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### Fearless Speech

Mary Anne Franks

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# FEARLESS SPEECH

Mary Anne Franks\*

## ABSTRACT

The American conception of free speech is primarily defined as the freedom to say whatever one wants, with little regard for the quality, context, or impact of the speech. Thus, American free speech doctrine is often characterized as neutral with regard to the speaker and the content of speech; in practice, however, it consistently privileges powerful over vulnerable speakers and harmful over critical speech.

From Philadelphia to Skokie to Charlottesville, the First Amendment has been interpreted to protect speech by white men that silences and endangers women and minorities. As free speech doctrine and practice become increasingly concerned with private as well as state action, free speech becomes even more of a monopoly and monoculture dominated by the interests of white men. The impoverished and elitist conception of free speech that governs current American legal theory and practice undermines all three values the First Amendment is meant to protect: autonomy, truth, and democracy.

This Article proposes that First Amendment theory and practice should be reoriented around ancient Greek concept of *parrhesia*, or fearless speech. As the philosopher Michel Foucault describes it, the speaker of *parrhesia* “chooses frankness instead of persuasion, truth instead of falsehood or silence, the risk of death instead of life and security, criticism instead of flattery, and moral duty instead of self-interest and moral apathy.” *Parrhesia* is, in essence, the act of speaking truth to power. The more fearless the speech, the more protection and encouragement it should receive, both from state and private actors; the more reckless the speech, the less protection and encouragement it should receive. The ideal of fearless speech, rather than free speech, is a superior guide for a society with democratic aspirations.

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## INTRODUCTION

“How can we expect righteousness to prevail when there is hardly anyone willing to give himself up individually to a righteous cause? Such a fine, sunny day, and I have to go, but what does my death matter, if through us, thousands of people are awakened and stirred to action?”

– Sophie Scholl, 1943

Sophie Scholl was 21 years old when she was guillotined by the Nazis.<sup>1</sup> Sophie was the only female member of The White Rose, a secret group of university students who distributed pamphlets denouncing Nazi atrocities between 1942 and 1943.<sup>2</sup> In one pamphlet, the group wrote, “[S]ince the conquest of Poland *three hundred thousand* Jews have been murdered in a bestial manner. . . ‘Is this a sign that the German people have become brutalized in their most basic human feelings, that the sight of such deeds does not strike a chord within them, that they have sunk into a terminal sleep from which there is no awakening, ever, ever again?’<sup>3</sup> Another leaflet promised that the group “will not be silent. We are your bad conscience. The White Rose will not leave you in peace!”<sup>4</sup>

Sophie and her brother, Hans, both students at the University of Munich, brought a suitcase full of pamphlets to their campus on February 18, 1943.<sup>5</sup> Jakob Schmid, a university janitor and member of the Nazi party, observed Sophie throwing copies of the pamphlet from a balcony overlooking a courtyard where students were walking.<sup>6</sup> He reported the siblings to the Gestapo.<sup>7</sup> During her interrogation, which left her with a broken leg, Sophie was offered the chance to save her life in exchange

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<sup>1</sup> Alissa Wilkinson, *Nazis Executed Sophie Scholl 74 Years Ago This Week. A 2005 Movie Told Her Story*, VOX (Feb. 25, 2017), <https://www.vox.com/culture/2017/2/25/14719804/sophie-scholl-final-days-movie-of-the-week>.

<sup>2</sup> Katie Rickard, *Memorializing the White Rose Group*, in *MEMORIALIZATION IN GERMANY SINCE 1945* 161 (B. Niven & C. Paver eds., 2009); LARA SAHGAL & TOBY AXELROD, *HANS AND SOPHIE SCHOLL: GERMAN RESISTERS OF THE WHITE ROSE* 9 (2016).

<sup>3</sup> ANNETTE DUMBACH & JUD NEWBORN, *SOPHIE SCHOLL AND THE WHITE ROSE* 191 (3d ed. 2018).

<sup>4</sup> *Id.* at 198.

<sup>5</sup> *Id.* at 145.

<sup>6</sup> *Id.* at 146.

<sup>7</sup> *Id.*

for implicating her brother and pledging allegiance to Hitler, but she refused.<sup>8</sup>

After four days in custody, Sophie, Hans, and a third member of the White Rose, Christoph Probst, appeared in the so-called “People’s Court” for trial. The defendants were not given an opportunity to speak, but Sophie nonetheless interrupted the judge, Roland Freisler, shouting, “Somebody had to make a start! What we wrote and said is what other people are thinking. They just don’t dare say it out loud!”<sup>9</sup> The judge sentenced all three to death. As she was led to the guillotine only hours later, Sophie spoke these last words:

How can we expect righteousness to prevail when there is hardly anyone willing to give himself up individually to a righteous cause? Such a fine, sunny day, and I have to go, but what does my death matter, if through us, thousands of people are awakened and stirred to action?<sup>10</sup>

Thirty-three years later, in 1976, the National Socialist Party of America (NSPA) announced its intention to march through the town of Skokie, Illinois, wearing Nazi-style uniforms and displaying banners featuring swastikas.<sup>11</sup> Members distributed pamphlets and made unsolicited phone calls to Skokie residents with Jewish-sounding names promoting the march.<sup>12</sup> At the time, around half of Skokie’s population was Jewish, including thousands of Holocaust survivors.<sup>13</sup> The town of Skokie passed a series of ordinances to prevent the march from taking place.<sup>14</sup> The NSPA, represented by the American Civil Liberties Union (ACLU), successfully argued that the march was free speech protected by the First Amendment.<sup>15</sup>

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<sup>8</sup> *Id.* at 151; see also Margie Burns, *Sophie Scholl and The White Rose*, INT’L RAOUL WALLENBURGER FOUND., <http://www.raoulwallenberg.net/holocaust/articles-20/sophie-scholl-white-rose/> (last visited Mar. 1, 2019).

<sup>9</sup> KATHRYN J. ATWOOD, *WOMEN HEROES OF WORLD WAR II: 26 STORIES OF ESPIONAGE, SABOTAGE, RESISTANCE, AND RESCUE* 28 (2011).

<sup>10</sup> Laura Smith, *Beheaded by the Nazis at Age 21, Sophie Scholl Died Fighting Against White Supremacy*, TIMELINE (Sept. 13, 2017), <https://timeline.com/sophie-scholl-white-rose-guillotine-6b3901042c98>; MICHAEL RUSE, *ATHEISM: WHAT EVERYONE NEEDS TO KNOW* 220 (2015).

<sup>11</sup> *Collin v. Smith*, 578 F.2d 1197, 1200 (7th Cir. 1978).

<sup>12</sup> *Id.* at 1216.

<sup>13</sup> *Id.* at 1199.

<sup>14</sup> *Id.*

<sup>15</sup> Ron Grossman, *Flashback: ‘Swastika War’: When the Neo-Nazis Fought in Court to March in Skokie*, CHI. TRIB. (Mar. 10, 2017, 1:01 PM),

In striking down Skokie's efforts to prevent the march, the Illinois Supreme Court analogized the case to the 1971 Supreme Court case *Cohen v. California*.<sup>16</sup> In that case, the Court reversed the conviction of Robert Cohen, who had been charged with disturbing the peace for wearing a jacket displaying the words "Fuck the Draft" inside a courthouse.<sup>17</sup> The Court rejected the argument that speech could be restricted on the basis of its offensiveness.<sup>18</sup> It was just as impermissible to prohibit the display of swastikas in public demonstrations, the Illinois Supreme Court held, as it was to punish Cohen for the profane phrase on his jacket.<sup>19</sup> The court asked, rhetorically,

How is one to distinguish [the swastika] from any other offensive word (emblem)? . . . [W]hile the particular four-letter word (emblem) being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.<sup>20</sup>

Following the *Cohen* tradition, the Skokie case is a classic illustration of the American approach to free speech. Free speech in America is primarily framed as the freedom to say whatever one wants, with little regard for the quality, context, or impact of that speech.<sup>21</sup> The harmfulness of speech does not disqualify it from protection; in fact, speech that is deeply harmful is often afforded *greater* protection than other kinds of speech.<sup>22</sup> This holds true regardless of how reckless the speech, how powerful the speaker, or how vulnerable the target.

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<https://www.chicagotribune.com/news/opinion/commentary/ct-neo-nazi-skokie-march-flashback-perspec-0312-20170310-story.html>.

<sup>16</sup> *Vill. of Skokie v. Nat'l Socialist Party of Am.*, 373 N.E.2d 21, 23 (Ill. 1978).

<sup>17</sup> *Cohen v. California*, 403 U.S. 15, 16 (1971).

<sup>18</sup> *Id.* at 23.

<sup>19</sup> *Skokie*, 373 N.E.2d. at 24.

<sup>20</sup> *Id.* at 23–24.

<sup>21</sup> See generally STEVEN H. SHIFFRIN, *WHAT'S WRONG WITH THE FIRST AMENDMENT?* (2016).

<sup>22</sup> *Id.* at 2–3.

Taking advantage of the privileges afforded by their race and gender, the NSPA organized a campaign in Skokie to terrorize a vulnerable group using symbols of white supremacy and genocide. Their goal was best summarized by a slogan on one of the signs they planned to carry during their march: “Free Speech for the White Man.”<sup>23</sup> According to expert testimony regarding the impact of the proposed march on Skokie’s inhabitants:

[T]he words of any Nazi to any Jew have, by definition, lost the usual intent and limitation of words: they are symbolic continuations of the Holocaust, literal perpetuations of the climate of the Holocaust, and preparations for a new Holocaust. No matter what words their placards bear, when Nazis march in Skokie, their presence and their regalia says to Jews: “You thought you escaped. You did not. We know where you are. When our strength is sufficient and when the time is ripe, we will come and get you.”<sup>24</sup>

The members of the NSPA did not speak out on behalf of the truth or of the greater good, but out of hatred. Their actions required no sacrifice of their own self-interest but involved substantial and unjustified risk of harm to others. In this sense, their “free speech” was reckless speech.

The American approach espoused by the neo-Nazis and their defenders stands in sharp contrast to the ancient Greek approach to free speech, *parrhesia*.<sup>25</sup> *Parrhesia* literally means “to speak freely,” but “freely” in this context is best translated, as philosopher Michel Foucault has done, as “fearlessly.”<sup>26</sup> To be fearless, speech must involve frankness, criticism, and above all, risk. As Foucault describes it, the speaker of *parrhesia* “chooses

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<sup>23</sup> See Mary Anne Franks, *Beyond ‘Free Speech for the White Man’: Feminism and the First Amendment*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 366 (Robin West & Grant Bowman eds., 2019) [hereinafter Franks, *Beyond Free Speech*].

<sup>24</sup> Mark A. Rabinowitz, *Nazis in Skokie: Fighting Words or Heckler’s Veto?*, 28 DEPAUL L. REV. 259, 281–82 n.143 (1979).

<sup>25</sup> Keith Werhan, *The Classical Athenian Ancestry of American Freedom of Speech*, 2008 SUP. CT. REV. 293, 316.

<sup>26</sup> Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419, 1421–22 (2005) [hereinafter Simon, *Parrhesiastic Accountability*].

frankness instead of persuasion, truth instead of falsehood or silence, the risk of death instead of life and security, criticism instead of flattery, and moral duty instead of self-interest and moral apathy.”<sup>27</sup> *Parrhesia* is, in essence, the act of speaking truth to power.

The resistance activities of Sophie Scholl and the White Rose were an example of fearless speech. Sophie was born into a middle-class German family and was a member of the girls’ branch of the Hitler Youth as a child.<sup>28</sup> Instead of continuing to enjoy the safety and security of her privileged social status during wartime Germany, Sophie chose to risk her life by criticizing Nazi atrocities against the Jewish people.

Though American free speech doctrine is often characterized as being neutral regarding the speaker and the content of speech, in practice it tends to privilege the powerful over the vulnerable and to reward reckless speech over fearless speech. From Philadelphia to Skokie to Charlottesville, the First Amendment has been interpreted to protect the harmful speech of white men over the critical speech of women and minorities. As free speech doctrine and practice continues to expand in application and influence—to conduct as well as speech and to private as well as state action—the monopolization of speech by white men’s interests and the preferential treatment of reckless speech over fearless speech is further entrenched. The current conception of free speech has become impoverished, elitist, and toxic, and it ultimately undermines all three of the values the First Amendment is meant to protect: autonomy, truth, and democracy.<sup>29</sup>

To reverse this course, First Amendment theory and practice should be reoriented around fearless speech. Speech that is sincere, critical, and brave should set the standard by which First Amendment protection is measured. The more fearless the speech, the more protection and encouragement it should receive, by both state and private actors; the more reckless the speech, the less protection and encouragement it should receive. The ideal of fearless speech, rather than free speech, is a superior guide for a society with democratic aspirations.

This Essay has three main Parts. Part I details the flaws of the current free speech paradigm, including its monopolistic and monocultural nature, its false premises and false promises,

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<sup>27</sup> Michel Foucault, *Discourse and Truth: The Problematization of Parrhesia*, Lecture Series at University of California at Berkeley 5 (Oct.–Nov., 1983) [hereinafter Foucault, *Discourse*]. Page numbers refer to this online version of the lectures, which are a verbatim transcription of J. Pearson’s translation, available at <https://foucault.info/parrhesia/>.

<sup>28</sup> DUMBACH & NEWBORN, *supra* note 3, at 14–15.

<sup>29</sup> See, e.g., SHIFFRIN, *supra* note 21, at 184–92.

and its fetishization of white men's reckless speech. Part II explains the alternative concept of *parrhesia*, describes its origins and distinguishing features, and provides examples of literary, historical, and modern-day fearless speech. Part III explores how to encourage a fearless speech culture, focusing on the role of universities as state actors and online platforms as private actors.

### I. THE NEED FOR A NEW FREE SPEECH PARADIGM

The First Amendment is meant to promote the values of autonomy, truth, and democracy.<sup>30</sup> The protection of free speech is essential to the development and flourishing of the individual human personality, the pursuit of truth, and the equal exercise of self-governance. But contemporary First Amendment theory and practice fails to serve these three goals. The current free speech paradigm is not only monocultural and monopolistic, but it is based on false premises and false promises. Current free speech doctrine and culture fetishizes white men's reckless speech, resulting in the silencing of women and minorities.

#### A. Monopoly and Monoculture

To begin with the obvious: the First Amendment was created by white men for white men.<sup>31</sup> The Framers excluded all women and people of color from participation in the political process,<sup>32</sup> and the institutions of slavery and coverture ensured that these groups remained subjected to, not subjects of, the Constitution.<sup>33</sup> To be sure, they spoke in the name of "we the people," but, as Caroline Forell writes,

The "we" has been mythologized to mean that all Americans had a voice in the founding of the new nation when in fact the real "we" was entirely male, white, and propertied. And whether the "we" is described as "people" or "men," the authors had in mind those who resembled themselves. The purportedly universal "we" actually represented a particular gender, a

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<sup>30</sup> Timothy Zick, *First Amendment Cosmopolitanism, Skepticism, and Democracy*, 76 OHIO ST. L.J. 705, 714 (2015).

<sup>31</sup> See Franks, *Beyond Free Speech*, *supra* note 23.

<sup>32</sup> LAURA E. FREE, *SUFFRAGE RECONSTRUCTED: GENDER, RACE, AND VOTING RIGHTS IN THE CIVIL WAR ERA I* (2015).

<sup>33</sup> See MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION: OUR DEADLY DEVOTION TO GUNS AND FREE SPEECH* (forthcoming May 2019).

particular race, and a particular class of people.<sup>34</sup>

It is no coincidence, then, that the conception of free speech enshrined in the First Amendment reflects white, wealthy men's experiences and interests. The First Amendment is a prohibition against interference with speech, not a positive guarantee of speech, and as such, benefits only those who have access to speech in the first place. In Catharine MacKinnon's analysis:

The First Amendment was written by those who already had the speech; they also had slaves, many of them, and owned women. They made sure to keep their speech safe from what threatened it: the federal government. You have to already have speech before the First Amendment, preventing government from taking it away from you, does you any good.<sup>35</sup>

At the time the First Amendment was written, black people did not have rights over their own bodies, to say nothing of a right to speak freely.<sup>36</sup> Neither, to a great extent, did most women, who under coverture were considered to have no independent legal existence apart from their husbands.<sup>37</sup> Black men were not allowed to exercise the most basic form of political expression, the vote, until 1870; for women, the formal recognition of that right did not come for fifty more years.<sup>38</sup> Long after the Reconstruction Amendments and 19th Amendment were passed, women and non-white men continued to be barred from the political, employment, and educational opportunities available to white men, meaning that their voices were excluded

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<sup>34</sup> Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769, 770.

<sup>35</sup> CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 204 (1987).

<sup>36</sup> Richard Delgado & David Yun, "The Speech We Hate": *First Amendment Totalism, the ACLU, and the Principle of Dialogic Politics*, 27 ARIZ. ST. L.J. 1281, 1298 (1995).

<sup>37</sup> 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*430, \*442–45 (1765) ("[T]he very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything.").

<sup>38</sup> *Suffrage in America*, NAT'L PARK SERV., <https://www.nps.gov/subjects/womenshistory/15th-and-19th-amendments.htm> (last visited Mar. 1, 2019).

from legislatures, juries, public spaces, workplaces, and schools.<sup>39</sup>

Fifty years after the Constitutional Convention, a second convention was held in Philadelphia<sup>40</sup> that provided a dramatic illustration of exactly who was meant to be included in “we the people.” The Anti-Slavery Convention of American Women was scheduled to take place in May 1838 at Pennsylvania Hall just a few blocks away from Independence Hall.<sup>41</sup> The speakers and invitees included women and black men, all advocates for the abolition of slavery and the recognition of women’s rights—advocates, that is, for transforming “we the people” from rhetoric into reality.<sup>42</sup> In the weeks leading up to the Convention, notices appeared around Philadelphia urging those “who cared about their jobs and the Constitution” to “protest this convention of ‘amalgamators.’”<sup>43</sup> On the day of the event, several thousand protestors flooded into Pennsylvania Hall, hissing, shouting, smashing windows, and threatening the female speakers with bricks and rocks.<sup>44</sup> When the organizers of the event appealed to the mayor to intervene, he refused, stating that they “had brought this chaos on themselves.”<sup>45</sup> As speakers and audience members fled, the mob took over the hall and set it on fire.<sup>46</sup>

A contemporaneous newspaper account of the event offered the following justification of the mob’s actions: the activists committed “abominations,” including allowing “Negro fellows” to accompany “white ‘ladies’” in the street and to sit together with them on the same benches.<sup>47</sup>

Such practices, outraging the moral sense of the community, and if continued, tending inevitably to throw society into confusion, and to engender immorality and vice, it could not be expected, that any people, having respect for

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<sup>39</sup> See generally Serena Mayeri, “A Common Fate of Discrimination”: Race-Gender Analogies in Legal and Historical Perspective, 110 YALE L.J. 1045 (2001).

<sup>40</sup> SALLY G. MCMILLEN, *SENECA FALLS AND THE ORIGINS OF THE WOMEN’S RIGHTS MOVEMENT* 67 (2008).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 67–68.

<sup>45</sup> *Id.* at 67.

<sup>46</sup> *Id.* at 68.

<sup>47</sup> Michael K. Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109, 1170 (1997).

themselves or affection for their children, would permit to endure.<sup>48</sup>

The May 1838 burning of Philadelphia Hall made clear, if there had been in any doubt, that the very thought of women and black men exercising freedom of speech was enough to provoke white men into a violent rage.

The United States has come a long way since 1838, but white men's monopoly on free speech, as well as on power more generally, has largely remained intact. Today, white men account for roughly 30% of the American population,<sup>49</sup> but make up 60% of federal judges<sup>50</sup> and 80% of members of Congress.<sup>51</sup> Every U.S. president has been male, and all but one has been white.<sup>52</sup> The Supreme Court, which holds the formidable power to decide who and what the First Amendment protects, was exclusively white until 1967 and exclusively male until 1981.<sup>53</sup> Of the 113 Supreme Court Justices that have served in its 228-year history, all but six have been white men.<sup>54</sup> It is not only the people hearing First Amendment cases who are overwhelmingly white and male; it is also those bringing the cases and representing the parties. Of the roughly 500 First Amendment freedom of expression cases the Supreme Court has heard, 89% were brought by men, and 93% were litigated by men.<sup>55</sup> Further, First Amendment scholarship is dominated by men as well. Of the 32 individuals listed in the Wikipedia entry for "First

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<sup>48</sup> *Id.*

<sup>49</sup> Emily Baxter & Jamie Keene, *The Excessive Political Power of White Men in the United States*, in *One Chart*, THINK PROGRESS (Oct. 10, 2014, 1:09 PM), <https://thinkprogress.org/the-excessive-political-power-of-white-men-in-the-united-states-in-one-chart-bbc11d4f52b7/>.

<sup>50</sup> Michele L. Jawando & Allie Anderson, *Racial and Gender Diversity Sorely Lacking in America's Courts*, CTR. FOR AM. PROGRESS (Sept. 15, 2016, 9:00 AM), <https://www.americanprogress.org/issues/courts/news/2016/09/15/144287/racial-and-gender-diversity-sorely-lacking-in-americas-courts/>.

<sup>51</sup> Sheryl Estrada, *The 115th Congress Not a Model for Diversity*, DIVERSITY INC. (Jan. 4, 2017), <https://www.diversityinc.com/news/115th-congress-not-model-diversity>.

<sup>52</sup> *Presidents of the United States*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/United-States/Presidents-of-the-United-States> (last visited Mar. 1, 2019).

<sup>53</sup> Jessica Campisi & Brandon Griggs, *Of the 113 Supreme Court Justices in US History, All But 6 Have Been White Men*, CNN (Sept. 5, 2018, 8:56 AM), <https://www.cnn.com/2018/07/09/politics/supreme-court-justice-minorities-trnd/index.html>.

<sup>54</sup> *Id.*

<sup>55</sup> Research compiled from Westlaw searches, finding 515 cases involving First Amendment freedom of expression, of which 59 were brought by women and 38 were litigated by women. These search results were acquired on September 7, 2018, by searching United States Supreme Court cases using "First Amendment" and "free speech" as search terms.

Amendment Scholars,” 25 are male.<sup>56</sup> Of the top 20 most-cited constitutional law scholars from 2013-17, nineteen are male.<sup>57</sup> Aside from the government system and academia, recent scandals from the Catholic Church to Hollywood, from Silicon Valley to the White House, have revealed that male-dominated institutions and industries are frequently rife with misogyny, abuse, exploitation, and corruption.<sup>58</sup>

The stifling and elitist monoculture of free speech created by white men’s outsized influence over the creation, interpretation, and application of First Amendment doctrine and practice calls out for its own reckoning.

### B. *False Premises and False Promises*

The danger of chilling effects, the merits of the marketplace of ideas, and the importance of protecting freedom for the speech we hate, are settled tenets of First Amendment orthodoxy.<sup>59</sup> As such, their validity is often assumed rather than demonstrated. Under close examination, however, these articles of faith are undeserving of such confidence.

#### 1. Chilling Effects

One of the key concepts underpinning the free speech monoculture is the doctrine of “chilling effects.” A chilling effect is “a concern that an otherwise legitimate rule will curb protected expression outside its ambit. This phenomenon generally arises when would-be speakers, faced with the uncertainties of the legal process, refrain from making protected statements.”<sup>60</sup> Concern about chilling effects drives what is sometimes called an absolutist approach to the First Amendment, one that is characterized by intense skepticism about most forms of speech regulation.<sup>61</sup> In this view, even regulations of unprotected speech are dangerous because of their potential to discourage protected speech.

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<sup>56</sup> *First Amendment Scholars*, WIKIPEDIA,

[https://en.wikipedia.org/wiki/Category:First\\_Amendment\\_scholars](https://en.wikipedia.org/wiki/Category:First_Amendment_scholars) (last visited Mar. 1, 2019).

<sup>57</sup> Brian Leiter, *20 Most-Cited Constitutional Law Scholars in the U.S. for the Period 2013–2017*, L. PROFESSOR BLOGS NETWORK: BRIAN LEITER’S L. SCH. REPORTS (Aug. 21, 2018), <http://leiterlawschool.typepad.com/leiter/2018/08/20-most-cited-constitutional-law-scholars-in-the-us-for-the-period-2013-2017.html>.

<sup>58</sup> See, e.g., Haley Britzky, *#MeToo’s 2018: Congress, Church and Silicon Valley*, AXIOS (Dec. 29, 2018), <https://www.axios.com/metoo-2018-congress-church-silicon-valley-sexual-assault-5b2b112e-1882-4ee3-95ee-c4bc4b53d909.html>.

<sup>59</sup> See FRANKS, *supra* note 33.

<sup>60</sup> Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1655 (2013).

<sup>61</sup> Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2465 (1998).

Also, laws that are considered overly broad or vague can be struck down on First Amendment grounds partly because of their potential for chilling effects.<sup>62</sup> Overly broad laws restrict both unprotected and protected speech, whereas vague laws make it difficult for people to know what speech is restricted and what is not.<sup>63</sup> According to the doctrine of chilling effects, both kinds of laws create the risk that citizens will self-censor or be otherwise deterred from engaging in protected speech.<sup>64</sup>

In *New York Times v. Sullivan*,<sup>65</sup> the Court held a public official suing for defamation must prove that the speaker or publisher of the statement acted with “actual malice,” which the Court defined as either knowing that the statement was false or acting with reckless disregard to its truth or falsity.<sup>66</sup> Defamation is not protected by the First Amendment; nonetheless, the Court held that because an “erroneous statement is inevitable in free debate . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need to survive.’”<sup>67</sup> This case in effect used the First Amendment to grant an affirmative right of negligent defamation with regard to public officials, a right later extended to defamation of all public figures.<sup>68</sup>

But as intuitively appealing as the chilling effects theory may be, Leslie Kendrick has observed that “the Supreme Court has founded the chilling effect on nothing more than unpersuasive empirical guesswork.”<sup>69</sup> Objective evidence of chill is hard to come by, a troubling fact in light of how much influence the theory has in law and policy decisions. Indeed, the overwrought fear of chilling effects has produced what could be called a “hothouse effect”—an excessively solicitous approach to free speech that cultivates the right in an unnaturally isolated environment, one that has been stripped of all risk of competition or challenge.<sup>70</sup>

Even more troubling, concern about chilling effects tends to be highly selective.<sup>71</sup> If the underlying concern is how people are being silenced or deterred from speaking due to fear of negative consequences, then it is notable how little attention is

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<sup>62</sup> Annie Ross, *An Illegal Rub?: Analyzing Craigslist's First Amendment Right to Host Adult Services Ads*, 21 B.U. PUB. INT. L.J. 405, 418 (2012).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> 376 U.S. 254 (1964).

<sup>66</sup> *Id.* at 280.

<sup>67</sup> *Id.* at 272.

<sup>68</sup> *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155 (1967).

<sup>69</sup> Kendrick, *supra* note 60, at 1684.

<sup>70</sup> See FRANKS, *supra* note 33.

<sup>71</sup> *The White Knights of the First Amendment*, MS. MAG. (Sept. 14, 2016), <http://msmagazine.com/blog/2016/09/14/the-white-knights-of-the-first-amendment/> (noting that “there is far more evidence that the people attacked by free speech activists are the ones who are experiencing actual chilling effects”).

paid to the chilling of women and non-white men's speech. Harassment, threats, genocidal rhetoric, hate speech, "doxing," and revenge porn all have silencing effects, and their primary targets are women, non-white men, and sexual minorities.<sup>72</sup>

Ample empirical evidence exists for how harassment chills freedom of expression, mobility, and association. Cynthia Bowman observes that "the continuation and near-general tolerance of street harassment . . . inflicts the most direct costs upon women, in the form of fear, emotional distress, feelings of disempowerment, and significant limitations upon their liberty, mobility, and hopes for equality."<sup>73</sup> According to a 2014 study on street harassment, women's responses to street harassment include no longer visiting certain places alone; changing the way they walk, behave, or dress; giving up on outdoor activities; quitting jobs, or moving. Mari Matsuda writes that victims of racist speech "have had to quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor."<sup>74</sup>

In short, the evidence shows that harassment against minorities and women causes a greater chilling effect than any governmental action.

## 2. The Marketplace Myth

According to the "marketplace of ideas" theory, unfettered competition in speech ultimately leads to truth.<sup>75</sup> Early versions of the concept can be found in some form in the writings of John Milton, John Stuart Mill, and Thomas Jefferson, but it is Justice Oliver Wendell Holmes's dissent in *Abrams v. United States*<sup>76</sup> that did the most to establish the concept in First Amendment jurisprudence:

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

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<sup>72</sup> See FRANKS, *supra* note 33.

<sup>73</sup> Cynthia Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 542 (1993).

<sup>74</sup> Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2337 (1989).

<sup>75</sup> Thomas W. Joo, *The Worst Test of Truth: The "Marketplace of Ideas" As Faulty Metaphor*, 89 TUL. L. REV. 383, 386 (2014).

<sup>76</sup> 250 U.S. 616, 618 (1919).

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.<sup>77</sup>

From this, there are two interrelated assumptions in the marketplace of ideas theory: that markets are truly competitive, and competition leads to truth. Neither assumption is backed up by reality.

*a. The Myth of Competition*

One of the foundational problems with the marketplace of ideas theory is the equation of markets with unfettered competition. No market, economic or otherwise, is actually “free.”

First, economic markets are subjected to extensive regulation, from corporate structuring to securities regulation to quality and safety standards. As Thomas Joo writes, “equating ‘markets’ with unregulated competition ignores the fact that markets require, and receive, some degree of regulation in order to operate properly. Regulation and markets are complementary, not antithetical, institutions.”<sup>78</sup>

The marketplace of speech is similarly subject to extensive regulation; indeed, many economic regulations are also speech regulations. Contrary to a claim often made by First Amendment fundamentalists, it is not true that the First Amendment protects the vast majority of speech against regulation. In addition to explicitly unprotected categories such as obscenity, true threats, incitement, defamation, speech integral to criminal conduct, child pornography, and fighting words, the government also regulates the marketplace of ideas through trade secrets law, products liability, antitrust law, copyright, trademark, privacy law, antidiscrimination law, perjury, evidence law—and the list goes on.<sup>79</sup>

Recognizing that marketplaces are extensively regulated makes it possible to see how access to marketplaces is not equal across society. The rules of the marketplace have a great deal of

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<sup>77</sup> *Id.* at 630 (Holmes, J., dissenting).

<sup>78</sup> Joo, *supra* note 75, at 415.

<sup>79</sup> See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1783–84 (2004) [hereinafter Schauer, *Boundaries of the First Amendment*].

influence over who gets to participate in the marketplace. Many people are denied access to the marketplace in whole or in part due to factors entirely unrelated to the quality of their ideas: because of their gender, race, sexual orientation, or economic status. Similarly, many people are granted a disproportionate amount of access to the marketplace based not on their merit but on privileges associated with those same arbitrary factors.

*b. The Myth of Truth*

In the marketplace mythology, competition, not regulation, is always the answer to conflict; the unregulated marketplace is supposed to provide the most beneficial outcomes for the general welfare. In an echo of Second Amendment fundamentalists who insist that the best response to gun violence is more guns,<sup>80</sup> First Amendment fundamentalists insist the best response to bad speech is more speech.<sup>81</sup> In the context of free speech, competition is often couched in terms of “counter-speech” and beneficial outcomes in terms of “truth.”<sup>82</sup> In Justice Louis Brandeis’s famous formulation, “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”<sup>83</sup> The optimistic embrace of counter-speech as the cure for falsity and injury is, however, unfounded.

First, as an initial matter, there is no basis for the belief that markets produce truth. Markets merely reflect the preferences of those who use them. While those preferences might favor truth, they equally might not. The most that can be said about an idea that has triumphed in the marketplace is that many people like it, or that the people with the most power in the marketplace like it.<sup>84</sup> Second, even if people had strong preferences for the truth, there is no reason for confidence that the marketplace would help them discover it. As the “fake news” epidemic has amply demonstrated, Americans are neither necessarily interested in nor particularly gifted at discerning truth from falsity or fact from opinion.<sup>85</sup> Short attention spans, lack of education, and confirmation bias, lead many people to believe

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<sup>80</sup> See, e.g., JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME* (1998).

<sup>81</sup> Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 B.Y.U. L. REV. 553, 553–54 (2000).

<sup>82</sup> See FRANKS, *supra* note 33.

<sup>83</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

<sup>84</sup> Joo, *supra* note 75, at 408.

<sup>85</sup> Joe Concha, *Pew Study Finds Americans Can't Tell Fact from Opinion*, THE HILL (June 18, 2018, 5:16 PM), <https://thehill.com/homenews/media/392870-pew-study-finds-americans-cant-tell-fact-from-opinion>.

things that are demonstrably false.<sup>86</sup> Being constantly plugged into the Internet, a medium allowing nearly unfettered and instantaneous exchange of information, has worsened, not improved, this situation. It is important to recall that Justice Brandeis's praise of counter-speech was contingent, not absolute: the remedy of more speech is efficacious only "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education."<sup>87</sup> In an age of instantaneous transmission, there often is literally *no time* to correct falsehoods before they go "viral."

Even when truth does emerge in the market, it often does so too late to correct first impressions or undo harm. As the expression goes, "a lie can get halfway around the world before the truth has a chance to get its pants on."<sup>88</sup> What is more, "market correction not only takes time, it is not unidirectional. Incorrect notions in economic markets and in the 'marketplace of ideas' do not simply rise and then permanently fall. They rise and fall . . . in endless repetition: truths and falsehoods alike come and go."<sup>89</sup>

Attempts to correct untruths can actually backfire, due to a phenomenon psychologists refer to as "the illusory truth effect." Repeated exposure to false information, even in a corrective context, increases the likelihood that the false information will be remembered as true.<sup>90</sup> Recent studies have confirmed that when people view false headlines, they are more likely to accept them as true when they encounter them again.<sup>91</sup>

Finally, there are many forms of speech that simply cannot be countered in any meaningful way. Justice Brandeis spoke of "falsehood and fallacies" that can be averted by "processes of education."<sup>92</sup> But it is not only false information that can inflict great injury, as Brandeis himself knew well. In his 1890 article co-authored with Samuel Warren, *The Right to Privacy*, Brandeis argued that every person had the right to keep

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<sup>86</sup> See Elizabeth Kolbert, *Why Facts Don't Change Our Minds*, NEW YORKER (Feb. 27, 2017), <https://www.newyorker.com/magazine/2017/02/27/why-facts-dont-change-our-minds>.

<sup>87</sup> *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) (emphasis added).

<sup>88</sup> This saying, or some version of it, is often incorrectly attributed to Winston Churchill. Joshua Gillin, *NFL's Colin Kaepernick Incorrectly Credits Winston Churchill for Quote About Lies*, PUNDITFACT (Oct. 9, 2017, 5:21 PM), <https://www.politifact.com/punditfact/statements/2017/oct/09/colin-kaepernick/nfls-colin-kaepernick-incorrectly-credits-winston/>.

<sup>89</sup> Joo, *supra* note 75, at 414.

<sup>90</sup> See generally Lisa K. Fazio et al., *Knowledge Does Not Protect Against Illusory Truth*, 144 J. EXPERIMENTAL PSYCHOL. 993, 993–1002.

<sup>91</sup> Brian Resnick, *Alex Jones and the Illusory Truth Effect, Explained*, VOX (June 19, 2017, 10:07 AM), <https://www.vox.com/science-and-health/2017/6/17/15817056/alex-jones-megyn-kelly-lies-nbc-psychology-illusory-truth>.

<sup>92</sup> *Whitney*, 274 U.S. at 357–77 (Brandeis, J., concurring).

truthful, intimate information out of public view.<sup>93</sup> In contrast to the law of defamation, which involves the right “to prevent inaccurate portrayal of private life,” the law of privacy protects the right to “prevent its being depicted at all.”<sup>94</sup> There is no “counter-speech” to the publication of a person’s nude image, the dissemination of a home address, or the disclosure of undocumented status, and no “process of education” can undo their damage.

In addition to violations of privacy, there are other forms of effectively unanswerable speech, such as eliminationist propaganda, stalking, and emerging hyper-realistic forms of defamation using manipulated photographs and videos, sometime referred to as “deep fakes.”<sup>95</sup> Such unanswerable speech can only be prohibited, not countered.

### 3. The Speech We Hate

The term “hate” tends to generate more heat than light in the context of free speech. The mutually exclusive assertions that “the First Amendment protects hate speech” and “the First Amendment does not protect hate speech” are made with nearly equal frequency and confidence, and both statements are essentially meaningless. “Hate speech” is not a category of speech recognized by the Supreme Court.<sup>96</sup> If what is meant by hate speech is merely unpleasant, unpopular, or crude expression, then it is largely true the First Amendment protects hate speech. If what is meant by hate speech is true threats, incitement, defamation, obscenity, fighting words, or certain kinds of discriminatory expression, then it is not true that the First Amendment protects hate speech. “hate” and “hatefulness” are subjective, vague, and arbitrary terms.

The meaning of “freedom for the thought we hate” is further obscured by the ambiguity of the word “we.” All speech is hateful to someone. What it looks like to protect the thought we hate varies considerably depending on who “we” are—the general public? The Supreme Court? Women? The Jewish community? Neo-Nazis?

According to First Amendment orthodoxy, it should not concern us that free speech protection seems to follow a hierarchy of gender, race, and class. Self-styled First Amendment champions are quick to emphasize they do not defend

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<sup>93</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 218 (1890).

<sup>94</sup> *Id.* at 218.

<sup>95</sup> See Robert Chesney & Danielle K. Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CAL. L. REV. (forthcoming 2019).

<sup>96</sup> See NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP xxi (2018).

pornographers, tobacco advertisers, and white supremacists because they like their speech; it is the very distasteful nature of their speech that makes it so important to defend.<sup>97</sup>

In explaining why it so often defends “controversial and unpopular entities” such as neo-Nazis and the KKK, the ACLU states:

We do not defend them because we agree with them; rather, we defend their right to free expression and free assembly. Historically, the people whose opinions are the most controversial or extreme are the people whose rights are most often threatened. Once the government has the power to violate one person’s rights, it can use that power against everyone . . . [W]e subscribe to the principle that if the rights of society’s most vulnerable members are denied, everybody’s rights are imperiled.<sup>98</sup>

This is an illuminating answer, but probably not in the way it was intended. The professed animating principle, that the rights of the vulnerable should be protected not only for their sake but for the sake of the general welfare, is noble. It echoes the social justice insights of Kimberlé Crenshaw’s intersectional scholarship<sup>99</sup> and Mari Matsuda’s concept of “looking to the bottom.”<sup>100</sup>

But the way the ACLU actually applies the concept of vulnerability distorts the principle beyond recognition. It is a skillful sleight of hand: “unpopular entities” with “controversial or extreme” opinions become “vulnerable members” of society whose “rights are threatened.” But whether a group is unpopular, or an opinion is controversial is, first, in the eye of the beholder, and, more importantly, being unpopular is not the

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<sup>97</sup> See Zachary Margulis-Ohnuman, *Figures of Speech: First Amendment Heroes and Villains* by William Bennett Turner Berrett-Koehler Publishers (2011), 36 CHAMPION 57, 58 (2012).

<sup>98</sup> *Guardians of Freedom*, ACLU, <https://www.aclu.org/guardians-freedom> (last visited Mar. 1, 2019).

<sup>99</sup> Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1990).

<sup>100</sup> Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

same as being vulnerable and being disliked is not the same as being threatened.

By equating being disliked with being vulnerable, the ACLU can claim that Nazis, KKK members, and pornographers are vulnerable members of society in need of protection. This is perverse for two reasons. First, these groups are neither universally disliked in an objective sense; they in fact enjoy considerable popularity and power.<sup>101</sup> Second, classifying these groups as vulnerable erases truly vulnerable groups who are often exploited by the very groups that the ACLU spends its considerable resources to protect.<sup>102</sup>

The ACLU's view is often expressed as "freedom of speech for the thought we hate." The principle is derived from Justice Oliver Wendell Holmes's dissenting opinion in the 1929 case *United States v. Schwimmer*.<sup>103</sup> "if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."'<sup>104</sup>

But the civil libertarian assumption that "the thought we hate" means sexist, racist, and other speech expressing contempt and hatred is telling. A closer look at the case that birthed the principle of "freedom for the thought we hate" complicates the picture considerably.

*Schwimmer* was the first Supreme Court free speech case argued by a woman, Olive H. Rabe.<sup>105</sup> It is also one of the few free speech cases that was brought by a woman, Rosika Schwimmer.<sup>106</sup> Technically, the case is not about the First Amendment at all, but about statutory interpretation.<sup>107</sup> Schwimmer was a Hungarian-born pacifist whose citizenship application was denied due to her stated refusal to take up arms to defend the country.<sup>108</sup> The majority felt that this refusal

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<sup>101</sup> Morrison Torrey, *Thoughts About Why the First Amendment Operates to Stifle the Freedom and Equality of a Subordinated Majority*, 21 WOMEN'S RTS. L. REP. 25, 35 (1999).

<sup>102</sup> Delgado & Yun, *supra* note 36, at 1296.

<sup>103</sup> *United States v. Schwimmer*, 279 U.S. 644, 655 (1929), *overruled in part* by *Girouard v. United States*, 328 U.S. 61 (1946).

<sup>104</sup> See Ronald K.L. Collins, *38 Women Who Argued First Amendment Free Expression Cases in the Supreme Court: 1880–2018*, CONCURRING OPINIONS, FAN 199 (Aug. 7, 2018), <https://concurringopinions.com/archives/2018/08/fan-199-first-amendment-news-special-issue-38-women-who-argued-first-amendment-free-expression-cases-in-the-supreme-court-1880-2018.html>.

<sup>105</sup> See Mary Anne Franks, *The Free Speech Fraternity*, CONCURRING OPINIONS (Sept. 20, 2018), <https://concurringopinions.com/archives/2018/09/fan-200-first-amendment-news-mary-anne-franks-the-free-speech-fraternity.html>.

<sup>106</sup> *Schwimmer*, 279 U.S. at 646.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 646.

indicated that Schwimmer was “not well bound or held by the ties of affection to any nation or government” and thus “liable to be incapable of the attachment for and devotion to the principles of our Constitution that are required of aliens seeking naturalization.”<sup>109</sup> In dissent, Justice Holmes wrote that while Schwimmer’s position “might excite popular prejudice,” it should not be punished on that basis.<sup>110</sup>

In the quintessential case of “freedom for the thought we hate,” Justice Holmes defended a woman’s refusal to comply with the demands of power against her conscience. Such speech has very little in common with what is often referred to as “hate speech” today, which generally means speech that supports white male supremacy.<sup>111</sup> The former challenges power; the latter seeks to entrench it.

Donald Trump’s sexist and racist speech helped him win the presidency in 2016.<sup>112</sup> A 2017 poll found that more than a third of Americans feel that “America must protect and preserve its White European heritage,” while nearly 40% believe that white people “are currently under attack in this country.”<sup>113</sup> One in ten Americans believes the country has “gone too far” to achieve gender equality<sup>114</sup> and 40% believe women should be forced to carry pregnancies to term against their will.<sup>115</sup> Less than half of Americans believe that sexual assault should disqualify a person from becoming a Supreme Court Justice.<sup>116</sup> Racist and sexist views are openly and routinely articulated by political officials, widely broadcast by both traditional and social media outlets, and reflected in outbreaks of physical violence against women and minorities.<sup>117</sup> Unlike Schwimmer’s refusal, free

<sup>109</sup> *Id.* at 652.

<sup>110</sup> *Id.* at 654.

<sup>111</sup> See Franks, *Free Speech Fraternity*, *supra* note 105.

<sup>112</sup> Tom Jacobs, *Research Finds That Racism, Sexism, and Status Fears Drove Trump Voters*, PAC. STANDARD (Apr. 24, 2018), <https://psmag.com/news/research-finds-that-racism-sexism-and-status-fears-drove-trump-voters>.

<sup>113</sup> *New Poll: Some Americans Express Troubling Racial Attitudes Even as Majority Oppose White Supremacists*, U. VA. CTR. FOR POL. (Sept. 14, 2017), <http://www.centerforpolitics.org/crystalball/articles/new-poll-some-americans-express-troubling-racial-attitudes-even-as-majority-oppose-white-supremacists/>.

<sup>114</sup> Juliana M. Horowitz et al., *Wide Partisan Gaps in U.S. Over How Far the Country Has Come on Gender Equality*, PEW RES. CTR. (Oct. 18, 2017), <http://www.pewsocialtrends.org/2017/10/18/wide-partisan-gaps-in-u-s-over-how-far-the-country-has-come-on-gender-equality/>.

<sup>115</sup> *Public Opinion on Abortion*, PEW RES. CTR. (Oct. 15, 2018), <http://www.pewforum.org/fact-sheet/public-opinion-on-abortion/>.

<sup>116</sup> A majority of Republicans—55%—felt that it should not. Tim Marcin, *Sexual Assault Should Not Disqualify Kavanaugh If Proven, Majority of Republicans Believe: Poll*, NEWSWEEK (Sept. 27, 2018, 10:05 AM), <https://www.newsweek.com/sexual-assault-should-not-disqualify-kavanaugh-proven-majority-republicans-1141877>.

<sup>117</sup> Max Boot, *Fox News and the Rest of the Right-Wing Media Can’t Escape Responsibility*, WASH. POST (Oct. 28, 2018), <https://www.washingtonpost.com/opinions/ask-the-questions-about-right-wing-terrorists-that-we-ask-about-islamist->

speech in the service of white male supremacy is not a radical act of speaking truth to power—it is an attempt to maintain the status quo.

### C. *Reckless Speech*

One of the most egregious features of current free speech doctrine and practice is that it not only idealizes but trivializes cowardly and violent speech. Misogynist and racist speech is often characterized as “offensive,” a fuzzy concept that allows for absurd equivocations.<sup>118</sup> When civil libertarians warn that any law that could be used to suppress the speech of a neo-Nazi could be used against a civil rights champion, it creates a false equivalence. The problem with messages of racial extermination is not that they are offensive; it is that they are dangerous. The message that “Jews are an inferior people” may be merely offensive. The message that “Jews should be exterminated” is not. By contrast, a message of racial equality is not dangerous, no matter how offensive it might be to bigots.

Censoring the expression of preferences for certain races or beliefs in the superiority of particular religions because they are offensive is indeed open to abuse and likely counterproductive. But speech advocating violence and discrimination against individuals or groups on the basis of race, religion, or gender is not merely offensive. That kind of speech not only undermines democratic values but creates a substantial and unjustified risk of other forms of injury to its targets, including physical injury. That is, these forms of speech are *reckless*.<sup>119</sup>

#### 1. It Began with Words: The Thin Line between Speech and Conduct

A 2018 study by University of Warwick researchers Karsten Müller and Carlo Schwarz concluded that “social media can act as a propagation mechanism between online hate speech and real-life violent crime.”<sup>120</sup> Müller and Schwarz examined more than 3000 anti-refugee attacks over a two-year period in Germany, along with a range of variables—including wealth, demographics, newspaper sales, the number of refugees, and

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militants/2018/10/28/64403b32-daec-11e8-b3f0-62607289efee\_story.html?utm\_term=.2b7ffcdac5cc.

<sup>118</sup> See Franks, *Beyond Free Speech*, *supra* note 23.

<sup>119</sup> The Model Penal Code defines recklessness as consciously disregarding “a substantial and unjustifiable risk” of harm. MODEL PENAL CODE § 2.02 (AM. LAW INST. 2017).

<sup>120</sup> Karsten Müller & Carlo Schwarz, *Fanning the Flames of Hate: Social Media and Hate Crime* (Nov. 30, 2018),

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3082972](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082972).

Facebook use—in the communities where they occurred.<sup>121</sup> What they found was startling: “Wherever per-person Facebook use rose to one standard deviation above the national average, attacks on refugees increased by about 50 percent.”<sup>122</sup>

The researchers note that previous studies had demonstrated other media’s power to influence action: “Television has also been shown to be associated with short-lived outbursts of domestic violence . . . exposure to pornographic material on the internet is associated with increased sex crime.”<sup>123</sup> Müller and Schwarz “do not claim that social media itself causes crimes against refugees out of thin air.”<sup>124</sup> Their suggestion is, rather, “that social media can act as a propagating mechanism for hateful sentiments. . . . [and] that quasi-random shifts in exposure to anti-refugee sentiment on social media can increase the number of anti-refugee attacks.”<sup>125</sup>

Less than two weeks after the election of Donald Trump as president of the United States, white nationalists gathered a few blocks from the White House in a federal building named for Ronald Reagan.<sup>126</sup> In front of a crowd of mostly young men, the group’s leader, Richard Spencer, celebrated the election of Trump and waxed poetic about the superiority of the white race:<sup>127</sup>

He railed against Jews and, with a smile, quoted Nazi propaganda in the original German. America, he said, belonged to white people, whom he called the “children of the sun,” a race of conquerors and creators who had been marginalized but now, in the era of President-elect Donald J. Trump, were “awakening to their own identity.”

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<sup>121</sup> Amanda Taub & Max Fisher, *Facebook Fueled Anti-Refugee Attacks in Germany, New Research Suggests*, N.Y. TIMES (Aug. 21, 2018)

<https://www.nytimes.com/2018/08/21/world/europe/facebook-refugee-attacks-germany.html>.

<sup>122</sup> *Id.*

<sup>123</sup> Müller & Schwarz, *supra* note 120, at 5.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Joseph Goldstein, *Alt-Right Gathering Exults in Trump Election with Nazi-Era Salute*, N.Y. TIMES (Nov. 20, 2016), <https://www.nytimes.com/2016/11/21/us/alt-right-salutes-donald-trump.html>.

<sup>127</sup> *Id.*

As he finished, several audience members had their arms outstretched in a Nazi salute. Mr. Spencer called out: “Hail Trump! Hail our people!” and then, “Hail victory!”—the English translation of the Nazi exhortation “Sieg Heil!” The room shouted back.<sup>128</sup>

The Washington, DC-based U.S. Holocaust Museum issued a statement about the event, which included the somber reminder that “[t]he Holocaust did not begin with killing; it began with words.”<sup>129</sup>

## II. FEARLESS SPEECH

Racist and misogynist speech is in no danger of suppression by the government. There has perhaps never been a safer time in America to express virulently misogynist, racist, and xenophobic speech. Donald Trump’s successful presidential campaign was fueled by such speech.<sup>130</sup> His cabinet and advisors are overwhelmingly white, male, radical conservatives.<sup>131</sup> Many of them have personal histories of violence against women<sup>132</sup> and open prejudices against racial minorities, the LGBT community, immigrants, and Muslims.<sup>133</sup> Republicans control every branch of the federal government<sup>134</sup> and the majority of state governments.<sup>135</sup> They operate enormous media enterprises that

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<sup>128</sup> *Id.*

<sup>129</sup> Julie Zauzmer, ‘The Holocaust Did Not Begin with Killing; It Began with Words.’ *Museum Condemns Alt-Right Meeting*, WASH. POST (Nov. 22, 2016), [https://www.washingtonpost.com/news/acts-of-faith/wp/2016/11/22/the-holocaust-did-not-begin-with-killing-it-began-with-words-museum-condemns-alt-right-meeting/?noredirect=on&utm\\_term=.5c20e9edad9c](https://www.washingtonpost.com/news/acts-of-faith/wp/2016/11/22/the-holocaust-did-not-begin-with-killing-it-began-with-words-museum-condemns-alt-right-meeting/?noredirect=on&utm_term=.5c20e9edad9c).

<sup>130</sup> See Jacobs, *supra* note 112.

<sup>131</sup> See Jasmine C. Lee, *Trump’s Cabinet So Far Is More White and Male Than Any First Cabinet Since Reagan’s*, N.Y. TIMES (Mar. 10, 2017), <https://www.nytimes.com/interactive/2017/01/13/us/politics/trump-cabinet-women-minorities.html>.

<sup>132</sup> See NARAL, *What Do Trump’s Cabinet Picks Have in Common? A History of Misogyny*, MEDIUM (Dec. 14, 2016), <https://medium.com/@NARAL/what-do-trumps-cabinet-picks-have-in-common-a-history-of-misogyny-fa266b790066>.

<sup>133</sup> Darlena Cunha, *Donald Trump’s Administration Is a Basket of Deplorables*, TIME (Nov. 22, 2016), <http://time.com/4577724/donald-trump-deplorable-administration/>.

<sup>134</sup> See Robert Reich, *Containing the Catastrophe of Trump Controlling All Three Branches of Government*, SAN FRAN. CHRON. (Oct. 11, 2018), <https://www.sfchronicle.com/opinion/article/Containing-the-catastrophe-of-Trump-controlling-13291432.php>.

<sup>135</sup> See Adam Nagourney & Sydney Ember, *Election Consolidates One-Party Control Over State Legislatures*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/politics/statehouse-elections.html>.

produce a steady stream of rightwing propaganda in television, radio, and the Internet outlets.<sup>136</sup> Multibillionaire “philanthropists” like the Koch brothers use their vast wealth to shape politics and educational institutions toward conservative ends.<sup>137</sup>

White men have throughout history used their expansive privileges of free speech to threaten and incite violence against those that challenge their supremacy. In the current free speech paradigm, white men’s reckless speech is overprotected while the critical speech of women and non-white men is under-protected. This status quo should be disrupted.

#### A. *Origins of Parrhesia*

The ancient Greeks recognized two different conceptions of freedom of speech, *isegoria* and *parrhesia*.<sup>138</sup> Both were rights protected by the Athenian constitution and both are often translated as “free speech,” but the two concepts differ in significant ways. “In ancient Athens, *isegoria* described the equal right of citizens to participate in public debate in the democratic assembly,” whereas *parrhesia* is “the license to say what one pleased, how and when one pleased, and to whom.”<sup>139</sup> Keith Werhan writes that *parrhesia* “described the freedom to speak one’s mind frankly and with complete openness, to say the whole truth as one understands the truth. The truth-telling prescribed by parrhēsia typically had a confrontative, critical bite.”<sup>140</sup>

The French philosopher Michel Foucault was fascinated by the interplay of power and risk inherent in the concept of *parrhesia*, which he translated as “fearless speech.”<sup>141</sup> Foucault devoted a series of lectures to the concept in the 1980s at the University of Berkeley. Foucault describes *parrhesia* as

a kind of verbal activity where the speaker has a specific relation to truth through frankness, a certain relationship to his own life through danger, a certain type of relation to himself or other people through

<sup>136</sup> See Lucia Graves, *This Is Sinclair, 'The Most Dangerous US Company You've Never Heard of*, GUARDIAN (Aug. 17, 2017), <https://www.theguardian.com/media/2017/aug/17/sinclair-news-media-fox-trump-white-house-circa-breitbart-news>.

<sup>137</sup> See generally JANE MAYER, DARK MONEY (2016).

<sup>138</sup> Teresa M. Bejan, *The Two Clashing Meanings of Freedom of Speech*, ATLANTIC (Dec. 2, 2017), <https://www.theatlantic.com/politics/archive/2017/12/two-concepts-of-freedom-of-speech/546791/>.

<sup>139</sup> *Id.*

<sup>140</sup> Werhan, *supra* note 25, at 316.

<sup>141</sup> Simon, *Parrhesiastic Accountability*, *supra* note 26, at 1421–22.

criticism (self-criticism or criticism of other people), and a specific relation to moral law through freedom and duty. More precisely, *parrhesia* is a verbal activity in which a speaker expresses his personal relationship to truth, and risks his life because he recognizes truth-telling as a duty to improve or help other people (as well as himself). In *parrhesia*, the speaker uses his freedom and chooses frankness instead of persuasion, truth instead of falsehood or silence, the risk of death instead of life and security, criticism instead of flattery, and moral duty instead of self-interest and moral apathy.<sup>142</sup>

While Foucault clarified that *parrhesia* did not always involve the risk of death, it always involved risk of some kind and required “courage in the face of danger: it demands the courage to speak the truth in spite of some danger.”<sup>143</sup>

Jonathan Simon writes that Foucault was drawn to the complex questions about power and truth raised by *parrhesia*, including

Who is able to tell the truth? What are the moral, the ethical, and the spiritual conditions which entitle someone to present himself as, and to be considered as, a truth-teller? About what topics is it important to tell the truth? . . . What are the consequences of telling the truth? What are the anticipated positive effects for the city, for the city's rulers, for the individual?, etc. And finally: What is the relation

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<sup>142</sup> Foucault, *Discourse*, *supra* note 27, at 5.

<sup>143</sup> *Id.* at 4.

between the activity of truth-telling  
and the exercise of power?<sup>144</sup>

### B. Key Features

Over the course of the Berkeley lectures, Foucault identifies several key features of fearless speech. Three of these features in particular are useful to the project of reorienting the American approach to free speech: sincerity, criticism, and courage.

#### 1. Sincerity

*Parrhesia*, Foucault says, is distinct from rhetoric. Where rhetoric seeks to persuade through logic or manipulation, *parrhesia* is direct and transparent.<sup>145</sup> This feature of *parrhesia* is often rendered as “frankness” because the speaker says:

“everything he has in mind: he does not hide anything, but opens his heart and mind completely to other people through his discourse. In *parrhesia*, the speaker is supposed to give a complete and exact account of what he has in mind so that the audience is able to comprehend exactly what the speaker thinks.”<sup>146</sup>

A more precise term, I believe, would be *sincerity*, Foucault notes that “the speaker makes it manifestly clear and obvious that what he says is his own opinion.”<sup>147</sup> Foucault contrasts the fearless speaker with the rhetorician, who uses whatever strategy is most likely to convince her audience regardless of her own view. Instead, “the parrhesiastes acts on other people’s mind by showing them as directly as possible what he actually believes.”<sup>148</sup> By taking full accountability for what he says – as Foucault writes, “the parrhesiastic enunciation thus takes the form: ‘I am the one who thinks this and that’”<sup>149</sup> – the fearless speaker exhibits transparency and good faith, not cynicism or devil’s advocate posturing.

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<sup>144</sup> Jonathan Simon, *Fearless Speech in the Killing State: The Power of Capital Crime Victim Speech*, 82 N.C. L. REV. 1377, 1395–96 (2004) [hereinafter Simon, *Killing State*] (citing MICHEL FOUCAULT, FEARLESS SPEECH 50 (Joseph Pearson ed., 2001)).

<sup>145</sup> Foucault, *Discourse*, *supra* note 27, at 7.

<sup>146</sup> *Id.* at 2.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

## 2. Criticism

According to Foucault, speech must be critical to be fearless.<sup>150</sup> “What makes parrhesia dangerous,” writes Simon, “is that it is likely to be critical. It is not *parrhesia* to praise the sovereign or flatter one’s friends, even if one believes what one says.”<sup>151</sup>

But while fearless speech is always critical, not all critical speech is fearless. Importantly, to be a fearless speaker, the parrhesiastes must be less powerful than the audience he addresses:

Parrhesia is a form of criticism, either towards another or towards oneself, but always in a situation where the speaker or confessor is in a position of inferiority with respect to the interlocutor. The parrhesiastes is always less powerful than the one with whom he or she speaks. The parrhesia comes from “below”, as it were, and is directed towards “above”. This is why an ancient Greek would not say that a teacher or father who criticizes a child uses parrhesia. But when a philosopher criticizes a tyrant, when a citizen criticizes the majority, when a pupil criticizes his or her teacher, then such speakers may be using parrhesia.<sup>152</sup>

To criticize those with less power may be justified or even necessary, but it can never qualify as fearless speech. In order to be an act of *parrhesia*, criticism must “punch up,” not “punch down.”

## 3. Courage

This relationship to power is intimately linked to the most important feature of *parrhesia*, which is courage in the face of danger. Simon writes, “[t]he danger in *parrhesia* must come from another, the interlocutor, who is in a position to hurt the speaker.”<sup>153</sup> Foucault repeatedly stresses that dangerous speech

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<sup>150</sup> *Id.* at 4.

<sup>151</sup> Simon, *Killing State*, *supra* note 144, at 1391.

<sup>152</sup> Foucault, *Discourse*, *supra* note 27, at 4–5.

<sup>153</sup> Simon, *Killing State*, *supra* note 144, at 1392.

is speech that goes against the majority: “If there is a kind of ‘proof’ of the sincerity of the parrhesiastes,” says Foucault, “it is his courage. The fact that a speaker says something dangerous—different from what the majority believes—is a strong indication that he is a parrhesiastes.”<sup>154</sup>

Importantly, this willingness to risk danger is directed inward, not outward. The fearless speaker “says something which is dangerous *to himself* and thus involves a risk.”<sup>155</sup> This risk can take different forms, but it is always a risk to the speaker’s self-interest. Sometimes what the parrhesiastes risks is “his privilege to speak freely when he discloses a truth which threatens the majority”; in its most extreme form, the risk the speaker takes is the risk of death.<sup>156</sup>

### C. Examples of Fearless Speech

#### 1. Ancient Greece

The philosopher Socrates is perhaps the most well-known example of a *parrhesiastes* in ancient Greek history. In his famous dialogues, Socrates questioned and critiqued the values of the Athenian elite.<sup>157</sup> He undertook this speech for the greater good, namely, to help his fellow Greeks understand themselves more deeply and to live more fulfilled lives.<sup>158</sup> Socrates’ speech so angered the powerful majority that he was punished for his speech by death.<sup>159</sup>

Foucault undertakes close readings of several Greek plays to find other examples of *parrhesia*. One of the most compelling comes from Foucault’s analysis of Euripides’ tragedy *Ion*.<sup>160</sup> Ion tells the story of a woman named Creusa, who is raped<sup>161</sup> by the god Apollo when she is a girl.<sup>162</sup> Creusa becomes pregnant and hides in a cave to give birth alone.<sup>163</sup> Full of shame and fearful that her parents will learn what has happened, Creusa abandons her newborn son to exposure and wild animals.<sup>164</sup> Unknown to her, Apollo sends his brother Hermes to take the child to his

<sup>154</sup> Foucault, *Discourse*, *supra* note 27, at 3.

<sup>155</sup> *Id.* (emphasis added).

<sup>156</sup> *Id.* at 5.

<sup>157</sup> *Id.* at 8.

<sup>158</sup> *Id.* at 38.

<sup>159</sup> *Id.* at 40.

<sup>160</sup> *Id.* at 13–21.

<sup>161</sup> It is interesting to note Foucault’s rumination on the distinction between rape and seduction: “Is it a rape or a seduction? For the Greeks, the difference is not as crucial as it is for us. Clearly, when someone rapes a woman, a girl, or boy, he uses physical violence; whereas when someone seduces another, he uses words, his ability to speak, his superior status, and so on.” *Id.* at 14.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

temple, the oracle at Delphi.<sup>165</sup> The boy, Ion, is raised as a servant in the temple, and Apollo tells no one, not even Ion himself, that he is his son.<sup>166</sup>

After Creusa marries a foreigner named Xuthus and discovers that they are unable to have children, she wonders if her son by Apollo is dead or alive.<sup>167</sup> As the oracle at Delphi was the place mortals could come to ask the gods for the truth, Creusa and Xuthus decide to visit the oracle to ask if they will ever have children.<sup>168</sup> The question Xuthus plans to ask the oracle is straightforward: he only wants to know if he and Creusa will ever have children.<sup>169</sup> Creusa, however, has a different, secret question: she wants to know what has happened to the son she had by Apollo.<sup>170</sup>

When they arrive at the temple, they are met by Apollo's servant, Ion.<sup>171</sup> None of them, including Ion himself, knows that he is Creusa's son.<sup>172</sup> Creusa is still ashamed of her story, and so she tells Ion that she is consulting the oracle for a friend.<sup>173</sup> Creusa relates the rape by Apollo to Ion as though it happened to this friend, and asks Ion if he thinks Apollo will answer her question.<sup>174</sup> Ion, a faithful servant to Apollo, tells Creusa that if Apollo has done what she describes, the god would be too ashamed to answer:

ION: . . . is Apollo to reveal what he intends should remain a mystery?

CREUSA: Surely his oracle is open for every Greek to question?

ION: No. His honor is involved; you must respect his feelings.

CREUSA: What of his victim's feelings? What does this involve for her?

ION: There is no one who will ask this question for you. Suppose it were proved in Apollo's own temple that he had behaved so badly, he would be justified

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 15.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

in making your interpreter suffer for it. My lady, let the matter drop. We must not accuse Apollo in his own court. That is what our folly would amount to, if we try to force a reluctant god to speak, to give signs in sacrifice or the flight of birds. Those ends we pursue against the gods' will can do us little good when we gain them . . . .<sup>175</sup>

When Xuthus asks his question of Apollo, Apollo lies to him and tells him that Ion is his own son.<sup>176</sup> When Xuthus tells Creusa that Apollo has given him a son, she flies into a rage: not only will Apollo not admit to his wrongdoing, nor tell her whether her child is alive, but he also (so it appears) gives her husband a son who will be a stranger to her. In her anger and despair, she speaks the truth about what Apollo has done:

Clinging to my pale wrists as I cried for my mother's help you led me to bed in a cave, a god and my lover, with no shame, submitting to the Cyprian's will. In misery I bore you a son, whom in fear of my mother I placed in that bed where you cruelly forced me.<sup>177</sup>

As Foucault describes it,

Creusa's tirade against Apollo is that form of parrhesia where someone publicly accuses another of a crime, or of a fault, or of an injustice that has been committed. And this accusation is an instance of parrhesia insofar as the one who is accused is more powerful than the one who accuses. For there is the danger that because of the accusation made, the accused

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 17.

<sup>177</sup> *Id.* at 20.

may retaliate in some way against his or her accuser.<sup>178</sup>

## 2. Modern Day

According to Jonathan Simon, *parrhesia* is rare in modern society, though “not, however, wholly absent from contemporary political life. The western tradition of critical *parrhesiastic* speech by intellectuals, a recognizable genealogy that stretches from Socrates through Emile Zola to Daniel Ellsberg, remains alive today but only episodically.”<sup>179</sup> Simon makes the intriguing argument that “[t]oday, crime victims have emerged as perhaps the most important source of *parrhesia*.”<sup>180</sup> The victim who speaks takes a risk in two ways:

First, the reprocessing of the traumatic experiences that underlie *parrhesiastic* truth may do damage to the speaker through his own circuits of memory and emotion. Second, the truth spoken may offend powerful members of the audience who may seek to retaliate. “[I]n *parrhesia* the danger always comes from the fact that the said truth is capable of hurting or angering the interlocutor.” In both senses, *parrhesiastic* speech is fearless speech because it knowingly embraces risk.<sup>181</sup>

### a. Christine Blasey Ford

In July 2018, Judge Brett Kavanaugh of the United States Court of Appeals for the D.C. Circuit was rumored to be on Donald Trump’s shortlist of nominees for the Supreme Court to replace retiring Justice Anthony M. Kennedy.<sup>182</sup> When she

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<sup>178</sup> *Id.*

<sup>179</sup> Simon, *Killing State*, *supra* note 144, at 1401.

<sup>180</sup> Simon, *Parrhesiastic Accountability*, *supra* note 26, at 1451 (“The role of victims in the criminal justice system has recently drawn interest and mostly skepticism from legal scholars examining the practice of victim-impact statements in capital trials and in other aspects of capital punishment.”).

<sup>181</sup> Simon, *Killing State*, *supra* note 144, at 1390–91 (citing FOUCAULT, FEARLESS SPEECH 16–17 (Joseph Pearson ed., 2001)).

<sup>182</sup> Emma Brown, *California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks Out About Her Allegation of Sexual Assault*, WASH. POST (Sept. 16, 2018), [https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52df917b\\_story.html?utm\\_term=.73ff142c3cb9](https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52df917b_story.html?utm_term=.73ff142c3cb9).

learned of this, Dr. Christine Blasey Ford reached out to her Congressional representative, Anna Eshoo, and the *Washington Post*.<sup>183</sup> After consulting with Eshoo, she sent a letter to Senator Dianne Feinstein, the ranking Democrat on the Judiciary Committee, which described an incident involving Dr. Ford and Judge Kavanaugh when both were teenagers.<sup>184</sup> Dr. Ford asked Sen. Feinstein to keep the letter confidential and did not go on the record with the *Washington Post* “as she grappled with concerns about what going public would mean for her and her family — and what she said was her duty as a citizen to tell the story.”<sup>185</sup>

Ford hired lawyer Debra Katz, an expert in sexual harassment cases, who advised her to take a polygraph test in anticipation of accusations that she was lying.<sup>186</sup> Katz provided the results of the test, which indicated that Ford was telling the truth about her allegation, to the *Post*.<sup>187</sup> Ford decided in August not to go public with her accusation, believing that it would “upend her life” and likely have no effect on Kavanaugh’s nomination, which seemed to be a foregone conclusion.<sup>188</sup> “Why suffer through the annihilation if it’s not going to matter?” Ford told the *Post*.<sup>189</sup>

Because she had promised to keep the letter confidential, Sen. Feinstein did not mention the allegation during Kavanaugh’s initial confirmation hearings.<sup>190</sup> On September 12, 2018, *The Intercept* reported that it had learned from other Democratic members of the Judiciary Committee that Sen. Feinstein was in possession of a document relating to Kavanaugh, without naming Ford.<sup>191</sup> At that point, Feinstein sent Ford’s letter to the FBI, which sent the letter to the White House with Ford’s name redacted, which in turn sent the letter to the full Senate Judiciary Committee.<sup>192</sup>

On September 16, 2018, Ford went public as the author of the allegations.<sup>193</sup> As she told the *Washington Post*, she “decided that if her story is going to be told, she wants to be the

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Ryan Grim, *Dianne Feinstein Withholding Brett Kavanaugh Document from Fellow Judiciary Committee Democrats*, INTERCEPT (Sept. 12, 2018, 9:24 PM), <https://theintercept.com/2018/09/12/brett-kavanaugh-confirmation-dianne-feinstein/>.

<sup>192</sup> Brown, *supra* note 182.

<sup>193</sup> *Id.*

one to tell it.”<sup>194</sup> She told the *Post* on the record that in 1982, when she was 15 years old, Kavanaugh had sexually assaulted her at a party.<sup>195</sup> According to her account, Ford was pushed into a bedroom where rock music was playing.<sup>196</sup> An intoxicated 17-year-old Kavanaugh held her down on a bed, tried to pull her clothes off and covered her mouth with his hand to stifle her screams.<sup>197</sup> She managed to escape when Kavanaugh’s friend Mark Judge, who was watching the incident, fell on top of them.<sup>198</sup> She fled to a bathroom and locked herself in, waiting until she heard the two teenagers going down the stairs before leaving the house.<sup>199</sup>

According to Ford, she told no one what had happened at the time, terrified that her parents would discover that she had attended a party where teenagers were drinking.<sup>200</sup> In addition to the polygraph results, Ford gave the *Post* therapist session notes from 2012 that recount the assault.<sup>201</sup> Kavanaugh’s name is not mentioned in the notes, but they give the details of Ford’s attack “by students ‘from an elitist boys’ school’” who went on to become “highly respected and high-ranking members of society in Washington.”<sup>202</sup> Ford’s husband stated that Ford had identified Kavanaugh as her attacker when she told him of the attack in 2012.<sup>203</sup>

After she went public, Ford’s private information was posted online, her email was hacked, and she received death threats that forced her and her husband and sons to leave their home.<sup>204</sup> Her credibility and character were attacked by multiple Republican members of Congress and by President Donald Trump.<sup>205</sup> On September 21, 2018, President Trump, who has himself been accused of sexual misconduct by more than 20

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> Jessica Contrera et al., *Kavanaugh Accuser Christine Blasey Ford Moved 3,000 Miles To Reinvent Her Life. It Wasn’t Far Enough*, WASH. POST (Sept. 26, 2018), [https://www.washingtonpost.com/local/christine-blasey-ford-wanted-to-flee-the-us-to-avoid-brett-kavanaugh-now-she-may-testify-against-him/2018/09/22/db942340-bdb1-11e8-8792-78719177250f\\_story.html?utm\\_term=.f68b19835d29](https://www.washingtonpost.com/local/christine-blasey-ford-wanted-to-flee-the-us-to-avoid-brett-kavanaugh-now-she-may-testify-against-him/2018/09/22/db942340-bdb1-11e8-8792-78719177250f_story.html?utm_term=.f68b19835d29).

<sup>205</sup> Peter Baker, *In Risky Shift, Trump and G.O.P. Directly Assail Christine Blasey Ford*, N.Y. TIMES (Oct. 3, 2018), <https://www.nytimes.com/2018/10/03/us/politics/blasey-ford-trump-republicans.html>.

women,<sup>206</sup> stated in a Twitter post that:

I have no doubt that, if the attack on Dr. Ford was as bad as she says, charges would have been immediately filed with local Law Enforcement Authorities by either her or her loving parents. I ask that she bring those filings forward so that we can learn date, time, and place!<sup>207</sup>

According to a statement issued by her lawyers on September 23, 2018, “[d]espite actual threats to her safety and her life, Dr. Ford believes it is important for senators to hear directly from her about the sexual assault committed against her.”<sup>208</sup> Four days later on September 27<sup>th</sup>, Dr. Ford testified in an open Senate hearing about her allegations.<sup>209</sup>

If Ford was telling the truth, her speech qualifies as an act of *parrhesia*, one that echoes in many ways Creusa’s speech against Apollo in the play *Ion*. It exhibits the three key features of fearless speech: sincerity, criticism, and courage. Ford’s story is a direct account of her experience with Judge Kavanaugh. Her account of the assault describes the event as she remembers it, free of rhetorical manipulation or embellishment. Commentators have noted that the story has the ring of authenticity because it contains awkward details that a fraudulent account would not, such as the presence of a third party and the admission of imperfect memory.<sup>210</sup> The speech is critical, constituting a very

<sup>206</sup> See Eliza Relman, *The 22 Women Who Have Accused Trump of Sexual Misconduct*, BUS. INSIDER (Sept. 26, 2018), <https://www.businessinsider.com/women-accused-trump-sexual-misconduct-list-2017-12>.

<sup>207</sup> @RealDonaldTrump, TWITTER (Sept. 21, 2018, 6:14 AM), <https://twitter.com/realdonaldtrump/status/1043126336473055235>. See also Allie Malloy, *Trump Unleashes on Kavanaugh Accuser*, CNN (Sept. 22, 2018), <https://www.cnn.com/2018/09/21/politics/donald-trump-brett-kavanaugh-accuser-tweets/index.html>.

<sup>208</sup> See Sheryl G. Stolberg & Nicholas Fandos, *Christine Blasey Ford Reaches Deal to Testify at Kavanaugh Hearing*, N.Y. TIMES (Sept. 23, 2018), <https://www.nytimes.com/2018/09/23/us/politics/brett-kavanaugh-christine-blasey-ford-testify.html>.

<sup>209</sup> Emily Tillett et al., *Christine Blasey Ford Concludes Testimony, "100 Percent" Sure Kavanaugh Assaulted Her*, CBS NEWS (Sept. 28, 2018), <https://www.cbsnews.com/live-news/brett-kavanaugh-hearing-confirmation-today-christine-blasey-ford-sexual-assault-allegations-live/>.

<sup>210</sup> See Melissa Healy, *Here's What Experts Who Study Sexual Violence Say About the Credibility of Christine Blasey Ford's Testimony*, L.A. TIMES (Sept. 28, 2018), <https://www.latimes.com/science/sciencenow/la-sci-sn-ford-testimony-credibility-memory-20180928-story.html>; Sandra Newman, *I've Studied False Rape Claims. The Accusation Against Kavanaugh Doesn't Fit the Profile*, VOX (Sept. 18, 2018),

serious attack on Kavanaugh's character and fitness as a judge, especially as he is being considered for a lifetime appointment on the nation's highest court. Her speech is courageous because she risks the wrath not only of a man more powerful than she is but also of his extremely powerful supporters, including multiple high-ranking members of Congress and the President of the United States. Nearly as soon as she went public with her story, Ford faced serious attacks on her safety and wellbeing in the form of death threats and harassment, attacks that have continued months after her testimony.<sup>211</sup> Ford nonetheless voluntarily chose to continue her speech act by testifying before Congress, exposing her to the hostility of Republican supporters of Judge Kavanaugh as well as to the judgment and scrutiny of the world at large.

As Simon writes, crime victims have a special relationship with *parrhesia*, because their speech is doubly risky: they face risk in the secondary traumatization of recounting the crime, and in the potential for abuse by "powerful members of the audience who may seek to retaliate" against her for her speech.<sup>212</sup> In this, Ford's speech is reminiscent of Anita Hill's, who testified before a hostile Senate twenty-seven years ago about sexual harassment allegations against then-judicial nominee Clarence Thomas.<sup>213</sup> Ford's speech also highlights the risky nature of sexual misconduct allegations generally, especially against powerful men. As the #MeToo movement has demonstrated, women who bring accusations of sexual assault routinely face malicious and misogynistic scrutiny by the public, the press, and social media, as well as threats to their physical safety, their families, their employment, and their property.<sup>214</sup>

#### *b. Other Examples*

Other examples of modern-day fearless speech include the outspoken teenage survivors of the Parkland school shooting, many of whom have been subjected to death threats, defamation campaigns, conspiracy theories, and the exposure of their private

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<https://www.vox.com/first-person/2018/9/18/17874504/kavanaugh-assault-allegation-christine-blasey-ford>.

<sup>211</sup> Anna North, *Christine Blasey Ford Has a Security Detail Because She Still Receives Threats*, VOX (Nov. 8, 2018),

<https://www.vox.com/2018/11/8/18076154/christine-blasey-ford-threats-kavanaugh-gofundme>.

<sup>212</sup> Simon, *Killing State*, *supra* note 144, at 1390.

<sup>213</sup> See Margaret Talbot, *On the Attack*, NEW YORKER (Oct. 8, 2018),

<https://www.newyorker.com/magazine/comment/on-the-attack>.

<sup>214</sup> See Beverly Engel, *Why Don't Victims of Sexual Harassment Come Forward Sooner?*, PSYCHOL. TODAY (Nov. 16, 2017),

<https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner>.

information in response to their protests against gun violence and political corruption.<sup>215</sup> Similarly, other political protesters attempting to speak truth to power have been harassed, vilified, and sometimes arrested for their speech, among them Black Lives Matter protesters (including Colin Kaepernick),<sup>216</sup> the Dakota Access Pipeline protesters,<sup>217</sup> and protesters against political figures such as Donald Trump<sup>218</sup> and Judge Kavanaugh.<sup>219</sup> They also include female politicians, journalists, professors, and activists who continue to speak out about abuses of power, the persistence of inequality, and the existence of misogyny in the face of overwhelming online and in-person harassment, from cultural critics targeted by GamerGate<sup>220</sup> to the academics singled out for intimidation by right-wing groups such as the Professor Watchlist.<sup>221</sup>

#### *D. Distinguishing Fearless Speech from Reckless Speech*

In the age of the Internet, virtually any speech act can draw criticism from some quarter, especially if the speaker is high-profile. This creates the possibility that a very broad range of speakers may attempt to cast themselves as engaged in *parrhesia*, pointing to the negative consequences engendered by their controversial opinions. Indeed, a key tactic of the “alt-right” is to engage in offensive and outlandish speech in the hopes of provoking violent backlash, which is then offered as proof of the speaker’s courage. This is the *modus operandi* of right-wing “provocateurs” such as Milo Yiannopoulos, who present themselves as people with ideas so dangerous they are constantly

<sup>215</sup> Chantal Da Silva, *Florida School Shooting Survivors Receiving Death Threats*, NEWSWEEK (Feb. 26, 2018), <https://www.newsweek.com/florida-school-shooting-survivors-death-threats-819484>.

<sup>216</sup> Victoria M. Massie, *The Backlash Over Colin Kaepernick Is just Americans’ Refusal to Acknowledge Racism—Again*, VOX (Oct. 16, 2016), <https://www.vox.com/identities/2016/10/13/12710860/colin-kaepernick-anthem-protest-explained>.

<sup>217</sup> See Sam Levin, *Over 70 Arrested at Standing Rock as Dakota Access Aims to Finish Pipeline*, GUARDIAN (Feb. 1, 2017), <https://www.theguardian.com/us-news/2017/feb/01/standing-rock-arrests-dakota-access-pipeline-construction>.

<sup>218</sup> See Ed Pilkington, *Almost 600 Arrested at Washington Protest Over Trump Immigration Policy*, GUARDIAN (June 28, 2018), <https://www.theguardian.com/us-news/2018/jun/28/us-immigration-protest-trump-washington-senate>.

<sup>219</sup> Marissa J. Lang, *Hundreds Arrested in Protest Against Trump’s Supreme Court Nominee*, WASH. POST (Oct. 4, 2018), [https://www.washingtonpost.com/local/dozens-arrested-in-cancel-kavanaugh-protest-against-trumps-supreme-court-nominee/2018/10/04/d07ff450-c812-11e8-b2b5-79270f9cce17\\_story.html?utm\\_term=.22c1dd2c1f34](https://www.washingtonpost.com/local/dozens-arrested-in-cancel-kavanaugh-protest-against-trumps-supreme-court-nominee/2018/10/04/d07ff450-c812-11e8-b2b5-79270f9cce17_story.html?utm_term=.22c1dd2c1f34).

<sup>220</sup> See Katherine Cross, *What ‘GamerGate’ Reveals About the Silencing of Women*, REWIRE (Sept. 9, 2014), <https://rewire.news/article/2014/09/09/gamergate-reveals-silencing-women/>.

<sup>221</sup> Christopher Mele, *Professor Watchlist Is Seen as Threat to Academic Freedom*, N.Y. TIMES (Nov. 28, 2016), <https://www.nytimes.com/2016/11/28/us/professor-watchlist-is-seen-as-threat-to-academic-freedom.html>.

being suppressed by “leftists,” the “establishment,” “mainstream media,” and the like.<sup>222</sup>

But such speakers can be distinguished from truly fearless speakers by carefully evaluating their speech in terms of sincerity and their access to power. Many self-styled provocateurs, such as Alex Jones, admit that much of what they say is a performance calculated to inflame their supporters’ prejudices, not to arrive at truth or serve the common good.<sup>223</sup> Such an attitude is fundamentally insincere, making it incompatible with *parrhesia*. As Werhan writes,

The brave and honest parrhesiast, devoted to enhancing the welfare of the polis rather than his own power and prestige, would never stoop to ingratiating himself with his audience. He would neither flatter his listeners nor appeal to their prejudices. To do so would constitute an abuse rather than an exercise of parrhēsia, because such a speaker would have focused on pleasing his audience rather than on confronting it with the truth.<sup>224</sup>

What is more, the risk in *parrhesia* depends on the relationship of the speaker to power. A powerful person who criticizes a less powerful person is not engaging in *parrhesia*. As Foucault expresses it, “[i]t is because the *parrhesiastes* must take a risk in speaking the truth that the king or tyrant generally cannot use *parrhesia*; for he risks nothing.”<sup>225</sup> A President who uses speech to attack a citizen, as Donald Trump has done repeatedly,<sup>226</sup> is not engaged in fearless speech. Rather, when powerful figures use speech to attack less powerful figures, they often engage in reckless speech, creating a substantial and unjustified risk of harm to the person they target.

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<sup>222</sup> Talib K. Greene, *Free Speech or Die?*, MEDIUM (Feb. 26, 2018), <https://medium.com/s/story/free-speech-or-die-53a206027143>.

<sup>223</sup> Joe Concha, *Alex Jones ‘Playing a Character,’ Says Lawyer*, THE HILL (Apr. 17, 2017), <https://thehill.com/homenews/media/329071-alex-jones-playing-a-character-says-lawyer>.

<sup>224</sup> Werhan, *supra* note 25, at 320–21.

<sup>225</sup> Foucault, *Discourse*, *supra* note 27, at 4.

<sup>226</sup> Paul Blumenthal, *Are Trump’s Belligerent Tweets Against Critics Also an Attempt At Censorship?*, HUFFINGTON POST (June 27, 2018), [https://www.huffingtonpost.com/entry/donald-trump-twitter-harassment-first-amendment\\_us\\_5b32aa2ee4b0b745f1789352](https://www.huffingtonpost.com/entry/donald-trump-twitter-harassment-first-amendment_us_5b32aa2ee4b0b745f1789352).

Finally, *parrhesia* implies a certain level of competence and knowledge. The positive form of *parrhesia* can be contrasted with its pejorative sense of *parrhesia* (“*negative parrhesia*”) which “consists in saying any or everything one has in mind without qualification.”<sup>227</sup> Foucault elaborates,

This pejorative sense occurs in Plato, for example, as a characterization of the bad democratic constitution where everyone has the right to address himself to his fellow citizens and to tell them anything—even the most stupid or dangerous things for the city.<sup>228</sup>

Likewise, those with specific criticisms could refuse to risk frank speech. In democracy, “negative *parrhesia*” might have taken the form of “ignorant outspokenness” by those poorly informed to guide the polity.<sup>229</sup>

### III. ENCOURAGING A FEARLESS SPEECH CULTURE

To evolve from a free speech culture to a fearless speech culture, First Amendment theory and practice should be reoriented around fearless speech. Speech that is sincere, critical, and brave should set the standard by which First Amendment protection is measured. The more fearless the speech, the more protection and encouragement it should receive, both by state and private actors; the more reckless the speech, the less protection and encouragement it should receive.

#### *A. Fearless Speech v. Expansionist Speech*

The reorientation around fearless speech should be distinguished from what could be called the “expansionist” approach to the First Amendment, which has been gaining popularity over the last several years.<sup>230</sup> This approach has been primarily championed by self-styled civil libertarians of the Internet age, but more recently has also been taken up by

<sup>227</sup> Foucault, *Discourse*, *supra* note 27, at 3.

<sup>228</sup> *Id.*

<sup>229</sup> Simon, *Killing State*, *supra* note 144, at 1394.

<sup>230</sup> See Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1615–17 (2015).

conservatives who complain that free speech is under attack at universities and online spaces.<sup>231</sup>

As discussed briefly above, the First Amendment on its face provides a narrow and negative right of free speech: “Congress shall make no law ‘abridging the freedom of speech.’”<sup>232</sup> Literally interpreted, this only prohibits the creation of federal laws—and after incorporation, state laws—that infringe upon the freedom of speech. The Supreme Court has further clarified that the First Amendment does not apply equally to all speech and does not apply to some speech at all.<sup>233</sup>

The expansionist approach attempts to expand the First Amendment in three ways: who is bound by it, how they are bound by it, and what counts as speech. Expansionists call for the First Amendment obligations to apply not only to state, but also private actors; for First Amendment obligations to include not just refraining from infringement of speech but to affirmatively providing opportunities for speech; and for a definition of speech that includes things like money, computer code, and the public display of firearms.<sup>234</sup>

Thanks to the expansionist agenda, it is becoming increasingly commonplace for private universities, social media platforms, and other non-state actors to be accused of “censorship” when they choose not to provide platforms to certain speakers or to exclude certain kinds of speech.<sup>235</sup> Not only does this approach risk expanding First Amendment doctrine beyond all intelligible limits, but it is also clear that many proponents are motivated by a desire to reinforce, rather than challenge, the existing speech hierarchy.

The fearless speech approach, by contrast, is not expansionist. It does not attempt to collapse the distinction between free speech in the doctrinal sense and free speech in the cultural sense, although it recognizes the two inform each other. What it attempts to do is to provide a guide for how to prioritize free speech concerns. Free speech doctrine is made, not found.

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<sup>231</sup> See Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html>.

<sup>232</sup> U.S. CONST. amend. I.

<sup>233</sup> See Schauer, *Boundaries of the First Amendment*, *supra* note 79.

<sup>234</sup> See ALAN K. CHEN ET AL., *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* (2017).

<sup>235</sup> See, e.g., Jason Abbruzzese, *Trump Echoes Conservative Claims That Social Media Companies Censor Conservatives*, NBC NEWS (Aug. 18, 2018), <https://www.nbcnews.com/tech/tech-news/trump-echoes-conservative-claims-social-media-companies-censor-conservatives-n901876>; Jeffrey Adam Sachs, *There Is No Campus Free Speech Crisis: A Close Look at the Evidence*, NISKANEN CTR. (Apr. 27, 2018), <https://niskanencenter.org/blog/there-is-no-campus-free-speech-crisis-a-close-look-at-the-evidence/>.

Free speech rights are recognized, defended, and championed through the actions and attention of multiple actors, including governments, courts, litigants, the general public, lobbyists, the media, and civil liberties organizations. How any of these actors decide to allocate their attention and resources has a great impact on free speech theory and practice.

Given that state actors are directly restrained by the First Amendment, their primary obligation in a fearless speech culture is negative: to avoid punishing or censoring fearless speech. As private actors are not restrained by the First Amendment, their primary obligation in a fearless speech culture is positive: to encourage fearless speech.

### *B. State Action*

Fearless speech cannot flourish if it is subjected to official government suppression. Accordingly, defending acts of fearless speech from state censorship, including indirect censorship, should be the top priority of free speech defenders.

In concrete terms, this means that speakers who engage sincerely, critically, and courageously with those more powerful than themselves should be given as much breathing room as possible without jeopardizing public welfare. That means, for example, that protests mobilized against powerful institutions, such as law enforcement, university administrations, the prison system, and government actors, should be vigorously defended against government suppression. Even indirect attempts at suppression of this speech, such as President Trump's repeated calls for punishment of the media and retaliation against figures such as Colin Kaepernick,<sup>236</sup> should be denounced and challenged.

### *C. Private Action*

Though private actors have no First Amendment obligations, they should take their role in setting norms and practices of free speech seriously. Private actors can best serve a fearless speech culture by devoting their platforms to highlighting fearless speech and by exercising their own free speech rights to ignore or quarantine low-quality, false, or otherwise reckless speech. Internet platforms have a particularly influential role to play in free speech culture, as they exert arguably greater power over free speech norms and practices than many government entities.

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<sup>236</sup> Travis Waldron, *Does Colin Kaepernick Have a First Amendment Case Against Donald Trump?*, HUFFINGTON POST (June 5, 2018), [https://www.huffingtonpost.com/entry/kaepernick-trump-first-amendment-nfl-national-anthem\\_us\\_5b15b680e4b093ac33a0f94c](https://www.huffingtonpost.com/entry/kaepernick-trump-first-amendment-nfl-national-anthem_us_5b15b680e4b093ac33a0f94c).

### 1. Online Platforms and Fearless Speech

Tech platforms, as non-state actors not restrained by current First Amendment doctrine, have a unique opportunity to develop and model the standard of fearless speech. They can encourage fearless speech by boldly exercising their right to moderate or prohibit reckless speech, especially violent or false content.

Unfortunately, tech platforms have for decades instead encouraged reckless speech. Today's Internet is awash in threats, harassment, misinformation, conspiracy theories, doxing, and "revenge porn." These forms of harmful expression inflict serious and often irremediable injury on their targets, including the chilling of their speech. A 2016 report by Data & Society Research Institute found that 47% of Americans had experienced online harassment or abuse,<sup>237</sup> and that 27% self-censor to avoid potential abuse.<sup>238</sup>

These consequences are not evenly distributed across society. As Alice Marwick writes,

Men and women are equally likely to face harassment online, but women experience a wider variety of online abuse, including more serious violations. Young people also experience such behavior far more than older adults. Thus, young women have it the worst; they're much more susceptible to doxing, sexual harassment, cyberstalking, and in-person attacks than men or older women. Lesbian, gay, and bisexual people are also more likely to experience harassment.<sup>239</sup>

The more frequent and more serious forms of online abuse that women experience help explain why women self-censor at greater rates than men. The Data & Society Research Institute study found that 41% of women in the 15–29 age group

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<sup>237</sup> See Amanda Lenhart et al., *Online Harassment, Digital Abuse, and Cyberstalking in America*, DATA & SOC'Y RES. INST. 3 (Nov. 21, 2016), [https://www.datasociety.net/pubs/oh/Online\\_Harassment\\_2016.pdf](https://www.datasociety.net/pubs/oh/Online_Harassment_2016.pdf).

<sup>238</sup> *Id.* at 4.

<sup>239</sup> Alice Marwick, *A New Study Suggests Online Harassment Is Pressuring Women and Minorities To Self-Censor*, QUARTZ (Nov. 24, 2016), <https://qz.com/844319/a-new-study-suggests-online-harassment-is-pressuring-women-and-minorities-to-self-censor/>.

self-censor online, as compared to 33% of men in that same age group.<sup>240</sup> As Marwick writes, social media sites “function as hosts for public conversations on a huge variety of social issues. If women, people of color, and LGB internet users are shying away from contributing because of well-founded fears of retaliation, their voices will be missing from this important civic sphere.”<sup>241</sup>

For many years, online platforms have done very little to respond to harassing and abusive content. Tech companies have justified their laissez-faire approach by invoking First Amendment rhetoric: that the best response to bad speech is more speech and that censorship is the greatest evil to be avoided.<sup>242</sup> Kate Klonick has explained that “a common theme” exists in the evolution of the three major technology platforms—YouTube, Facebook, and Twitter:

American lawyers trained and acculturated in American free speech norms and First Amendment law oversaw the development of company content-moderation policy. Though they might not have “directly imported First Amendment doctrine,” the normative background in free speech had a direct impact on how they structured their policies.<sup>243</sup>

This implicit reliance on the First Amendment has long been praised by civil libertarians, who view the replication of American free speech norms across the global Internet as unquestionably positive. But given the elitist and anti-democratic tendencies of current First Amendment doctrine and practice, the fact that online platforms operate in the shadow of the First Amendment should instead be cause for grave concern.

The Internet has contributed significantly to the degradation of free speech. The immediacy and anonymity of online communication removes many of the incentives for refraining from abusive and harmful expression as well as making it harder to investigate such expression.<sup>244</sup> The net result

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<sup>240</sup> Lenhart et al., *supra* note 237, at 4.

<sup>241</sup> Marwick, *supra* note 239.

<sup>242</sup> See FRANKS, *supra* note 33.

<sup>243</sup> Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1621 (2018).

<sup>244</sup> See Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 255–56 (2011).

has been to privilege the speech of white men over all others online as well as offline.<sup>245</sup> By building their approach to free speech on the First Amendment, online platforms have replicated and intensified the limitations of American free speech theory and practice rather than transcending them.

*a. Turning the Tide*

Over the last few years, tech industry leaders have finally begun to take some of the issues relating to online abuse—and their impact on the free speech of women, minorities, and other marginalized groups—seriously. Tech companies have developed tools and policies to address revenge porn, racist message boards, mugshot sites, fake news, and terrorist propaganda.<sup>246</sup> Several major companies have taken the step of banning high-profile speakers who violate their terms and services.<sup>247</sup> While expansionist critics complain that such actions violate the principle if not the law of free speech,<sup>248</sup> these online platforms are in fact exercising their own free speech rights in ways that help encourage a culture of fearless speech. The attempts to curb abuse on online platforms have not only reduced harassment and hateful speech but have fostered more speech by more diverse groups.<sup>249</sup>

Beginning in July 2018, several major online platforms began removing content produced by Alex Jones, a high-profile, far-right radio show host and creator of the conspiracy theorist website Infowars.<sup>250</sup> Jones is notorious for claiming, among other things, that the Sandy Hook shooting did not take place<sup>251</sup> and for promoting the “PizzaGate” conspiracy theory.<sup>252</sup> In July,

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<sup>245</sup> See FRANKS, *supra* note 33.

<sup>246</sup> Mary Anne Franks, “Revenge Porn” Reform: A View from the Front Lines, 69 FLA. L. REV. 1251, 1270–74 (2017) [hereinafter Franks, *Revenge Porn Reform*].

<sup>247</sup> Alex Hern, *Facebook, Apple, YouTube and Spotify Ban Infowars’ Alex Jones*, GUARDIAN (Aug. 6, 2018, 6:47 AM), <https://www.theguardian.com/technology/2018/aug/06/apple-removes-podcasts-infowars-alex-jones>.

<sup>248</sup> Jessica Anderson et al., *Onlinecensorship.org Launches Inaugural Report*, EFF (Mar. 31, 2016), <https://www.eff.org/deeplinks/2016/03/onlinecensorshiporg-launches-inaugural-report>.

<sup>249</sup> Jon Penney, *Can Cyber Harassment Laws Encourage Online Speech?*, MEDIUM (Aug. 15, 2017), <https://medium.com/berkman-klein-center/can-cyber-harassment-laws-encourage-online-speech-4e1ae884bfba>.

<sup>250</sup> Sarah Wells, *Here Are the Platforms that Have Banned Infowars So Far*, TECHCRUNCH (Aug. 8, 2018), <https://techcrunch.com/2018/08/08/all-the-platforms-that-have-banned-infowars/>.

<sup>251</sup> Elizabeth Williamson, *Alex Jones, Pursued Over Infowars Falsehoods, Faces a Legal Crossroads*, N.Y. TIMES (July 31, 2018), <https://www.nytimes.com/2018/07/31/us/politics/alex-jones-defamation-suit-sandy-hook.html>.

<sup>252</sup> Pizzagate was a viral conspiracy theory that began in the fall of 2016, after the personal email account of Hillary Clinton’s campaign manager, John Podesta, was hacked and many of his emails were published by WikiLeaks. Some users on

YouTube removed several of Jones' videos for violating the company's policies, as well as demonetizing his YouTube channel.<sup>253</sup> Following YouTube's action, Facebook removed several of Jones's videos and issued a 30-day ban preventing Jones from posting on his personal Facebook page.<sup>254</sup> Spotify, Stitcher, and Apple all removed some of Jones's podcasts soon after.<sup>255</sup> By the first week of August, Pinterest, LinkedIn, Mailchimp, Vimeo, and even YouPorn had deleted content by or relating to Jones.<sup>256</sup> For several weeks, the only major online platform not to take action against Jones was Twitter.<sup>257</sup> On September 6, 2018, Twitter announced that it was permanently suspending Jones and the Infowars account.<sup>258</sup>

The mass banning of Alex Jones is only one example of online platforms exercising their rights to remove or limit reckless speech. On February 24, 2015, Reddit, the self-described "front page of the Internet," became the first major online platform to ban the unauthorized disclosure of intimate images (often referred to as "revenge porn").<sup>259</sup> The announcement came as a surprise to many, as only months before, Reddit had been one of the primary circulation points of nude photos hacked from the private accounts of over a hundred celebrities.<sup>260</sup> Around the same time, Reddit began to "quarantine" some of the site's most controversial subreddits, or communities and to ban others outright.<sup>261</sup> When a subreddit is banned, it is deleted altogether from the site; when a subreddit is quarantined it is still accessible, but it is flagged with a warning prompt and cannot

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message boards such as 4chan and Reddit claimed that mentions of "pizza" in the emails were coded references to child sex trafficking. Proponents of the theory accused several high-ranking Democratic officials of involvement with a child sex ring run out of a pizzeria in Washington, D.C. called Comet Ping Pong. In December 2016, a North Carolina man armed with a rifle traveled to the restaurant to investigate this conspiracy. See Andrew Breiner, *Pizzagate, Explained: Everything You Want To Know About the Comet Ping Pong Pizzeria Conspiracy Theory but Are Too Afraid to Search for on Reddit*, SALON (Dec. 10, 2016, 9:00 PM), <https://www.salon.com/2016/12/10/pizzagate-explained-everything-you-want-to-know-about-the-comet-ping-pong-pizzeria-conspiracy-theory-but-are-too-afraid-to-search-for-on-reddit/>.

<sup>253</sup> See Wells, *supra* note 250.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> Kate Conger & Jack Nicas, *Twitter Bars Alex Jones and Infowars, Citing Harassing Messages*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/technology/twitter-alex-jones-infowars.html>.

<sup>258</sup> *Id.*

<sup>259</sup> See Franks, *Revenge Porn Reform*, *supra* note 246, at 1270–71.

<sup>260</sup> *Id.*

<sup>261</sup> Steven Asarch, *Reddit Quarantines. A New Wave of Subreddits, Including CringeAnarchy and WatchPeopleDie*, NEWSWEEK (Sept. 28, 2018), <https://www.newsweek.com/reddit-quarantine-subs-toxic-controversial-moderators-1144663>.

host ads.<sup>262</sup> Among the subreddits that Reddit has banned are r/fatpeoplehate, which encouraged mockery of overweight individuals, r/CoonTown, a subreddit dedicated to racial invective<sup>263</sup>; and r/GreatAwakening, which is devoted to the rightwing conspiracy theory QAnon.<sup>264</sup>

Other examples include the web hosting and security services that dropped the white supremacist website *The Daily Stormer* after its creator celebrated the murder of Heather Heyer at the 2017 Unite the Right rally in Charlottesville, Virginia, and the decision of Airbnb, Uber, and Lyft to deny service to the white supremacist attendees of that rally.<sup>265</sup>

Such measures have drawn intense criticism from civil libertarians and, more recently, conservatives who claim that they constitute leftwing censorship. According to Jillian York, the director for International Freedom of Expression at the Electronic Frontier Foundation (EFF), Reddit “has for years proclaimed itself a place for free speech, which is one of my criteria for when a platform is ‘too big to censor.’”<sup>266</sup> The EFF is a co-founder of a project called Onlinecensorship.org, which tracks the content moderation policies of major social media companies.<sup>267</sup> According to York, while online platforms may “not consider their policies to constitute censorship,” “[w]e challenge this assertion, and examine how their policies (and their enforcement) may have a chilling effect on freedom of expression.”<sup>268</sup> ACLU lawyer Chris Hansen expressed a similar view in a 2017 interview:

the greater censorship dangers today involve attempts by nongovernmental entities—such as Facebook, Twitter, Google, and other internet companies—to

<sup>262</sup> *Id.*

<sup>263</sup> Adi Robertson, *Reddit Bans 'Fat People Hate' and Other Subreddits Under New Harassment Rules*, VERGE (June 10, 2015), <https://www.theverge.com/2015/6/10/8761763/reddit-harassment-ban-fat-people-hate-subreddit>.

<sup>264</sup> Adi Robertson, *Reddit Has Banned the QAnon Conspiracy Subreddit r/GreatAwakening*, VERGE (Sept. 12, 2018), <https://www.theverge.com/2018/9/12/17851938/reddit-qanon-ban-conspiracy-subreddit-greatawakening>.

<sup>265</sup> Jason Silverstein, *Airbnb, Lyft, Uber Allowing Service To Be Denied to Unite the Right Marchers*, CBS NEWS (Aug. 10, 2018), <https://www.cbsnews.com/news/unite-the-right-dc-uber-airbnb-lyft-allowing-service-to-be-denied-to-marchers/>.

<sup>266</sup> Adi Robertson, *Welcome to Voat: Reddit Killer, Troll Haven, and the Strange Face of Internet Free Speech*, VERGE (July 10, 2015, 9:11 AM), <https://www.theverge.com/2015/7/10/8924415/voat-reddit-competitor-free-speech>.

<sup>267</sup> See Anderson et al., *supra* note 248.

<sup>268</sup> *Id.*

decide what speech is appropriate online, and those efforts largely are directed at hate speech. Facebook and other internet companies aren't bound by the First Amendment, which only applies to the government. As the government increasingly pressures companies to remove online content, we're creating a censorship system that applies to an enormous amount of communications that don't enjoy constitutional protections.<sup>269</sup>

b. "Strategic Silence"

But what expansionist critics ignore is that the belated and imperfect efforts of online platforms to counter abuse are actually creating the space for more, not less, speech. As we have seen in the offline context, indulging the reckless speech of the powerful inevitably results in the silencing of the vulnerable.<sup>270</sup> Even if such indulgence by state actors can be justified by the First Amendment, private actors' lack of First Amendment obligations should leave them free to experiment with other approaches to free speech.

The Internet has demonstrated perhaps more clearly than any other form of communication how a laissez-faire approach to speech fails to serve the values of autonomy, truth, or democracy. More and more online platforms are confronting the reality that the best answer to bad speech is not, in fact, more speech, leading them to undertake the kind of measures that Joan Donovan and Danah Boyd have called "strategic silence."<sup>271</sup>

Donovan and Boyd explain that strategic silence existed long before the Internet. They point to the work of Felix Harcourt, who describes how the 1920s Ku Klux Klan relied on media coverage—even or especially negative media coverage—to amplify their recruitment efforts and to gain influence over public opinion.

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<sup>269</sup> Noa Yachot, *The 'Magna Carta' of Cyberspace Turns 20: An Interview with the ACLU Lawyer Who Helped Save the Internet*, ACLU (June 23, 2017), <https://www.aclu.org/blog/free-speech/internet-speech/magna-carta-cyberspace-turns-20-interview-aclu-lawyer-who-helped>.

<sup>270</sup> Delgado & Yun, *supra* note 36, at 1296.

<sup>271</sup> Joan Donovan & Danah Boyd, *The Case for Quarantining Extremist Ideas*, GUARDIAN (June 1, 2018), <https://www.theguardian.com/commentisfree/2018/jun/01/extremist-ideas-media-coverage-kkk>.

Knowing they could bait coverage with violence, white vigilante groups of the 1960s staged cross burnings and engaged in high-profile murders and church bombings. Civil rights protesters countered white violence with black stillness, especially during lunch counter sit-ins. Journalists and editors had to make moral choices of which voices to privilege, and they chose those of peace and justice, championing stories of black resilience and shutting out white extremism. This was strategic silence in action, and it saved lives.<sup>272</sup>

As Donovan and Boyd write, “[a]ll Americans have the right to speak their minds, but not every person deserves to have their opinions amplified, particularly when their goals are to sow violence, hatred and chaos.”<sup>273</sup> Private actors, especially highly influential private actors like online platforms, should embrace their freedom to amplify fearless speech that challenges power over reckless speech that aims to silence and injure the vulnerable.

Contrary to First Amendment orthodoxy, suppressing reckless, inflammatory, and violent speech does not make it grow stronger. Since Alex Jones was banned from multiple online platforms, his influence has weakened.<sup>274</sup> The same is true for rightwing provocateur Milo Yiannopoulos, who was permanently suspended from Twitter in 2016,<sup>275</sup> and for white nationalist leader Richard Spencer, whose website was removed by web hosting service GoDaddy in 2018.<sup>276</sup> All three have watched their followers dwindle and their sources of financial support dry up: “once you remove the biggest megaphones from

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<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> Jack Nicas, *Alex Jones Said Bans Would Strengthen Him. He Was Wrong*, N.Y. TIMES (Sept. 4, 2018), <https://www.nytimes.com/2018/09/04/technology/alex-jones-infowars-bans-traffic.html>.

<sup>275</sup> Rachel Kraus, *Milo Yiannopoulos' Facebook Rant Shows That De-Platforming Actually Works*, MASHABLE (Aug. 20, 2018), <https://mashable.com/article/milo-yiannopoulos-deplatforming-alex-jones/#GcJBgr8pwOq1>.

<sup>276</sup> Casey Michel, *White Supremacist Richard Spencer Is on a Very Bad Run*, THINK PROGRESS (May 7, 2018), <https://thinkprogress.org/richard-spencer-turns-to-other-white-supremacists-for-help-4d9393e9cc81/>.

bad actors, their power diminishes and their ability to attract larger audiences and sow disinformation decreases.”<sup>277</sup>

### CONCLUSION

Jonathan Simon laments that “[f]reedom of speech plays a critical role in contemporary democracy, but fearless speech does not.”<sup>278</sup> This does not have to be the case. We can reorient our free speech culture by placing fearless speech at the heart of First Amendment protection. We can shift our resources and attention away from the reckless, cowardly speech of the powerful toward the speech of the sincere, critical, and brave. In doing so, we will come much closer to achieving the aspiration of free speech for “we the people” instead of free speech for the privileged few.

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<sup>277</sup> Laura Hudson, *Twitter Is Wrong: Facts Are Not Enough to Combat Alex Jones*, THE VERGE (Aug. 10, 2018, 1:26 PM), <https://www.theverge.com/2018/8/10/17675232/twitter-alex-jones-jack-dorsey-free-speech>.

<sup>278</sup> Simon, *Killing State*, *supra* note 144, at 1400.