically amplify the capacity of speech in one place to cause violence elsewhere at some uncertain time...”¹⁵¹ The safety valve rationale is thus turned on its head. Rather than assuaging psychic tensions, harmful speech combines, proliferates and transmutes into violent action.

A second market failure is the absence of counterspeech. Again, a functioning marketplace presumes interaction, whereby certain harmful ideas will be criticized, counterpoised, and revealed as erroneous by more valuable forms of expression. Without counterspeech, the market fails to run efficiently and harmful expression takes hold. In the context of conspiracy speech, both empirical data and personal accounts reveal that conspiracy message boards operate more as an echo chamber than as an open marketplace.¹⁵² This phenomenon exists on multiple levels. As an initial matter, internet fora are often segregated by interest, attracting individuals

147. Tushnet, *supra* note 46; Chen, *supra* note 46.

148. Chen, *supra* note 46, at 391.

149. Lyrisa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEXAS TECH. L. REV. 147, 149–50 (2012).

150. *Id.*

151. See Cass R. Sunstein, Opinion, *Islamic State’s Challenge to Free Speech*, BLOOMBERG (Nov. 23, 2015), <https://www.bloomberg.com/opinion/articles/2015-11-23/islamic-state-s-challenge-to-free-speech>.

152. Jaffe & Del Real, *supra* note 122.

predisposed to likeminded ideologies.¹⁵³ In this sense, online congregation more closely replicates members-only meetings than public squares. Of course, this is true of many online—and even offline—gathering places, not just hubs for conspiracy speech. Unpopular speech is often first-expressed behind closed doors. Ideologies may develop in private, bastioned internally by assenting voices, before they are revealed to the public and tested in the marketplace. This is common in both contemporary right-wing groups and the Marxist collectives of yesteryear. Indeed, this interest-specialization has also taken hold in society more generally. The advent of partisan news media delivers politically-curated content and ensures that individuals are less-likely to be exposed to dissenting opinions.¹⁵⁴ Social media algorithms, moreover, track users’ search history and tend to reproduce preexisting ideas and biases.¹⁵⁵ In sum, counterspeech exposure is dwindling and the continued efficacy of rationale is becoming increasingly nebulous.

There is reason to believe, however, that the absence of counterspeech is particularly acute in online message boards where conspiracies proliferate. Much of this can be attributed to community norms and standards. In the context of QAnon, online moderators have played a key role in not only determining which speech matters, but also who is allowed to speak.¹⁵⁶ This has resulted in membership purges when individuals fail to pass an ideological purity test. For example, moderators of a significant QAnon message board began banning users who failed to “keep the faith” after President Biden’s inauguration.¹⁵⁷ The capacity to remove dissenting voices from online message boards renders counterspeech a lofty goal rather than a market default.¹⁵⁸

Relatedly, moderators wield significant influence in determining which posts are valuable within particular communities.¹⁵⁹ This taste-making function distributes cache to certain speakers who best meet a particular set

153. See, e.g., Philip M. Napoli, *What If More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55, 77 (2018); Nunziato, *supra* note 142, at 1527.

154. Mark Jurkowitz et al., *U.S. Media Polarization and the 2020 Election: A Nation Divided*, PEW RSCH. CTR., (Jan. 24, 2020), <https://www.journalism.org/2020/01/24/u-s-media-polarization-and-the-2020-election-a-nation-divided/>.

155. Joanna Stern, *Social-Media Algorithms Rule How We See the World. Good Luck Trying to Stop Them*, WALL ST. J. (Jan. 17, 2021), <https://www.wsj.com/articles/social-media-algorithms-rule-how-we-see-the-world-good-luck-trying-to-stop-them-11610884800>.

156. Brandy Zadrozny & Ben Collins, *How Three Conspiracy Theorists Took ‘Q’ and Sparked Qanon*, NBC News (Aug. 14, 2018), <https://www.nbcnews.com/tech/tech-news/how-three-conspiracy-theorists-took-q-sparked-qanon-n900531>.

157. Ben Collins (@oneunderscore_), TWITTER (Jan. 20, 2021, 2:09 PM), https://twitter.com/oneunderscore_/status/1351970186027560960?lang=en.

158. Drew Harwell & Craig Timberg, *QAnon Believers Grapple with Doubt, Spin New Theories as Trump Era Ends*, WASH. POST (Jan. 20, 2021), <https://www.washingtonpost.com/technology/2021/01/20/qanon-trump-era-ends/>.

159. *Id.*

of standards. Often times, value is assigned to posts that closely reproduce the moderators' viewpoint in the most incendiary way.¹⁶⁰ This results in a grooming effect—speakers are incentivized toward ideological assent as a means of social recognition.¹⁶¹ This incentive structure may be particularly tantalizing for individuals who are outcast or exiled in more traditional communities. Moreover, the reward for valued speech is often increased exposure.¹⁶² This serves a dual function. The incendiary message not only reaches wider audiences, but also signals to other members what valuable speech looks like. All this serves to reproduce particular viewpoints and shut out counterspeech.

Finally, particular demographic attributes present in online conspiracy communities may further reduce the efficacy of counterspeech. One such example is the tendency of conspiracy followers to withdraw from other speech venues.¹⁶³ As stated earlier, community incentive structures may appeal to individuals that typically operate outside of conventional social networks or suffer from mental illness.¹⁶⁴ Thus, loners, social outcasts, and the mentally-ill may find homes within these communities that they lack elsewhere. This predatory baiting is a particularly pernicious aspect of online conspiracy fora. Beyond that, however, conspiracy speech seems especially adept at conscripting individuals from other networks into the conspiracy community. Put another way, followers choose to associate with fellow conspiracy theorists over traditional relations such as friends and family.¹⁶⁵ Countless personal accounts document this phenomenon—someone's parent or child becomes increasingly withdrawn, in contact less-frequently, only willing to engage in certain subject matter discourse.¹⁶⁶ In this sense, conspiracy forums become the predominant, if not exclusive, speech venue in which these persons participate. What is less clear is why this tends to happen. One reason could be that conspiracy speech's objective garb tends to persuade followers that they have uncovered an unfettered reality. Operating under this assumption, these individuals may prefer

160. Kevin Roose, *'False Flag' Theory on Pipe Bombs Zooms from Right-Wing Fringe to Mainstream*, N.Y. TIMES (Oct. 25, 2018), <https://www.nytimes.com/2018/10/25/business/false-flag-theory-bombs-conservative-media.html>.

161. *Id.*

162. *Id.*

163. Louise Hall, *Former QAnon Follower Compares Movement to Drug and Alcohol Addiction*, THE INDEPENDENT (Mar. 13, 2021), <https://www.independent.co.uk/news/world/americas/us-politics/qanon-covid-conspiracy-theory-rein-lively-b1816755.html>.

164. Jan-Willem van Prooijen, *The Psychology of Qanon: Why Do Seemingly Sane People Believe Bizarre Conspiracy Theories?*, NBC NEWS (Aug. 13, 2018), <https://www.nbcnews.com/think/opinion/psychology-qanon-why-do-seemingly-sane-people-believe-bizarre-conspiracy-ncna900171>.

165. Hall, *supra* note 163.

166. *QAnon Casualties*, REDDIT (last visited May 11, 2021), <https://www.reddit.com/r/QAnonCasualties/>; Dickson, *supra* note 112.

discourse with the similarly “enlightened.” Relatedly, a unifying characteristic among conspiracy speakers seems to be a severe distrust of institutional authority.¹⁶⁷ This may render followers less likely to seek information from sources outside the conspiracy community. Another factor could be that progressive “information” reveals, such as Q drops, are psychologically stimulating.¹⁶⁸ Because Q could release a bombshell at any time, followers may choose conspiracy speech over more quotidian realities. A fourth reason may have to do with membership stigma. Conspiracy followers may be renounced or disclaimed by traditional network ties for participation in such speech, leaving online message boards as their only viable communities.¹⁶⁹ Finally, the COVID-19 pandemic, which foreclosed many traditional speech venues, may well have exacerbated these problems.¹⁷⁰ Again, these suggestions are not backed by detailed empirical research and thus form only individual or speculative accounts. It seems evident, however, that these qualities make counterspeech less viable in this context.

V. EXISTING SCHOLARSHIP

Because online conspiracy speech is an emerging phenomenon, there has been little academic treatment of the subject directly. That being said, commentators have produced scholarship in adjacent fields—such as cyber terrorism and hate speech—that ostensibly address the issues caused by harmful online expression. These solutions can be roughly categorized into two groups: (1) Judicial and (2) Legislative. This section provides a topography of recent scholarship and identifies the edifying strengths and potential pitfalls of each.

A. JUDICIAL SOLUTIONS

1. *Overrule Brandenburg*

The most far-reaching judicial solutions call for the wholesale abandonment of *Brandenburg* and its progeny. These scholars presume that *Brandenburg* has either outlasted its relevance or was incorrectly decided in the first instance.¹⁷¹ Regarding the former, some commentators believe *Brandenburg* to be stuck in the past. Conceptualizing the standard in

167. Joe Pierre, *The QAnon Conspiracy Theory: Mistrust and Mass Appeal*, PSYCH. TODAY (Nov. 4, 2019), <https://www.psychologytoday.com/us/blog/psych-unseen/201911/the-qanon-conspiracy-theory-mistrust-and-mass-appeal>.

168. Hall, *supra* note 163.

169. Jaffe & Del Real, *supra* note 122.

170. Ali Breland & Sinduja Rangarajan, *How the Coronavirus Spread QAnon*, MOTHER JONES (June 23, 2020), <https://www.motherjones.com/politics/2020/06/qanon-coronavirus/>.

171. Tsesis, *supra* note 109, at 12–16.

instrumental terms, they argue that *Brandenburg* should be understood as a pragmatic doctrine reflecting “technological and social conditions of its time—one that may grow obsolete as those conditions shift.”¹⁷² Specifically, they point to changing technological circumstances as fundamentally altering the policy balance originally struck by the *Brandenburg* court.¹⁷³ In 1969, when *Brandenburg* was decided, harmful expression was primarily disseminated physically via forms like pamphlets, leaflets, in-person meetings, and public gatherings.¹⁷⁴ The physical medium imposed both economic and temporal costs on speakers, severely limiting their capacity to reach mass audiences instantaneously. In particular, fringe groups were likely to lack the material and structural resources necessary to realize a mainstream platform. In this context, limiting government regulation to circumstances where unlawful advocacy is directed toward inciting, and likely to produce, imminent lawless action seemed an appropriate balance. Today, by contrast, speech is “disseminated widely and cheaply via the internet and channeled through social media.”¹⁷⁵ This novel format allows for groups to proliferate and expand beyond anything the *Brandenburg* Court could have conceived. Put simply, the propensity for speech to incite violence has increased exponentially while the government’s power to regulate has remained stagnant. As a result, tragic events such as the Pulse nightclub shooting,¹⁷⁶ the Boston Marathon bombings,¹⁷⁷ and the El Paso shootings¹⁷⁸ have all been directly linked to online terrorist advocacy. Although such speech has catalyzed very tangible harms, it is considered “abstract”—and thus protected—under prevailing First Amendment doctrine. Understanding the internet to have irrevocably moved the goal posts, these scholars argue that *Brandenburg* should be recalibrated to address modern concerns.¹⁷⁹

More drastically, some commentators believe that *Brandenburg* severely underestimated the dangers of harmful expression in the first instance. In particular, these scholars argue that *Brandenburg*’s imminence requirement fails to accurately characterize the process by which advocacy befalls violence.¹⁸⁰ As touched upon earlier, ideologically-motivated violent

172. Han, *supra* note 134, at 86–87.

173. *Id.*

174. *Id.* at 100.

175. *Id.* at 86.

176. *Orlando Nightclub Shooting: How the Attack Unfolded*, BBC (June 15, 2016), <https://www.bbc.com/news/world-us-canada-36511778>.

177. James Gordon Meek, *FBI Feared Boston Bombers ‘Received Training’ and Aid from Terror Group, Docs Say*, ABC NEWS (May 21, 2014), <https://abcnews.go.com/Blotter/fbi-feared-boston-bombers-received-training-aid-terror/story?id=23819429>.

178. *Texas Walmart Shooting: El Paso Attack ‘Domestic Terrorism’*, BBC (Aug. 5, 2019), <https://www.bbc.com/news/world-us-canada-49226573>.

179. Han, *supra* note 134, at 86–87.

180. Tsesis, *supra* note 109, at 12–16.

crimes are not committed in a vacuum. Rather, they seem to result from prolonged exposure to harmful expression, whereby one's worldview is oriented increasingly toward hostile ideologies. As Alexander Tsesis notes, "[a]ngry words, spoken in the heat of the moment, may result in violence. But the entrenchment of outgroup hatred in an entire culture takes time and has far more impact than spontaneous aggression."¹⁸¹ Again, this is hardly farfetched. Some of the worst human rights atrocities have been preceded by virulent and dehumanizing propaganda campaigns. Speech of this nature stokes preexisting biases and blames certain disfavored groups for social ills. When this speech is repeated, speakers and listeners are desensitized to the violence of its content. Thus, "[t]here is a close, and virtually necessary, connection between advocacy, preparation, coordination, infrastructure development, training, indoctrination, desensitization, discrimination, singular violent acts, and systematic oppression."¹⁸² By proscribing regulation save imminently lawless expression, these commentators argue that *Brandenburg* treats the symptoms and not the illness.

Central to these critiques is the idea that the First Amendment has achieved hegemonic status within the hierarchy of constitutional values—so much so that free speech is not simply prioritized over other amendments, but is elevated over intrinsic human rights such as dignity and safety from bodily harm. Commentators question whether this arrangement is an appropriate reflection of social priorities.¹⁸³ While such notions may first appear sacrilegious, viewed outside our hegemonic context they are not unpersuasive. Should we seriously be in the business of protecting expression to the point of real and tangible harms? As Justice Jackson stated, "[t]he Constitution is not a suicide pact."¹⁸⁴ Is, for example, speech that falsely denounces the Sandy Hook massacre as a hoax worth the trauma inflicted on survivors and family members?¹⁸⁵ Should we continue to legitimize cross burnings in the yards of Black families?¹⁸⁶ These questions implicate our deepest values and will likely yield difficult answers. In theorizing solutions, these scholars often look toward European nations as reference points, indicating that democratic societies frequently regulate harmful speech without invoking the specter of authoritarian censorship.¹⁸⁷ Viewed comparatively, such doctrinal change is not beyond imagination.

181. *Id.* at 11.

182. *Id.* at 10.

183. *Id.* at 12–16.

184. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

185. Daniel Trotta, *Infowars Founder Who Claimed Sandy Hook Shooting Was a Hoax Ordered to Pay \$100,000*, REUTERS (Dec. 31, 2019), <https://www.reuters.com/article/us-texas-lawsuit-alex-jones/infowars-founder-who-claimed-sandy-hook-shooting-was-a-hoax-ordered-to-pay-100000-idUSKBN1YZ1BB>.

186. *See generally* *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

187. Tsesis, *supra* note 109, at 20.

The clear pitfall of such critiques, however, is that absent philosophical sea change, it is unlikely the Court will be willing to accept such reforms. As mentioned previously, the prevailing liberal speech regime prefers more speech to regulation. In fields as broad as incitement or hate speech, arguments favoring more restrictive standards will likely be met with severe resistance. Again, this reticence is likely to be amplified in the First Amendment context because of its place within our constitutional design.

2. *Maintain Brandenburg*

On the other hand, many commentators feel that current First Amendment doctrine strikes the appropriate balance between speech and regulation. Taking a deontological perspective, they argue that *Brandenburg* correctly reflects certain essential values necessary to any meaningful free speech regime.¹⁸⁸ In this sense, the standard for government regulation exists at a fixed point—it is not something to be recalibrated with changing circumstances.¹⁸⁹ These scholars point to the myriad technological advances that took place in the 20th century and will continue into the 21st.¹⁹⁰ Because society has survived since *Brandenburg* with little jurisprudential adjustment, it makes little sense to abandon course. Further, tailoring First Amendment law each and every technological advancement would result in doctrinal incoherence.

More persuasively, these scholars rightfully recognize that exaggerated national security concerns have often resulted in restrictions on individual freedoms.¹⁹¹ In this sense, the present fear of cyber terrorism—or online conspiracy speech—is little different than the specter of Communism in the early 20th century.¹⁹² Knowing that periods like the Red Scare or McCarthyism are now considered indelible stains on our constitutional democracy, we can choose to resist modern temptations to suppress rather than regress into familiar pitfalls. These dangers are especially stark against the backdrops of power and identity. Suppression tends to affect marginalized and disempowered groups more saliently than those in the mainstream.¹⁹³ First, this brand of ideological repression masks more pernicious biases such as ethnonationalism and race hatred. Second, affected groups—due to lack of resources, liminal legal status, and social disfavor—are less able to combat suppressive measures. Considered together, the dangers in regulating speech will always far outweigh the dangers of some abstract threat at some abstract time.

188. Han, *supra* note 134, at 87.

189. *Id.*

190. *Id.*

191. Geoffrey R. Stone, *ISIS, Fear, and the Freedom of Speech*, HUFFPOST: BLOG (Dec. 22, 2016), http://www.huffingtonpost.com/geoffrey-r-stone/isis-fear-and-the-freedom_b_8864050.html.

192. *Id.*

193. Tsesis, *supra* note 109, at 12–16.

While this perspective has admirable and edifying strengths, its approach underestimates the transformative quality of the internet. Television and radio were certainly extraordinary communicative interventions, but they lack the interactive capacity of online speech. As stated earlier, the internet reimagines temporal barriers, speaker/audience dichotomies, and public forums. These attributes make it possible for speech to proliferate, persuade, and shape sensibilities in ways never before imagined. Ignoring these fundamental changes—or pretending they are substantively indistinguishable from prior technological innovations—is a poor way to meet emerging constitutional challenges. Further, the internet tends to both alter and exacerbate the relational concerns identified in the previous paragraph. As scholars have noted, hate speech and ethnocentric advocacy have found comfortable homes in the online forum.¹⁹⁴ Such speech has demonstrable links to violent action.¹⁹⁵

B. LEGISLATIVE

Commentators have also proposed solutions beyond adjusting the black letter law. Most notoriously, in the realm of cyberterrorism, Eric Posner suggested a statute that would criminalize “accessing websites that glorify, express support for, or provide encouragement for ISIS” or “ISIS recruitment.”¹⁹⁶ Other provisions would outlaw distributing links to those websites, or even disseminating website content such as text, videos, or images.¹⁹⁷ Obviously, existing doctrine would also have to change considerably for this law to be upheld as constitutional. Still, this proposal represents the draconian measures some scholars are willing to take to combat online incitement.

On the false speech side, one commentator proposed establishing a licensing regime for journalists.¹⁹⁸ Like other professional industries—such as the legal and medical fields—a strict licensing scheme would subject journalists to a rigorous set of occupational and ethical standards.¹⁹⁹ In particular, professional membership would be predicated upon increased public responsibility, whereby journalists take on a fiduciary role in “guard[ing] [the] democratic discourse.”²⁰⁰ This scheme would be enforced

194. *Id.*

195. *Id.*

196. Eric Posner, *ISIS Gives Us No Choice but to Consider Limits on Speech*, SLATE (Dec. 15, 2015), http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/12/isis_s_online_radicalization_efforts_present_an_unprecedented_danger.html.

197. *Id.*

198. Manzi, *supra* note 45, at 2649.

199. *Id.*

200. *Id.* at 650.

by statutory discipline, professional ethics committees, and continuing education requirements.²⁰¹

While these ideas represent novel and ambitious solutions to emerging free speech problems, both contain critical flaws. As mentioned above, Posner's suggestion is unworkable absent dramatic doctrinal overhaul. In fact, his suggestion would require far greater constitutional transformation than a mere recalibration of Brandenburg—enacting such a statute would entail reimagining our First Amendment regime wholesale. Courts are therefore unlikely to acquiesce no matter how compelling the countervailing interest. Beyond its unworkability, though, the proposed statute implicates a slew of policy concerns. First, the provisions are obviously draconian, providing criminal sanctions for actions as innocuous as sharing links or relaying website content. While there are statutory carve-outs for journalistic and research purposes, speakers engaged in what is currently considered “pure advocacy” would undoubtedly be subject to prosecution. Further, a robust intent requirement would be necessary to prevent over-policing and criminalizing accidental disseminations. Second, the statute is acutely content-based, solely criminalizing speech related to a single terrorist group. ISIS is undeniably unique in its capacity for heinous action, but outlawing advocacy no matter how abstract would result in government eradication of an entire ideology—an unprecedented level of authoritarian censorship. Third, the statute is largely directed against foreign terrorist advocacy. At a pragmatic level, most speakers transmitting ISIS propaganda are likely to be located beyond American criminal jurisdiction. More troublesome, however, is the likelihood that Muslim and Arab groups will be disproportionately prosecuted under this statute. Such dragnetting is not uncommon in our nation's history.²⁰² This discriminatory impact raises a host of equal protection concerns.

Whereas Posner's measures are excessive, it can be argued that the licensing scheme does not go far enough. While journalists should be held to high ethical standards, placing the disciplinary onus on them misunderstands the problem. The vast majority of “fake news” and misinformation originates with ideological groups and political operatives, not professional journalists. Professional licensing standards could serve as a valuable source identifier, assisting audiences to distinguish between factual information and blatant falsehoods. However, it does little to regulate “alternative” forums where the most harmful forms of speech proliferate. Relatedly, certain audiences are severely distrustful of “legitimate” news sources. Thus, several problems ignited by misinformation exist beyond the scope of professional journalism.

201. *Id.*

202. Shubh Mather, *Surviving the Dragnet: 'Special Interest' Detainees in the US after 9/11*, 47 RACE & CLASS 31, 31-46 (2006).

On the other hand, a licensing scheme could be both socially and constitutionally problematic if it restricted access to information. Privileging facts to a distinct elite class would spur fears of indoctrination and social control. Moreover, it could blur the line the free press and other elite institutions. Transforming the press into an elite professional class may compromise its most valuable function—serving as check on political power.

VI. PROPOSED SOLUTION

This article seeks to fill academic interstices with a solution of its own. Inspired by prior scholarship, I propose an adjudicatory model that identifies and excludes conspiracy speech from Constitutional protection. Through this scheme, the First Amendment can be deployed to address tangibly harmful expression without sacrificing its essential character.

My solution reimagines First Amendment law by creating a doctrinal exception for online conspiracy speech. Under this regime, regulation is permissible where there is (1) intentional (2) online proliferation of (3) factually false speech with a (4) demonstrable link to violent action. In broad strokes, this would allow either congressional legislation or private party action to enjoin speech fora that meet the aforementioned criteria. From a pragmatic standpoint, regulation would target moderator accounts responsible for housing the speech in question. Placing liability on community standard-bearers ensures the model is both workable and effective.

The proposed test is essentially cumulative. Prohibition is only permitted where the speech at issue implicates the various market failures, policy concerns, and characteristics of low-value speech touched upon earlier in this article. For example, because conspiracy speech houses both the violent proclivities of unlawful advocacy and the mis-informative tendencies of false expression, there is greater justification for government regulation. Where these factors are triggered, the policy balance struck by existing doctrine destabilizes. The potential social harm comes to outweigh countervailing concerns over censorship and suppression. Put another way, the conspiracy speech at issue is rendered so valueless—indeed, so outside the realm of First Amendment concern—that it falls below first-tier protection. Having more in common with obscenity, fighting words, and true threats, the speech becomes ripe for regulation.

A. PROPOSED MODEL

1. *Intentional Proliferation*

Intentionality is a threshold consideration. Suppression of online conspiracy speech is only warranted where either the speaker *intends* to

cause tangible harm and is *aware* that the speech at issue has a proclivity do so. These requirements ensure that regulation is neither arbitrary nor draconian. Unlike Posner's solution, the one-off or naïve poster understands that she will not be legally sanctioned for participation within the online forum. In essence then, the intentionality requirement places liability on the *moderator* of the online conspiracy forum rather than individual speakers.²⁰³ This makes sense for a variety of reasons. First, moderators exercise broad control over the online communities they manage.²⁰⁴ These individuals have the power to shape expressive norms, regulate forum membership, and curate the range of permissible content within a particular forum.²⁰⁵ As such, moderators bear responsibility for the speech environment they foster. They cannot claim ignorance of the toxic nature of speech when they are directly involved in facilitating it. This is particularly so where moderators, such as those running QAnon forums, become aware of lawless action associated with and inspired by their forum's content.

Second, fixing liability on moderators avoids the Disrupter/True Believer distinction mentioned in Part III. Under the intentionality requirement, it does not matter whether the moderator actually believes in the proliferating conspiracy, or is simply wielding it for personal or political gain. Personal motivation becomes irrelevant to the inquiry—and for good reason. Probing the individual's mind produces evidentiary complications. Discerning whether someone acted with the requisite malice sufficient to trigger liability is an extremely difficult threshold to meet. Motivation can be ambiguous and is often comprised of cumulative and conflicting incentives. An online moderator may truly believe in the speech's content while also harboring awareness that dissemination improves her station or accomplishes a personal goal. These considerations merely distract from the issue at hand. By focusing on the *intention* to disseminate despite *awareness* of harm, this test avoids these complications. The requisite showing simply requires a finding of (1) constructive awareness of tangible harm followed by (2) continued proliferation.

Third, moderator liability assuages pragmatic concerns. In online fora, where thousands of people interact anonymously, it can be difficult to locate discrete speakers. Moderators, on the other hand, occupy much more prominent roles within online communities.²⁰⁶ These individuals frequently

203. Several commentators and politicians have suggested reworking 47 U.S.C. § 230, which generally provides immunity to website platforms for third-party content. Amending § 230 would subject social media companies to suit for housing harmful speech on their platforms. Although this proposed reform could provide a workable solution, deeper exploration is beyond the scope of this article.

204. Zadrozny & Collins, *supra* note 156.

205. Harwell & Timberg, *supra* note 158.

206. *Id.*

exhibit visible tags that draw attention to their managerial position.²⁰⁷ Even where those titles are absent, message board settings often contain identifying information.²⁰⁸ Because moderators are tasked with policing community norms, they must be responsive to group concern.²⁰⁹ Where forum members feel a shared standard has been violated, their first and often only form of recourse is to contact the moderator.²¹⁰ Finally, the hierarchical structure of online communities ensures that moderators are frequently referenced by other members.²¹¹ As moderators wield significant influence within an online community, sub-members may quote, acknowledge, or appeal to moderators in espousing a particular viewpoint.²¹² All these factors combine to reduce informational costs.

Fourth, moderator liability also limits causation issues. As difficult as it is to discern the identity of an anonymous online speaker, it can be even more difficult to pinpoint the specific incendiary post responsible for inciting lawless action. Online forums house a multiplicity of different voices. Whereas prior manifestations of criminal incitement might resemble a charismatic speaker addressing an angry crowd, that dichotomy collapses in the online world. Numerous and diverse posters interact with and build off one another, creating a collective expression. Crowd and speaker are rendered one and the same. Readers then interact with this content over time and at different times. It becomes functionally impossible to identify both the individual post or the precise temporal moment where the reader is stirred to action. This is all to say that lawlessness is not inspired by the discrete viewpoint of an individual speaker, but the cumulative effect of a toxic chorus.²¹³ The intentionality requirement addresses this issue by reallocating liability to environmental management rather than the noxious content of individual posts.

Last, moderators often exercise control over the entire forum. This control often includes a deactivation power.²¹⁴ Fixing liability on the moderator ensures that the legal test is not a paper tiger. Holding moderators

207. *How Do I Find Out who is a Mod of a Subreddit Where the Mods Aren't Listed?* REDDIT (last visited May 12, 2021), https://www.reddit.com/r/NoStupidQuestions/comments/9uz0fy/how_do_i_find_out_who_is_a_mod_of_a_subreddit/.

208. *Id.*

209. Sarah Welty, *5 Qualities of a Great Online Moderator*, GUTCHECK (Sept. 15, 2015), <https://www.gutcheckit.com/blog/5-qualities-of-a-great-online-moderator>.

210. *Id.*

211. Shashank Dubey, *Importance of Moderators in an Online Community*, WBCOM DESIGNS (July 4, 2020), <https://wbcomdesigns.com/importance-of-moderators-in-an-online-community/>.

212. *Id.*

213. Rob Arthur, *We Analyzed More Than 1 Million Comments on 4chan. Hate Speech There Has Spiked by 40% Since 2015*, VICE (July 10, 2019), <https://www.vice.com/en/article/d3nbzy/we-analyzed-more-than-1-million-comments-on-4chan-hate-speech-there-has-spiked-by-40-since-2015>.

214. Adrian Chen, *When the Internet's 'Moderators' Are Anything But*, N.Y. TIMES (July 21, 2015), <https://www.nytimes.com/2015/07/26/magazine/when-the-internets-moderators-are-anything-but.html>.

responsible would address the communal aspect of online conspiracy speech by shutting down the distribution site.

Online Dissemination

My proposed test limits conspiracy speech regulation to online expression. In essence, more traditional forms of speech do not implicate the type of market failures spurred by electronic mediums. Displaced from internet fora, conspiracy theories are again regulated by counterspeech and mitigated by cooling periods. “Real-world” expression does not amplify immediately to global audiences. In-person conspiracies are not confined within dangerous echo chambers. The conditions for market failure—conditions that catalyze the need for regulation in the first instance—are absent from consideration. Put another way, traditional conspiracy speech does not functionally realign the policy balance struck by Supreme Court precedent. By restricting regulation to online conspiracy speech, my proposed solution *supplements* *Brandenburg* rather than *displaces* it.

As such, the proposed model is faithful to principles of *stare decisis*. Creating a new test for online conspiracy speech avoids the difficult policy decisions inherent in abandoning canonical, and largely workable, doctrine. Legal change need not be so black and white. Rather, the supplementary approach simply conscribes *Brandenburg* to the situations it was originally envisioned to govern. As commentators have noted, the Justices in *Brandenburg* could not have possibly imagined the communicative intervention caused by the internet.²¹⁵ We can accept that premise as true without necessarily implying that the decision must be discarded. As such, *Brandenburg* can continue as the standard for tangible incidents of criminal incitement while online conspiracy speech can be assessed under a different legal test.

2. *Factual Falsity*

Third, my proposed solution limits regulation to speech that is factually false. This requirement has two prongs. First, the speech at issue must be *expressed* as factual. The legal test only implicates speech that purports to describe reality as it actually exists. Second, the factual expression must be capable of being objectively disproved.

The first prong seeks to differentiate ideological advocacy from rank misinformation. Distinguishing between the two is central to the test’s workability. Ideas are largely sacred within free speech doctrine, falling squarely within the First Amendment’s core protections.²¹⁶ As such, any test that proscribes ideology is likely to be met by strong constitutional challenge. On the other hand, factual falsity—negligible in value—has historically

215. Han, *supra* note 134, at 86–87.

216. Han, *supra* note 117; Schauer, *supra* note 117.

received far less deference.²¹⁷ The issue with conspiracy speech, as Mark Tushnet has deftly identified, is that factually false statements can be ideologically inflected.²¹⁸ False claims at times come to be associated with higher forms of expression, such as politics, religion, and philosophy.²¹⁹ Despite that complication, the ideological inflection of any particular fact exists on a spectrum rather than on a distinct plane. Some facts bare closer relation to lofty ideals.²²⁰ Moreover, some ideas are considered more valuable—and thus receive more protection—than others. Such a spectrum necessarily implies a point where the negative value of the factually-false expression outweighs the value produced by ideological association. While that may be a conceptually difficult distinction to make, it is necessary to regulate the tangible threats posed by online conspiracy speech. Moreover, there are factors to assist judicial decision-making.

The primary indicator is where speech is phrased as empirical rather than ideological. Put a different way, the speech at issue must be *descriptive* rather than *normative*. Any proscribed messaging should intend to describe world conditions as they objectively exist rather than advocating what they should be. Here, the evidentiary touchstone is confusion. The key distinction between ideological advocacy and the spread of misinformation exists in the discrepancy between persuasion and deception. Advocacy implies a certain awareness on the part of the listener. Ideological participants understand they are subscribing to a particular worldview—there is conscious choice to adopt a value system consistent with preexisting beliefs and normative ideations. Even where ideologues understand their beliefs to be “true” or superior, there is a recognition that competing philosophies exist. On the other hand, individuals misled by conspiracy speech may be naïve to the fact they are being deceived. Agency drops from the equation. Rather, the conspiracy theory is received as singular and objective fact, warping the way listeners interact with the world around them. There are countless stories from former QAnon believers recounting feelings of delusion and betrayal.²²¹ These individuals suffered tangible harms for participation in the conspiracy, including losses of time, resource, familial association, and even personal liberty.²²² This plethora of evidence makes it possible to differentiate between descriptive and normative expression.

Second, it must be possible to objectively disprove the speech at issue. As David Han posits, the conspiracies must live in the “realm of demonstrable falsity.”²²³ This means that the speech does not purport to

217. Han, *supra* note 117; Schauer, *supra* note 117.

218. Tushnet, *supra* note 126, at 18.

219. *United States v. Alvarez*, 567 U.S. 709, 731–32 (Breyer, J., concurring).

220. *Id.*

221. Harwell & Timberg, *supra* note 157.

222. Jaffe & Del Real, *supra* note 121.

223. Han, *supra* note 40, at 184.

describe nebulous realms outside the grasp of human knowledge.²²⁴ There are some topics that fundamentally evade understanding. It is impossible, for instance, for any one person to concretely prove the existence of God, or alternate dimensions, or the possibility of extraterrestrial life. Implicating any of these topics would result in expressive chill and potentially curtail scientific advancement. As such, these issues fall without the proposed test. On the other hand, some factual claims are easily disproven. For example, satellite imaging clearly shows that earth is spherical rather than flat.²²⁵ President Obama's birth certificate expressly refutes that he was born in Kenya.²²⁶ Finally, a basic floor plan of Comet Ping Pong pizzeria negates the existence of a basement pedophilia ring.²²⁷ Counterevidence of this nature brings conspiracy speech within the regulatory ambit.

3. *History of Violence*

The final factor requires that speech be linked with a demonstrable history of violence. Conspiracy speech of the type imagined here produces real-world, physical injury.²²⁸ Any regulated speech then must be associated with tangible manifestations of violent action. There are three important points to clarify. First, psychic injury falls below the relevant threshold for speech regulation. While psychological harms are undoubtedly damaging to the individual, they are difficult to both quantify and prove. Attempting to discern when exactly expression caused emotional injury—and the magnitude of such injury—results in evidentiary challenges. Limiting regulation to violent crime avoids these issues. Second, the speech must *inspire* the violent action in some way—it is not enough that the expression be obliquely associated with lawless behavior. While the temporal connection need not be imminent, there must be some causal link between the speech and lawless act. Third, regulation under this test requires a *history* of violent action rather than a few isolated incidents. This ensures that speakers and moderators are not held accountable for the behavior of discrete bad actors. Criminal law correctly places liability on criminal defendants for the individual manifestations of violent conduct. Requiring a discernible violent legacy ensures that regulatory focus remains on expression. Each of these three requirements prevent regulation from becoming overbroad.

Finally, association with past violence avoids prior constraint issues. Under this factor, speech and speech forums are allowed to proliferate until they become incontrovertibly related to social harm. In this light, the

224. *Id.*

225. Picheta, *supra* note 23.

226. *Barack Obama Releases Birth Certificate*, BBC (Apr. 27, 2011), <https://www.bbc.com/news/av/world-us-canada-13213810>.

227. There is no basement at Comet Ping Pong. Stelter, *supra* note 44.

228. Miller, *supra* note 25.

proposed model avoids prospective chill. Regulation can only proceed in retrospect.

B. AREAS OF CONCERN

Although my proposed model attempts to find the least-restrictive means by which to regulate conspiracy speech, it is far from perfect. Like any expressive limitation, fixing the correct policy balance implicates tradeoffs. Some may find the test unduly restrictive while others argue it does not go far enough. New doctrine inspires new, and often perceptive criticism—these are the wages of policymaking.

As an initial matter, one could plausibly assert that the proposed exception is too narrow to warrant judicial consideration. Put another way, the suggested model seems acutely limited to conspiracies such as QAnon and Pizzagate. Although the test is well-suited to address these heartland concerns, the next conspiracy theory may implicate new issues requiring different legal factors. The propensity of conspiracies to originate and transform would lead to constant judicial tinkering. While that criticism is warranted, my proposed solution may still find broader applicability. Consider a situation where an online forum spreads scientifically refutable misinformation that a particular racial group is responsible for a discrete social malady. Believing the theory to be true, conspiracy participants go on to violently assault members of that racial class. Although posed in general terms, this is hardly a hypothetical circumstance. As of this writing, Asian Americans and Asian Pacific Islanders continue to experience racially-motivated attacks stemming from a purported connection to the COVID-19 virus.²²⁹ Despite demonstrable falsity—along with significant public awareness campaigns—people continue to mistakenly blame this demographic group for the inception and spread of the pandemic.²³⁰ Under the proposed test, government regulators could shut down the online forum spreading such misinformation.

The issue of cyberterrorism is a more difficult case. Although cyberterrorist advocacy intentionally disseminates socially-harmful messaging across electronic fora, it frequently implicates high speech concerns.²³¹ Terrorist advocacy then may be too ideologically inflected to meet the proposed standard. In particular, where terrorist speech is driven by religious fundamentalism, such expression may find safe harbor within

229. Nicole Hong & Jonah E. Bromwich, *Asian-Americans Are Being Attacked. Why Are Hate Crime Charges So Rare?*, N.Y. TIMES (May 5, 2021), <https://www.nytimes.com/2021/03/18/nyregion/asian-hate-crimes.html>.

230. N'dea Yancey-Bragg, 'A Historic Surge': Anti-Asian American Hate Incidents Continue to Skyrocket Despite Public Awareness Campaign, USA TODAY (May 6, 2021), <https://www.usatoday.com/story/news/nation/2021/05/06/racism-us-anti-asian-hate-grows-despite-biden-speech-activism/4969692001/>.

231. Han, *supra* note 118.

the core of the First Amendment. More still, speech of this nature is difficult to factually disprove. Terrorist expression may not lay claim to objective reality, but rather advocate the supremacy of a particular world vision. Such normative, prescriptive speech would seemingly render the proposed model overbroad. As such, supplemental methods may be required to curb terrorist advocacy.

Further, placing liability on forum moderators, rather than discrete speakers, could be met with a *Claiborne Hardware* challenge.²³² *Claiborne* generally limits associational liability in speech contexts. To overcome *Claiborne*'s general proscription, the government must show that (1) the advocacy group's goals were unlawful and (2) that its members intended to further those goals.²³³ Where conspiracy theories have a history of demonstrable violence, however, they might meet this high standard. Continued dissemination of false speech despite awareness of its propensity to cause social harm would seemingly satisfy both prongs of the *Claiborne* test. Further, the false nature of conspiracy speech may render *Claiborne* distinguishable. Whereas the boycott at issue in *Claiborne* implicated political speech at the heart of the First Amendment, demonstrably false speech is more susceptible to regulation.²³⁴

Moreover, requiring legacies of violent action could rightfully trigger humanitarian criticism. Specifically, delaying regulation until speech can be tangibly linked to repeated instances of violence appears as mistaken prioritization. I tend to agree with this assessment. Allowing toxic expression to transform into tangible harm feels like sacrificing life at the altar of speech. At the same time, the presiding speech regime has determined that this is the price paid for free expression. In order to maintain workability, the test has been specifically constructed to avoid prior restraint and overbreadth.

Finally, regulating conspiracy speech may implicate more fundamental concerns. Despite the borderline preposterous content espoused by QAnon and Pizzagate, the conspiracies essentially stem from fear of governmental control. These theories evince an anxiety of autonomy—an essential distress that individuals no longer control their own destinies. Rather, an entrenched network of elites dictates the structures and institutions that give shape to our social reality. As such, fear of expressive regulation—already a paradigm First Amendment concern—is particularly acute in the realm of conspiracy speech. Proscribing conspiratorial expression may compound feelings of powerlessness among believers—indeed, may provide more evidence that the system is rigged against them. Should this happen, speech prohibition might have the ironic effect of spurring the same social harm it had originally

232. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

233. *Id.* at 920.

234. *Id.* at 888.

intended to regulate. Still, this argument can be made in many scenarios. Fear of reprisal exists wherever the government tries to regulate dangerous or unstable populations. In the meantime, people are killed, believers misled, and capitols breached. Fear of reaction can never excuse inaction.

VII. CONCLUSION

Conspiracy theory is increasingly becoming public reality. Once considered fringe expression, the internet has legitimized conspiracy speech by making it available to global audiences under the guise of objective fact. Such issues should be considered seriously. Conspiracies pose a threat to our democracy, not only figuratively, but—as congresspersons can attest to—literally. Despite their farfetched content, conspiracies tend to inspire fervent and faithful followings. Where passions are enflamed, and realities distorted, conspiracy speech can quickly become felony harm. This is already happening, in violent crescendo. The injurious legacy of QAnon should be instructive for legal commentators and judicial actors. As conspiracies continue to generate and take new forms, First Amendment law must adapt in kind.