

RECKLESS ASSOCIATIONS

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ABSTRACT

This Article provides a theoretical foundation and practical guide for a new form of liability that has proven necessary in the Internet era: the tort of Reckless Association. This tort would hold de facto leaders of informal networks responsible when radicalized members of the network cause physical harm to others. Recent prosecutions of the leaders of the Oath Keepers and other white supremacists who organized the Charlottesville protest, and rumblings of a similar prosecution against Donald Trump relating to the January 6th U.S. Capitol attack, demonstrate a public appetite for this form of legal responsibility. To date, these prosecutions proceed on theories of incitement or conspiracy, but those doctrines do not deter cultural leaders like Trump, whose media habits have created a drumbeat for increasingly paranoid thinking and action while also studiously avoiding making discrete statements that fit the heightened requirements of incitement.

Rather than forcing these cases into old vessels, courts should recognize a new form of secondary liability for de facto leaders whose conduct within a social network has influenced the decision of network members to commit violence against individuals outside the network. This form of liability is now necessary, as the Internet era has increased the risk that associations will devolve into dysfunction and paranoia. Moreover, this form of liability was not practical until recently because the evidence necessary to prove causation and mental state — a network analysis that relies very little on the content of speech — was not previously available. Finally, while covered by the First Amendment, this type of liability should pass constitutional scrutiny because it is narrowly tailored to foreseeable physical harm.

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I. INTRODUCTION

Social media platforms enable like-minded individuals to find each other and communicate freely about shared interests. This networking is the reason social media exists, and it works well for many purposes — entertainment, shopping, and general social interaction.¹ But it has come at a cost. Individuals who share preexisting political beliefs can become radicalized and emboldened.² Predictably, some of them will commit extreme and harmful acts. There is no better symbol of this problem than the crowd who stormed the U.S. Capitol on January 6th,

1. See *infra* notes 109–16 and accompanying text.

2. See *infra* notes 117–31 and accompanying text.

2021, after years of social network communications had left them angry or deluded about the integrity of U.S. institutions and elections.³

Legal scholars and policymakers are exploring new types of law that might mitigate these risks without impeding the beneficial qualities of social media, but so far the interest in new forms of regulation has focused primarily on platforms.⁴ This Article takes a different tack. We discuss how legal liability can be responsibly extended from radicalized individuals who physically assault officers, counterprotesters, and bystanders, to the central nodes of their social networks. These individuals, such as former President Donald Trump and the less well-known influencers of fringe groups like the Proud Boys, Antifa, the Oath Keepers, and QAnon, are the actors within a complex communications ecosystem with the greatest moral responsibility and practical ability to deter violence.⁵ They are the most trusted and influential nodes in radicalized networks and are, therefore, the best subjects of legal deterrence.⁶

3. See Dan Barry, Mike McIntire & Matthew Rosenberg, 'Our President Wants Us Here': *The Mob That Stormed the Capitol*, N.Y. TIMES (Nov. 10, 2021), <https://www.nytimes.com/2021/01/09/us/capitol-rioters.html> [<https://perma.cc/5FPL-5X8M>]. The roots of this crisis persist, moreover, as the "Big Lie" (the claim that Donald Trump would have won the election but for election fraud) was embraced, in varying degrees, by nearly half of Republican nominees during a primary season that took place concurrently with the Congressional January 6th Commission hearings. See Nathaniel Rakich & Kaleigh Rogers, *At Least 120 Republican Nominees Deny the Results of the 2020 Election*, FIVETHIRTYEIGHT (July 18, 2022, 6:00 A.M.), <https://fivethirtyeight.com/features/at-least-120-republicans-who-deny-the-2020-election-results-will-be-on-the-ballot-in-november/> [<https://perma.cc/SN4F-C69Q>].

4. See Chris Riley & David Morar, *Legislative Efforts and Policy Frameworks Within the Section 230 Debate*, BROOKINGS TECHSTREAM (Sept. 21, 2021), <https://www.brookings.edu/techstream/legislative-efforts-and-policy-frameworks-within-the-section-230-debate> [<https://perma.cc/Q79B-ZPLL>] (summarizing proposals by scholars and lawmakers to suspend Section 230 immunity for platforms that take or fail to take certain actions related to content moderation, artificial intelligence, automation, or transparency). One exception is work by Justin Hyland that proposes extending conspiracy liability to individuals who actively moderate an online forum. See Justin Hyland, *Conspiracy Speech: Reimagining the First Amendment in the Age of QAnon*, 44 HASTINGS COMM. & ENT. L.J. 1, 32–34 (2021).

5. Most of the examples we use in this Article concern far-right groups in part because the facts leading up to attack are better documented in the news media and court cases and in part because political violence is more prevalent among far-right and Islamist extremist groups than it is among far-left ideological groups. See Katarzyna Jasko, Gary LaFree, James Piazza & Michael H. Becker, *A Comparison of Political Violence by Left-Wing, Right-Wing, and Islamist Extremists in the United States and the World*, PNAS, July 18, 2022, at 1, 4.

6. By focusing on potential liability for speakers and associations, notwithstanding the First Amendment constraints on such liability, we are returning to a body of scholarship that emerged in the early days of social media that attempted to use law to deter dangerously influential online speech. See generally, e.g., Lyrisa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH. L. REV. 147, 148 (2011) (discussing the law's inability to reach speech that is "offensive but 'harmless' in its original context" but is spread through social media to other contexts where violent reactions occur); Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 VA. J.L. & TECH. 5, 42–45 (2002) (recommending a form of liability for hate speech posted to the Internet that is likely to prompt violence); John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement*

While leaders of radicalized networks have been the subject of civil lawsuits and criminal prosecutions,⁷ there has been surprisingly little attention paid to the deep legal and policy considerations related to holding individuals responsible for crimes carried out by other members of their groups. To be sure, mainstream media has accurately portrayed President Trump, Alex Jones, “Q,” and others as recklessly indifferent to the cumulative impact of their online speech,⁸ but those observations have not carried over into a policy conversation about expanding or revising the law. Theories of legal responsibility being tried in court — namely conspiracy and incitement — are likely to be difficult and will often fail when applied to group leaders who were not giving explicit orders in real time or themselves committing crimes.⁹

As a result, leaders of radicalized groups can skirt liability by restricting their words and deeds so they can deny sharing a specific criminal end goal. The central nodes in radicalized networks can avoid doing the “dirty work” — attacking Capitol Police officers,¹⁰ or intentionally driving a car into a group of counterprotesters¹¹ — while fostering communication environments that contributed to those attacks. Worse, leaders are in the best position to shield themselves in this way. The de facto leaders of radicalized groups are able to avoid legal risks even though the real-world dangers that their persistent media practices

Standard, 51 CATH. U. L. REV. 425, 428 (2002) (proposing a revision of the imminence requirement in incitement law to fit Internet communications). These authors use incitement law as the vehicle. While our proposal differs, we agree with these scholars that the stakes and risks of Internet speech differ from the traditional speech harms that are capable of being vindicated by narrow rules of defamation and incitement.

7. See, e.g., Neil MacFarquhar, *Jury Finds Rally Organizers Responsible for Charlottesville Violence*, N.Y. TIMES (Nov. 23, 2021), <https://www.nytimes.com/2021/11/23/us/charlottesville-rally-verdict.html> [<https://perma.cc/MB8V-Q8TH>] (describing a jury award in civil case *Sines v. Kessler*, 324 F. Supp. 3d 765 (W.D. Va. 2018), as well as the outcomes of criminal prosecutions). Based on the pleadings, it is not obvious that these outcomes are compatible with established First Amendment precedent concerning theories of incitement. See discussion *infra* Section III.D.

8. Again, the commentary tends to quickly move from the culpability of these individuals to the culpability of the platforms they use. See, e.g., Adrienne LaFrance, *The Most Powerful Publishers in the World Don’t Give a Damn*, ATLANTIC (Aug. 8, 2018), <https://www.theatlantic.com/technology/archive/2018/08/the-most-powerful-publishers-in-the-world-dont-give-a-damn/567095> [<https://perma.cc/U5DC-7MMX>]; Kevin Roose, *What Is QAnon, the Viral Pro-Trump Conspiracy Theory?*, N.Y. TIMES (Sept. 3, 2021), <https://www.nytimes.com/article/what-is-qanon.html> [<https://perma.cc/QZ5K-9JL8>].

9. See discussion of the mismatch between incitement and conspiracy elements and the problems of radicalized networks *infra* Section III.D.

10. Tom Dreisbach, *How Trump’s ‘Will Be Wild!’ Tweet Drew Rioters to the Capitol on Jan. 6*, NPR (July 13, 2022), <https://www.npr.org/2022/07/13/1111341161/how-trumps-will-be-wild-tweet-drew-rioters-to-the-capitol-on-jan-6> [<https://perma.cc/3HCG-J5ZQ>].

11. Paul Duggan & Justin Jouvenal, *Neo-Nazi Sympathizer Pleads Guilty to Federal Hate Crimes for Plowing Car into Protestors at Charlottesville Rally*, WASH. POST (Apr. 1, 2019), https://www.washingtonpost.com/local/public-safety/neo-nazi-sympathizer-pleads-guilty-to-federal-hate-crimes-for-plowing-car-into-crowd-of-protesters-at-unite-the-right-rally-in-charlottesville/2019/03/27/2b947c32-50ab-11e9-8d28-f5149e5a2fda_story.html [<https://perma.cc/K6G7-NCQR>].

created may have been obvious to them. They observe members of their unofficial associations sink slowly into irreversible paranoia. While true believers go to jail for actions taken in the real world, the self-serving leaders of their movements can guard themselves with plausible deniability.¹²

Thus, there is good reason to believe that the current tort system underdeters behavior that poses unjustified risks to society. We offer a remedy — a new tort — that imposes secondary liability on individuals who assume a position of influence within a radicalized network that recklessly causes network members to physically harm others.

To illustrate: Alex Jones could be held civilly liable for the physical harm caused by the shooting at Comet Ping Pong pizzeria¹³ if the victim, through the discovery of Twitter, Facebook, and other social networking data, could show that Jones was among the most influential nodes in the shooter's network that persistently trafficked in "Pizzagate" pedophile conspiracy theories.¹⁴ Jones could exercise a defense based on lack of sufficient mental state (reckless indifference) if he could show even a modest attempt to correct the record or dampen the potential hostility before the incident — a defense we believe he would not actually be able to muster.¹⁵

This form of liability we call Reckless Association is simultaneously modern and traditional. It is modern because it uses forms of evidence like communications metadata, network analyses, and machine learning that are a product of the new information age. These forms of evidence will be critical for a plaintiff who must prove that a defendant caused an attack to occur and was sufficiently aware of the risk. But Reckless Association is also traditional because it is grounded in political theories that balance duties and liberties across members of society and go no further than necessary to reduce unjustified risks.¹⁶

12. See Clay Calvert, *First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer*, 51 CONN. L. REV. 117, 139–43 (2019) (describing the factors that courts use to analyze the intent element and the difficulty of proving intent in a case brought against Donald Trump).

13. See Matthew Haag & Maya Salam, *Gunman in 'Pizzagate' Shooting Is Sentenced to 4 Years in Prison*, N.Y. TIMES (June 22, 2017), <https://www.nytimes.com/2017/06/22/us/pizzagate-attack-sentence.html> [<https://perma.cc/3Q36-KFV3>].

14. See James Doubek, *Conspiracy Theorist Alex Jones Apologizes for Promoting 'Pizzagate'*, NPR (Mar. 26, 2017, 4:49 A.M.), <https://www.npr.org/sections/thetwo-way/2017/03/26/521545788/conspiracy-theorist-alex-jones-apologizes-for-promoting-pizzagate> [<https://perma.cc/P2PW-6WZB>].

15. See *infra* Section V.C.

16. That is, traditional tort principles avoid overdetering activities and innovations. The negligence standard is preferred over a strict liability rule, in most contexts, because it induces actors to take optimal precautions without as much reduction in activity levels. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 66–70 (1987).

Scholars and policymakers are aware of the adverse effects of radicalized online networks.¹⁷ But policy proposals are often directed at social media companies, rather than network leaders, on the theory that platforms amplify or fail to remove radical content (from a progressive perspective) or exacerbate polarization by engaging in biased content moderation (from a conservative perspective).¹⁸ If policymakers are ready to blame Facebook and Twitter for this fiasco, the de facto leaders of radicalized, violent groups are *more* blameworthy by having better insight into the customs, beliefs, and motivations of their communities and actively encouraging a grievance mindset. And yet, there has not been a serious effort to apply liability to these leaders unless their posts and offline conduct satisfy the requirements for incitement, conspiracy, defamation, or sedition.

We suspect this omission results from tacit assumptions and misconceptions about the First Amendment. The implicit logic of contemporary debate is that courts cannot reach the central nodes of a radicalized network without causing a chilling effect that would inhibit speech and free association. While this is true in one sense — liability may very well cause individuals to avoid becoming authority figures in groups that aggressively traffic in conspiracy theories and radicalizing rhetoric — if liability is appropriately constrained, it should meet the requirements of constitutional scrutiny for the same reasons that narrow versions of defamation and incitement law do.¹⁹ Moreover, to the extent

17. See, e.g., Ghayda Hassan et al., *Exposure to Extremist Online Content Could Lead to Violent Radicalization: A Systematic Review of Empirical Evidence*, 12 INT'L J. DEV. SCI. 71, 72, 84 (2018).

18. See Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303, 307–09 (2021) (pointing out that political partisans have contradictory goals when they agree on reforms to platform liability rules). Compare Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 418–23 (2017) (recommending Section 230 reform in order to incentivize greater moderation of content), with Online Freedom and Viewpoint Diversity Act, S. 4534, 116th Cong. (2020), and Stop the Censorship Act of 2020, H.R. 7808, 116th Cong. (2020) (discouraging content moderation). Internet law scholars have explained that politicians have contradictory goals even when they find superficial common ground in the desire to regulate tech platforms. See, e.g., Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 98–99 (2021); Daphne Keller, *Amplification and Its Discontents: Why Regulating the Reach of Online Content Is Hard*, 1 J. FREE SPEECH L. 227, 233–36 (2021) (describing three different models of anti-“amplification” legislation that lead to very different results).

19. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 285–88 (1964) (permitting public figures to bring defamation claims against defendants if they can prove a knowing mental state); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 350–52 (1974) (permitting private figures to bring defamation claims based on negligence because defamatory statements “are of such slight social value” that they are outweighed by social interests in protecting plaintiffs (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (reserving the possibility of incitement liability for advocacy of violence that is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”). In brief, while incitement liability

the First Amendment constrains liability based on Reckless Association, it would likewise constrain laws that would force major platforms to purge content and users.²⁰ Policy remedies that target social media platforms are likely more offensive to First Amendment values because if platforms face liability risks, they are bound to overcensor.²¹ It's difficult for outsiders to predict which groups pose a risk since no one platform can see coordination and communications taking place in other online and offline fora. Platforms will not be highly motivated to keep censorship to a minimum if there is a significant risk of liability for only one form of error (wrongly permitting misinformation to be communicated).

That said, liability for Reckless Association must be designed carefully to fit the spirit and doctrine of First Amendment protections. After all, we propose secondary liability based entirely on a defendant's role in an expressive association. Nevertheless, liability can be well-tailored to a serious risk to society by requiring physical injury and proof that the defendant was a very active and persistent central node in a radicalized communications network. A bounded tort of this sort should be able to withstand scrutiny. It would be narrow enough to avoid unnecessary chilling effects but would also be more flexible and fitting to the risks of our modern hyper-networked communications ecosystem than existing forms of liability.

Given the uncertainty about how the First Amendment will constrain theories of liability premised primarily on patterns of association, we begin in Part II by elucidating the individual right to freely associate on social media. Part III explains how the radical freedom to associate, made possible by social media, has brought tremendous benefits as well as some risks to society. The risks are predictable given the theory and available evidence about how people form beliefs and act under the influence of highly selective, frictionless associations, but they nevertheless fall into a liability vacuum. Part IV explains why secondary tort liability, imposed on central nodes of a radicalized network, is the most incisive response to the problem, and it shows that such liability is

requires purpose and imminence, our tort proposal would be constrained by requiring persistence and physical injury. See discussion of the limits of incitement law *infra* Section III.D.

20. See Keller, *supra* note 18, at 238–46 (describing how First Amendment precedent conflicts with laws that deter platforms from amplifying or merely hosting lawful but distasteful speech); cf. *Smith v. California*, 361 U.S. 147, 153 (1959) (“For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected . . . [T]he bookseller’s burden would become the public’s burden, for by restricting him the public’s access to reading matter would be restricted.”).

21. See, e.g., Quinta Jurecic, *The Politics of Section 230 Reform: Learning from FOSTA’s Mistakes*, BROOKINGS INST. (Mar. 1, 2022), <https://www.brookings.edu/research/the-politics-of-section-230-reform-learning-from-fostas-mistakes/> [<https://perma.cc/6K2G-BSUF>] (describing “overly aggressive” moderation when Congress removed Section 230 immunity for a narrow band of content).

consistent with the goals and purposes of tort law. Part V serves the main course: it lays out the elements for a new tort of Reckless Association and explains how two of the most important elements — causation and mental state — can be proved using network analyses. Part VI addresses objections.

II. THE AMBIGUOUS RIGHT TO FREELY ASSOCIATE

We begin with the elephant in the room: any proposal to create liability based on patterns of communication will have to align with constitutional guarantees of freedom of speech and association. Given the importance of this matter, we provide our understanding of the scope, purpose, and limits of constitutional protections that must constrain a project of this sort. The First Amendment creates the stage upon which our drama can play out, so we describe it up front.

The First Amendment protects individuals who want to speak and associate, and for good reason. In order to change culture or accomplish large projects, individuals need groups. The speech that members of a group engage in together when they are exchanging ideas and advocating for change is protected directly by the First Amendment, but the Supreme Court has come to recognize that the group itself receives some degree of protection as well. State acts that disrupt or chill participation in a group must survive constitutional scrutiny.

The scope and purpose of the right to freely associate are discussed much less frequently than those of speech. As a stand-alone feature of the First Amendment, the right to free association encompasses the freedom to join or leave a group, and for groups to accept or decline their members, without unjustified interference from lawmakers. But the reason to recognize and protect this freedom, beyond the members' speech protections, is hard to pin down.

This Part describes the theory that motivates a constitutional right to freedom of association and then integrates that theory with the much more ambiguous legal precedent.

A. Group Theory

The constitutional right to free association hinges on the value of social groups. Groups are necessary to realize the full value of the freedom of speech. They provide a forum for members to exchange information, discover and debate shared interests, and to make and execute plans. All these functions — except plan execution — are forms of protected expression. But they take on a different nature when they are done by individuals in sustained and insular contact with each other. In short, while each individual has agency over their own beliefs, it is only

in groups that individuals can form collective ideas, organize movements, and create cultures.

The Supreme Court recognized the unique value of expression within groups of members with a common interest in *NAACP v. Alabama ex rel. Patterson*,²² the first case to explicitly identify and recognize the modern form of a right to free association. The state of Alabama attempted to execute a court order granting the state access to the names and addresses of all members of the NAACP, but the Supreme Court held that in context, this would unconstitutionally interfere with the expressive and association interests of NAACP members.²³ The Court explained that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.”²⁴

The earliest free association cases concerned laws passed in southern states to intimidate and interfere with the work of the NAACP.²⁵ These cases were easy, at least with the benefit of time and social progress, because the statutes challenged in these cases, which required the NAACP to reveal the identities of its members or else refrain from conducting business in the state,²⁶ facilitated hostility to the political ideas espoused by the association.²⁷ The laws aimed to thwart the cultural and political persuasion of the NAACP’s message.

Other cases involved lesser risks of violence but still came to the same result.²⁸ In *Shelton v. Tucker*,²⁹ for example, the Court struck down a law that required public school teachers to disclose the names of organizations for which they were donors or members.³⁰ The Court recognized that, unlike the NAACP cases, the state had a strong interest in collecting information of various sorts about its teachers in order to vet the competence of those hired to educate and shape the next generation of residents.³¹ Nevertheless, the Court found that this valid state interest was insufficient to outweigh the teachers’ interest in uninhibited association, particularly since the looming threat of job loss was

22. 357 U.S. 449 (1958).

23. *Id.* at 451–53, 466.

24. *Id.* at 460.

25. *See, e.g., id.* at 462; *Bates v. City of Little Rock*, 361 U.S. 516, 517, 527 (1960).

26. *Patterson*, 357 U.S. at 451–52.

27. *Id.* at 462.

28. *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234, 238–42, 250 (1957) (plurality opinion); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 592, 609–10 (1967).

29. 364 U.S. 479 (1960).

30. *Id.* at 480, 490.

31. *Id.* at 485. In a modern context, imagine what interest a school board might have in knowing that an elementary school teacher is a member of the Proud Boys or a QAnon fan group.

severe enough to cause significant chilling effects among teachers.³² The *Shelton* opinion linked the freedom of association to the freedom of thought itself: “Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate”³³ Thus, the Court implied (though did not explicitly say) that free inquiry is stunted if thinkers can’t have access to groups.

The best way to synthesize the cases is to understand freedom of association as highly influential on the freedom of thought, while also posing serious, if infrequent, threats to democratic values and liberties. If a person is not free to participate as a member in a group, the information and ideas that they will have access to, and decide to act on, will differ. “Freedom of expression embraces more than the right of an individual to speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective.”³⁴ A person’s access to groups will influence the course of a person’s beliefs and intentions as an individual. Access to groups, just like access to speech, will shape their “character and potentialities as a human being.”³⁵ Individuals have new thoughts and preferences, but these constitute and are shaped by the culture of groups.³⁶

State burdens on group membership will alter the course of a person’s beliefs. The Court has suggested this is particularly troubling when a group helps each individual gain the courage and conviction to express a controversial position that can challenge and improve mainstream opinion.³⁷ Meanwhile, groupings do not inherently cause negative externalities for others. So, if a state tries to actively interfere with association, it may be (as it was with the NAACP) that the state disfavors the ideas espoused by the association, and not because of any legitimate risk of anger or lawlessness.

32. *Id.* at 486–87.

33. *Id.* at 487 (quoting *Sweezy*, 354 U.S. at 250).

34. *NAACP v. Button*, 371 U.S. 415, 452 (1963) (Harlan, J., dissenting); see also Note, *Conspiracy and the First Amendment*, 79 *YALE L.J.* 872, 874 (1970) (“A legal system which strongly endorses freedom of expression and its underlying values should also protect the individual’s right to associate with others of like mind in order to make his expression of opinion more effective.”).

35. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 879 (1963) (going on to explain that “[e]very man is influenced by his fellows, dead and living”).

36. As the Supreme Court has put it, “We have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–19 (1984).

37. See *id.* at 622 (“According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.”).

This is, at least, the theory underlying constitutional protection of the right to free association. However, common law, statutes, and constitutional precedents suggest the right to free association is more limited than the lofty pronouncements quoted above might suggest. The courts have had no difficulty upholding laws that greatly interfere with the membership and management of associations if there is a plausible state interest for doing so and as long as the law does not directly burden the expression of a group or its members.³⁸

More importantly, the theory underpinning a right to free association does not stand on its own, independent from the value of free speech. While it's true that associations have a significant influence over which ideas and beliefs are ultimately formed, the same can be said about all manner of conduct and experiences. Driving a car, visiting Cuba, and dropping acid will change what a person thinks about or comes to believe, but they are all regulated as conduct (even if a person wants to engage in them primarily to learn or alter their thoughts).

Free speech benefits society when it serves as “a method of achieving a more adaptable and at the same time more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus.”³⁹ Groups of like-minded individuals can certainly foster both healthy cleavages from the mainstream culture and necessary consensus between their members or between the groups and society at large.⁴⁰ But they can also entrench false beliefs, organize harmful movements, and create a culture that demonizes the out-group.⁴¹ They can reduce the practice of independent thought and exacerbate the risks and excesses of free speech.⁴² Thus, the freedom of association and its caselaw are in an awkward relationship with other First Amendment liberties.

38. See, e.g., *id.*; Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 538, 544 (1987); N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 13–14 (1988); Boy Scouts of Am. v. Dale, 530 U.S. 640, 656–60 (2000) (reiterating the same rule but finding that, in the case of the Boy Scouts, a nondiscrimination law *did* directly burden the expression of an expressive association).

39. Emerson, *supra* note 35, at 884.

40. See Milly Casey-Campbell & Martin L. Martens, *Sticking It All Together: A Critical Assessment of the Group Cohesion-Performance Literature*, 11 INT'L J. MGMT. REVS. 223, 224 (2009); Lyn M. van Swol, Emma Frances Bloomfield, Chen-Ting Chang & Stephanie Willes, *Fostering Climate Change Consensus: The Role of Intimacy in Group Discussions*, 31 PUB. UNDERSTANDING SCI. 103, 105–06 (2022); Scott Graupensperger, Alex J. Benson, Bethany C. Bray & M. Blair Evans, *Social Cohesion and Peer Acceptance Predict Student-Athletes' Attitudes Toward Health-Risk Behaviors: A Within- and Between-Group Investigation*, 22 J. SCI. & MED. SPORT 1280, 1284–85 (2019).

41. See discussion of these pathologies of groups and the theories that explain them *infra* Part III.

42. See discussion *infra* Part III.

B. Strict in Theory, Looser in Fact

In theory, “state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”⁴³ But in fact, courts frequently uphold laws that directly intervene in the membership or management of associations.

First, many regulations that significantly impact who associates with whom are fairly categorized as regulations of conduct and will not be struck down as unconstitutional unless the interference with the group is significant and unjustified.⁴⁴ Moreover, even when a law directly burdens membership or management of a group, the reasoning of Supreme Court opinions reveals that the onus is on the association to prove that the burden is significant and not outweighed by the state interest.⁴⁵

One proven way an association or an individual member can meet this burden is to show that the law directly penalizes an individual based solely on their affiliation or association with a disfavored group.⁴⁶ Another is to provide evidence, as the NAACP did in its challenge to the Alabama law requiring associations to disclose membership lists, that the law is likely to lead to its members’ intimidation and violent retribution.⁴⁷ Outside these two extreme and increasingly rare types of regulations, challenges to laws based solely on a freedom of association challenge are likely to fail.

43. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–61 (1958).

44. *See, e.g., NAACP v. Button*, 371 U.S. 415, 436, 444–45 (1963) (invalidating a restriction on attorney solicitation because there was no compelling state interest and the statute “broadly curtail[ed] group activity leading to litigation”); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 371–379 (1977) (finding that maintaining a sense of professionalism in the attorneys bar and avoiding adverse effects of advertising were not sufficient justifications for restrictions on attorney advertising); *Shapiro v. Ky. Bar Ass’n*, 486 U.S. 466, 479 (1988); *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 623, 635 (1995) (narrowly upholding a restriction after applying intermediate scrutiny review and finding a substantial interest behind the restriction).

45. For example, in *NAACP v. Alabama*, the Court’s assessment of the imposition on the right to freely associate was dependent on the fact that the group was locally unpopular. *See Patterson*, 357 U.S. at 462. “Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.” *Id.*

46. “[T]he Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen’s association with an unpopular organization.” *Healy v. James*, 408 U.S. 169, 186 (1972) (first citing *United States v. Robel*, 389 U.S. 258 (1967); then citing *Keyishian v. Board of Regents*, 385 U.S. 589, 605–10 (1967); then citing *Elfbrandt v. Russell*, 384 U.S. 11 (1966); and then citing *Scales v. United States*, 367 U.S. 203 (1961)). “In these cases it has been established that ‘guilt by association alone, without [establishing] that an individual’s association poses the threat feared by the Government,’ is an impermissible basis upon which to deny First Amendment rights.” *Id.* (alteration in original).

47. *Patterson*, 357 U.S. at 462 (“Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”).

For example, in a later set of cases considering freedom of association challenges to public accommodations and antidiscrimination laws, the Court said that regulations of organizations that effectively force an association to abandon its expressive goals would also violate the right to freedom of association but then found organizations that challenged antidiscrimination laws unable to meet that standard.⁴⁸ Having determined that the state interest in such laws was compelling, the Court placed the burden of proof on the associations, rather than the government, to prove that their expressive activities were unduly affected.⁴⁹ Free speech cases have no such burden-shifting, even when the government has a compelling state interest to regulate speech.⁵⁰ Thus, the reality of freedom of association is more muddled than the soaring language in the Court's most famous cases would suggest.

Moreover, the right protects associating only when the group exchanges information, gives advice, or organizes plans related to lawful activities.⁵¹ A group that organizes criminal activities is a criminal conspiracy, and membership alone can send a person to prison.⁵² Even groups with less than a solid agreement to commit a specific crime seem to fall out of First Amendment protection. Membership in a recognized

48. *See, e.g.*, *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 548–49 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 627 (1984); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988). *But see, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000).

49. For example, in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), the Court explained that “[b]y requiring the Jaycees to admit women as full voting members, the Minnesota Act works an infringement of the [right to expressive association]. There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.” *Id.* at 623. And yet, the Court found that because the law did not have the purpose of interfering with expressive association, and because the public interest in reversing gender discrimination is so great, the Court upheld the law because “the Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members’ freedom of expressive association.” *Id.* at 626.

50. *See, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 171–72 (2015); *United States v. Stevens*, 559 U.S. 460, 468 (2010). We do not address here the more robust set of protections that the Court has afforded to intimate associations within families and sexual partners. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685–86 (1977); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *Moore v. City of East Cleveland*, 431 U.S. 494, 503–04 (1977).

51. *Brown v. Hartlage*, 456 U.S. 45, 55 (1982) (“Although agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment.”); *see NAACP v. Button*, 371 U.S. 415, 429 (“[T]he First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion.”).

52. *E.g.*, CAL. PENAL CODE § 182(a)(5) (West 2022) (“[T]wo or more persons [may not] conspire . . . [t]o commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.”); MODEL PENAL CODE § 5.03(1) (AM. L. INST. 1985) (“A person is guilty of conspiracy with another person or persons to commit a crime if . . . [he] agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime.”).

gang can cause a convicted criminal to receive an enhanced sentence,⁵³ and this is so even though gangs can be engines of cultural change and can have a mix of lawful and illicit goals.⁵⁴ Similarly, association with a U.S.-designated domestic hate group will affect law enforcement's investigations,⁵⁵ and a separate crime of material support can apply to individuals who were indirectly involved in a domestic terrorism incident.⁵⁶ Thus, groups have been regulated, and individual members have shouldered legal penalties, even when there is only a weak agreement between the members to support or engage in criminal conduct.⁵⁷

The regulation of conspiracies, gangs, and terrorist organizations not only frustrates the particular criminal objectives that one particular group may have at any given time but also creates a general deterrence against forming groups that foster illegal, antisocial behavior among their members.⁵⁸ The fact that membership in certain groups can create criminal liability is controversial precisely because of its uneasy relationship to First Amendment principles.⁵⁹ But at least some of the controversy can be attributed to the fact that courts have engaged in some degree of hypocrisy, claiming that the freedom of association is a form of free speech (or an important corollary) while simultaneously providing less protection in practice. The law and discourse could be improved with better specifications about which associations have a net positive impact on productive forms of speech and thought and which have a deleterious effect. These "better specifications" are the theoretical contributions of our Article. And the new tort of Reckless

53. CAL. PENAL CODE § 186.22(b)(1) (West 2022). This is justifiable in a policy sense by evidence that gang-related violent crime is more "contagious" than non-gang-related violent crime. P. Jeffrey Brantingham, Baichuan Yuan & Denise Herz, *Is Gang Violent Crime More Contagious than Non-Gang Violent Crime?*, 37 J. QUANTITATIVE CRIMINOLOGY 953, 970 (2020).

54. See Caspar Walsh, *Gangs Are Good for Society*, GUARDIAN (Nov. 10, 2011), <https://www.theguardian.com/society/joepublic/2011/nov/10/gangs-good-society-youth-crime> [<https://perma.cc/R8YR-2XD8>] (arguing that gangs provide structure for youths and that this structure is sometimes orthogonal to, if not averse to, violence).

55. *Does the FBI Investigate Hate Groups in the United States?*, FBI: FREQUENTLY ASKED QUESTIONS, <https://www.fbi.gov/about/faqs/does-the-fbi-investigate-hate-groups-in-the-United-States> [<https://perma.cc/24WY-9JMP>].

56. See FED. BUREAU OF INVESTIGATION & DEP'T OF HOMELAND I., STRATEGIC INTELLIGENCE ASSESSMENT AND DATA ON DOMESTIC TERRORISM 21–22 (2022) (describing prosecution under 18 U.S.C. § 2339A for material support of domestic terrorism).

57. We use Kent Greenawalt's conception of "strong" and "weak" agreements here. See Kent Greenawalt, *Speech and Crime*, 1980 AM. BAR FOUND. RSCH. J. 645, 743–44 (1980) (defining weak agreements as those "for which a sense of commitment is present but highly attenuated").

58. Martin H. Redish & Michael J.T. Downey, *Criminal Conspiracy as Free Expression*, 76 ALB. L. REV. 697, 710 (2013) ("The crime of conspiracy serves two commonly accepted functions: preventing the 'specific object' of the conspiracy from being realized, and stemming the 'general danger' incident to group activity with criminal purpose.").

59. *Id.* at 697–99; see David B. Filvaroff, *Conspiracy and the First Amendment*, 121 U. PA. L. REV. 189, 199 (1972) (noting "there is a deep-seated conflict between traditional conspiracy doctrine and the law of free speech").

Association is the policy recommendation that naturally follows from the specifications.

C. Toward a Theory of Secondary Liability

Lawmakers lack a solid theory about what makes a “good” or “bad” association. If the markers of healthy associating are understood, or conversely, if there are telltale signs of dangerous associations, the freedom of association can begin to recognize hierarchical categories akin to free speech doctrine’s recognition of unprotected and low-value speech.⁶⁰

Consider, for a moment, the current state of free speech precedent and scholarly debate as it concerns unprotected or low-value expression. Incitement is a form of secondary liability: the individual inciting violence with their speech is held as a factual and legal cause of lawless action that their audience causes to others.⁶¹ Defamation is also a form of secondary liability in the sense that the harm suffered by the victim is suffered as a result of the audience giving credence to the speech of the defendant and changing its esteem of the victim.⁶² If a plaintiff loses a job prospect because an employer ran across a false accusation about the plaintiff, the defamation defendant is found to be as factually responsible (and *more* morally responsible) as the employer. And under traditional publisher liability rules, book and newspaper publishers can be held liable for disseminating (essentially repeating) the unlawful speech of the original author.⁶³ All of these doctrines provide a route to secondary liability based on the expressive activity of the defendant, and they have all gone through the process of defining and time-tested winnowing through caselaw. The Court has explicitly and implicitly found that other forms of speech have low value and are less entitled to First Amendment protection.⁶⁴ Such less-protected speech includes graphic content made accessible to children,⁶⁵ speech on purely private

60. See Note, *supra* note 34, at 874–75 (footnote omitted) (“But since the first amendment does not afford absolute protection to all forms of individual expression, it could hardly be claimed to offer full protection to all forms of association.”).

61. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (providing the test for incitement liability for advocating imminent lawless action that can withstand First Amendment challenge).

62. RESTATEMENT (SECOND) OF TORTS §§ 558–59 (AM. L. INST. 1977) (defining a defamatory communication as one that causes third persons to disassociate with the victim or hold the victim in lower esteem).

63. RESTATEMENT (SECOND) OF TORTS §§ 578, 581 (AM. L. INST. 1977).

64. For a discussion of the development of “low-value speech” as a concept in First Amendment law, see Arnold H. Loewy, *The Use, Nonuse, and Misuse of Low Value Speech*, 58 WASH. & LEE L. REV. 195, 196–99 (2001), and see generally Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015) (arguing New Deal cases generated the distinction between low- and high-value speech).

65. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 69–70 (1976).

matters,⁶⁶ advertising,⁶⁷ and expression that copies the copyrighted works of others.⁶⁸

There has been no equivalent theorizing about “low-value groups” that might be held responsible for the actions of a subset of members even though the logic of low-value speech applies just as well to groups. For example, the government is allowed to regulate or prohibit obscenity because that material has “a corrupting and debasing impact leading to antisocial behavior.”⁶⁹ Similarly, as Part III will show, a small subset of online networks also have a corrupting impact, and some of them can be differentiated from socially valuable networks for special legal treatment.

Scholars have engaged in sustained debates about whether the First Amendment does or should cover all forms of expression outside the specific categories of unprotected speech⁷⁰ and whether there should be reduced protections for so-called low-value speech.⁷¹ Nevertheless, it is clear that when the state is confronted with a First Amendment challenge to a regulation of speech, the regulation will have an easier time surviving scrutiny if the speech at issue has been recognized in the past as causing social problems.⁷² If courts deviate from the traditional categories of unprotected expressive activity, they will have to explain why a new form of unprotected or less-protected expression should now be recognized despite being (apparently) unnecessary during previous generations.

The answer, if there is one, must relate to broad access to the Internet. Perhaps in a pre-Internet world, the risks of chilling effects from forms of secondary liability were not worth the benefits since the speech of extremists and outcasts rarely found an audience, and the audience members rarely had the means to coordinate and persistently interact with each other. Changes to the patterns of communications and

66. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985).

67. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562–63 (1980).

68. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

69. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973).

70. Compare Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1771 (2004) (arguing that many categories of communication are de facto unprotected), with Jane Bambauer & Derek Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335, 340–42 (2017) (arguing that the regulation of communications is and should be subject to some form of constitutional scrutiny in nearly all cases). The Supreme Court is increasingly hostile to Schauer’s position. See *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015) (finding that all statutes that regulate communications and make content-based distinctions must undergo strict scrutiny).

71. Compare Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547, 551–54 (1989) (challenging the wisdom of recognizing “low value” categories of speech), with ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 39–40 (1965 ed. 1960) (arguing the freedom of core political speech is absolute, while the liberty to engage in other types of expression can be abridged with sufficient justification).

72. See *United States v. Stevens*, 559 U.S. 460, 470–72 (2010).

associations raise the possibility that there may be as-yet unrecognized exceptions to the general rule of thumb that new forms of liability based on expressive activities are unnecessary. In other words, there may be evidence that the stakes of uninhibited association, particularly in terms of its externalities and damage to others, may be quantitatively and qualitatively greater than in previous communication ecosystems. We present the case that this is so *infra* Parts III and IV.

D. Proceeding with Caution

The rest of this Article will lay the groundwork for the justifiable regulation of low-value associations. While there may be a range of such associations, we are particularly interested in developing legal liability, consonant with First Amendment protection, that would apply to reckless leaders of malfunctioning groups that cause physical harm to outsiders. The archetype case, as we explain in more detail below, would be one that might be brought against Donald Trump, Alex Jones, or QAnon interpreters based on their roles as central and active nodes in dysfunctional networks — those that have actually and foreseeably caused epistemic failure and resulted in conduct that harmed people outside the networks. However, even if all agreed that certain associations should be understood as low value and risky, and therefore less deserving of strong constitutional protections, two considerations weigh in favor of proceeding with caution.

The first consideration concerns overbreadth and strategic enforcement. Some of the most important social transformations have been accompanied by overzealous individuals or satellite groups that have breached the bounds of protest and engaged in lawless violence.⁷³ If a network's de facto leaders can be held responsible for the conduct of its members, that law could be expanded, exploited, and abused to send the leaders of a large movement to jail for the conduct of a few unrepresentative protesters. It could, in other words, cause influential leaders like Martin Luther King, Jr. to be unjustly targeted for liability or imprisonment.

73. See James A. Geschwender, *Civil Rights Protest and Riots: A Disappearing Distinction*, 49 SOC. SCI. Q. 474, 475–76 (1968) (citing NEIL J. SMELSER, *THEORY OF COLLECTIVE BEHAVIOR* (1963)); Emma Thomas, *Why Do Protests Turn Violent? It's Not Just Because People Are Desperate*, THE CONVERSATION (June 5, 2020), <https://theconversation.com/why-do-protests-turn-violent-its-not-just-because-people-are-desperate-139968> [<https://perma.cc/94TU-UVJ2>]. Moreover, the boundary between a peaceful protest and acts of intimidation is contested and influenced by the political beliefs of the beholder. See Dan M. Kahan, David A. Hoffman, Donald Braman, Danieli Evans & Jeffrey J. Rachlinski, *'They Saw a Protest': Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 884 (2012).

We see this as the key problem that must be avoided in designing a constitutional constraint on low-value associations. But the problem is not intractable.

The second practical problem with defining low-value associations is that it's likely to be unpopular. Today, the general public is enamored with the freedom of association, and this is particularly true when it comes to the Internet.⁷⁴ Globally, while seventy-three percent of Internet users favor government censorship of speech to remove content that is “harmful to children” and sixty-four percent favor removal of content that is “discriminatory” or “racist,” only thirty-nine percent believe the government should be able to know with whom one communicates online.⁷⁵ Presumably, the response to active interference with communicative associations would be even more negative. The simultaneous contempt for hateful speech and love for freedom of association is the online world's equivalent of “hate the sin, not the sinners.”

The opinion of scholars is more nuanced than that of the general public. While First Amendment scholars generally agree that a degree of freedom of association is a necessary (but not alone sufficient) condition for a functional democracy,⁷⁶ they also recognize that the assembly of groups of people can blur the line between ideas and action. A misguided crowd will have a more intimidating and disruptive effect than a misguided individual.⁷⁷ And some scholars have argued that freedom of association is too often used to engage in our worst tendencies and bigotry.⁷⁸ Thus, our work in subsequent Parts is consonant with the legal scholars who are skeptical about the presumed goodness of free association.

74. There may be something culturally distinct about the United States in this regard, too. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 170 (Henry Reeve trans., 2007) (1838) (“In no country in the world has the principle of association been more successfully used, or more unsparingly applied to a multitude of different objects, than in America.”).

75. WILLIAM H. DUTTON, GINETTE LAW, GILLIAN BOLSOVER & SOUMITRA DUTTA, *THE INTERNET TRUST BUBBLE: GLOBAL VALUES, BELIEFS AND PRACTICES* 13 (2013).

76. See, e.g., Charley Lewis, *The Right of Assembly and Freedom of Association in the Information Age*, in *HUMAN RIGHTS IN THE GLOBAL INFORMATION SOCIETY* 151, 154 (Rikke Frank Jørgensen ed., 2006). We discuss legal scholars in this sub-part, but sociologists and political scientists have written about association in similarly positive terms. See generally, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (20th anniversary ed. 2020) (2001) (exploring the decline in various forms of association and the corresponding impact on democracy).

77. This is what Tarko and Gangotena describe as the negative externality problem of freedom of association. Vlad Tarko & Santiago J. Gangotena, *Freedom of Association and Its Discontents: The Calculus of Consent and the Civil Rights Movement*, in *37B RESEARCH IN THE HISTORY OF ECONOMIC THOUGHT AND METHODOLOGY* 197, 202, 204–08 (Luca Fiorito et al. eds., 2019).

78. See, e.g., *id.* at 205–06; JACOB T. LEVY, *RATIONALISM, PLURALISM, AND FREEDOM* 295 (2015).

Nevertheless, criticism in the literature is relatively narrow and reserved primarily for offline associations and organizations.⁷⁹ Freedom of association in the modern and more capacious sense that we study in this Article — the freedom to choose and maintain online social ties — doesn't attract as much negative attention.

Consider, for example, Tabatha Abu El-Haj's strictly positive account of the role of associations in political action:

Associations strengthen democracy in important part because they are places to bring friends, places to make friends, and places to organize friends. The role civic associations play in generating political action cannot be explained apart from the foundational role of social ties and organization. . . . Relationships, affiliations, and organizations are at least as important as ideas, voice, or expression in the process of *forming preferences* and translating them into actions. The point is not that ideas do not matter at all, but rather that relationships matter a great deal.⁸⁰

Similarly, Katherine Strandburg and Peter Swire have advocated for strong First Amendment freedom of association on networked communications. Strandburg is concerned about the chilling effects of network surveillance on formal and informal associations, implicitly arguing that chilling is usually bad for society.⁸¹ Swire is concerned that European and U.S. regulations that directly interfere with channels of communication on social networks will interfere with the freedom of association.⁸² Both would apply a constitutional test as soon as freedom of association is implicated, even indirectly, by state action.⁸³

79. Most focus on the mixed nature of associations as being both expressive and conduct-oriented, and so the criticism explores, e.g., the impropriety of using freedom of association as a way to dodge generally applicable antidiscrimination laws. See, e.g., Gregory J. Wartman, *Freedom of Discrimination?: The Conflict Between Public Accommodations' Freedom of Association and State Anti-Discrimination Laws*, 37 J. MARSHALL L. REV. 125, 126 (2003).

80. Tabatha Abu El-Haj, *Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 ARIZ. L. REV. 53, 59–60 (2014) (emphasis added).

81. Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741, 751–52, 765–66 (2008) [hereinafter Strandburg, *Freedom of Association in a Networked World*]; see also Katherine J. Strandburg, *Surveillance of Emergent Associations: Freedom of Association in a Network Society*, in DIGITAL PRIVACY: THEORY, TECHNOLOGIES, AND PRACTICES 437–38 (Alessandro Acquisti et al. eds., 1st ed. 2008) [hereinafter Strandburg, *Surveillance of Emergent Associations*].

82. Peter Swire, *Social Networks, Privacy, and Freedom of Association: Data Protection vs. Data Empowerment*, 90 N.C. L. REV. 1371, 1373–74 (2012).

83. See *id.* at 1390; Strandburg, *Freedom of Association in a Networked World*, *supra* note 81, at 785.

Like these scholars, we agree that relationships are uniquely important to forming preferences and beliefs, but we don't share their enthusiasm for strong constitutional protections. As we explain in the next Part, the radical freedom of association that is made possible today by the Internet has an observable and explainable detrimental impact on individuals' knowledge about politics and other complex systems. These deranged beliefs occasionally lead individuals to commit violence against others outside the association. Thus, it is high time that the freedom of association engages in the same soul-searching and adjustment that is frequently performed in free expression articles and caselaw.

There are good reasons to believe that associating in groups can improve the functioning of free speech. But we must enrich the theory of free association to incorporate how information and ideas are exchanged within groups and what the external effects of that exchange are likely to be. We turn to this next.

III. RADICAL ASSOCIATIONS

Associations do good and bad things based on the knowledge, beliefs, and plans that their members build up over time. Thus, to establish whether a network is "bad," we inevitably need to look at how a network can distort beliefs. To that end, this Part explores the value of associations on knowledge.

This Part begins with a discussion of the epistemic value of social ties and how social networking platforms have created radical associations — that is, groups of individuals who are able to persistently communicate with others who share very similar preferences and beliefs. These associations are not bound to some constraints that once made them useful for knowledge. We then show how radical associations serve some societal goals well but also create new dangers in the political sphere. When radical associations cause significant negative externalities, they may qualify as "reckless associations" and warrant the civil recourse we develop in Parts IV and V.

A. Associations Before and After the Internet

Social ties have a complex relationship with knowledge. On the one hand, close ties like friendship and kinship are good for knowledge and epistemic progress because people feel a moral obligation to friends and family to engage in empathic listening and to work toward

a mutual understanding when they are in a disagreement.⁸⁴ Members of tight social circles are committed to each other in these ways. But the problem with close ties is that they often don't supply a diversity of information that would come from other acquaintances.⁸⁵ On the other hand, those with access to diverse information may not share the trust necessary for empathic listening and challenging beliefs.

This tradeoff between commitment (arising from close social bonds) and diversity (arising from larger social circles) was not a salient problem until the 19th century. This is because prior to the industrial era, a variety of information and perspectives was unlikely to be accessible anyway.⁸⁶ Most people lived and worked in small, close-knit groups.⁸⁷ Their networks were insular and homogenous, and the only source of information for most.⁸⁸ “[T]he primordial ‘filter bubble’ consisted of tradition, church, and kin, all of which worked to limit exposure to external information.”⁸⁹ While wars, trade, and migration allowed for some slow-paced changes in social networks, friendships in the pre-industrial era were the natural product of low physical mobility, strong local social ties, and poor access to diverse information.⁹⁰ The typical person may have felt a strong sense of belonging⁹¹ but had limited opportunity to come across out-of-network friends. New, unorthodox information was not only hard to come by but easily quashed

84. In the *Nicomachean Ethics*, Aristotle famously characterized friends as mutual stewards over each other's epistemic development. See ARISTOTLE, *NICOMACHEAN ETHICS* bk. VIII, at 139 (C.D.C. Reeve trans., 2014) (c. 384 B.C.E.). Because of the intensity of commitment required by (perfect) friendship, Aristotle explicitly predicted that the number of people with whom an individual can sustain a perfect friendship is very small. See *id.* at 139–40. This insight has been empirically validated by the experiments and replications of Robin Dunbar. See Maria Konnikova, *The Limits of Friendship*, *NEW YORKER* (Oct. 7, 2014), <https://www.newyorker.com/science/maria-konnikova/social-media-affect-math-dunbar-number-friendships> [<https://perma.cc/JW97-TC9K>] (summarizing findings and replications of “Dunbar's number,” which posits that humans can only maintain meaningful social connection with about 150 people).

85. That is, epistemic progress cannot be abstracted away from the distribution of knowledge across individuals. Frederick Hayek is famous for recognizing the importance of distributed knowledge — that is, “the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess.” See Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 *AM. ECON. REV.* 519, 519 (1945).

86. See Keith N. Hampton & Barry Wellman, *Lost and Saved . . . Again: The Moral Panic About the Loss of Community Takes Hold of Social Media*, 47 *CONTEMP. SOCIO.* 643, 644 (2018).

87. See *id.* at 644–45.

88. See *id.*

89. *Id.* at 645 (citation omitted).

90. *Id.* at 644; FERDINAND TÖNNIES, *COMMUNITY AND ASSOCIATION* 48–50, 233 (London, Routledge & Paul 1955) (1887). Ray Pahl suggests that prior to commercial society, “friendships” were really more like associations based on mutual aid and necessity. RAY PAHL, *ON FRIENDSHIP* 57 (2000).

91. 2 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 383–84 (1776) (describing how country village life gave everybody a reputation and character that they tended to, and this was lost when the individual moved to the large and anonymous city).

by authority figures, further restricting the pool of evidence and ideas that circulated.⁹²

Industrialization rapidly changed this. The birth of the modern city and its economic prospects pulverized the tight-knit communities and threw many different people into one place at the same time. What emerged was a sort of network of networks centered around each individual.⁹³ Every person had a mix of family, coworkers, neighbors, and church members to socialize with, and greater mobility created a constant, low-level churn in any given place.⁹⁴ Thus, social ties in the industrial era were characterized by high physical mobility, a greater quantity of weaker social ties, and a significant expansion of access to information.

Moreover, the role of social ties was not as critical for epistemic pursuits as it was before urbanization. Knowledge could also be acquired through new or greatly expanded institutions like the industrial press and broadcast media. These information enterprises were expensive, so their limited supply created bottlenecks in the type of information shared.⁹⁵ As a result, they tended to have the economic motivation to serve the lowest common denominator.⁹⁶ Or at least, in any event, they did not have extreme economic pressure that tense competition can cause to compromise truth-seeking in order to serve a niche viewpoint.⁹⁷ So, like the increasingly random acquaintances, mass media tended to reflect the knowledge of a wide (but not perfectly representative) swath of the population. In the industrial age, average was king.

The increased access to information diversity brought about by the industrial era came with the cost of less commitment. During this era, the tradeoff between the enhanced engagement of friends or kin and the greater information diversity of larger social networks first became

92. See Hampton & Wellman, *supra* note 86, at 644–45.

93. See *id.* at 646.

94. See DE TOCQUEVILLE, *supra* note 74, at xiii (De Tocqueville observed in the American city in the early 19th Century that “Americans of all ages, all stations in life, and all types of disposition” were “forever forming associations.”).

95. See Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806–07 (1995); MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* 369 (2d ed. 2010); see also Robert D. Putnam, *Bowling Alone: America’s Declining Social Capital*, 6 J. DEMOCRACY 65, 75 (1995). Putnam emphasizes the social structure of these information sources — formal education and civic systems. *Id.* at 67, 73.

96. See David Waterman, “Narrowcasting” and “Broadcasting” on *Nonbroadcast Media*, 19 COMM’N. RSCH. 3, 20 (1992); Simon P. Anderson & Jean J. Gabszewicz, *The Media and Advertising: A Tale of Two-Sided Markets*, in 1 HANDBOOK OF THE ECONOMICS OF ART & CULTURE 567, 604 (Victor A. Ginsburgh & David Throsby eds., 2006).

97. See Ethan Hartsell, Miriam J. Metzger & Andrew J. Flanagin, *Contemporary News Production and Consumption: Implications for Selective Exposure, Group Polarization, and Credibility*, in NEWS WITH A VIEW 238, 239–40 (Burton St. John III & Kirsten A. Johnson eds., 2012) (noting the economic incentive created by increasing viewership of partisan news outlets as compared to viewership of more-objective news outlets, thus creating an economic incentive to polarize broadcast media content).

evident. When city-dwellers were cut off from their friends or families left in their hometowns, associations provided an effective way to get some of the advantages of kinship.⁹⁸

Associations have weaker bonds than friendships and kinships, but their larger size ensures exposure to more information relevant to a shared mission. Any given association will presumably have some level of informational diversity based on the members of the group and will also have some rules of engagement (often unspoken though, of course, in formal associations there are bylaws) that replicate some of the mutual concern and obligations that perfect friends share for one another. After all, each individual invests time and attention into the association that causes mutual concern (or, at the very least, some sunk cost fallacy-based commitment) for other members. Also, groups typically have mechanisms to mediate conflict that gives voice to all members and expects some loyalty from them.⁹⁹ These rules are not always made explicit, but they are critical to attracting and sustaining membership. Since finding (let alone joining) another group was costly in the industrial era,¹⁰⁰ members of a group with a similar interest were generally content with the mix of benefits (voice) and obligations (loyalty). There is, therefore, some stickiness in associations of almost every sort — some costs to an individual member who may be tempted to leave, and to the group when it may be tempted to shove out an obstinate member. Disagreements between members were usually managed through internal deliberation that prompted greater engagement and more complex order.¹⁰¹

These practices of deliberation, which created a healthy-enough equilibrium in the industrial era, have been eroded by online communications platforms. Just as industrialization caused a shock to patterns of social ties, the Internet era has brought another, altogether different one. As with the industrial era, people enjoy high levels of physical mobility. But the costs of finding and maintaining social ties have been dramatically reduced.¹⁰² Social ties that are partially or entirely

98. See Gerald Gamm & Robert D. Putnam, *The Growth of Voluntary Associations in America, 1840–1940*, 29 J. INTERDISC. HIST. 511, 518–20 (1999) (describing the scholarly consensus that voluntary associations blossomed during the time of urbanization but arguing that new data suggests the trend started much earlier).

99. Here, we refer to voice and loyalty in their now-classic Hirschmanian connotation. See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970) (describing “voice” as the means to create legitimacy and loyalty where exit is not a viable option).

100. See Jeffrey Boase, John B. Horrigan, Barry Wellman & Lee Rainie, *THE STRENGTH OF INTERNET TIES*, at vi–vii (2006) (showing the converse — that expanding social networks was easier with the help of the Internet).

101. Cf. Arnold M. Rose, *Voluntary Associations Under Conditions of Competition and Conflict*, 34 SOC. FORCES 159, 161 (1955) (describing how associations faced with competition tend to be more flexible and have more structure).

102. Strandburg, *Surveillance of Emergent Associations*, *supra* note 81, at 437 (“Digital technology has lowered the costs of collective activity and decreased the importance of geographical proximity.”).

maintained online use a variety of platforms (Facebook, Instagram, Twitter, TikTok, Reddit, even email listservs) that allow persistent contact over space and time. Each platform has its own emphasis, functionality, and audience appeal. Older users tend to congregate on Facebook,¹⁰³ while younger users prefer apps like TikTok.¹⁰⁴

Nevertheless, all the platforms play similar roles in developing each user's online persona, allowing people who would have otherwise become distant acquaintances or foggy memories to find each other and stay connected. Social networks enable users to actively or passively exploit "homophily" — a preference to have contact with "people like us"¹⁰⁵ — to more efficiently find the content that will be most engaging and salient to them. We can now select and de-select our associates at virtually no cost.

By allowing self-selected and persistent communications, social media has reverted our associations to something more similar to the pre-industrial era, when observation and communication were nearly constant among close-knit groups of similar people.¹⁰⁶ But unlike in the agrarian society, social media platforms also allow for easy exit. There is little reason for an individual to take the time and emotional toll to grapple with and fix the mistaken beliefs of one group when they can easily find another group that doesn't need the intervention. There are no rules of engagement when a factual dispute breaks out except for the omnipresent threat of exit. Withdrawal is always a click away.¹⁰⁷

103. See *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/> [<https://perma.cc/DLE9-4Z76>] (showing that as of 2021, sixty-nine percent of Americans use Facebook and that social media users over fifty use it significantly more than Instagram).

104. See Emily A. Vogels, Risa Gelles-Watnick & Navid Massarat, *Teens, Social Media and Technology 2022*, PEW RSCH. CTR. (Aug. 10, 2022), <https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022/> [<https://perma.cc/3DRM-R6RM>] (finding thirty-two percent of teens use Facebook while sixty-seven percent use TikTok).

105. See Miller McPherson, Lynn Smith-Lovin & James M. Cook, *Birds of a Feather: Homophily in Social Networks*, 27 ANN. REV. SOCIO. 415, 416 (2001). To be clear, what it means to be "like us" is flexible and fluid, and can just as well be defined by values like "tolerance" as it can by demographics like race, geopolitical status like nationality, or interests like sports. We may believe that our social ties are more similar to us than they really are; nevertheless, they are truly more similar than a person selected at random would be. See Sharad Goel, Winter Mason & Duncan J. Watts, *Real and Perceived Attitude Agreement in Social Networks*, 99 J. PERSONALITY & SOC. PSYCH. 611, 613–16 (2010).

106. See Hampton & Wellman, *supra* note 86, at 644.

107. See Brendan Sasso, *Study Finds 18 Percent of Social Media Users Block, 'Unfriend' Over Politics*, THE HILL (Mar. 12, 2012), <https://thehill.com/policy/technology/108391-study-finds-18-percent-of-social-media-users-block-unfriend-over-politics> [<https://perma.cc/C268-UDSL>]. Consistent with this, there is evidence that the persistence offered by online relationships does not contribute to trust and intimacy as much as does the persistence of offline relationships. See, e.g., Craig Calhoun, *The Infrastructure of Modernity: Indirect Social Relationships, Information Technology, and Social Integration*, in SOCIAL CHANGE AND MODERNITY 205, 211 (Hans Haferkamp & Neil J. Smelser eds., 1992); see also DEBORAH CHAMBERS, SOCIAL MEDIA AND PERSONAL RELATIONSHIPS 1 (2013) (inquiring about

To date, lawmakers have not fully explored in sufficient detail the effect modern communications technology has had on patterns of association — the impact of online social networks on our actual social networks. A possible explanation for this is that while the search engine and the World Wide Web supercharged the freedom of speech beginning in the 1990s, the freedom of association didn't receive its dose of steroids until the popularization of social networking platforms like Facebook.¹⁰⁸

Therefore, modern patterns of associations are characterized by a combination of low mutual responsibility and low diversity. This makes them radically homophilic compared to groups that were possible in earlier communications environments. This style of associating works well in some contexts, but it creates an epistemic danger zone that can have serious consequences to outsiders and to society as a whole. We turn next to the work of disambiguating the fun zone from the danger zone.

B. The Mixed Effects of Radical Associations on Beliefs

Social media has both positive and negative effects on its users and society as a whole. Generally, we should expect unconstrained self-selection to be highly beneficial for the purposes of leisure and consumerism. But the same unconstrained self-selection that makes social media useful in those contexts becomes potentially harmful when users engage on political matters.

Regarding leisure or matters of personal taste, people do not need to be cautious about whether the information they receive from their social ties will push them deeper into rabbit holes. Disagreements among group members about what content is most entertaining or beautiful need not be resolved.¹⁰⁹ Polite and unexplored disagreement (or even exit) is appropriate and unlikely to cause harm. More importantly, enthusiastic and unexamined *agreement* that sends members of an

“whether digital modes of communication are generating new intimacies and new meanings of ‘friendship’ as features of a networked society”); Thomas V. Pollet, Sam G.B. Roberts & Robin I.M. Dunbar, *Use of Social Network Sites and Instant Messaging Does Not Lead to Increased Offline Social Network Size, or to Emotionally Closer Relationships with Offline Network Members*, 14 *CYBERPSYCH., BEHAV. & SOC. NETWORKING* 253, 256 (2011) (finding that social networking ties have no effects on offline social ties); Alistair G. Sutcliffe, Jens F. Binder & Robin I.M. Dunbar, *Activity in Social Media and Intimacy in Social Relationships*, 85 *COMPUTS. HUM. BEHAV.* 227 (2018) (finding that only more intimate support groups of social network users appear to be closely connected with offline social activities).

108. See Sarah Phillips, *A Brief History of Facebook*, *GUARDIAN* (July 25, 2007), <https://www.theguardian.com/technology/2007/jul/25/media.newmedia> [<https://perma.cc/SRD8-M6AA>].

109. Hugo Mercier makes a similar point using movie reviews — people put more weight on those whose tastes they trust in movies because there is no “right” answer. See HUGO MERCIER, *NOT BORN YESTERDAY: THE SCIENCE OF WHO WE TRUST AND WHAT WE BELIEVE* 168 (2020).

online group down rabbit holes is also unlikely to cause harm. On the contrary, the quirky recesses of online taste are part of what makes the Internet wonderful.

For topics for which satisfying one person's preference has no negative impact on others' choices, homophily is an asset. When a user sees an endorsement of a cat video in her newsfeed, she will glean useful knowledge that drives down matching costs.¹¹⁰ "This person has a lot of my tastes, particularly when it comes to comedy, and he liked this video so much that he shared it. That means I will probably like it, too."¹¹¹ The new knowledge is the product of objective information about a subjective preference. "This particular video of a cat stuck in a slipper is likely to appeal to me."

Some more profound social pursuits are also well-served by radical networks. We rely on our close social ties for advice, camaraderie, and mutual respect — all profoundly important ingredients for the human experience. Here, too, homophily is likely to work well without having unintended effects or negative externalities.¹¹² People who are already

110. Matching costs are the transaction costs related to making sure that a consumer is able to find and use (or purchase) existing goods, services, or content that best match their preferences. Markets aspire to make sure "[e]very desire of each consumer, no matter how whimsical, is met precisely by the voluntary supply of some producer. And this is true for all markets and consumers simultaneously." John Geanakoplos, *Arrow-Debreu Model of General Equilibrium*, in 1 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 119 (John Eatwell et al. eds., 1987). Markets are not always able to match consumers to the right suppliers and vice versa. As a result, a tremendous amount of money and effort goes into matching institutions like advertising, clearinghouses, and physical or digital marketplaces. But incomplete markets get closer to the ideal with better and more accessible aggregations of information about preferences and supply. Radical associations reduce the search and matching costs and, therefore, help to reduce market failures. On the economics of matching, see Muriel Niederle, Alvin E. Roth & Tayfun Sönmez, *Matching and Market Design*, in 2 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 4030 (2d ed. 2008). For the seminal article on matching, see generally Gary S. Becker, *A Theory of Marriage: Part I*, 81 J. POL. ECON. 813 (1973) (applying economic theory to explain marital patterns).

111. Because friends have a pattern of responding to, and engaging with, social media posts that express pride, anguish, and other poignant emotions, the Facebook newsfeed algorithm is well-trained to make sure that these types of communications are prominently displayed — that the information will be found and known. *How Feed Works*, FACEBOOK, <https://www.facebook.com/help/1155510281178725> [<https://perma.cc/3F3Q-V457>]; Josh Constine, *How Facebook News Feed Works*, TECHCRUNCH (Sept. 6, 2016), <https://techcrunch.com/2016/09/06/ultimate-guide-to-the-news-feed/> [<https://perma.cc/38FH-5LPZ>].

112. Spending time engaging with close social ties is the least controversial aspect of social media's influence over the attention economy. See Tim Wu, *Blind Spot: The Attention Economy and the Law*, 82 ANTITRUST L.J. 771, 792 (2019) (referring to time spent on friends as one of a number of "attentional greenfields"); see generally TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS (2016) (discussing the impact of modern technology on attention). As is the case with consumer information aggregation, concerns for the users and for third parties only arise if we suspend the assumption of rationality and consider problems related to addiction. At this point, though, evidence indicates that recommender systems are serving user preferences even when users are observed over time. See, e.g., Tien T. Nguyen, Pik-Mai Hui, F. Maxwell Harper, Loren Terveen & Joseph A. Konstan, *Exploring the Filter Bubble: The Effect of Using Recommender Systems on Content Diversity*, 23 PROC. INT'L CONF. WORLD WIDE WEB 677, 684 (2014).

similar are likely to provide advice and comfort that resonates more strongly.¹¹³ The analysis for the satisfaction of social preferences is quite simple because sharing information (and other communications) between friends is one of the ends, rather than a means, of socializing. Homophily works for us, individually and collectively, in the context of leisure and social belonging. Therefore, we would expect cheap and persistent communication to improve life on these dimensions.

Likewise, homophily is good for markets. A person with similar taste in goods, such as a friend, will likely provide more useful information than a random acquaintance.¹¹⁴ Consumption preferences can be realized simultaneously without raising serious compatibility issues between individuals.¹¹⁵ That is, one user can buy a bright yellow truck that perfectly matches his aesthetic without affecting another user's ability to buy a sensible sedan. One person's liberty in the consumer market does not usually impede another's. So radical associations have largely beneficial impacts on markets.¹¹⁶

Political beliefs are markedly different.¹¹⁷ One person's preference carried out through collective political action *does* interfere with another's.¹¹⁸ A well-working information aggregation system is thus critical for epistemic improvement on political topics.¹¹⁹ For this type of

113. Kevin Wright, *Perceptions of Online Support Providers: An Examination of Perceived Homophily, Source Credibility, Communication and Social Support Within On-line Support Groups*, 48 COMMUN Q. 44, 47 (2000).

114. See Pam Hughes, *Social Media Users Trust Their Friends Most for Product Advice*, BUS. 2 CMTY (Oct. 18, 2021), <https://www.business2community.com/social-media-articles/social-media-users-trust-their-friends-most-for-product-advice-02437151> [<https://perma.cc/AJ4P-65R5>].

115. In fact, the very existence of a general market equilibrium only occurs when *all* individual plans are simultaneously satisfied. See Geanakoplos, *supra* note 110, at 119.

116. Digital communications in general are understood to (mostly) drive down transaction costs and make markets more efficient. See, e.g., Avi Goldfarb & Catherine Tucker, *Digital Economics*, 57 J. ECON. LITERATURE 3, 3–4 (2019).

117. In truth, the story is actually a bit more complex. For one thing, the realms of political beliefs and economic or social preferences overlap. See William H. Dutton & Bianca C. Reisdorf, *Cultural Divides and Digital Inequalities: Attitudes Shaping Internet and Social Media Divides*, 22 INFO. COMMUN & SOC'Y 18, 29–30 (2019). Also, under some conditions, social media will have a negative epistemic impact on social and economic beliefs and will have a positive impact on political knowledge. An individual's beliefs about a social or economic choice can wind up suffering from the same selection effects that plague political beliefs. Conversely, social networks can be a perfectly functional source of political information when the conditions are right, i.e., when the members of the group are similarly attuned to aggregating non-distorted information, or when the political topic that is being discussed has direct and immediate impact on the members so as to make false beliefs hard to sustain.

118. See Kaarlo Miller & Raimo Tuomela, *Collective Goals Analyzed*, in FROM INDIVIDUAL TO COLLECTIVE INTENTIONALITY: NEW ESSAYS 34, 44–46 (Sara Rachel Chant et al. eds., 2014).

119. It is worth observing that while the expansion of the utility maximization problem to these categories of preferences is grounded at the interconnection of political theory and economics, the analytical methodology remains exclusively economical and draws, in particular, on game theory. See, e.g., David Austen-Smith, *Information Transmission in Debate*, 34 AM.

factual information, unlike social and economic knowledge, radical associations bring epistemic risks — that is, risks that people may be driven to distorted beliefs. When they take action based on those beliefs, it can negatively affect others.

Scholars across multiple disciplines have put forward several theories that explain why radical association can lead to biased thinking, polarization, and extremism (although they do not always recognize our increased ability to freely associate as the ultimate source of these problems). We will quickly survey them here.

First, reduced diversity of information may lead to distortions in the aggregation of political knowledge when individuals associate primarily with others who already share their beliefs. The proverbial filter bubbles are produced not only or even mainly by Big Tech algorithms but, as we showed elsewhere, by our social ties.¹²⁰ Social media is increasingly used as the primary source of news information, and our online friends are the primary filter through which that information passes. While it's true that automated algorithms like the Facebook newsfeed will prioritize some political content of some friends over others, the algorithm is no more (and in fact, often somewhat less) biased than the users' own past engagement with posted material.¹²¹ Professor Cass Sunstein's theory of "enclave deliberation" is consistent with this idea.¹²² Sunstein's research finds that groups that are more homogeneous at the start of an experiment are more likely to draw their information and construct their beliefs from overlapping evidence and "argument pools."¹²³ Bias in the evidence and argument pools in turn

J. POL. SCI. 124, 125 (1990); Peter J. Coughlan, *In Defense of Unanimous Jury Verdicts: Mistrials, Communication, and Strategic Voting*, 94 AM. POL. SCI. REV. 375, 382 (2000) (studying how economic theories of voting affect jury deliberation outcomes depending on individual preferences, information structures, and transaction costs). For a review of theoretical and empirical studies on deliberation, see generally Tali Mendelberg, *The Deliberative Citizen: Theory and Evidence*, in 6 RESEARCH IN MICROPOLITICS: POLITICAL DECISION-MAKING, DELIBERATION AND PARTICIPATION 151 (Michael X. Delli Carpini et al. eds., 2002).

120. See Jane R. Bambauer, Saura Masconale & Simone M. Sepe, *Cheap Friendship*, 54 U.C. DAVIS L. REV. 2341, 2345 (2021); Jane R. Bambauer, Saura Masconale & Simone M. Sepe, *The Nonrandom Walk of Knowledge*, 37 SOC. PHIL. & POL'Y 249, 255–56 (2021).

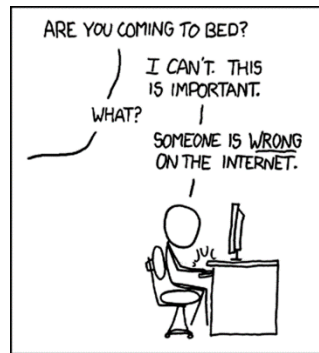
121. See Eytan Bakshy, Solomon Messing & Lada A. Adamic, *Exposure to Ideologically Diverse News and Opinion on Facebook*, 348 SCIENCE 1130, 1130–31 (2015). Companies can also make predictions based on "doppelgangers" — people who are similar but not necessarily known to the user. SETH STEPHENS-DAVIDOWITZ, EVERYBODY LIES 201–04 (2017). Friends can do some of that work for the predictive analytics by being verified real-life doppelgangers.

122. See Cass R. Sunstein, *The Law of Group Polarization*, 10 J. POL. PHIL. 175, 177 (2002).

123. See *id.* at 176–77; see also CASS R. SUNSTEIN & REID HASTIE, WISER: GETTING BEYOND GROUPTHINK TO MAKE GROUPS SMARTER 44–45 (2015). Sunstein, however, leaves open the question of why deliberating groups would be homogeneous in the first place. While there are multiple explanations for the decreased role of randomness within groups, enclave

decreases the ambivalence that each participant had started with, causing beliefs to become more extreme and more strongly held.¹²⁴

Second, modern associations don't have mechanisms for internal self-correction. Radical networks are more contingent and have less incentive and intrinsic sense of duty to resolve a disagreement. Real-life associations have the qualities of loyalty and voice that prevent members from disengaging if they think their peers are mistaken. Online associations lack these procedures. Conflicts in beliefs will only be resolved through the open-minded exchange if an offline relationship or individual personalities drive each participant to take on those duties.¹²⁵ Otherwise, voice and loyalty are costly for social media users. There is simply too much errant information coming through the transom to respond thoughtfully, as this classic *xkcd* cartoon reminds us:¹²⁶



Moreover, sincere expressions of doubt or disagreement are costly if they might trigger a hostile reaction (which is more likely to occur in an unconstrained, online environment).¹²⁷ Indeed, the fear of social opprobrium when unpopular views are shared can lead to disengagement and even proactive belief falsification.¹²⁸ There are not enough reasons

deliberation is the effect and the very *purpose* of social media. Radical online freedom of association encourages constant bonding and information exchange between friends, creating intense selective exposure to information.

124. See Penny S. Visser & Robert R. Mirabile, *Attitudes in the Social Context: The Impact of Social Network Composition on Individual-Level Attitude Strength*, 87 J. PERSONALITY & SOC. PSYCH. 779, 790 (2004) (finding that social groups increase attitude strength by decreasing ambivalence).

125. People have fewer "close friends" with whom they discuss important matters (and, presumably, who they trust enough to have productive disagreement) than they did in 1985. See Matthew E. Brashears, *Small Networks and High Isolation? A Reexamination of American Discussion Networks*, 33 SOC. NETWORKS 331, 336 (2011).

126. *Duty Calls*, XKCD, <https://xkcd.com/386/> [<https://perma.cc/LDY3-HTEA>].

127. See John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCH. & BEHAV. 321, 321–22 (2004).

128. See Junyan Jiang & Dali L. Yang, *Lying or Believing? Measuring Preference Falsification from a Political Purge in China*, 49 COMPAR. POL. STUD. 600, 601 (2016). This

for members of a radical network starting to traffic in wild claims to establish trust and work to correct other members' errors. Further, political beliefs differ from leisure and consumerism-related beliefs because there often isn't a clear feedback loop that rewards individuals for correct beliefs and penalizes them for incorrect ones.¹²⁹ If an individual starts to believe wild political theories and our social institutions do not provide a check, there is not much else that can help discipline false political beliefs.

On top of the features that make online associations radical — low diversity and low accountability — there are also other culprits: cognitive distortions such as confirmation bias¹³⁰ or psycho-social phenomena like tribalism¹³¹ can cause people to erroneously look for or retain

preference falsification can become true belief over time. See Francisco J. Leon-Medina, Jordi Tena-Sánchez & Francisco J. Miguel, *Fakers Becoming Believers: How Opinion Dynamics Are Shaped by Preference Falsification, Impression Management, and Coherence Heuristics*, 54 *QUALITY & QUANTITY* 385, 407 (2020). See generally TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION* (1995) (describing contexts where individuals have espoused theories that they do not believe, and the vicious cycle of public lies that can result).

129. See BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* 132–34 (2007).

130. See generally DANIEL KAHNEMAN, PAUL SLOVIC & AMOS TVERSKY, *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman et al. eds. 1982) (describing different cognitive biases and their effects on decision-making); Cass R. Sunstein, *Conformity and Dissent* 45 (Univ. Chi. Pub. L. & Legal Theory, Working Paper No. 34, 2002), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1067&context=public_law_and_legal_theory [<https://perma.cc/73CY-5HLA>]. A recent, more refined study of confirmation bias found that softer evidence, open to a greater range of interpretation, is especially likely to be interpreted in ways that are consistent with one's priors (which may not necessarily be irrational from an epistemic perspective). See Roland G. Fryer, Jr., Philipp Harms & Matthew O. Jackson, *Updating Beliefs When Evidence Is Open to Interpretation: Implications for Bias and Polarization*, 17 *J. EUR. ECON. ASS'N* 1470 (2019); see also Edward Glaeser & Cass R. Sunstein, *Does More Speech Correct Falsehoods?*, 43 *J. LEGAL STUD.* 65, 69 (2014).

131. See LILLIANA MASON, *UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY* 42 (2018); Raymond R. Reno et al., *The Transsituational Influence of Social Norms*, 64 *J. PERSONALITY & SOC. PSYCH.* 104 (1993) (when political preferences are made visible, individuals will adapt their own political preferences to be more similar to the group). In a famous study that was able to disentangle the effects of cognitive function (specifically, numeracy — a measure of quantitative reasoning) and ideology, Dan Kahan found that a person's ideology could interfere in the performance of a quantitative analysis (essentially, solving mathematics word problems) if the correct answer went against the participant's political priors. Dan M. Kahan et al., *Motivated Numeracy and Enlightened Self-Government*, 1 *BEHAV. PUB. POL'Y* 54, 75 (2017). More interesting still, the study subjects who scored highest on numeracy had a greater degradation on performance with the politically salient math problems that ran against their beliefs than the subjects who scored lowest on numeracy. *Id.* This led Kahan to conclude that cognitive errors like confirmation bias have less influence on reasoning than a form of highly motivated reasoning that operates through cold cognition and logical reasoning. See *id.* at 78. Analytical people have more mental tools at their disposal to contort new facts into arguments, to themselves and others, that corroborate their preexisting beliefs. *Id.*; see also Peter K. Enns & Gregory E. McAvoy, *The Role of Partisanship in Aggregate Opinion*, 34 *POL. BEHAV.* 627, 636 (2012) (finding that polarized individuals are impaired from

information that is consistent with their prior beliefs or their group identity.

To be clear, not every online association that discusses politics will be dysfunctional. Much of the political discourse that takes place with the benefit of radical freedom of association is productive and valuable. But it is entirely predictable, given the lack of self-disciplining structure, that many online associations will foster false beliefs. It is also foreseeable that a subset of these will involve members who act on those beliefs and unlawfully harm others.

C. From Radical Associations to Physical Harm

On November 3, 2020 (Election Day), then-President Trump intensively used social media to propagate doubts about election integrity.¹³² By January 6, 2021, enough people in Trump's sphere of influence believed the allegations that two remarkable things happened: a crowd used force to storm the Capitol to disrupt the confirmation of Joe Biden and Kamala Harris's victory,¹³³ and Republicans lost both of their Senate seats in Georgia as a result of low Republican voter turnout due to lost confidence in election integrity.¹³⁴ Both events illustrate the significant real-world impact of radical networks, though, of course, only the violent attacks are subject to legal redress.

In one sense, these events resulted from a long process years in the making; widespread belief that the 2020 election was stolen is just one example of a long pattern of communications that sow distrust in institutions. The January 6th riot is one point on a timeline that extends past Trump through Infowars and the Arab Spring all the way to the early

understanding objective economic information); James N. Druckman et al., *How Elite Partisan Polarization Affects Public Opinion Formation*, 107 AM. POL. SCI. REV. 57, 73 (2013) (individuals in polarized groups are less affected by substantive information on policy). In another sense, tribalism is not a break from rationality. For the small price of a false belief, often about something that we cannot control anyway, see generally CAPLAN, *supra* note 129 (describing the systematic biases of voters), we achieve the hardwired goal of forming and defending social cohesion.

132. Glenn Kessler & Salvador Rizzo, *President Trump's False Claims of Vote Fraud: A Chronology*, WASH. POST (Nov. 5, 2020), <https://www.washingtonpost.com/politics/2020/11/05/president-trumps-false-claims-vote-fraud-chronology> [<https://perma.cc/7A45-388A>].

133. See Tom Dreisbach, *How Trump's 'Will Be Wild!' Tweet Drew Rioters to the Capitol on Jan. 6*, NPR (July 13, 2022), <https://www.npr.org/2022/07/13/1111341161/how-trumps-will-be-wild-tweet-drew-rioters-to-the-capitol-on-jan-6> [<https://perma.cc/3HCG-J5ZQ>].

134. See Mark Niesse & Jennifer Peebles, *Turnout Dip Among Georgia Republicans Flipped U.S. Senate*, ATLANTA J.-CONST. (Feb. 2, 2021), <https://www.ajc.com/politics/turnout-dip-among-georgia-republicans-flipped-us-senate/IKWGEGFEEVEZ5DXTP7ZXXOR OIA/> [<https://perma.cc/XZF9-8NWN>].

days of talk radio.¹³⁵ In another sense, the riot's particular motivation, organization, and execution was a rapid and chaotic development.

Social media has ushered in an era of unstructured, dynamic social movements.¹³⁶ Radical associations are like weather systems. Even when it is obvious that a storm is brewing, it is not clear when and where lightning will strike.¹³⁷ This unpredictability poses a problem for legal systems. Law and policy take for granted that many social problems can be modeled and explained, at least partly, by cause and effect relationships. Even when those models are multilayered, a problem should be able to be broken down into its constitutive parts and tackled using straightforward interventions. But radical networks are complex systems, and complex systems are different.¹³⁸ What is true of the individual parts is not necessarily true of their sum.¹³⁹

Sociologists and economists have studied highly interactive social environments as examples of complex systems and have documented that networks of people are indeed complex — behaving as if they are their own entities with habits and rules that do not simply correspond to individual choices and behaviors. One of the best examples and partial explanations of social networks as complex systems is captured by the idea of “peer effects.”¹⁴⁰ These are behaviors that individual members of some groups take on that cannot be explained simply by selection into the group. For example, college and high school student

135. See YOCHAI BENKLER ET AL., NETWORK PROPAGANDA 313–29 (2018). See generally MARTIN GURRI, THE REVOLT OF THE PUBLIC AND THE CRISIS OF AUTHORITY IN THE NEW MILLENNIUM (2014) (describing similar patterns of distrust and mobilization across the globe in the wake of digital communications and social networking).

136. See GURRI, *supra* note 135, at 26–27, 78.

137. Gurri refers to a similar phenomenon as the “perilous conditions of the Fifth wave.” *Id.* at 339.

138. On complex systems, see STEFAN THURNER ET AL., INTRODUCTION TO THE THEORY OF COMPLEX SYSTEMS 22 (2018) (explaining that complex systems involve “chicken-egg-type” problems where individual elements are influenced by interactions with other elements and the interactions are influenced by the individual elements).

139. As explained by Giorgio Parisi, the 2021 Nobel laureate in physics, complex systems have their own laws of nature that cannot be approximated by scaling up the behavior of individuals or small systems. Giorgio Parisi, *Nobel Lecture: Multiple Equilibria*, NOBEL PRIZE (Dec. 8, 2021), <https://www.nobelprize.org/prizes/physics/2021/parisi/lecture/> [<https://perma.cc/5AZL-FVJA>]; see also Giorgio Parisi, *Complex Systems: A Physicist's Viewpoint*, 263 *PHYSICA A* 557 (1999). Parisi's work was inspired by a very influential study published in *Science* in 1972 by P.W. Anderson, titled “*More is Different: Broken Symmetry and the Nature of Hierarchical Structure in Science*.” Generally, it is common knowledge that phenomena such as global economies and biology are complex systems that require new models to explain or predict how they will behave. These involve multiple layers of interacting units that co-evolve and influence one another. Vikram S. Vijayaraghavan, Pierre-André Noël, Zeev Maoz & Raissa M. D'Souza, *Quantifying Dynamical Spillover in Co-Evolving Multiplex Networks*, *SCL. REPS.*, Oct. 13, 2015, at 1, 1.

140. For seminal contributions, see generally Charles F. Manski, *Economic Analysis of Social Interactions*, 14 *J. ECON. PERSPS.* 115 (2000), and Charles F. Manski, *Identification of Endogenous Social Effects: The Reflection Problem*, 60 *REV. ECON. STUD.* 531 (1993). For a survey of the literature, see generally Yann Bramoullé et al., *Peer Effects in Networks: A Survey*, 12 *ANN. REV. ECON.* 603, 604–05, 617–19 (2020).

behavior studies find that dormmates and friend groups greatly influence whether the student drinks heavily, uses drugs, or engages in crime.¹⁴¹ The rules that these social interactions seem to follow will be better understood when the economic models for human behavior are combined with the findings from psychology, ethnographic studies, and history, so with time and wisdom, we may come to understand how social interactions influence all parties involved.¹⁴² But when those interactions take place at the speed of broadband, human behavior is bound to be less independent and less predictable.

To help ground and clarify a theory of legal responsibility for reckless associations, we will adapt some of the terminology from network theory¹⁴³ and complex systems literature. We will refer to individuals who participate in one or more associations as “nodes” within “networks.”¹⁴⁴ If these networks evolved independently, the multilayer networks that make up actual human interactions would simply be a superimposition of different networks. But of course, this is not the case. Individuals participate in multiple networks, so there are frequent interactions within and across networks, causing beliefs in each network and the ecosystem to co-evolve over time.¹⁴⁵

The frequency of interactions between nodes in this multilayered network of networks can be measured in various ways. It has a direction¹⁴⁶ (from whom to whom) and a strength.¹⁴⁷ The strength can be captured at the very least by the quantity of communications, and can also include a crude measure of the quality of communications to the extent that original content, retweets, “likes,” or simple receipt of messages fall on a hierarchy.¹⁴⁸

While some complex systems involve interactions between elements that can be described as deterministic — such as the chaotic-looking movements of a double pendulum — other systems (like social

141. See Bruce Sacerdote, *Peer Effects in Education: How Might They Work, How Big Are They and How Much Do We Know Thus Far?*, 3 HANDBOOK ECON. EDUC. 249, 252–53 (2011). Studies of peer effects have had to overcome what is known as the “reflection problem” in which it is difficult to measure the influence of a group on an individual because the individual also influences the group. See CHARLES F. MANSKI, IDENTIFICATION PROBLEMS IN THE SOCIAL SCIENCES 127–28 (1995). If we try to predict the behavior of an individual based on the behavior of the group of which they are a member, how do we know which direction the causal arrow points?

142. This was true of the general field of behavioral economics. See FLORIS HEUKELOM, BEHAVIORAL ECONOMICS: A HISTORY 1 (2014).

143. On network theory, see generally M.E.J. NEWMAN, NETWORKS: AN INTRODUCTION (2d ed. 2018).

144. *Id.* at 1 (defining nodes as the points that form a network).

145. See NOAH E. FRIEDKIN & EUGENE C. JOHNSEN, SOCIAL INFLUENCE NETWORK THEORY: A SOCIOLOGICAL EXAMINATION OF SMALL GROUP DYNAMICS 25 (2011).

146. ROBERT A. HANNEMAN & MARK RIDDLE, INTRODUCTION TO SOCIAL NETWORK METHODS 42–44, 131 (2005) (ebook).

147. *Id.* at 13.

148. See *id.* (describing several different variables that can be incorporated into the concept of “tie strength” between two nodes).

networks) are not deterministic; they are stochastic.¹⁴⁹ That is, we can hope to understand the chance that some result or reaction will occur due to prior actions, but these discovered rules will always be probabilistic rather than certain.

Finally, the last concept from the complex systems literature we need to import is the concept of “states.”¹⁵⁰ These are the qualities of the individual elements (in our case, people) that describe how they are likely to behave and interact with other elements.¹⁵¹ In our case, the states each individual will be in relate to their beliefs, identities, and propensities to take action. These are the qualities of individuals within informal associations that will be altered based on the interactions that they have with others. An omniscient onlooker might be able to see how a person’s preferences for movies change over time depending on how they interact with others over various platforms and real-life social groups.

More to the point, the same omniscient observer could see how a person’s belief about whether the 2020 presidential votes were fraudulently cast and counted might change over time based on each individual’s interactions with members of various networks. For example, suppose an individual is a node in several social networks that engage in hate speech, conspiracy theories, and various coded or blatant vitriol. In that case, the propensity for antisocial beliefs and actions for that individual will likely be at least partly determined by the network’s interactions. As that individual takes on an increasingly radical state, this will have some marginal effect on other nodes in each network. This progression can lead to a runaway dynamic if the network does not have a brake system. At some point, it is foreseeable that some nodes will engage in violence based on the strength of their beliefs.

This context suggests that informal radical associations, facilitated by Internet communications, create peer effects on a vastly different scale and with much greater variety relative to industrial era and pre-modern associations. The risks and rewards of these radical networks exist in a legal vacuum today with unchecked negative (as well as positive) effects on society.

D. Strained Legal Theories

A legal system that relies on simple relationships of cause and effect will not be able to force radical networks to internalize the risks that they create. The legal theories being tested today to try to reach this problem — defamation, incitement, and conspiracy — are each inadequate.

149. See THURNER, *supra* note 138, at 29.

150. See *id.* at 21 (defining the concept of “states”).

151. See *id.*

Defamation will occasionally serve as an attractive option for victims of conspiracy theories, as the recent litigation against Alex Jones can attest. Jones was recently ordered to pay the parents of a Sandy Hook Elementary School shooting victim over \$45 million in compensatory and punitive damages for his defamatory statements claiming that the Sandy Hook mass shooting was a hoax and the parents were crisis actors.¹⁵² As a result of Jones's persistent propagation of this conspiracy theory, families and survivors of the Sandy Hook shooting have been physically harassed, have received death threats, and have relocated to avoid being tracked and followed.¹⁵³

The facts of the defamation cases again have the qualities that we believe merit civil redress, but there should be at least some doubt about whether Jones's statements were actually defamatory, given that the test uses a reasonable listener standard and does not include speech that "could not reasonably have been interpreted as stating actual facts" about the plaintiff.¹⁵⁴ While free speech scholar Lyrissa Lidsky has argued that Jones's statements are defamatory statements of fact because he knew that *his* readers, reasonable or not, understood the statements to be factually accurate,¹⁵⁵ this may be an expansion of defamation law to cover instances where the speaker has knowledge or purpose that a subset of listeners will believe the statements as factually accurate even if no reasonable person would. The implications of this expansion outside of scenarios like InfoWars may not be entirely salutary, as political organizers, comedians, and other speakers may sometimes know that some of their audience will take their rhetoric or jokes more literally and seriously than intended.¹⁵⁶ In any event, defamation law is also quite limited because it attaches only to defamatory statements made about named or identifiable plaintiffs and thus will not cover many of the communications and commiseration that lead to violence.

Incitement requires speech directed at an audience designed to cause imminent unlawful action.¹⁵⁷ It is a strange legal claim because

152. Jack Queen, *Jury Awards \$45.2 Million in Punitive Damages in Alex Jones Sandy Hook Trial*, REUTERS (Aug. 6, 2022), <https://www.reuters.com/business/media-telecom/jury-alex-jones-defamation-case-begin-deliberations-punitive-damages-2022-08-05/> [<https://perma.cc/7X63-87VW>].

153. Complaint at 2, *Lafferty v. Jones*, No. 3:18-cv-01156 (D. Conn. July 13, 2018).

154. This is why vicious parodies are constitutionally protected. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988).

155. Lyrissa Lidsky, *My Thoughts on the Alex Jones Defamation Cases*, PRAWFSBLAWG (Oct. 1, 2021), <https://prawfsblawg.blogs.com/prawfsblawg/2021/10/icymi-my-thoughts-on-the-alex-jones-defamation-cases-fall-2018-first-amendment-news.html> [<https://perma.cc/Z5EZ-CYP8>].

156. Moreover, it's also not clear that the parents' reputation is harmed in the community that is most relevant to their sense of self-esteem or economic opportunity. Lidsky herself recommends using the "community segment to which [the plaintiff] belonged" as the relevant community for an analysis of reputational harm. Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 46 (1996).

157. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

it is extremely narrow thanks to constitutional requirements that require the inciter's speech to be temporally and motivationally bound to the lawlessness, and yet it is also mysteriously permissive, potentially holding a speaker responsible for the rash conduct of a stranger who has no previous engagement with the speaker. To modern eyes, this appears to be a form of liability that undermines the assumption that the listener who engages in illegal conduct ordinarily has control over his reactions.¹⁵⁸

For example, incitement has been successfully used to prosecute attendees and organizers of the “Unite the Right” rally in Charlottesville. It has accompanied allegations that the defendants also engaged in the violence themselves (and therefore adds little deterrence value).¹⁵⁹ Participants of the Charlottesville protest admitted to shoving and pushing counterprotesters without justification, thus facing direct legal liability for their actions.¹⁶⁰ Several individuals harmed by the Charlottesville rally have brought a civil claim for incitement against leaders of groups and loose-knit organizations who encouraged people to attend the “Unite the Right” rally using incendiary racist and antisemitic appeals.¹⁶¹ However, except for the named defendants facing battery and assault allegations,¹⁶² we expect the claim to fail eventually. After all, the U.S. Supreme Court case that constrained the law of incitement — *Brandenburg v. Ohio*¹⁶³ — involved a KKK leader who stated at a rally that if the white race continues to be oppressed, “there might have to be some revengeance taken.”¹⁶⁴ The Court found that advocating violence is constitutionally protected.¹⁶⁵ An incitement prosecution is only permissible if the speaker incites *imminent* unlawful conduct.¹⁶⁶

In the case of Charlottesville organizers, with a few possible exceptions, the defendants who did not actually carry out physical assaults

158. Indeed, courts have dismantled the ability for a government to censor a speaker because the speech might make the audience hostile and violent *to the speaker* (what is sometimes referred to as the “hostile audience” doctrine). See Fred Schauer, *Costs and Challenges of the Hostile Audience*, 94 NOTRE DAME L. REV. 1671, 1672–73, 1684 (2019).

159. See Press Release, U.S. Dep’t of Just., Three Members of California-Based White Supremacist Group Sentenced on Riots Charges Related to August 2017 “Unite the Right” Rally in Charlottesville (July 19, 2021), <https://www.justice.gov/usao-wdva/pr/three-member-s-california-based-white-supremacist-group-sentenced-riots-charges-related> [https://perma.cc/4V48-3VSB].

160. *See id.*

161. *See* Complaint at 22–23, *Sines v. Kessler*, No. 3:17-cv-00072 (W.D. Va. Oct. 12, 2017).

162. *Id.* at 93. The count for assault and battery lists only one of the defendants — Fields. *Id.* We cannot tell from the complaint alone whether plaintiffs had evidence that the other defendants committed acts of physical violence.

163. 395 U.S. 444 (1969) (per curiam).

164. *Id.* at 446.

165. *See id.* at 447.

166. *See id.*

did not seem to meet the standards for incitement. Very little in the over 100-page complaint demonstrates an explicit direction or order to immediately start physically attacking peaceful counterprotesters.¹⁶⁷ There is scant evidence that the organizers had the intent and purpose to commit murder (as opposed to a cold indifference to the potential result). Given the defendants' aim to make an expressive mark in the political discourse using offensive, incendiary, and even intimidating language,¹⁶⁸ their conduct and mental state look indistinguishable from other organizers of other ugly spectacles. For example, in *National Socialist Party of America v. Village of Skokie*,¹⁶⁹ the Supreme Court recognized a First Amendment right for Nazis to organize a march.¹⁷⁰ When the attorneys for the plaintiffs who successfully sued the Charlottesville organizers explained that they wanted to hold march organizers responsible "to deter [other] hate groups from mounting similar toxic spectacles in the future,"¹⁷¹ they put into sharp relief the tension between the case and the constitutional precedent that protects toxic spectacles.

Claims brought against the group leaders for conspiracy to commit violence are also on shaky ground because much of the evidence demonstrates a sort of bloodlust for altercation and a desire to be in a position where self-defense might be legally justified.¹⁷² There is less evidence that the defendants actually "executed a common plan"¹⁷³ to engage in unprovoked violence.

Nevertheless, even if the vehicles for recovery are misfits for a case of this nature, we are convinced that the plaintiffs in the Charlottesville case should have a meritorious claim against the de facto leaders of the various radical networks that participated in the violent Charlottesville protests. The lawsuits are just, even if elements of conspiracy and incitement are not met, because the organizers were critical actors in a communications network that did nothing to discipline the increasingly paranoid beliefs of its members before the highly predictable and violent results. The trove of communications at the plaintiffs' disposal

167. See First Amended Complaint at 49, 58, 62, *Sines v. Kessler*, No. 3:17-cv-00072 (W.D. Va. Oct. 12, 2017) (quoting statements in which defendants praised or described, but did not explicitly and immediately order others to commit, acts of violence). One exception is communications sent in real time, while the Charlottesville police were attempting to clear out a park, that rally attendees should "HOLD YOUR FUCKING GROUND. DON'T RETREAT. DON'T GIVE AN INCH." See *id.* at 73.

168. MacFarquhar, *supra* note 7.

169. 432 U.S. 43 (1977).

170. See *id.* at 43–44.

171. MacFarquhar, *supra* note 7.

172. See First Amended Complaint at 34–37, *Sines v. Kessler*, No. 3:17-cv-00072 (W.D. Va. Oct. 12, 2017) (pointing to statements made on the social media platform Discord). To be clear, the evidence from the Discord discussion is not *clearly* oriented toward self-defense, but it does focus on the types of weapons that individuals planned to bring rather than how they would use the weapons. See *id.*

173. *Id.* at 87.

clearly shows that associations like the Proud Boys or *The Daily Stormer*'s readership are led by individuals who take precautions against their own risk of violating the law (indeed, there was an entire channel on the social media platform Discord dedicated to explaining Virginia law¹⁷⁴) but who do not attempt to curb the excesses and obvious pandemonium of the network as a whole.

The visible and well-organized events in Charlottesville and at the Capitol riot on January 6th are not the only examples of physical harm that leaders of radical networks have caused. The QAnon network alone has inspired individuals at the edge of the network to make bombs, to use an armored vehicle loaded with guns and 900 rounds of ammunition to block a bridge near the Hoover Dam, to commit murder and kidnapping, and to derail a train.¹⁷⁵ These scattered events have the same causal sources (Q and the leading QAnon interpreters), but secondary liability wouldn't reach them even under significantly looser conceptions of conspiracy and incitement liability. Ideally, courts would develop a form of tort liability *before* another January 6th-style incident by maturing it through the process of holding ringleaders responsible for one-off assaults, murders, and kidnappings. Civil liability could also prevent violent subcultures from forming and gaining influence within social movements outside of the "MAGA right."¹⁷⁶ After all, the right-wing side of the political spectrum does not have a monopoly on subcultures with a history of ideology-driven fits of violence.¹⁷⁷

Whether conscious or not, leaders of radical associations avoid legal accountability for the disorder they create during the long-term,

174. *Id.* at 27, 37.

175. See Lois Beckett, *QAnon: A Timeline of Violence Linked to the Conspiracy Theory*, *GUARDIAN* (Oct. 16, 2020), <https://www.theguardian.com/us-news/2020/oct/15/qanon-violence-crimes-timeline> [<https://perma.cc/CRK8-ESG8>].

176. By this, we mean the Republicans who are most loyal to Trump's "Make America Great Again" movement, many of whom deny the validity of the results of the 2020 presidential election. See Joshua D. Clinton & John G. Geer, *New Polling Shows the Power of MAGA Even as Support for Trump Fades*, *TIME* (Dec. 15, 2022), <https://time.com/6241434/polling-support-maga-trump> [<https://perma.cc/A6Q2-4R8P>].

177. One example is the Boogaloo movement, an extremist movement that is "anti-government, anti-authority and anti-police in nature." *The Boogaloo Movement*, ANTI-DEFAMATION LEAGUE (Sept. 16, 2020), <https://www.adl.org/resources/background/boogaloo-movement> [<https://perma.cc/SG9A-WQ3M>]. The Boogaloo movement loosely polices itself from becoming affiliated with white supremacist organizations and frequently participates in Black Lives Matter protests, but the group's messaging has inspired several one-off attacks, including the attempted murder of a police officer. See *id.* A different potential example is violence within the Black Lives Matter movement. At least one Black Lives Matter protest organizer has been sued for indirectly causing harm to police officers who were battered by protesters who began looting a store and throwing objects at the officers. See Kevin Foster, *La. State Supreme Court Says DeRay McKesson Can Be Sued for 2016 Protest*, *WAFB* (Mar. 25, 2022), <https://www.wafb.com/2022/03/25/la-state-supreme-court-says-de-ray-mckesson-can-be-sued-2016-protest> [<https://perma.cc/73HR-89A2>]. However, the complaint for negligence states only that DeRay McKesson "was present during the protest and he did nothing to calm the crowd" and that he intended to plan more protests. Complaint at 4–5, *Doe v. McKesson*, No. 3:16-cv-00742 (M.D. La. Nov. 7, 2016).

cumulative course of social interactions. Thus, it is incumbent upon the academy and our legal institutions to consider some modest tort law changes to reestablish in-network accountability. This will require some care, not only because of the backstop that the First Amendment provides when the government attempts to interfere with associations, but also because sound policy will require humility. In the next Part, we show how tort first principles provide a good foundation for a form of liability befitting an era of radical freedom of association.

IV. RADICAL ASSOCIATIONS AND TORT FIRST PRINCIPLES

When industrialization brought new risks to society, the common law tort system studied its impact through the accretion of test cases and came up with the rules of negligence and strict liability that have served us well (with the help of flexibility and modifications over time and context). Now that we are experiencing another shock — from radically free networks, associations, and communications — the tort system should be called into action again to address a new set of negative externalities.

This Part charts a course for an evolution in tort law by applying the core concepts of a harm principle and ex post liability rules to the present problem of harm caused by radical associations. At a conceptual level, the fit is quite good. Then, we demonstrate the limits of industrial-era liability rules to reach and properly deter the problems caused by radical associations. Finally, we show that digital communications and surveillance techniques allow for a form of ex post liability that would not have been possible in a previous era and that should be harnessed to properly assign blame and responsibility to the leaders of violent social movements. This will set the foundation for the actual tort — Reckless Association — that we develop in Part IV.

A. The Compensation and Harm Principles

One of the primary functions of the state (and of tort law) is to limit the conduct of individuals when that conduct unduly impedes the freedom of others. Even dyed-in-the-wool libertarians like Robert Nozick understand that the state must mediate freedom versus freedom clashes to achieve a minimum (or optimal) level of freedom for everybody.¹⁷⁸ The rules for fair play are in a persistent state of contestation and revision. Some rules, like those that forbid individuals from committing violence on one another, are highly stable because the costs to the victims' liberty is so obviously greater than the costs to an inhibited actor who might like to perform violence. But the less obvious and well-

178. See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 56 (1974).

settled areas of liberty-versus-liberty trade-offs must find a balance between competing claims of right.

On the one hand, those who have a personal interest in crossing the bounds or imposing risk on others will argue in favor of a right to freedom of action, even if their actions cause more harm to the freedom and flourishing of people as a whole.¹⁷⁹ On the other hand, those who have a personal interest in protection will argue for a legal constraint on others' actions, even if the actions of those others would cause more *benefit* to the freedom and flourishing of people as a whole.¹⁸⁰ When the risks and rewards of conduct fall in the murky middle of the spectrum, where conduct is not so risky as to justify a straight-out ban but also not so safe to justify complete freedom, the compensation principle helps individuals and society work out optimal behavior.¹⁸¹

Nozick anticipated that the law might forbid an activity and compensate those for whom it is forbidden.¹⁸² This works well enough for some purposes (like eminent domain), but the administrability and potential for strategic claims are too great in many contexts. A similar form of partial prohibition could involve a preclearance process, where an activity is banned unless an actor affirmatively proves to the state that the conduct is justified. This describes the processes we currently use for introducing new pharmaceutical drugs¹⁸³ and medical devices¹⁸⁴ into the market. A property rule, where property rights are assigned to the potential victims, is another example of a partial ban. An actor would have to engage in a preclearance process with individuals (the potential victims) rather than the government.¹⁸⁵

The alternative to partial bans is partial liberty. A liability rule allows risky activities to take place, but requires those who engage in them to compensate individuals if the conduct results in harm.¹⁸⁶ This compensation principle, the bedrock of tort law, is the most apt to address problems caused by radical associations. First, it is clear that freedom of association is not so inherently risky (akin to murder or violence) that it should be banned outright and without compensation.

179. *Id.* at 57–58.

180. *Id.* at 71–73.

181. *See id.* at 73–78.

182. *Id.* at 83.

183. *Development & Approval Process | Drugs*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/drugs/development-approval-process-drugs> [<https://perma.cc/Y7FR-CC2G>] (describing the drug approval process).

184. *Premarket Notification 510(k)*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/medical-devices/premarket-submissions-selecting-and-preparing-correct-submission/premarket-notification-510k> [<https://perma.cc/M566-UTAE>] (describing premarket notification requirements for medical devices).

185. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1108 (1972).

186. Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CALIF. L. REV. 1, 1 (1985) (describing the compensation principle).

The benefits of shared bonds (not to mention the biological and psychological need for them) are great, and radically free associations produce value for society, as discussed in Part III.

At the other end of the spectrum, radical freedom of association could be treated as an activity that should be completely unconstrained — an unqualified right. Given the laxity in legal responses to radicalized groups, this fairly describes how the law works today. But it need not stay this way. Radically free associations create externalities by predictably imposing risk on people who are not members of the association. Part II showed that, despite entrenched American constitutional laws and values protecting freedom of association, this freedom is not unqualified. On the contrary, as with speech, freedom of association can be curtailed through public law as long as restrictions are well-calibrated to concrete risks of harm.

This leaves us with two possibilities: partial prohibitions (where an activity is presumptively prohibited regardless of risk) or partial freedoms (where an activity is presumptively permitted). First Amendment precedent would very likely preclude partial prohibitions of associations because prior restraints on speech are highly suspect and rarely constitutional.¹⁸⁷ A system that generally prohibits First Amendment-protected activities and puts the state in charge of exceptions to those bans would have to satisfy the strictest scrutiny.¹⁸⁸ The Supreme Court has also cast doubt on the notion that legal rights require speakers to receive permission and consent from private individuals before engaging in First Amendment-protected activities.¹⁸⁹ If ex ante oversight and permission schemes cannot be imposed, the best way to deter risky behavior is to use ex post enforcement. That is, we must live with a general rule of freedom and permissiveness accompanied by a compensation rule that forces actors to pay for the harm they have caused. From a First Amendment perspective, an ex post liability rule ensures that regulation is not based on a speculative or exaggerated sense of threat since a plaintiff must prove damages to clear the summary judgment bar.¹⁹⁰

Finally, there is the matter of *which* actors should compensate victims based on the illegal conduct of group members. One option — the one that most readily comes to mind to most policymakers and legal scholars given their choice place as a communications bottleneck — is

187. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (the “Pentagon Papers” case); see *Near v. Minnesota*, 283 U.S. 697, 719–20 (1931).

188. See *N.Y. Times Co.*, 403 U.S. at 727.

189. See *Time, Inc. v. Hill*, 385 U.S. 374, 383–84 (1967) (limiting application of a right to privacy); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).

190. RESTATEMENT (SECOND) OF TORTS § 281 (AM. L. INST. 1965). In light of the Supreme Court’s recent rulings regarding standing, this limitation is becoming increasingly necessary for any lawsuit that proceeds in federal court. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2211–12 (2021); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339–42 (2016).

the platforms.¹⁹¹ These are the actors who provide the infrastructure for networks of individuals to form informal (or formal) groups that go on to cause unlawful conduct based on delusional beliefs. But platform liability is likely to be both under- and overinclusive. For the former, a liability rule applied to platforms will miss the applications specifically designed for end-to-end encrypted communications, such as Telegram, WhatsApp, and Signal.¹⁹² While it is tempting to assume public forums like Facebook and Twitter are the main sources of dysfunction and harm arising from radical associations, WhatsApp and Telegram have become semi-public forums as well, hosting chats with hundreds or thousands of people at a time.¹⁹³ If Facebook and Twitter faced potential liability, they would purge their rosters to a greater degree, and the end-to-end encrypted applications will become the primary venue for frictionless associations (if they aren't already).

Imposing a liability rule on platforms is also overinclusive. It would be sure to cause excessive content moderation and user bans because the costs of liability outweigh the benefits to the platforms, even if the benefits to their users are great. This is particularly so in cases where a platform might suspect that risky hate groups are speaking in code or will be playing with the boundary between sarcasm and earnest communications. Thus, a liability rule imposed on platforms would very likely produce a more significant chilling effect than necessary and may not survive a First Amendment tailoring analysis.¹⁹⁴

However, these concerns are not as relevant when considering the responsibility and potential liability of highly influential nodes within a network. These individuals have better knowledge, access, and control over their associates than a platform. They also by definition are invested in the community and will not be easily chilled from participating and will not be overly censorial in mindset since the costs to the association are costs to these central individuals.

Ultimately, the goal is to identify the de facto leaders of radical associations that have caused epistemic dysfunction — that is, dysfunctional systems of knowledge accumulation — that have predictably led to deranged beliefs and harm to others. The liability rule we will propose is similar to holding the agents or trustees of a formal entity (like a corporation) responsible for the harm caused by that entity. We lay out the specific principles and standards for liability in the next Part, but at a high level, what we propose is a new layer of legal

191. See *supra* note 18.

192. Emma Roth, *The Seven Best Secure Messaging Apps*, THE VERGE (June 30, 2022), <https://www.theverge.com/23186209/best-secure-messaging-apps-end-to-end-encryption-e2ee> [<https://perma.cc/H4RX-9VTC>].

193. Rani Molla, *Why Right-Wing Extremists' Favorite New Platform Is So Dangerous*, VOX (Jan. 20, 2021), <https://www.vox.com/recode/22238755/telegram-messaging-social-media-extremists> [<https://perma.cc/5HMW-ZGWW>].

194. We discuss this at length *supra* Part I.

responsibility that identifies actors whose relationship to wrongdoers is not quite as formalized as the typical principal-agent or corporate relationships, but whose relationship to others is still clear and consistent enough to apply secondary liability for reasons similar to tort liability for dram shops that overserve their patrons.

B. Filling Pockets of Underdeterrence

Tort law provides a strong, if imperfect, foundation for secondary liability of the sort we propose here. It allows plaintiffs to sue actors who indirectly caused harm to them in some circumstances, but those circumstances are constrained to ensure that the costs of accidents are not shifted too far up into the more distant recesses of the causal chain, particularly when there is a more direct and more blameworthy actor that the plaintiff can sue.¹⁹⁵

Some of this conservatism is justified by the liberal values of individualism and autonomy that undergird our legal system — values that we need not (and do not) disparage to address the problem of radicalized associations. But the assumption that each individual is the sole person responsible for their choices should be relaxed slightly when the realities of our social world create circumstances where groups so influence some individuals that they have a level of shared agency. This is the case for persistent, low-cost, radical associations. In these groups, the behavior of individuals follows the logic of the complex information ecosystem that we described at the end of Part III. The individuals who actually do the dirty work — who actually storm the Capitol — are among the most culpable, to be sure, but so are the de facto leaders who have outsized influence and awareness. On balance, we have a serious problem of underdetering de facto network leaders who have enough information and agency to be deterred.

The tort system already has mechanisms to spread fault and liability across multiple actors, including those with some influence and control over the ultimate actor. However, existing laws are not flexible enough to reach de facto leaders of radical associations. The principal-agent relationships that lead to liability under the doctrine of respondeat superior are limited to circumstances like the employment relationship where the principal literally orders the agent to do things on their behalf.¹⁹⁶ Liability based on conspiracy or aiding and abetting gets closer to the scenario described above and is also the theory which lawsuits and prosecutions related to January 6th have relied upon to date, but

195. This is illustrated by the concept of superseding causes in the proximate cause caselaw. See RESTATEMENT (SECOND) OF TORTS § 440 (AM. L. INST. 1965).

196. RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. L. INST. 1958) (listing factors when determining whether there is a principal-agent relationship).

these legal actions are slow and underinclusive because of the elements required.¹⁹⁷

But other forms of secondary liability are quite compatible with our proposal. The tort system has permitted plaintiffs to sue defendants who negligently incentivized or facilitated the bad behavior of third parties who ultimately caused harm to the plaintiff, but the terrain is fraught because of competing interests in compensation and deterrence (on one side) and principles of agency and fear of overdeterrence (on the other). For example, dram shop laws and social host liability will allow a plaintiff who is harmed by an intoxicated driver to sue both the driver and the establishment or individual who supplied the driver with an unreasonable amount of alcohol.¹⁹⁸ States differ wildly on how and whether they allow liability of this sort to be placed on the provider of alcohol,¹⁹⁹ which isn't surprising since the moral culpability of the provider (as opposed to the person who actually consumed it and drove) is an edge case, right on the margin of common sensibilities about these things. But the parallel to a case against the de facto leader of a radical association is clear: President Trump, Alex Jones, Proud Boys leaders, and others had enough information such that they should have known they were overserving.

Many states that recognize social host liability based on overserving alcohol permit innocent third parties to sue the negligent server but do not permit the drunk driver himself to bring suit (unless the driver is underage).²⁰⁰ Thus, secondary liability is available to address and mitigate externalities to those who have little awareness or control over the dangerous conduct (and who are therefore comparatively innocent) even as it is denied to the actor who did the drinking and driving.

Cases involving the “negligent entrustment of a dangerous instrumentality to an incompetent user” also follow this pattern.²⁰¹ In *Hamilton v. Accu-Tek*,²⁰² for example, a New York court held that a gun manufacturer could be sued for negligently marketing and distributing guns in a manner that foreseeably resulted in the guns finding their way onto the black market through gun show loopholes when one such gun was used by a third party to shoot the plaintiff during an armed

197. See discussion of the incitement and conspiracy cases *supra* Section III.D.

198. See 1 JAMES F. MOSHER, *LIQUOR LIABILITY LAW* § 5.03 (35th ed. 2022); Peter A. Slepchuk, Note, *Social Host Liability and the Distribution of Alcohol and Narcotics: A Survey and Guide*, 44 *SUFFOLK U. L. REV.* 933, 933 (2011).

199. See Jennifer Levitz, *Party Laws Put Hosts on Hook*, *WALL ST. J.* (Sept. 11, 2012), <https://www.wsj.com/articles/SB10000872396390443571904577631603480250074> [<https://perma.cc/DCD4-RYJC>].

200. Slepchuk, *supra* note 198, at 933, 942, 945–46, 950–52, 953, 955–57 (Colorado, Georgia, Idaho, Maine, Massachusetts, Minnesota, New Hampshire, New York).

201. Benjamin Zipursky & John Goldberg, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 *VAND. L. REV.* 657, 683 (2001).

202. 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

robbery.²⁰³ Parents of teenagers who committed school shootings have also been held criminally responsible for failing to secure their guns. In one case, the parents were charged with involuntary manslaughter for homicides committed by their son because the school had provided notice just one day earlier that their son was searching for ammunition online, and the parents not only continued to give him access to a gun but joked that he needs to learn not to get caught.²⁰⁴

An even more analogous case, because the scope of the First Amendment should similarly cover it, is *Weirum v. RKO General, Inc.*²⁰⁵ In this case, a radio station set up a contest where the first listener to locate a popular radio DJ out in the streets would win a prize.²⁰⁶ Although the contest did not require or explicitly encourage listeners to drive unsafely in their pursuit of the DJ, the court concluded that it was entirely foreseeable that the contest would have that effect and would consequently put third parties who weren't participating at heightened risk.²⁰⁷ This case is controversial; cases following a similar theory have been brought against Snapchat based on the design of its speed filter, which many young drivers were using to document the high speeds with which they drove their cars (right before smashing into the plaintiffs), and courts have been unwilling to extend negligence or products liability under those facts.²⁰⁸

So, as we aim to develop a new form of secondary liability, it should be properly understood as but a gentle expansion of existing negligence law. Moreover, since the complex dynamics of radical associations render the actors who are the most direct physical cause of harm — e.g., those who stormed the Capitol — to be somewhat less morally culpable than would normally be the case, and the central

203. *Id.* at 831, 839. *But cf.* John C. P. Goldberg & Benjamin C. Zipursky, *Concern for Cause: A Comment on the Twerski-Sebok Plan for Administering Negligent Marketing Claims Against Gun Manufacturers*, 32 CONN. L. REV. 1411, 1415–17 (2000).

204. Jack Healy, *Behind the Charges Faced by the Parents of the Michigan Shooting Suspect*, N.Y. TIMES (Dec. 3, 2021), <https://www.nytimes.com/2021/12/03/us/crumbley-parents-charged-michigan-shooting.html> [<https://perma.cc/SDN9-TM9Q>]; *see also* Herland v. Izatt, 345 P.3d 661, 672 (Utah 2015) (recognizing a duty when an individual supplies a gun to an incompetent or impaired person). John Goldberg and Benjamin Zipursky, citing Robert Rabin, refer to this form of tort liability as “enabling torts” and advocate for their exorcism in tort theory and doctrine. *See* John C.P. Goldberg & Benjamin J. Zipursky, *Intervening in Wrongdoing in Tort: The Restatement (Third)’s Unfortunate Embrace of Negligent Enabling*, 44 WAKE FOREST L. REV. 1211, 1212, 1218 (2009).

205. 539 P.2d 36 (Cal. 1975). Note, though, that this case involves facts that would probably fall under the less-protected category of commercial speech. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983).

206. *Weirum*, 539 P.2d at 38.

207. *Id.* at 40.

208. *See, e.g.*, Maynard v. Snapchat, Inc., 851 S.E.2d 128, 128 (Ga. Ct. App. 2020). *But see id.* at 133 (McFadden, C.J., dissenting) (noting that “[t]he novelty of the technology and the circumstances at issue should not distract us. There is nothing novel about the legal questions before us. The Maynards’ allegations fall squarely within the requirements for stating a claim for defective design . . .”).

nodes — the actors who encouraged increasingly paranoid and antisocial thinking over a sustained period of intense interactions — to be somewhat more morally culpable, extension of liability is appropriate.

C. New Opportunities for Ex Post Enforcement

The current circumstances of our communications ecosystem make freedom of association more likely to lead to radicalization and harm, but that same ecosystem also has a feature that makes liability and deterrence more feasible: communications between individuals are more traceable than they have been in the past. If one or more individuals commit a crime with the markings of online radicalization, a court can order their service providers to provide metadata associated with their accounts.²⁰⁹ This data can be used to construct an initially deidentified network graph that reveals the nodes that have most intensively interacted with the criminal's group over time.²¹⁰

These network graphs will be pivotal for proving the elements of a Reckless Association, as we discuss in the next Part. But before we dive into the particulars of a new form of tort liability, it's worthwhile to step back and understand why liability of this sort has not emerged before. One reason is that the negative externalities produced by informal associations were not as much of a threat to others. As Part III explained, fringe groups once had more difficulty organizing, growing their ranks, and reinforcing one another than they do in the Internet era.²¹¹ But another reason is that a tort of this sort would have been impractical, if not impossible, until recently because of the inability to establish a history of an actor's social interactions. As early as the nineties, Lawrence Lessig and other Internet scholars anticipated that Internet architecture would become an architecture of surveillance and control.²¹² The architecture is here. In the rest of this Article, we are proposing a light-handed form of control: an ex post liability rule that helps internalize the externalities of radically free associations.

209. See Denise Russo & Abebe Rorissa, *The Use and Impact of Metadata in Civil Cases*, FIRST MONDAY, <https://firstmonday.org/ojs/index.php/fm/article/view/11605/10191> [<https://perma.cc/XZB7-HPGL>].

210. This is similar to the metadata network of "hops" that the NSA used as revealed by Edward Snowden's disclosures. See Susan Landau & Asaf Lubin, *Examining the Anomalies, Explaining the Value: Should the USA FREEDOM Act's Metadata Program be Extended?*, 11 HARV. NAT'L SEC. J. 308, 315–16 (2020) (describing the programs).

211. Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1837 (1995).

212. See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 142, 163 (1999).

V. SECONDARY LIABILITY FOR RECKLESS ASSOCIATION

At last, we have the background necessary to work out the appropriate elements and limitations of a liability rule for Reckless Association. In a nutshell, here is how liability would work:

Suppose a man were physically attacked and his child were kidnapped by an estranged spouse whose beliefs had been fully warped by conspiracy theories. Of course, the victim could file a civil suit against the estranged spouse. But in addition, he could use the discovery process to access the spouse's communications metadata and two or three "hops" to produce a network graph (probably in a form that is initially redacted to protect identities).²¹³ A network analysis of this data would reveal the central nodes of the attacker's radicalizing network — the individuals in the network who are the most connected and the most frequent contributors to the swarm of crazy-making content. The victim could then file a civil suit against these individuals if he can prove that their use of the social networks was persistent enough and reckless enough to foreseeably cause a member of the association to engage in physical harm.

This Part proposes the elements for such a tort and then delves into the nuances of the causation and mental state requirements.

A. The Elements

A defendant is subject to liability to a plaintiff if the defendant **assumed a leadership position** within an association that **recklessly caused** a member of the association to **intentionally harm the plaintiff's person**.

Each bolded and underlined term will require a distinct form of proof from the plaintiff, constraining tort liability to appropriately clear, predictable, and risky circumstances.

The damages required, we suggest, should relate to intentional physical harm. While property damages and severe emotional distress can also be compensated when accompanying physical harm, the novelty of this form of secondary liability requires strict limitations in its application, especially as courts and society come to understand and adjust to it. A radical movement that produces physical violence is

213. For an explanation of "hops," see Amy Nordrum, *NSA Can Legally Access Metadata of 25,000 Callers Based on a Single Suspect's Phone*, IEEE SPECTRUM (May 16, 2016), <https://spectrum.ieee.org/nsa-can-legally-access-metadata-of-25000-callers-based-on-a-single-suspects-phone-analysis-suggests> [<https://perma.cc/MFQ7-3XJ3>] (noting that in the context of phone calls, two hops refers to "someone who called someone who called the [individual at issue]"). For an explanation of network graphs, see Dima Goldenberg, *Social Network Analysis: From Graph Theory to Applications with Python*, TOWARDS DATA SCI. (Jan. 16, 2021), <https://towardsdatascience.com/social-network-analysis-from-theory-to-applications-with-python-d12e9a34c2c7> [<https://perma.cc/6HZZ-PVMV>].

qualitatively different from one that maintains enough discipline to cause fear and property damage but no intentional physical injury (or so it seems to us).

The defendant's act, "assuming a position of leadership," requires the plaintiff to prove that the defendants were such active and influential members of the association that a network graph could easily identify them as central nodes. There are several ways to measure centrality in network and graph theory. Thus, courts could use a range of threshold criteria to ensure that an identified central node is very likely to have the quality of a *de facto* leader of a network.²¹⁴ Courts could even require a plaintiff to prove that the defendant meets more than one criterion for network centrality. In any case, the essential purpose of this element is to ensure that the defendant was highly active within a radical network and was also highly influential and knowledgeable about it. These qualities will be necessary anyway for the plaintiff to prove causation and recklessness.

The rest of this Part will elaborate on these elements: causation and recklessness. Since a putative defendant's acts are constituted entirely by First Amendment-protected conduct (communicating and associating), liability can only survive a constitutional challenge if it is firmly connected to harm, caused by the defendant, and with a sufficient mental state.²¹⁵ Since we propose limiting liability to cases where the plaintiff has become the victim of a crime that causes physical injury, the constitutional requirement for concrete harm is easily met. Causation and mental state are the requirements that need the greatest care and shoring up.

B. Sufficient Causation

Factual causation is the most analytically complex element because there are three layers of potential doubt: (1) *networks*: whether the actor who intentionally harmed the plaintiff would have committed the crime irrespective of their communications networks; (2) *a particular network*: whether any one network was a necessary condition to the actor's radicalization, given the actor's participation in other networks on other platforms; and (3) *the defendant's conduct on that particular network*: whether the defendant caused the particular network to have the radicalizing effect on its members.

214. Peter V. Marsden, *Network Analysis*, in 2 ENCYCLOPEDIA OF SOCIAL MEASUREMENT 822 (2005) (degree centrality); JENNIFER GOLBECK, ANALYZING THE SOCIAL WEB 30–31 (2013) (eigenvector centrality); DEREK L. HANSEN, BEN SHNEIDERMAN, MARC A. SMITH & ITAI HIMELBOIM, ANALYZING SOCIAL MEDIA NETWORKS WITH NODEXL 41 (2d ed. 2020) (closeness centrality).

215. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799–800 (2011) (harm and causation); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (mental state).

Generally speaking, tort law requires the plaintiff to prove that the defendant's conduct was a *necessary* condition but does not require proof that the defendant alone was *sufficient* to cause the accident. The black letter law asks whether the accident would have occurred without the defendant's tortious conduct.²¹⁶ Suppose the defendant's negligent conduct (e.g., an oil spill) was insufficient on its own to cause the accident (a fire). In that case, this will not stop the plaintiff from being compensated when other necessary conditions (e.g., a spark) interact with the defendant's negligence. But if the defendant's negligent conduct, such as an oil spill, is an unnecessary condition for the accident, for example because a fire of much greater proportion was already racing through the town on a trajectory certain to reach and destroy the plaintiff's property on the same schedule, then the plaintiff will fail to prove factual causation. However, there are exceptions to this general rule when evidentiary disadvantages are likely to plague every case of a certain sort, causing unjust pockets of effective immunity.²¹⁷

Network Causation Versus Correlation. It is critical to differentiate the acts of reckless associations from the actions of "lone wolf" actors with mental illness or other traits that make them equally likely to commit the crime, irrespective of the association's activity. The indicia of a Reckless Association would have to rely on two sources of evidence. Either the actor's speech or media diet could provide strong evidence that his motive was greatly influenced (caused, in other words) by a radical association or the act was one of a series of criminal attacks committed by members of a network who are not directly connected to each other. When either of these patterns is discovered, the central node of the apparent radical network can be sued for breaching a duty owed to their group.

Using January 6th again, if a network defined by Trump's Twitter following had 88 million individuals²¹⁸ in it, and only a few thousand stormed the Capitol, can it be said that Trump or other de facto leaders of the march on the Capitol caused members of their group to engage in criminal acts? Harder still, if only one person took on the task of raiding Comet Pizza to release the children he believed were locked in

216. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 26 (AM. L. INST. 2010).

217. For example, the loss-of-chance doctrine was developed and continues to be used in the context of medical malpractice, even though doctor negligence isn't a "but for" cause of death, because otherwise, the class of terminally ill patients would be effectively barred from suing negligent doctors, causing compensation gaps and deterrence problems. *Id.* § 26 cmt. n; see also Stephen R. Perry, *Risk, Harm, and Responsibility*, in THE PHILOSOPHICAL FOUNDATIONS OF TORT LAW 321, 337–39 (David G. Owen ed., 1995).

218. Sheila Dang & Helen Coster, *Trump Snubs Twitter After Musk Announces Reactivation of Ex-President's Account*, REUTERS (Nov. 20, 2022, 9:08 PM), <https://www.reuters.com/technology/musks-twitter-poll-showing-narrow-majority-want-trump-reinstated-2022-11-20> [<https://perma.cc/H4ZC-GC9M>] (stating that Trump "had over 88 million followers before he was banned on Jan. 8, 2021").

the basement, was that conduct caused by an insider like Alex Jones? Here, too, tort doctrine has already supplied an answer and explanation. Even if there is only one seemingly isolated event, if the defendant made the event much more likely to occur compared to the background baseline risk, then that increase in risk can be attributed to the defendant.²¹⁹ A person who intensively engages with a social network dominated by hate speech and conspiracy theories is much more likely to engage in violent action than an individual interacting in a more typical social network, even though there is, of course, some baseline risk that somebody in the more typical social network will also commit a crime.

DES cases like *Sindell v. Abbott Laboratories*²²⁰ work the same way. These cases involved plaintiffs whose mothers consumed a drug (DES) that caused a heightened risk of a rare form of cancer. Even the daughters of women who took DES were very unlikely to get cancer due to the pills.²²¹ However, the form of cancer was so exceedingly rare in “the wild” that it was obvious the pills caused the risk to increase by an order of magnitude or more.²²² (And because the manufacturers were in the best position to discover the increased risk and the risk could not be justified by offsetting benefits, the pharmaceutical manufacturers not only *caused* the cancer but *negligently caused* it).²²³ Reckless Association defendants are in a similar position: the probability that any one particular member of the network will take action and cause physical harm is low, but it is still much higher than it would be in the absence of persistent messaging from the de facto network leader.

Multiple sufficient radical networks. Black letter law can address causation questions involving multiple necessary causes, some of which are tortious (e.g., the oil spill and the spark that ignites it²²⁴). A separate doctrine has developed to address multiple causes, each of which may have been sufficient to cause the harm.²²⁵ In these cases, the plaintiff’s injury is “overdetermined” because harm could only be avoided by eliminating multiple sources of causation. The simple

219. See, e.g., *Herskovits v. Grp. Health Coop. of Puget Sound*, 664 P.2d 474, 476–78 (Wash. 1983) (describing cases where a defendant’s contribution to the likelihood of death or disease, even if there was already an underlying risk, can still cause liability to attach); *Hamil v. Bashline*, 392 A.2d 1280, 1289–90 (Pa. 1978) (jury instruction requiring defendant’s negligence to be the sole cause of death was not harmless error).

220. 607 P.2d 924 (Cal. 1980).

221. *Id.* at 927 (an estimated 1.5 to 3 million women took DES and hundreds or possibly thousands of their daughters developed adenocarcinoma).

222. The risk of contracting clear cell adenocarcinoma is forty times higher than usual for DES daughters. *Diethylstilbestrol (DES) Exposure and Cancer*, NAT’L INSTS. OF HEALTH, <https://www.cancer.gov/about-cancer/causes-prevention/risk/hormones/des-fact-sheet> [<https://perma.cc/K4P9-2CHZ>].

223. See *id.* at 936–37 (majority opinion).

224. *Overseas Tankship (UK), Ltd. v. Morts Dock & Eng’g Co.* (“The Wagon Mound No. 1”) [1961] 1 All ER 404 (PC) (a classic common law case that inspired American jurisprudence).

225. *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 174 (Mo. Ct. App. 1988).

analogy is that if two fires of equal size reach the same property at the same time, the plaintiff's property could not be saved by imagining the counterfactual where one (and only one) of the fires is eliminated. To avoid underdeterrence, courts have lifted the requirement to prove but-for causation in cases where the plaintiff's harm was (probably) caused by multiple acts that each would have been a sufficient cause.²²⁶

Radicalized social networks fit this pattern. An actor who became deranged enough to storm the Capitol and attack the police may very well be interacting with multiple radical associations, each of which would have encouraged the actor toward the same behavior in the absence of the others. This problem could be overcome with the right data — if plaintiffs' lawyers can access and analyze a meta-network of the third-party actor's communications across multiple media and platforms. This analysis would require linking data from accounts across different platforms and services, though, and could be both technically and legally difficult. Assuming networks have to be analyzed within platforms rather than across platforms, it's still possible for the plaintiff to prove a case. As long as each network can be causally linked to the third-party actor's illegal conduct using the probabilistic or content analysis options described above, each network should be treated as a legally responsible cause.

Defendant's role within a radicalized network. The final hurdle for factual causation is the defendant's role vis-à-vis the radicalized network. Even if a plaintiff can prove that they were harmed by somebody who had become radicalized under the influence of a network, how will the plaintiff prove that the defendant is a cause of that network's radicalization?

A natural instinct is to look at the content of the defendant's communications to see if, e.g., the defendant was the first to float the idea of a conspiracy theory. But this would be a mistake, both in terms of avoiding a clash with the First Amendment and in terms of identifying the actors who do the most to keep a paranoid theory churning and growing. Network activity, rather than the content of speech, is at the heart of this particular form of liability. Thus, network analysis of the centrality of each node will reveal the extent to which each member of an association assumed a position of authority in the actor's sphere of influence.

A causation analysis will have to rely on an analysis of each node. A node is more likely to be a cause of group disorder if it has a higher "degree" and particularly "out degrees"²²⁷ and a greater amount of

226. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 27 (AM. L. INST. 2010).

227. Degree is a measure of connections to other nodes, while out degrees measure the communications connections for which the node is a source of information rather than a recipient. THURNER, *supra* note 138, at 150–51.

“centrality.”²²⁸ As we said, there are several ways to measure centrality, but some (closeness and betweenness centrality) are more fitting than others. Together, these two measures can establish the frequency with which each node targeted the actor who harmed the plaintiff. In some cases, some nodes will emerge as more-likely-than-not causes of their network’s derangement, because removing a central node would leave the third-party actor with dramatically fewer impressions and communications received.

If the defendant, a central node in one of the radicalizing networks, can be shown to be a but-for cause of the network’s radicalization, there would be no causation problem. For example, if it were the case that by removing Donald Trump’s communications (including retweets and posts referring to his messages), the remaining “Stop the Steal” messages would have been less than half in number, then Trump would be a but-for cause of the radicalization of a network that produced the conduct of the rioters. In these cases, defendants like Donald Trump would fit what some have called the “INUS” condition — he would be an Insufficient-but-Necessary part of an Unnecessary but Sufficient Cause²²⁹ — and this now fits comfortably within tort theories of causation.²³⁰

Harder cases occur when the removal of one node still leaves combinations of other nodes that sustain nearly as much interaction with the third-party actor such that, even in the defendant’s absence, the third-party actor was still likely to harm the plaintiff.²³¹ This problem is sufficiently common that it has made its way into the Third Restatement of Torts.²³² Consider the following illustration:

Illustration 3. Able, Baker, and Charlie, acting independently but simultaneously, each negligently lean on Paul’s car, which is parked at a scenic overlook at the edge of a mountain. Their combined force results in the car rolling over the edge of a diminutive curbstone and plummeting down the mountain to its destruction. The force exerted by each of Able, Baker, and Charlie would have been insufficient to propel

228. *Id.* at 154 (defining centrality).

229. See J. L. Mackie, *Causes and Conditions*, 2 AM. PHIL. Q. 245, 245 (1965).

230. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 27 (AM. L. INST. 2010).

231. A similar problem is when the defendant’s conduct is tortious because it is marginally more risky than other, non-tortious, conduct. In these cases, courts are supposed to imagine a counterfactual in which the defendant behaves in a way that falls just short of the negligence line. Courts are not supposed to imagine the counterfactual world in which the defendant simply does not exist or stops his activities completely. *Id.* § 26, cmt. f, illus. 2.

232. The *Third Restatement of Torts* would treat the defendant’s conduct as part of a “causal set” within the multiple sufficient causes of the plaintiff’s injury. *Id.* § 27 cmts. a, f.

Paul's car past the curbstone, but the combined force of any two of them is sufficient. Able, Baker, and Charlie are each a factual cause of the destruction of Paul's car.²³³

For our purposes, the question is where to cut off liability since everyone in a radicalized network can be said to be leaning on the car. This is where the threshold requirement comes into play, effectively cutting off liability for everyone except the most active and culpable members of the network: if a combination of two or three nodes produces or amplifies more than half of the traffic that was directed to the third-party actor, those two or three or n nodes share authority over the network. The measures of node centrality will also be used to allocate the damages between the defendants.

Note that without some initial discovery, it will be difficult, if not impossible, for the plaintiff to identify the appropriate target for secondary liability. The de facto leaders of a violent actor's radicalized network may or may not be the individuals who are the most public and well-known for producing outrageous content. For example, there has been a national obsession with identifying and locating "Q,"²³⁴ but that individual (or those individuals) is (are) unlikely to be the central node in a network graph sense. The downstream QAnon aggregators and interpreters who obsessively share and redirect attention to the spare and cryptic "Q drops"²³⁵ are more responsible for the persistent hum and are thus more responsible for the harm that results when a member of their community takes matters into their own hands.²³⁶

Putting it together. Is it appropriate to hold a defendant accountable for being a necessary part of a radicalized network that was a sufficient cause of harm to the plaintiff if the causal chains still depend on the intentional and illegal conduct of a third party — the member of the network who actually attacks the plaintiff? The form of tort liability we propose requires some flexibility across several dimensions in order to

233. *Id.* § 27 cmt. f, illus. 3.

234. See, e.g., David D. Kirkpatrick, *Who Is Behind QAnon? Linguistic Detectives Find Fingerprints*, N.Y. TIMES (Feb. 19, 2022), <https://www.nytimes.com/2022/02/19/technology/qanon-messages-authors.html> [<https://perma.cc/ABB2-J5KR>].

235. This refers to posts made by "Q" on social media platforms. *Q Drop*, ANTI-DEFAMATION LEAGUE, www.adl.org/glossary/q-drop [<https://perma.cc/GM9F-8LW5>].

236. Richard Ruelas, *Arizona-Based QAnon Interpreter, Militia Mobilizer, Other Pages Taken Off of Facebook During Crackdown*, ARIZ. REPUBLIC (Oct. 8, 2020) (describing one "popular and influential interpreter["]"), <https://www.azcentral.com/story/news/local/arizona-investigations/2020/10/08/qanon-interpreter-praying-medic-off-facebook-after-q-crackdown/5917183002/> [<https://perma.cc/77BU-MY9B>]. See generally Antonis Papasavva et al., *The Gospel According to Q: Understanding the QAnon Conspiracy from the Perspective of Canonical Information*, 2021 SIXTEENTH INT'L AAAI CONF. ON WEB & SOC. MEDIA 735, 736–37 (describing how a few subcommunities helped solidify and disseminate the meaning of Q drops to wider audiences and how there is significant variation among these subgroups in the interpretations of the Q drops).

work. The doctrine of unnecessary but sufficient cause is not usually combined with doctrines related to secondary liability — where the accident that is caused is another, presumptively agentic, person doing something illegal. But the rationales for both secondary liability (*see* discussion *supra* Part IV) and for accepting sufficient causes (discussed here) survive the combination. A de facto leader of a radical online association greatly increases the risk of victimization to outsiders, and when those risks come to pass, the leader is a factual cause of the harm. Although the instrumentality in these cases is another person — a member of the association — the leader is as factually connected to the harm as any other defendant in similarly complex accidents (for example, in the context of medicine, where multiple actors and multiple preexisting or natural causes combine to produce a negative outcome).²³⁷

Factual causation is an analytically difficult element in the tort, but in the right cases with the right facts, we have little doubt there can be evidence that easily clears the bar. For example, an analysis of QAnon conspiracy theories on YouTube found that QAnon messaging was highly concentrated: just eleven channels were responsible for producing eighty percent of all videos mentioning QAnon within the universe of YouTube’s most popular news channels.²³⁸ If an avid viewer commits an act of physical violence based on a conspiracy theory, it is likely the plaintiff would be able to prove that one or two of the channel owners meet the qualifications for factual causation.

As for the required mental state of the defendant, we consider this next.

C. Sufficient Mental State

Finally, courts will require proof of a fault-worthy mental state both for policy reasons and for First Amendment avoidance.²³⁹ The plaintiff will need to prove that the defendant recklessly disregarded the risk that his association’s communication habits would cause at least one member of the association to purposefully harm an individual outside the network.

237. *See Herskovits v. Grp. Health Coop. of Puget Sound*, 664 P.2d 474, 475–77 (Wash. 1983).

238. Four of the eleven channels mentioned QAnon in half or more of their videos. *5 Facts About the QAnon Conspiracy Theories*, PEW RSCH. CTR. (Nov. 16, 2020), <https://www.pewresearch.org/fact-tank/2020/11/16/5-facts-about-the-qanon-conspiracy-theories> [<https://perma.cc/33ZE-JUP3>].

239. With respect to policy, tort law generally restricts strict liability to inherently dangerous activities for which there is little social loss if the activity level goes down. Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGIS. STUD. 1, 2 n.3, 19 (1980). With respect to the First Amendment, courts would probably follow cases like *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which require a showing of at least negligence in order to be forced to pay damages based on expressive activities. *Id.* at 349.

In practice, we expect this element to be proven to make a prima facie case based on the same evidence used to establish causation — the fact that the defendant was a critical node in a network that motivated its members to engage in violence. As we described in Section V.B above, such proof is likely to take one of two forms: (a) either two or more members of the network who are not in direct communication with each other engaged in the same otherwise-rare physical attack; or (b) a textual analysis — possibly using machine learning techniques that can infer semantic content — suggests that the network activity caused the third-party actor’s beliefs to deteriorate to a state of paranoia or desperation. One or the other of these sorts of proof for causation will also suffice to show that the defendant, who meets the threshold for de facto leadership within the network, must have been aware of the tenor of the discussion, the seriousness of followers, and the telltale signs of planning and plotting. Thus, if the plaintiff makes a prima facie case for causation, the burden of persuasion on the mental state element should shift to the defendant.²⁴⁰

In Part IV, recall that we suggested that a problem with modern, Internet-connected associations is that the probability distribution of each member’s likelihood of doing something foolish or committing a harmful act can shift suddenly because of feedback loops and peer effects. The central nodes of a radicalized social network have the best possible view — better than employees and even AI algorithms of an online platform²⁴¹ — to see the changes in the probability distributions of its members.

A defendant can challenge the plaintiff’s case by demonstrating that they attempted to redirect the group’s energy in a non-criminal direction. Indeed, even the most conscientious leaders of social movements will not have perfect success maintaining peace and fairness throughout the movement’s ranks. Mahatma Gandhi and Martin Luther King, Jr. were both leaders of social movements with violent and destructive moments.²⁴² Yet both made compelling arguments and earnest

240. At the risk of referencing nearly every unusual doctrine within the law of negligence, we can’t help but point out that this burden-shifting is similar to the procedures that accompany cases based on the *Res Ipsa Loquitur* doctrine. See generally William L. Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 3 MINN. L. REV. 241 (1936) (exploring the meaning of the *Res Ipsa Loquitur* doctrine).

241. This may change in the future, but today, machine learning algorithms still have a hard time distinguishing humor from serious posts. See Renata Vaz Shimbo & Marco Almada, *A Robot and a Moderator Walk into a Bar: Humour as a Problem for Automated Content Moderation*, THE DIGIT. CONSTITUTIONALIST (Feb. 17, 2022), <https://digi-con.org/a-robot-and-a-moderator-walk-into-a-bar-humour-as-a-problem-for-automated-content-moderation/> [<https://perma.cc/USZP-GY37>].

242. In Gandhi’s case, early in his career, protesters set a liquor shop and police station on fire. Gandhi personally intervened to ensure that the individuals trapped in the liquor shop were saved. MARK L. SCHRAD, *SMASHING THE LIQUOR MACHINE* 208–09 (2020). A march that Dr. King led in Memphis resulted in looting. *King’s Last March*, APM REP., <https://feature.spmreports.org/arw/king> [<https://perma.cc/77BU-MY9B>].

pleas to their respective associations' members to refrain from physical violence,²⁴³ and these statements were of a piece with their other speeches, teachings, and activities.

Contrast this with potential cases against Donald Trump or Alex Jones, who rarely urged caution among their members, and whose statements in those rare times were too late or too weak to be effective.²⁴⁴

Another possible defense that a defendant can raise is to show that they stopped engaging or even removed themselves from the association at a critical time in the history of the third-party actor's radicalization. (Such evidence would help the defendant challenge the plaintiff's case concerning both causation and mental state, since the defendant's reduced activity level would raise doubts about the defendant's culpably complicit mental state and the defendant's role in the causal chain).

Finally, two features of this sort of liability are worth highlighting. First, unlike many forms of unprotected speech, secondary liability for leaders of dysfunctional associations does not hinge on proof of malicious intent — that is, having knowledge or purpose of causing harm to the plaintiff. This means that, when analogizing to existing speech liability, the form of liability we propose is less similar to incitement (which requires the intent to produce imminent lawless action)²⁴⁵ and more similar to negligence cases (which do not).

Negligent speech cases have imposed liability on speakers who should have known that their speech would persuade a listener or reader to engage in lawless conduct. For example, in *Rice v. Paladin Enterprises, Inc.*²⁴⁶ (the “hitman case”), the publisher of a how-to book that described how to get away with murder was found liable for aiding and abetting a wrongful death when a reader used the book to plot a homicide.²⁴⁷ And yet, while the actual hitman intended to kill the victim, the

243. In response to the violence, Gandhi called off his civil disobedience campaign for a period and engaged in prayer and fasting for penance, writing “[i]f I can have nothing to do with the organized violence of the Government . . . I can have less to do with the unorganized violence of the people. I would prefer to be crushed between the two.” SCHRAD, *supra* note 242, at 209. King considered a similar fast to unify and discipline the movement. APM REP., *supra* note 242. In other speeches and writings, King showed that he understood and empathized with violent protest, but also made strong distinctions between property damage and physical violence. “Occasionally in life one develops a conviction so precious and meaningful that he will stand on it till the end. This is what I have found in nonviolence.” MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* 63–64 (1967).

244. Jim Acosta, *Trump Did Not Want to Tweet ‘Stay Peaceful’ During January 6 Riot, Key Former Aide Says*, CNN (Jan. 6, 2022), <https://www.cnn.com/2022/01/06/politics/trump-tweet-january-6/index.html> [<https://perma.cc/M8K7-SSMM>].

245. *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (per curiam) (extending First Amendment protection to speech advocating crime unless it is directed to inciting or producing imminent lawless action and likely to incite or produce such action).

246. 128 F.3d 233 (4th Cir. 1997).

247. *Id.* at 241–42. To find purposeful aiding and abetting in the case, the court relied on stipulations of the publisher that it knew and intended that the book would be used by would-be criminals. *Id.* at 248.

publisher did not. So, despite the “aiding and abetting” language, the case stood on a theory that required only a negligent or reckless mental state. *Weirum*, where the defendant radio station was held liable for harm caused to a third-party victim when it negligently incentivized listeners to drive recklessly through public streets, is also an example of a negligent speech case.²⁴⁸

To be sure, it is not unambiguously clear that these forms of liability for negligent speech can actually survive First Amendment review if they were truly put to the test, particularly since liability in these cases is based on the content of the speech. After all, if the First Amendment requires prosecutors to prove that a person who has incited violence has not only caused the result but *intended* it too, why should the state be able to punish speech that causes accidents without proving a knowing or purposeful mental state?²⁴⁹

These cases strike us as troubling when the state punishes individuals based on their speech and nothing more, as is arguably the case in both *Paladin* and *Weirum*. However, secondary liability for Reckless Association is *not* content-based. It is not even speech-based. Instead, while speech will form a significant part of the evidentiary support for a plaintiff’s case, the liability is imposed based on long-term malevolent association. No one utterance within that association will trigger liability on its own.

In fact, because the liability we propose does *not* depend on any particular communications of the actor, it has the greatest chance of piercing through the immunity that shields Trump and Jones from liability based on their speech (which will often studiously avoid the bounds of incitement or true threats). On the contrary, liability is

248. *Weirum*, 539 P.2d 36; see also *Navarrette v. Meyer*, 188 Cal. Rptr. 3d 623, 639–41 (Cal. Ct. App. 2015) (holding a passenger in a car liable to harm caused to others by telling the driver to “go faster”).

249. Unlike conspiracy or liability for aiding and abetting, the responsible actor does not have to share a purpose or specific intent with the person at the edge of their network who ultimately commits the illegal act. This solves both an evidentiary problem for individuals, like former President Trump, who may in fact share the intent but will disclaim it later, as well as a problem with the mental state element in cases against defendants like Alex Jones, who may in fact lack a specific purpose to cause the ultimate injury and instead are merely aware of and indifferent to the risk. For discussion of the importance of mental state in laws that penalize expression, see Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255, 1259, 1262 (2014); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1174–85, 1190 (2005) (discussing how heightened mens rea standards are constitutionally necessary for secondary liability based on crime-facilitating speech but also make these cases much harder to bring). We justify reducing the mental state requirement in cases of Reckless Association by increasing other protections for the defendant: namely, requiring proof of actual physical harm (not just risk) and proof of persistence on the defendant’s part. Note, also, that liability for material support to a recognized terrorist organization requires only that the defendant know that the organization they are assisting is a designated organization. It does not require knowledge or purpose that the aid provided will actually assist the group. See Heidi Kitrosser, *Free Speech and National Security Bootstraps*, 86 FORDHAM L. REV. 509, 514 (2017).

assigned based on emergent qualities of a group that have unknown relationship to the specific messages shared within the group. It is the conduct of group members, and the de facto leadership of the defendant, that matter.

VI. OBJECTIONS

In this Part, we address objections and explain why tort liability based on Reckless Association is the best of our imperfect policy options. The most obvious concern is that new liability encroaching on free association will overdeter, causing a chilling effect on marginalized, misunderstood, but socially valuable groups. Another concern is that the tort might not be efficacious if cynical leaders of radicalized networks use disclaimers to preserve a defense in a future case. These two objections are not mutually exclusive — errors of these sorts can (and probably will) coexist. Nevertheless, the tort is designed to minimize these problems, and the common law system has the flexibility to adjust if either error is too great. Finally, there is a concern that enforcement of this style of liability might be ideologically biased, and thus might permit courts to deter some expressive networks more than others. This is a legitimate concern, but one that extends well beyond this (or any) particular tort and is mitigated to some extent by the nature of a private right of action.

A. Chilling Effects

Responsible leaders of socially valuable causes will occasionally have rogue extremists within their circle of influence who commit violence. If leaders know that there is a chance that they will incur the costs of litigation and a possible damages award (even if errant), they will be less inclined to take or remain in a position of influence. In other words, there will be a chilling effect on intensive participation and engagement in online networks.

We see this as *the key* problem that must be avoided in the design of a liability rule. Indeed, we started the Article by considering the constitutional protections for associations to place the threat of overinclusion and reduced freedom at the front of mind. But the problem is not intractable. Every liability rule attempts to chill bad conduct without chilling neutral or valuable conduct, and the proposed tort does this well enough.

The risk of overdeterrence is mitigated in the design of the elements. The harm requirement does some of the work: since a plaintiff cannot sue unless they have been physically harmed, leaders of networks do not need to fear that they will be penalized for the creation of

unrealized risk.²⁵⁰ In order to prove that a network *caused* a member of the network to make a physical attack, the plaintiff will also have to offer proof of a sort that would fail in cases where the third-party actor more likely than not would have harmed the plaintiff regardless of the network's activity. A semantic and network analysis of the defendant's body of communications to the third-party actor, or the third-party actor's own communications before and after he started interacting with the defendant, will protect defendants who unwittingly (or even intentionally) attracted already-radicalized members.

Moreover, the requirement that the defendant assumed and maintained a central position in the network ensures that the defendant will have had enough notice that members of his network are becoming dangerously hostile. The same evidence that would be used to prove causation also ensures that the defendant was actively and persistently communicating with the attacker and either knew or was deliberately indifferent to the risk that the network members were becoming more paranoid. The leader of a radicalized network can avoid liability even despite evidence of network derangement if the leader advocates that group members refrain from violence or otherwise disavows the radicalizing content circulating in the network.²⁵¹

Thus, our hope and expectation is that liability based on recklessly leading a dysfunctional association is narrow enough to avoid creating a chilling effect for legitimate associations.²⁵² A leader of a group can avoid liability either by proactively encouraging law-abiding behavior or by taking a break and willfully abandoning their position of authority and influence.

Finally, and perhaps most importantly, the problem with holding leaders of a movement responsible for the actions of their members is not as fraught as it might seem. The leaders in the Civil Rights era intentionally violated laws that we now understand to be irredeemably

250. This is one way in which Reckless Association is narrower than liability for incitement or conspiracy, which can be applied based on inchoate harms. See *Conspiracy*, LEGAL INFO. INST. (Jan. 2022), <https://www.law.cornell.edu/wex/conspiracy> [<https://perma.cc/T8LP-X5TP>] (describing the forms of punishment that conspiracy statutes impose even when the target offense does not occur); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis added) (defining incitement as advocacy directed to producing imminent lawless action and that "is likely to incite or produce such action").

251. The persistence of the defendant's communications to network members helps separate these cases from constitutionally suspect forms of liability that would apply to artists or entertainers who produce works that reach large audiences. See Volokh, *supra* note 249, at 1162 (describing how purely entertaining crime-facilitating speech has high value and should be fully protected). To be sure, this tort does not require that a defendant share a purpose with the actor to commit an act of physical violence, and so falls short of the heightened mental state requirements that Volokh suggests should be required in the somewhat related context of crime-facilitating speech. *Id.* at 1182–85.

252. At the very least, ex post liability does not impose across-the-board burdens on groups of every sort the way a registration requirement or campaign contribution limit would. See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299–300 (1981).

flawed. By participating with other members of the movement, civil rights leaders had skin in the game. King engaged in civil disobedience himself, and exposed himself to the same legal repercussions as his followers. He also regularly disavowed violent disobedience, notwithstanding occasional comments construed as justifying riots in recent discourse.²⁵³ Bobby Seale and Huey P. Newton plainly and honestly advocated for violent protest, participated in it, and exposed themselves to the same legal repercussions as other members of the Black Panthers.²⁵⁴ Thus, for high-integrity group leaders, secondary liability is no threat because they take joint responsibility for the actions of their members. Secondary liability internalizes the externalities for low-integrity group leaders who gradually agitate their members into violence without sharing the legal risks.

Still, we recognize that if the tort we propose here is not so constrained, it could cause more problems than it solves. The elements of Reckless Association must be demanding enough so that the leader of a political movement who knows that somebody in their network or sphere of influence might do something violent is not at risk of liability for those reasons alone.²⁵⁵ But as we envision it, the Reckless Association tort would not pose much risk of overuse. Plaintiffs will have to show that a defendant has circulated a significant amount of incendiary content; the causation and mental state requirements would reach only

253. Compare Dr. Martin Luther King Jr., *The Other America*, Address at Stanford University (Apr. 14, 1967), <https://www.crmvet.org/docs/otheram.htm> [<https://perma.cc/L82D-GRHD>] (“Let me say as I’ve always said, and I will always continue to say, that riots are socially destructive and self-defeating. I’m still convinced that nonviolence is the most potent weapon available to oppressed people in their struggle for freedom and justice.”), with Patrisse Cullors, *Without the Right to Protest, America Is Doomed to Fail*, N.Y. TIMES (Oct. 2, 2020) (quoting “a riot is the language of the unheard” and claiming that Dr. King came to see rioting as a “necessary component” in an effective political movement), <https://www.nytimes.com/2020/10/02/opinion/international-world/protest-black-america.html> [<https://perma.cc/GY3W-3SAH>].

254. See CURTIS J. AUSTIN, *UP AGAINST THE WALL* 52 (2006) (explaining that Black Panthers founders had a willingness to capitalize on the Black community’s readiness to engage in self-defense and reciprocate violence if police brutality continued); *id.* at 65–67, 86 (re-counting incidents of violence and of imprisonment for weapons violations).

255. This is, in fact, a matter of constitutional necessity as *NAACP v. Claiborne* shielded NAACP leaders who organized boycotts from liability even though some individual members who protested in front of stores foreseeably engaged in criminal conduct. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 897–98 (1982). The actual facts of *Claiborne* do not come close to the requirements of the tort we’ve outlined here because none of the leaders of the NAACP had the sort of direct and persistent communications opportunities that Donald Trump or Q interpreters have today. The problems tackled by the Reckless Association tort are phenomena unique to, and uniquely trackable in, Internet networked communications. For example, unless there are facts that were not alleged in the complaint, we do not believe that the negligence case brought against DeRay McKesson for organizing a protest that became violent would satisfy the elements because there is no allegation or evidence that McKesson consistently communicated anti-police sentiment to the protesters who ultimately harmed the police officer. See *supra* note 177. That said, a network analysis may reveal that there are in fact individuals whose rhetoric about police did cause, actually and foreseeably, these protesters to take up the cause with violence.

individuals persistently in the ear, so to speak, on a daily or hourly basis of the individuals who cause violence. This persistent association — rather than leadership in a more abstract sense — is the behavior that keeps members of a loosely affiliated group in a cycle of grievance and paranoia. And even then, *de facto* leaders can avoid liability provided they affirmatively dissociate with law-breaking or violence.

B. A Deluge of Disclaimers

Responding to the incentives of the tort system, some *de facto* leaders of online networks will protect themselves from legal risk by broadcasting disclaimers. Tort liability would then be less effective (to the extent defendants are shielded from liability), and the information ecosystem would be flooded with defensive, inauthentic statements.

Undoubtedly, some individuals will engage in strategic behavior to avoid the risk of liability under this new tort. And some defendants may indeed avoid liability using disclaimers despite being morally guilty in some cosmic sense. But this will certainly not render the tort moot or wasteful. First, in some cases, plaintiffs will be able to convince a factfinder that the defendant's disavowal was designed to be weak, or to use code that the network would understand should be ignored. In these cases, the plaintiff will be able to succeed despite the defendant's efforts to shield himself. Moreover, a network that circulates contradictory messages, like "we need to ACT NOW to TAKE BACK OUR COUNTRY" and "our protest should be peaceful," is likely to instill some confusion and uncertainty among the members. As a result, the edge nodes of a network will be less likely to act. Thus, even if they are inauthentic, the disclaimers will have precisely the sort of moderating effect the tort is designed to induce.

C. Biased Enforcement

The examples we have provided to illustrate (and which indeed motivate) this Article come from the right-wing side of the political spectrum. We believe this has less to do with our personal biases and more to do with the fact that radicalizing trends have been prevalent in conservative media circles for longer than they have been on the left.²⁵⁶ Nevertheless, the asymmetry in our examples should raise eyebrows: Is the tort likely to be wielded in a politically biased manner? And even if cases are decided fairly, is it likely to be *perceived* as an instrument of political subjugation?

At the outset, it is worth noting that any law can be enforced unevenly, and can therefore be exploited by adherents of one political party

256. BENKLER, *supra* note 135, at 81–83.

to harass activists of another. But liability based on expressive activity is particularly vulnerable to the problem since the speech likely to be used as evidence in a case is also likely to have a political valence. It will be more challenging to separate a fact-finder's political orientation from the facts of a Reckless Association tort case than it will be to separate it, for example, from the facts of a car accident case or any other case where speech and beliefs are not part of the analysis.²⁵⁷

However, tort liability has some natural immunity to bias. First, unlike criminal prosecutions or private censorship by online platforms, tort-based lawsuits are initiated by putative victims. There is no single gatekeeper that might filter out good cases from being filed. This means courts must at least consider a plaintiff's complaint regardless of a suit's political valence. The next gatekeepers are trial judges who must decide whether the plaintiff's claims can survive motions for dismissal or summary judgment. As a group, they are more politically insulated than prosecutors and legislators, which is also a point in tort law's favor. This, plus the demanding standards required from the Reckless Association elements, should prevent serious political bias in enforcement. At least, we think it is worth the experiment.

Nevertheless, perceptions of bias must also be taken seriously. Most Americans believe that social media fact-checking is biased, and yet progressives largely favor more fact-checking while conservatives want platforms to do less.²⁵⁸ This is especially troubling given the level of political polarization in operation. If tort liability for Reckless Association were introduced ten years ago, perceptions of bias might be a minor problem. Today, in part because of the paranoia and conspiracy thinking brought on by radical freedom of association, any uneven enforcement will be understood as evidence of bias. Another way to put this is that de facto leaders of large radical networks pose an odd challenge. On the one hand, holding them responsible for downstream violence offers the greatest chance of effective deterrence. On the other hand, those cases are the most likely to create distrust in courts for a significant portion of the population. Nevertheless, while these concerns are real, they are again less severe in the context of tort liability than they are for criminal prosecutions and other overinclusive reforms.

257. This is not to say that these non-speech laws can't be enforced with bias, of course. See Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 105 (2013).

258. See David Kemp & Emily Ekins, *Poll: 75% Don't Trust Social Media to Make Fair Content Moderation Decisions, 60% Want More Control over Posts They See*, CATO INST. (Dec. 15, 2021), <https://www.cato.org/survey-reports/poll-75-dont-trust-social-media-make-fair-content-moderation-decisions-60-want-more> [<https://perma.cc/5RNU-ZX7T>].

VII. CONCLUSION

The problem with social media is that it is astoundingly good at what it is designed to do. Our unrestricted freedom to find people we want to associate with is both the legitimate goal of social media *and* a primary source of trouble. While we have developed many instincts and legal tools to protect us from lies and distortions of people who may have ulterior motives,²⁵⁹ we have not had to be as vigilant about the corrupting effect of talking to people we trust.²⁶⁰

It is clear enough that the radical freedom of online associations predictably causes individuals to associate in like-minded groups where peer effects and feedback loops lead to increasingly deluded beliefs. Society needs law and social norms to place responsibility for these dynamics on the set of people who can most easily monitor and avoid the problems. Contrary to popular belief, that set of people is *not* the executives and employees of major tech platforms. It is the users themselves — particularly the informal leaders — who benefit from the fame and financial rewards of the radicalization process without shouldering any of the risk.

This Article has provided a roadmap that will allow courts and litigants to expand tort liability from the edges of a radicalized network to its central nodes. This Article takes structuralism seriously by recognizing the new reality of networked radical associations. Individual behavior is partially determined by dynamics in the information ecosystem that are not entirely within the individual's control. This provides a philosophical reason to treat other, more agentic figures within a radicalized association as responsible, alongside the individuals who actually commit crimes of physical violence. Thus, the tort system will only assign individual fault in the correct places if it accounts for the structural effects of new media.

259. While we intuitively update our beliefs based on the evidence we see, it is very difficult to intuitively adjust for the information we know or suspect we are *not* seeing. See Benjamin Enke, *What You See Is All There Is*, 135 Q.J. ECON. 1363, 1366 (2020) (describing the “naïve intuitive statistician”). This is a break from our assumption of rationality, but it is a more modest one, a sort of baseline fallacy, rather than the cognitive biases that are usually used to explain group polarization. For a discussion of cognitive biases, see *supra* Section III.B.

260. Indeed, the very notion of trustworthiness is meant to be a bulwark against the threat of false claims, but it can instead create a potent form of groupthink and intolerance. See MASON, *supra* note 131, at 22–23.