

# FIRST AMENDMENT CONTRADICTIONS AND PATHOLOGIES IN DISCOURSE

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*A robust, principled application of the First Amendment produces contradictions that undermine the very justifications for free speech protections. Strong free speech protections are justified by the idea that rational, informed deliberation leads to peaceful decision-making, yet our marketplace of ideas is crowded with lies, reductive narratives, emotional appeals, and speech that leads to violence. Our current First Amendment model creates pathologies in discourse, which I term problems in speech quality and problems of speaker identity, that are exacerbated in our modern age of easy communication. The reason for these pathologies lies in the relationship between reason and emotion, both in human psychology and in First Amendment doctrine. This relationship is complex, and there are personal, psychological reasons that people are incentivized to engage in speech that is not truth-oriented. However, the solution to these speech pathologies is not to dramatically alter First Amendment doctrine, which, despite claims that the First Amendment is ill-equipped to deal with modern problems, is needed now more than ever.*

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## INTRODUCTION

Interpreting the First Amendment in a robust, principled way creates seemingly unavoidable contradictions. A major justification for the broad free speech protections enjoyed in the United States is that open discourse will lead to the truth and to more rational, peaceful decision-making.<sup>1</sup> Yet the First Amendment enables speech and institutional freedoms that are often speech-suppressive and corrosive to the process of rational deliberation. The application of the First Amendment thus undermines its own justifications.

To ensure that people have access to truthful information upon which to deliberate and peacefully resolve conflicts, courts have held that the First Amendment protects lies and appeals to emotion that circumvent rational processes.<sup>2</sup> Courts treat listeners as rational and truth-seeking,<sup>3</sup> but speakers often exploit our more instinctive or baser qualities, such as our cognitive and emotional biases and our intellectual laziness. Courts also draw a line between speech and conduct, protecting emotionally harmful speech yet allowing broad regulation of conduct,<sup>4</sup> to allow more speech into the marketplace of ideas and to favor speech over violent solutions to conflict.<sup>5</sup> Yet distorted, emotionally charged speech that does not fall into an unprotected category has contributed to violent acts. The First Amendment's freedoms create pathologies in discourse that have corrupted our marketplace of

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1. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (establishing the influential “marketplace of ideas” metaphor in which peaceful competition among competing viewpoints is the best test of an idea’s truth); see also LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 9–10, 140–44 (1986) (contending that free speech protections facilitate the development of society-wide tolerance); THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6–7 (1970) (articulating peaceful conflict resolution as a primary justification for free speech); JOHN STUART MILL, *ON LIBERTY* 33–39 (2d ed. 1859) (arguing that fulsome discussion leads to deeper appreciation of truth).

2. See *infra* Part I.

3. See Lyrrisa Barnett Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 805–16, 828–32 (2010).

4. See, e.g., *Virginia v. Hicks*, 539 U.S. 113, 119–20 (2003); *Eisenstadt v. Baird*, 405 U.S. 438, 458 (1972) (Douglas, J., concurring).

5. See Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 *FORDHAM L. REV.* 971, 976 (1995) (“The distinction between mind and body—or, as it is usually called in this context, speech and conduct, or expression and action—holds that speech is privileged above conduct in the sense that government may properly regulate the clash of bodies but not the stirring of hearts and minds.”); see also Erica Goldberg, *Emotional Duties*, 47 *CONN. L. REV.* 809, 864 (2015) (“The somewhat blurry line between speech, which is presumptively protected, and conduct, which is generally regulable, is premised at least in part on the notion that pure speech is a communicative act that directly causes only emotional harm, whereas conduct involves direct, physical, tangible interactions and harm.”).

ideas with reductive, oversimplified speech, emotional appeals, and the promotion of viewpoint intolerance.

Compounding this problem, and illustrating another important First Amendment contradiction, is the behavior of our academic institutions. These institutions, with First Amendment academic freedoms designed to foster new, subversive ideas and inquiry, have become increasingly homogeneous in the views they espouse and even impose on their students. As a way to uphold the First Amendment value of institutional academic freedom,<sup>6</sup> the Supreme Court in *Grutter v. Bollinger*<sup>7</sup> permitted universities facing challenges under the Equal Protection Clause to consider race as a factor in the admissions process.<sup>8</sup> The Court's rationale was based on a university's compelling interest in diversity,<sup>9</sup> because classroom discussions are livelier and students are better prepared for a global workforce when they are exposed to "widely diverse people, cultures, ideas, and viewpoints."<sup>10</sup> Yet increased attention to identity groups and their sense of inclusion, in many cases, leads to a hyper-focus on students' emotions and sense of identity, sometimes resulting in the chilling of true debates in academic institutions. The result is a diminution in the range of ideas and approaches to which students are exposed due to fears that certain views undermine a student's sense of identity or belonging.<sup>11</sup> Indeed, many believe there is insufficient viewpoint diversity in academia<sup>12</sup> and that

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6. See generally Erica Goldberg & Kelly Sarabyn, *Measuring "A Degree of Deference": Institutional Academic Freedom in a Post-Grutter World*, 51 SANTA CLARA L. REV. 217 (2011) (describing conflicts between institutional academic freedom granted to universities and individual academic freedom rights belonging to students and professors).

7. 539 U.S. 306, 306–07 (2003).

8. Goldberg & Sarabyn, *supra* note 6, at 220 ("The Supreme Court's invocation of academic freedom in [*Grutter v. Bollinger*] unambiguously declared that the courts must give a 'degree of deference to a university's academic decisions, within constitutionally prescribed limits.'").

9. *Grutter*, 539 U.S. at 327–28 (holding that a state law school's "educational judgment that such diversity is essential to its educational mission is one to which we defer" when applying strict scrutiny to the law school's consideration of race in its admissions process).

10. *Id.* at 328–31.

11. For a thorough exposition of the increased solicitude to students' sense of affront at reasonable debates, how it has chilled speech, and some proposed solutions, see GREG LUKIANOFF & JONATHAN HAIDT, *THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE* (2018).

12. See, e.g., Jonathan Haidt, *Viewpoint Diversity in the Academy* (2017), <https://jonathanhaidt.com/viewpoint-diversity/> [<https://perma.cc/Y47J-U3FJ>] (last visited Feb. 26, 2022) (illustrating graphically that, since the 1990s, the academy "transformed from an institution that leans to the left, which is not a big problem, into an institution that now has very little political diversity, which can be a big problem in some disciplines"); see also Christopher Frelman, *In Defense of Viewpoint Diversity*, INSIDE HIGHER ED (Oct. 8, 2018), <https://www.insidehighered.com/views/2018/10/08/why-its-vital-academe-have-more-viewpoint-diversity-opinion> [<https://perma.cc/Z8S5-W847>].

universities are imposing ideologies on students, sometimes in the name of social justice or diversity-and-inclusion goals.<sup>13</sup>

Ultimately, the scheme that we have devised to administer our First Amendment protections often undercuts itself. The First Amendment gives people and institutions enough “breathing room”<sup>14</sup> to undermine productive discourse. Protecting speech that is rational and deliberative leads to increases in hostile, uncivil, and sometimes distorted speech.<sup>15</sup> Protecting speech that is genuinely truth-seeking or truth-oriented leads to increases in lies and distrust.<sup>16</sup> Protecting speech as separate from conduct leads to violence. Safeguarding speech leads to the weaponization of speech as a form of speech control.<sup>17</sup>

The relationship between reason and emotion, both in First Amendment doctrine and in human psychology, fosters these incongruities that chill important speech and increase the amount of deceptive, unproductive speech in the marketplace of ideas. Legally, drawing lines between rational and emotional speech is difficult and unwise, so courts protect it all, sometimes leading to emotionally driven, cognitively biased, uncivil, unproductive discourse.<sup>18</sup> Conversely, under the guise of the First Amendment value of academic freedom, actors within the academy may seek censorship of ideas that they deem emotionally harmful.

The speech pathologies created by First Amendment contradictions become more problematic the easier communication is.<sup>19</sup> Social media and democratization of speech have exacerbated these contradictions<sup>20</sup> and added new problems such as “troll armies,” the propagandization of news, and flooding tactics where speech itself is used to control speech.<sup>21</sup>

13. See, e.g., Ashley Collman, *A North Korean Defector Says Going to Columbia University Reminded Her of the Oppressive Regime, Saying She Felt Forced to “Think The Way They Want You to Think,”* YAHOO!, (June 15, 2021), <https://www.yahoo.com/lifestyle/north-korean-defector-says-going-130747688.html> [<https://perma.cc/2W5X-S9EW>].

14. The Supreme Court has articulated that the First Amendment protects false speech in order to give those who speak the truth breathing room to express their ideas without fear of legal reprisal. See *infra* Section I.B.

15. See *infra* Part I.

16. See *id.*

17. See Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 549 (2018).

18. See *infra* Section I.A.

19. See Rachael L. Jones, *Can You Have Too Much of a Good Thing?: The Modern Marketplace of Ideas*, 83 MO. L. REV. 971, 972 (2018) (“What was once hailed as a place of discussion - where minority voices had a platform and all citizens were invited to sift through the muck of bad ideas and falsities in the search for truth - is starting to resemble an echo chamber.”).

20. Indeed, some scholars believe that, because of expression’s “speed, low cost, and abundance” due to technological changes, “the First Amendment faces a paradoxical threat: left unfettered, speech in the twenty-first century may undermine critical pieces of the democratic project itself.” See Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631, 1634–35 (2021).

21. See Wu, *supra* note 17, at 548.

One hopes that, even with contradictions of these types, the levels of lies, irrational and problematic speech, violent engagement, and the chilling of academic discourse are presumably less significant than we would experience in a counterfactual universe where we protect less speech and academic freedom, and where the government has more control over what is expressed. Yet scholars and laypeople across the spectrum, motivated by different concerns, doubt that the First Amendment is currently serving its purposes,<sup>22</sup> especially in an era of fake news, increasingly hateful speech, and allegations that government actors “direct online mobs” to retaliate against critics and opponents.<sup>23</sup> Further, there is increased skepticism around the concept and meaning of “truth” as an ultimate goal, reducing the appeal of protections designed to create a more enlightened citizenry.<sup>24</sup>

In this Article, I will explore the First Amendment contradictions that undermine the justifications for broad free speech protections and create modern pathologies in discourse. My goal is to demonstrate how these contradictions often arise from the interaction between emotion and reason in free speech doctrine. I argue that, although our current free speech doctrine may not seem well-equipped to handle modern First Amendment problems, these problems actually demonstrate the need for classic First Amendment principles and concepts—including the speech–conduct distinction and the breathing room around reductive or emotionally-charged speech—now more than ever. Cynicism over our First Amendment is contributing to its pathologies. Extra-legal and cultural solutions, in addition to signaling by the courts and government actors of the need for more peaceful, rational discourse, are the best way to cure our pathologies in discourse and restore faith in the marketplace of ideas.

In Part I, I will explore the relationship between emotion and reason in First Amendment doctrine. I will discuss how and when we protect even speech that subverts rational processes, deceives listeners, or is closely tied to violence. I will also discuss how free speech doctrine requires assuming listeners are more reasonable, more informed, more robust, and more rational than is descriptively accurate. In Part II, I address the ways the courts’ treatment of emotion and reason in free speech doctrine have corroded dialogue, and how our modern age has exacerbated the First Amendment’s ability to undermine itself. I catalog modern breakdowns in discourse for ease of understanding how emotion influences these

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22. *Id.* (arguing that the justifications for the First Amendment no longer hold when “it is no longer speech itself that is scarce, but the attention of listeners” and when troll armies, fake news, and other forms of speech are weaponized in order to control speech).

23. *Id.* at 579.

24. The questioning of ultimate truth in modern society happens in several ways. Most concretely, some argue that we are experiencing a political problem where facts and reasoning matter less than things that “feel true,” and politicians can exploit this for political gain. See Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351, 1352–53 (2019). More abstractly, and perhaps more importantly, the very notion of “truth” has been undermined by post-modernism. See Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 496 (2002) (describing our “highly relativist post-modern age in which we doubt all verities, or even the concept of truth”). For the purposes of this Article, I will consider factual truth to involve verifiable, falsifiable facts that have been demonstrated accurate and truth of opinion to involve the search for intellectually consistent, justifiable viewpoints based on verifiable facts and logically sound modes of reasoning.

problems. In Part III, I examine proposed solutions to these pathologies in discourse, including tweaks to First Amendment doctrine. I argue that, generally, contrary to the view that the First Amendment has become “obsolete,”<sup>25</sup> its wisdom is needed now more than ever, and that courts, government actors, and academic institutions all have a part to play in improving the important role of discourse in the search for factual accuracy and opinions supported by reliable information and logically sound modes of reasoning.

## I. EMOTION AND REASON, TRUTH AND LIES, PEACE AND VIOLENCE, SPEAKERS AND LISTENERS

Many of the contradictions within First Amendment jurisprudence arise because of a complicated interplay between emotion and reason, both in the doctrine and in human psychology. This Part first explores how and why we protect speech primarily designed to appeal to emotions or inspire emotional responses when a major justification for strong free speech protections is to promote deliberative reasoning processes that best lead to wisdom and insight. This Part then discusses how much the doctrine protects untruthful speech and speech that is often closely tied to violence, despite the rationale that strong free speech protections safeguard the truth-oriented processes within the bounds of peaceful resolutions of conflicts. Finally, this Part explains why we treat listeners of speech as reasonable, somewhat sophisticated, and mentally robust despite these characterizations often being descriptively untrue.

### A. Rational Deliberation and Its Emotional Undermining

Perhaps the primary justification for strong, robust, principled free speech protection is the “marketplace of ideas” metaphor, which Justice Oliver Wendell Holmes first introduced in a dissent in *Abrams v. United States*,<sup>26</sup> and which later became a guidepost in the Supreme Court’s First Amendment doctrine.<sup>27</sup> Under this theory, the best way to achieve truth is through exposure to all available information and the use of logical, deliberative processes to rationally convince people that your ideas or views have merit.<sup>28</sup> Scholars have noted that Supreme Court opinions interpreting the First Amendment often evince a preference for reason over emotion

25. See generally Wu, *supra* note 17, at 548 (contending that “there is reason to fear [the First Amendment] is entering a new period of political irrelevance”).

26. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”).

27. See David S. Han, *Constitutional Rights and Technological Change*, 54 U.C. DAVIS L. REV. 71, 96 (2020) (“As a historical matter, the modern era of First Amendment jurisprudence began in the early twentieth century with a set of cases dealing with textbook examples of political dissent, and it is these early political speech cases that produced probably the two most influential and oft-quoted opinions in all of First Amendment jurisprudence: Justice Holmes’s dissent in *Abrams v. United States* and Justice Brandeis’s concurrence in *Whitney v. California*.”).

28. See *Abrams*, 250 U.S. at 630.

and a faith that reason can triumph over emotion.<sup>29</sup> Speech considered to “contain[] no part of the exposition of ideas,”<sup>30</sup> such as obscenity and fighting words,<sup>31</sup> falls into unprotected categories of speech,<sup>32</sup> although the fighting words doctrine has been interpreted narrowly by the Supreme Court and lower courts, and is not often invoked to permit restrictions on speech.<sup>33</sup>

Yet the doctrine also permits speech that appeals to personal, psychological motivations that are not necessarily truth-oriented. This enables the potentially corrupting influences of cognitive and emotional biases, and protects speech that elicits strong emotional responses,<sup>34</sup> which are often influenced by the subconscious and may produce biased thinking.<sup>35</sup>

The relationship between reason and emotion is complex. In some ways, reason and emotion exist in tension, undermining each other and serving as separate mental processes. Emotional responses are immediate and generally involuntary, arising from subconscious processes out of the control of the individual moved by

29. See, e.g., Sheldon Nahmod, *The Sacred Flag and the First Amendment*, 66 IND. L.J. 511, 544–45 (1991) (quoting *Johnson v. Texas* for the Supreme Court’s confidence that reason is the best means of persuasion, because the Court held that “[t]he way to preserve the flag’s special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong”).

30. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

31. So-called “fighting words” are “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Id.*

32. See R. George Wright, *An Emotion-Based Approach to Freedom of Speech*, 34 LOY. U. CHI. L.J. 429, 430 (2003) (noting that “[t]he classic ‘fighting words’ case of *Chaplinsky v. New Hampshire* is largely about emotion” although the focus is on the emotions of the listener, not the speaker); John M. Finnis, “Reason and Passion”: *The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222, 223–27 (1967) (supporting the view that obscenity is unprotected, because it stimulates “the emotions or passions,” not “the intellect or reason”).

33. For example, in holding that defendant’s calling of an officer a “son of a bitch” was not fighting words and this could not support an arrest for disorderly conduct, the Third Circuit noted that “[t]he unprotected category of speech called ‘fighting words’ is an extremely narrow one. The First Amendment on the whole offers broad protection for speech, be it unpleasant, disputatious, or downright offensive.” *Johnson v. Campbell*, 332 F.3d 199, 212 (3d Cir. 2003).

34. When applying strong First Amendment protection to music, the Supreme Court noted that, “[f]rom Plato’s discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state.” *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989). The Court seemed not to distinguish here between appeals to intellect and appeals to emotion as speech worthy of protection and threatening to tyranny. *See id.*

35. See Doni Gewirtzman, *Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture*, 43 U. RICH. L. REV. 623, 648–49 (2009) (citing studies demonstrating that “affective forces . . . can alter individuals’ perspective on the future, warp their perception of risk, facilitate prejudice, manipulate attitudes based on mood, ignore information, distort processes of analytic and analogical reasoning, contribute to the prioritization of short-term benefit over long-term gain, and create bias in certain decision-making contexts”).

particular expression.<sup>36</sup> Emotional responses can be strong motivators to action that subvert or undermine rational processes; the ability of strong emotional responses to undermine reason and fairness is why courts review jury verdicts for “passion and prejudice.”<sup>37</sup>

Often, emotionally charged, inflammatory speech or speech that reduces sophisticated issues to black-and-white thinking are the best ways to motivate people or receive engagement. This speech is generally entirely protected by the First Amendment, although viewers may absorb this speech uncritically, often with disastrous results. For example, anti-Semitic attacks on Jewish Americans “more than doubled”<sup>38</sup> after a deadly conflict between Israel and Hamas in May of 2021 that killed at least 256 Palestinians and 13 Israelis.<sup>39</sup> The events leading up to this tragic conflict, the narratives told about the responsibility of the Israeli and Palestinian people, and the history, politics, changing borders, and animosity in the region are complex,<sup>40</sup> but several celebrities worldwide,<sup>41</sup> including a freelance journalist for CNN,<sup>42</sup> posted reductive, anti-Semitic messages on social media such

36. A comprehensive exposition of the causes of emotions and how they interact with and influence feelings, mood, behavior, and cognition is beyond the scope of this Article. While emotional psychology, neuroscience, and philosophy present many compelling, competing theories of emotions, there is some consensus that at least some of our emotions arise from subconscious processes, and that we also are affected by emotions about which we are not even consciously aware or cannot recognize or properly interpret. *See, e.g., id.* at 655 (describing how “emotion is not always the unpredictable, unruly force that the dominant view calls to mind, regardless of its visceral impact, often automatic nature, and potentially subconscious roots”); David Robson, *A New Way to Look at Emotions – and How to Master Yours*, BBC (Oct. 12, 2017), <https://www.bbc.com/future/article/20171012-how-emotions-can-trick-your-mind-and-body> [<https://perma.cc/8LEC-E6RA>].

37. *See* STEPHEN E. ARTHUR & ROBERT S. HUNTER, FEDERAL TRIAL HANDBOOK CIVIL § 22:12 (2021–22 ed.) (showing example jury instructions to illustrate the principle that “[a] jury verdict must be based on a rational and studied consideration of the trial evidence and applicable law, and not on an irrational sense of sympathy, passion or prejudice”).

38. Emily Shapiro, *Antisemitism Surged Across US During Gaza Conflict, Part of Multi-Year Rise: Advocates*, ABCNews (June 10, 2021, 6:00 AM), <https://abcnews.go.com/US/antisemitism-surged-us-gaza-conflict-part-multi-year/story?id=78092408> [<https://perma.cc/P2V2-BUZZ>] (citing data by the Anti-Defamation League).

39. For accounts of the total number of fatalities, see *Palestinian Teenager Shot Dead in Clash at Protest*, BBC NEWS (June 11, 2021), <https://www.bbc.com/news/world-middle-east-57446157> [<https://perma.cc/5MPV-JFDE>]; *73-Year-Old Israeli Woman Who Fell in Rocket Shelter Dies of Injuries*, TIMES ISRAEL (May 23, 2021, 7:35 PM), <https://www.timesofisrael.com/73-year-old-israeli-woman-who-fell-in-rocket-shelter-dies-of-injuries/> [<https://perma.cc/A5KM-GGHS>].

40. *See, e.g., Israel-Gaza Violence: The Conflict Explained*, BBC NEWS (June 16, 2021), <https://www.bbc.com/news/newsbeat-44124396> [<https://perma.cc/MX2S-GMHW>].

41. Marissa Sarnoff, *Bollywood Actress Deletes Anti-Semitic, Pro-Genocide Tweet Wrongly Attributing Adolf Hitler*, MEDIAITE (May 12, 2021, 3:58 PM), <https://www.mediaite.com/news/bollywood-actress-deletes-anti-semitic-pro-genocide-tweet-wrongly-attributing-adolf-hitler/> [<https://perma.cc/4VZL-7HBT>].

42. Thomas Moore, *CNN Fires Freelancer For Tweet Saying ‘World Today Needs a Hitler,’* HILL (May 17, 2021, 9:28 AM), <https://thehill.com/homenews/media/553840-cnn-fires-freelancer-for-tweet-saying-world-today-needs-a-hitler>.



as “[t]he world today needs a Hitler.”<sup>43</sup> The CNN journalist was fired<sup>44</sup> and many of the tweets were removed. A viral tweet of a quote falsely attributed to Adolph Hitler, “I would have killed all the Jews of the world . . . but I kept some to show why I killed them,” is likely protected speech under the First Amendment even if Twitter can decide to remove it.<sup>45</sup> Emotional, reductive speech abounds during any increased conflict between Israel and Palestine, impoverishing the debate.

However, emotion and reason also relate to each other symbiotically. Emotional responses can cause a person to reflect more deeply about a topic, change a person’s value system, or finally motivate a person to act after rational deliberation about his or her sense of justice or fairness.<sup>46</sup> Without emotions, objective reasoning processes would have far less direction.<sup>47</sup> Many philosophers, neuroscientists, and feminist scholars believe that emotions have a cognitive component, playing a perceptual role; feminist philosophers, for example, frame emotions like love and anger as the cognitive equipment to detect injustice.<sup>48</sup> Further, often the goal of communication is simply to induce emotional responses, to make people feel and feel connected to our common humanity.<sup>49</sup>

As a result, in addition to protecting opinions, ideas, and many factual assertions well-suited to the search for truth, free speech doctrine protects expression that may be designed primarily to affect emotions without linguistic processes, such

43. *Id.*

44. *Id.*

45. Lies that do not cause concrete, material harm (such as to an economic or reputational interest) are protected speech, and hateful speech is often protected in order to avoid governmental viewpoint discrimination.

46. Indeed, some emotions researchers believe that moral judgments are driven by emotional and intuitive reactions. See generally Gerald L. Clore, *Psychology and the Rationality of Emotion*, 27(2) MOD. THEOLOGY 325 (2011) (citing studies).

47. See Gewirtzman, *supra* note 35, at 654–55 (exploring studies demonstrating that emotions “play a role in creating consistent and stable preferences within individuals”). According to the philosopher David Hume, “[r]eason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.” DAVID HUME, *On the Influencing Motives of the Will*, in A TREATISE OF HUMAN NATURE 3, <https://www.pitt.edu/~mthomпсо/readings/hume.influencing.pdf> [<https://perma.cc/N7V3-SHKX>].

48. See, e.g., Susan Bandes, *What’s Love Got to Do With It?*, 8 WM. & MARY J. WOMEN & L. 97, 97–100 (2001) (describing how emotions like love and compassion are missing from discussions of law and can better inform our notions of justice); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 277–78 (1996) (eschewing the “mechanistic view” that “emotions are forces more or less devoid of thought or perception—that they are impulses or surges that lead the person to action without embodying beliefs, or any way of seeing the world that can be assessed as correct or incorrect, appropriate or inappropriate” in favor of the “evaluative view [that] holds, by contrast, that emotions do embody beliefs and ways of seeing, which include appraisals or evaluations of the importance or significance of objects and events”).

49. See, e.g., Hichem Naar, *Art and Emotion*, INTERNET ENCYC. OF PHIL., <https://iep.utm.edu/art-emot/> [<https://perma.cc/KH3K-UFEE>] (last visited April 14, 2022) (“That emotion is a central part of our dealings with artworks seems undeniable.”).

as visual art,<sup>50</sup> classical music,<sup>51</sup> and dance.<sup>52</sup> Perhaps these means of expression move us in ways that lead to truths even deeper than we can articulate. Or perhaps courts cannot draw a distinction between expression that is “rational” and expression that is “emotional.” Take, as an example, Picasso’s powerful *Guernica*, an abstract oil painting that most interpret as anti-war.<sup>53</sup> The painting moves the viewer through its use of color, form, and imagery. If the painting influences viewers, it is difficult to determine whether an individual viewer has been provoked by emotional processes that never lead to deeper reasoning or whether the viewer has been stimulated to feel emotions that provoke further analysis and add richness and value to ruminations about war.

Beyond simply protecting speech that has a predominantly emotional component, courts sometimes protect speech that may even subvert rational processes. Although courts generally hold that subliminal speech is not protected,<sup>54</sup> the lawsuits by families of children who have committed suicide after listening to music often do not withstand First Amendment challenges, even when plaintiffs claim the music contains coded messages.<sup>55</sup> According to one court, “art may evoke a mood of depression as it figuratively depicts the darker side of human nature” and may even philosophically advocate for suicide as a solution to one’s problems,

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50. See *Piarowski v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 628 (7th Cir. 1985) (holding that depictions of sexual imagery on stained-glass windows that did not involve a political statement but “were art for art’s sake” were protected speech, because the “First Amendment has been interpreted to embrace purely artistic as well as political expression and entertainment that falls far short of anyone’s idea of ‘art,’ such as . . . topless dancing”).

51. Indeed, discriminating against certain types of music when enacting an otherwise permissible content-neutral regulation of volume of music would be unconstitutional under the First Amendment. See *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1266 (11th Cir. 2007) (upholding town ordinance regulating volume that “does not distinguish, for example, between excessively loud singing, thunderous classical music recordings, reverberating bass beats, or television broadcasts of raucous World Cup soccer finals”).

52. See *Willis v. Town of Marshall*, 426 F.3d 251, 257 (4th Cir. 2005) (holding that “most forms of dance, whether ballet or striptease, when performed for the benefit of an audience, are considered expressive conduct protected by the First Amendment”).

53. See Paloma Esteban Leal, *Guernica*, MUSEUM NACIONAL CENTRO DE ARTE REINA SOPHIA, <https://www.museoreinasofia.es/en/tr6collection/artwork/guernica> [<https://perma.cc/MS54-JQ3T>].

54. See, e.g., *Waller v. Osbourne*, 763 F. Supp. 1144, 1148 (M.D. Ga. 1991) (“[T]he presence of a subliminal message, whose surreptitious nature makes it more akin to false and misleading commercial speech and other forms of speech extremely limited in their social value, would relegate the music containing such to a class worthy of little, if any, first amendment constitutional protection.”). In *Vance v. Judas Priest*, a state-court judge held that subliminal messages in music recordings are not protected speech, because “(A) subliminal communication does not advance any of the purposes of free speech; (B) an individual has a First Amendment right to be free from unwanted speech; and (C) the listener’s right of privacy outweighs the speaker’s right of free speech when subliminal speech is used.” *Vance v. Judas Priest*, Nos. 86-5844, 86-3939, 1990 WL 130920, at \*23 (Dist. Ct. Nev. Aug. 24, 1990).

55. See, e.g., *McCullum v. CBS Inc.*, 202 Cal. App. 3d 989, 1000-04 (Ca. Ct. App. 1988) (dismissing lawsuit brought by parents of teen who died by suicide after listening to Ozzy Osbourne’s song “Suicide Solution”).

without falling into an unprotected category of incitement.<sup>56</sup> It is unwise, in the context of artistic or political expression, for courts to determine when speech is profound and beneficial and when it has degraded our higher rational faculties. The Court in *Cohen v. California* famously articulated, in protecting the words “Fuck the Draft” emblazoned on a jacket worn in a courthouse, that “one man’s vulgarity is another’s lyric.”<sup>57</sup> Writing for the majority, Justice Harlan observed that “much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well.”<sup>58</sup>

Of course, there is a difference between *communicating* that the speaker feels an emotion and *appealing* to an emotional (i.e., not rational) response.<sup>59</sup> Some scholars have argued that only speech that actually communicates an emotion, working through cognitive processes of the listener, should be protected, but not speech that simply is designed to elicit strong emotional responses that subvert rational discourse.<sup>60</sup> Courts may not easily distinguish between speech that communicates an emotion and speech that simply arouses emotion, however.<sup>61</sup>

Emotional or primarily non-rational speech is protected, however, for reasons other than that it may lead to truths, or because it is necessary to protect rational speech. In addition to this “marketplace of ideas” rationale, another major justification for free speech protections, especially in the scholarly literature, is the view that individuals need to exercise expressive autonomy for human flourishing.<sup>62</sup> Under this approach, individuals deserve, as a right of autonomous moral agents, to be able to express themselves and self-actualize free from governmental interference; this self-expression is considered necessary for their growth, development, and fulfillment.<sup>63</sup> An expressive autonomy rationale would likely

56. *Id.* at 1001.

57. *Cohen v. California*, 403 U.S. 15, 25 (1971) (“Indeed we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.”).

58. *Id.* at 26.

59. Wright, *supra* note 32, at 476–77.

60. *See id.*

61. *Id.* at 442 (noting, in the context of courts’ protecting nude dancing as expressive conduct, that “[e]roticism seems to involve both emotion and idea, if we assume that idea and emotion can be kept distinct. Courts generally provide no clear understanding of any relationship or distinction between emotion and idea in this context”).

62. *See, e.g., Erica Goldberg, Competing Free Speech Values in an Age of Protest*, 39 CARDOZO L. REV. 2163, 2164 n.1 (“The primary rationales for the First Amendment are (1) the marketplace of ideas rationale, or the idea that competing voices freely expressed fosters the search for truth; (2) the democratic self-governance rationale, the view that free speech is essential to allowing an informed citizenry to participate in self-government; and (3) the expressive autonomy rationale, which deems free speech a moral right, which is necessary for self-actualization of autonomous agents.”); R. George Wright, *Why Free Speech Cases Are as Hard (and as Easy) as They Are*, 68 TENN. L. REV. 335, 337–41 (2001) (describing the “vital contribution of free speech to self-realization”).

63. *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 602 (1982) (describing the one true First Amendment value as “the value of having individuals control their own destinies”).

protect not only speech that informs, but also speech that perhaps undermines the marketplace of ideas and threatens productive discourse.<sup>64</sup>

Perhaps as a corollary to the necessity that courts protect speech that stimulates emotional, nonrational processes, First Amendment doctrine often precludes remedying the emotional harm caused by speech.<sup>65</sup> Individuals are often expected to bear the emotional costs of speech, particularly speech on a matter of public concern.<sup>66</sup> This may be because courts prioritize advancing rational thought over protecting listeners' emotions, because, as the expression goes, "truth hurts."<sup>67</sup> This diminishing of the costs of emotional harm bolsters and fulfills the marketplace of ideas rationale. But perhaps courts are also aware that the point of speech is to inspire the full range of emotional experiences and that emotion and rationality, while distinct concepts and processes, are inextricably intertwined.

Indeed, although discourse likely thrives on civil interchanges, the First Amendment cannot police the incivility and hostility that ensues under its protection. In many cases, even if it may be unproductive to dispassionate and thoughtful discourse,<sup>68</sup> anger might indeed be a reasonable response to certain ideas, and anger can demonstrate just how fallacious those ideas are.<sup>69</sup> Although anger may corrupt the thinking process,<sup>70</sup> and civility should likely be encouraged as a means of productive exchanges of ideas, the tone and substance of speech are likely

64. See *infra* Section II.A (discussing the emotional bonding/social cohesion function of "fake news").

65. See generally Goldberg, *Emotional Duties*, *supra* note 5 (discussing the physical/emotional harm in tort law and exploring why physical harm occasions legal remedies when emotional harm often is not compensable).

66. See *Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011) ("Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate."). In *Snyder*, the Supreme Court, in an 8–1 decision, overturned a \$11 million jury verdict awarded to a father whose son's military funeral attracted protesters from the Westboro Baptist Church. *Id.* at 447, 461.

67. The concept that "Truth Hurts" has been recently popularized in a song by Lizzo. See LIZZO, *TRUTH HURTS* (Nice Life Recording Co. & Atl. Recs. 2017).

68. See Paul M. Litvak et al., *Fuel in the Fire: How Anger Affects Judgment and Decision-Making*, in *INTERNATIONAL HANDBOOK OF ANGER: CONSTITUENT AND CONCOMITANT BIOLOGICAL, PSYCHOLOGICAL, AND SOCIAL PROCESSES* 287, 288 (Michael Potegal et al., eds. 2010) ("Anger makes people indiscriminately punitive, indiscriminately optimistic about their own chances of success, careless in their thought, and eager to take action.") (internal citations omitted). *But see* Wesley G. Moons & Diane M. Mackey, *Thinking Straight While Seeing Red: The Influence of Anger on Information Processing*, 33(5) *PERSONALITY & SOC. PSYCH. BULL.* 706 (2007) (finding that because angry people rely on heuristic cues, anger can sometimes stimulate better reasoning and decision-making, because angry people may filter out irrelevant information and be inspired to engage in processing).

69. For example, anger may reflect a subconscious understanding that a thought process is illogical or unfair or that a given understanding of the world leads to injustice.

70. See Olga Khazan, *The Best Headspace for Making Decisions*, *ATLANTIC* (Sept. 19, 2016), <https://www.theatlantic.com/science/archive/2016/09/the-best-headspace-for-making-decisions/500423/> [<https://perma.cc/KG2E-TLT7>] (citing studies demonstrating that "[a]nger simplifies our thinking. People switch to rules of thumb").

inseparable and civility cannot be enforced as a legal norm. Accounts of what even constitutes “rational deliberation” vary widely,<sup>71</sup> although surely we as a society should be able to agree on ways of verifying facts and modes of reasoning that are and are not conducive to the search for truth.

### *B. Breathing Room for Lies and Violence*

In addition to arousing strong emotional responses that may corrupt rational deliberation, speech may mislead, intentionally or unintentionally, and skew one’s search for truth and resulting behavior. The lawyer for the most “recognizable”<sup>72</sup> defendant charged after the January 6, 2021 attacks on the United States Capitol Building argued that his client, Jacob Anthony Chansley, was simply following the urging of then-President Trump to “walk down Pennsylvania Avenue and go to the Capitol.”<sup>73</sup> President Trump declared himself the rightful winner of the 2020 presidential election, and several people arrested for breaching the Capitol claimed they had, as one defendant told a reporter, “answered the call of my president.”<sup>74</sup> The district court judge, Royce Lamberth, rejected that argument and denied pretrial release to Chansley, noting that “if defendant truly believes that the only reason he participated in an assault on the U.S. Capitol was to comply with President Trump’s orders, this shows defendant’s inability (or refusal) to exercise his independent judgment and conform his behavior to the law.”<sup>75</sup> President Trump has been accused of inciting others to violence,<sup>76</sup> but his speech must meet a high bar before it becomes actionable as incitement due to the First Amendment

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71. Part of the problem here may be modernism’s questioning of whether such a thing as objective truth exists, and as a corollary whether the processes that lead to truth are as rational as we believe. See, e.g., Jennifer Lynn Orff, Note & Comment, *Demanding Justice Without Truth: The Difficulty of Postmodern Feminist Legal Theory*, 28 LOY. L.A. L. REV. 1197, 1197 (1995) (“Postmodern philosophy has challenged our traditional conceptions of both rational knowledge and objective truth. Feminist theory has contributed to the attack on rationality and objectivity by arguing that the traditional objective viewpoint has all too often disguised a viewpoint that is actually exclusively male.”).

72. Chansley is known as the “QAnon Shaman,” in part due to his face paint and horned, furred headpiece. See Katie Shepherd, *‘QAnon Shaman’ Stays in Jail as Judge Slams His Arguments: ‘So Frivolous as to Insult the Court’s Intelligence,’* WASH. POST (Mar. 9, 2021, 8:53 AM), <https://www.washingtonpost.com/nation/2021/03/09/qanon-shaman-jacob-chansley-jail/> [<https://perma.cc/M5R6-9UMJ>].

73. See *United States v. Chansley*, 525 F. Supp. 3d 151, 165 (D.D.C. 2021).

74. Alan Feuer & Nicole Hong, *‘I Answered the Call of My President’: Rioters Say Trump Urged Them On*, N.Y. TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/17/nyregion/protesters-blaming-trump-pardon.html> [<https://perma.cc/Q6BY-ZKWT>].

75. *Chansley*, 525 F. Supp. 3d at 165.

76. Sarah N. Lynch & Karen Freifield, *Trump, Giuliani Accused in Lawsuit of Conspiring to Incite Capitol Riot*, REUTERS (Feb. 16, 2021), <https://www.reuters.com/article/us-usa-trump-lawsuit/trump-giuliani-accused-in-lawsuit-of-conspiring-to-incite-capitol-riot-idUSKBN2AG1WD> [<https://perma.cc/BGQ9-SWLG>].

presumption<sup>77</sup> that those who hear his speech are a reasonable and sophisticated audience.<sup>78</sup>

When judges, scholars, or laypeople argue for changes in First Amendment doctrine, they often seek to more effectively restrict lies,<sup>79</sup> lower the difficulty required to render speech unprotected as incitement,<sup>80</sup> or create a new category of unprotected speech for hateful speech.<sup>81</sup> Speech that distorts or deceives, speech that leads others to lawless action, and speech that demonizes individuals based on their identities often comes at great social cost with little social value, yet the United States uniquely protects this speech quite broadly in its First Amendment jurisprudence.<sup>82</sup> If the primary goal of the First Amendment is to achieve truth, it is a wonder that listeners are exposed to so many lies, so much incendiary speech, and so much demonization based on group-identity characteristics. Indeed, some feel that speech itself has lost its value due to so much poisonous, harmful, deceptive speech, or never had much value in the first place.<sup>83</sup>

The reason for the contradictions First Amendment jurisprudence has created in this area can best be described using the “breathing space” analogy from the First Amendment’s interaction with libel law.<sup>84</sup> If lawsuits were free and courts and juries could perfectly determine which speech was a lie, far less defamatory speech would merit protection under the First Amendment. Lies that caused no

77. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

78. See *infra* Section I.C.

79. Noah Feldman, *Supreme Court May Change Libel-Law Standard Involving Public Figures*, OMAHA WORLD HERALD (July 13, 2021), [https://omaha.com/opinion/columnists/noah-feldman-supreme-court-may-change-libel-law-standard-involving-public-figures/article\\_89fa2dfe-e018-11eb-8458-170e0979a226.html](https://omaha.com/opinion/columnists/noah-feldman-supreme-court-may-change-libel-law-standard-involving-public-figures/article_89fa2dfe-e018-11eb-8458-170e0979a226.html) [https://perma.cc/6K4K-CHWZ].

80. See, e.g., Clay Calvert, *First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump & Spencer*, 51 CONN. L. REV. 117 (2019).

81. “Hate speech” as a category of unprotected speech does not exist in the United States; however, many scholars contend that hate speech has few if any social benefits and tremendous social costs, and should therefore be regulated. See, e.g., Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596 *passim* (2010); MARI MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT *passim* (1993); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.—C.L. L. REV. 133, 143–45 (1982).

82. See generally Roger P. Alford, *Free Speech and the Case for Constitutional Exceptionalism*, 106 MICH. L. REV. 1071 (2008).

83. See Brian Leiter, *The Case Against Free Speech*, 38 SYDNEY L. REV. 407, 408 (2016) (“All things considered, much, perhaps most, speech, in fact, has little or no positive value. So the idea that its free expression is *prima facie* a good thing should be rejected.”).

84. See *N.Y. Times v. Sullivan*, 376 U.S. 254, 271–72 (1964) (holding that “erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the breathing space that they need to survive”) (internal citations and quotation marks omitted).

material harm would likely still be protected,<sup>85</sup> but courts could protect individuals' reputations more and, in so doing, elevate the speech entering the marketplace of ideas by filtering out defamatory lies. A jurisprudence of this nature might render speech more trustworthy, thus facilitating a more efficient operation of the marketplace of ideas. However, because individuals fear the expense of lawsuits and are risk averse, the Supreme Court has expressed concern that individuals will self-censor.<sup>86</sup> Someone who is 95% sure that a statement about an important public figure—say that she accepts bribes—is true might censor himself for fear of either that 5% uncertainty, that juries will misunderstand the facts or misapply the law, or of the expenses of even a winning lawsuit.

To ensure that important expression is not chilled through self-censorship, courts place “breathing space” around the restriction of all defamatory speech—even false speech—so that truthful speech has a buffer before a lawsuit can survive summary judgment. If a public figure sues for defamation, that public figure plaintiff can win only if the statements made against her are both false and made with actual malice, which is intentional falsity or reckless disregard for the truth.<sup>87</sup> If a private figure sues for defamation, the false statement must be uttered or written by someone who was at least negligent with respect to the truth.<sup>88</sup> Strict liability cannot attach to defamation lawsuits.<sup>89</sup> This ensures that far more ideas, both truth and false, will enter the marketplace of ideas, especially about public figures.

Just as libel lawsuits are notoriously difficult to win in the United States, the bar for speech that is unprotected as incitement is very high in America. This creates another contradiction. One of the justifications for broad free speech protections is that speech does not cause tangible, permanent harm the way conduct does.<sup>90</sup> The speech–conduct distinction in free speech doctrine centers around the idea that speech is special and is protected separately from conduct, even conduct inspired by speech. Speech can be deliberated upon, unless it purposely circumvents the deliberative process and causes violence before people can think dispassionately. Incitement is unprotected as a category of speech, but speech must be directed to and reasonably likely to cause imminent lawless action before it can be deemed incitement.<sup>91</sup> This high bar ensures breathing room around valuable political statements that might be misused by others and inspire unlawful responses. Unlike in the libel context, there is no verifiable way to determine whether something is incitement or not (true statements can be falsified in the libel context, giving the speaker some measure of certainty and assurance before speaking). Those concerned that their statements may accidentally incite others to violence and that they may therefore be punished need even more breathing room or they will self-censor. As a result, not only lies but also speech that comes close to rousing an unruly mob (and

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85. See *United States v. Alvarez*, 567 U.S. 709, 722–24 (2012) (holding that false statements are not an unprotected category of speech, and, to criminalize a lie, it must be connected to fraud, reputational interests, or a specific, concrete harm).

86. *Sullivan*, 376 U.S. at 278–79.

87. *Id.* at 279–80.

88. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–49 (1974).

89. *Id.* at 347–48.

90. See *Sullivan*, *supra* note 5, at 977, 982.

91. *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

may indeed do so) is protected, all in the name of ensuring that courts do not chill valuable expression. The quest for truth and civilized discourse instead of violent resolution of conflict has, especially in our fast-paced modern era of discourse, led to much violence and distortion.<sup>92</sup> And hate.

Hateful speech is protected due to a fear of the government censoring speech based on its viewpoint.<sup>93</sup> Hateful speech, many have argued, not only leads to violence, oppression, and even genocide but also is not rational or beneficial to any exposition of ideas.<sup>94</sup> Hateful speech rouses anger, simplifies debates, and of all the types of expression is among the least valuable, most toxic, and least conducive to productive discussion. And yet courts fear the government deciding which speech illuminates and which does not.<sup>95</sup> Legitimate political opinions, especially on sensitive, delicate topics, need breathing room or people will self-censor for fear of communicating “hate speech.” Further, the speech itself is not violent, so we allow individuals their expressive freedoms to opine in ways that they believe are beneficial to the search for truth. Countries that do regulate “hate speech” have done so in contexts where restricting speech would be unthinkable in the United States—for example, Holocaust denial,<sup>96</sup> and jokes by a comedian that were deemed incitement to terrorism.<sup>97</sup> We live with the value, and we suffer the cost—sometimes an angry, hateful, violent population.

Part of the reason that libel, incitement, and inflammatory speech require this type of breathing room is because, given the discretion involved in implementing these standards, juries may be motivated to determine that speech is libel or incitement based not on whether the speech is actually true or false, or actually incitement or not, but on whether they find the speech agreeable or disagreeable. In that case, the juries themselves will be discriminating on the basis of viewpoint. The juries, using the mechanism of the state, will then be committing one of the chief First Amendment evils when rendering decisions about First Amendment cases. This ability of a jury to commit actual constitutional violations renders First Amendment cases different than, say, Fourth Amendment cases or medical malpractice cases, where the jury itself cannot violate someone’s privacy in rendering a Fourth Amendment verdict. The jury’s own cognitive biases in

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92. See *infra* Part II.

93. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011) (holding that even vile, hateful speech is protected, especially on a matter of public concern, when the distress occasioned by the speech is based on its content or viewpoint).

94. E.g., Waldron, *supra* note 81, at 1642; MATSUDA, *supra* note 81.

95. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–92 (1992) (striking down city ordinance that prohibits fighting words that are specifically “bias-motivated” or “based on virulent notions of racial supremacy”).

96. See Dan Glaun, *Germany’s Laws on Hate Speech, Nazi Propaganda & Holocaust Denial: An Explainer*, PBS (July 12, 2021), <https://www.pbs.org/wgbh/frontline/article/germanys-laws-antisemitic-hate-speech-nazi-propaganda-holocaust-denial/> [<https://perma.cc/TV9U-JNRB>].

97. See Krishnadev Calamur, *Controversial French Comedian Arrested Over Facebook Post on Paris Attacks*, NPR (Jan. 14, 2015, 11:46 AM), <https://www.npr.org/sections/thetwo-way/2015/01/14/377201227/controversial-french-comedian-arrested-over-facebook-post-on-paris-attacks> [<https://perma.cc/6TAH-4HDZ>].



rendering First Amendment decisions are partially why this breathing room is so necessary.<sup>98</sup>

### C. Assumptions about Listeners to Protect Speakers

As described in the previous Section, inhabitants of the United States are exposed to provocative, deceptive, inflammatory, hateful speech, and this exposure has increased since the advent of the Internet and social media platforms. In order to protect speakers' ability to engage in a range of expression, and, to some degree, in order to protect listeners' ability to access information, courts generally assume listeners have a high tolerance for upsetting speech, are reasonably sophisticated, and can reasonably discern hyperbole from reality.

Consider the results of Karen McDougal's lawsuit against Tucker Carlson, the host of the Fox News program "Tucker Carlson Tonight."<sup>99</sup> The former model and actress sued Fox News when Carlson allegedly "accused her of extorting now-President Donald J. Trump out of approximately \$150,000 in exchange for her silence about an alleged affair between Ms. McDougal and President Trump."<sup>100</sup> The district court dismissed the lawsuit for failure to state a claim, holding that, within the context of political debates on "commentary talk shows," audiences understand that speakers engage in hyperbole, especially when they accuse people of committing crimes.<sup>101</sup> This audience understanding applies doubly to shows like "Tucker Carlson Tonight," because part of Tucker Carlson's project is to "challenge political correctness and media bias . . . . This general tenor of the show should then inform a viewer that he is not stating actual facts about the topics he discusses and is instead engaging in exaggeration and non-literal commentary."<sup>102</sup> Carlson also prefaced his account of McDougal's relationship with President Trump by disclaiming that his analysis depends on the veracity of the individual who accused McDougal of threatening President Trump, Michael Cohen, and "assuming honesty isn't usually a wise idea with Michael Cohen."<sup>103</sup>

This analysis seems sound because Tucker Carlson informed his audience that his premises about McDougal may not be true, and Carlson often engages in hyperbole for rhetorical effect. What may be descriptively inaccurate, however, is to assume that Carlson's audience both listened carefully to his disclaimers in this instance and does not take him literally in general. McDougal's lawsuit was defeated due to the "rational audience model" that generally governs defamation law.

The rational audience model, according to Professor Lyrissa Lidsky, reflects "an idealized vision of the audience of core speech" where "audiences are capable of rationally assessing the truth, quality, and credibility of core speech."<sup>104</sup> Developments in cognitive psychology, unfortunately, indicate that this "faith in

98. See *infra* Part II.

99. See generally *McDougal v. Fox News Network*, 489 F. Supp. 3d 174 (S.D.N.Y. 2020).

100. *Id.* at 177.

101. *Id.* at 182–83.

102. *Id.* at 183–84.

103. *Id.* at 184.

104. Lyrissa Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 801 (2010).

human reason is misplaced,” and with it, the ideal of the marketplace of ideas.<sup>105</sup> Human beings, when mentally taxed, engage in heuristics, or “mental shortcuts,” to guide their decision-making. These shortcuts often deviate from rationality.<sup>106</sup> As examples, humans change their views on a subject depending on how the subject is framed (the framing effect);<sup>107</sup> filter information such that they are most affected by evidence they have heard most and most recently (the availability heuristic);<sup>108</sup> and become stymied when presented with too much information (decision paralysis).<sup>109</sup> The assumption that audiences rationally process speech, setting aside the variation in education level and level of discernment, flies in the face of cognitive psychology that applies to everyone and sometimes affects the most intelligent audiences the worst.<sup>110</sup>

Yet First Amendment doctrine persists in its normative “reasonable audience” approach despite descriptive evidence to the contrary. Professor Lidsky compellingly articulates why: the First Amendment’s assumptions about the media’s role in fostering critical engagement are the same assumptions that underlie our democracy and constitutional regime—that the public is capable of democratic self-governance and forging consensus on important political issues.<sup>111</sup> The normative ideal of the rational audience prevents “authoritative selection of the information to be included in public discourse,” which would violate citizen autonomy, denying citizens “a fundamental aspect of citizenship.”<sup>112</sup> The rational audience model is anti-paternalistic,<sup>113</sup> and it further prevents reduction of “public discourse to the level of the least sophisticated audience.”<sup>114</sup>

Lidsky compares the rational audience model to the reasonable person in tort law. “[T]he reasonable audience model in First Amendment law performs a function analogous to the reasonable person in tort law. It sets a minimum standard of reasonableness to which all citizens are expected to conform regardless (for the most part) of their actual capacity to do so.”<sup>115</sup> When defendants fail to conform to the standard of a reasonable person, they suffer for this standard: their liability increases. Yet in defamation lawsuits, when audiences behave irrationally and are credulous with hyperbolic speech, such as Tucker Carlson’s hypothetical involving Karen McDougal, the defamation plaintiff suffers in addition to the audience being misled. Thus, in order to preserve the view that speech should be well-informed, rational, and accessible to all, the interaction of libel law and the First Amendment

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105. *Id.* at 828.

106. *Id.* at 829–30.

107. *Id.* at 830.

108. *Id.* at 831–32.

109. *Id.* at 832.

110. See David Robson, *Why Smart People Are More Likely To Believe Fake News*, *GUARDIAN* (Apr. 1, 2019, 3:00 AM), <https://www.theguardian.com/books/2019/apr/01/why-smart-people-are-more-likely-to-believe-fake-news> [<https://perma.cc/GXP7-3SPS>].

111. Lidsky, *supra* note 104, at 839–40.

112. *Id.* at 840.

113. *Id.* at 844.

114. *Id.* at 841–43.

115. *Id.* at 842.

fosters a speech environment that allows distortions to flourish among us decidedly irrational audience members.

Thus, First Amendment doctrine's actual effect (the protection of emotional, inflammatory, misleading, and hateful speech) is fundamentally incongruous with its primary justification: the fostering of a deliberative, nonviolent, rational search for truth.

## II. INSTANCES OF FIRST AMENDMENT CONTRADICTIONS

The previous Part explored the First Amendment contradictions presented by the relationship between rationality and emotion, both in free speech doctrine and in human psychology. Although the First Amendment's potentially greatest asset is to protect the rational process that leads to truth, much irrational speech is encompassed within the First Amendment's protection. The First Amendment cannot police certain types of emotionally charged speech that have the potential to corrode our rational faculties, mislead us, and stir some individuals or groups to lawless acts. Humans are emotional creatures, and First Amendment jurisprudence cannot account for—and if anything exacerbates—pathologies in discourse that take us away from truth. When humans place our (sometimes unconscious) emotional responses and our emotional needs above the search for truth in unreasonable ways, we create pathologies that have increased as the ease with which we communicate and voice our opinions to large audiences has increased.

Strong, robust First Amendment protections with breathing room created for lies, incitement, and reductive speech that appeals to emotions and subverts rational processes have facilitated pathologies in our discourse that cannot be corrected legally. In this Part, I catalogue particular breakdowns in discourse and how they are caused by the combination of robust free speech doctrine, the unreasonable prioritization of emotions above the search for truth, and the ever-increasing ease of communication. These pathologies infecting the marketplace of ideas arise across the political spectrum. Section A details the proliferation of so-called “fake news” and, as a lesser version of outright lies, oversimplified narratives that spread and grip people's imaginations in response to current events. These distortions of truth arise due to the emotional balm of reaffirming one's own narrative, cognitive biases, and our desire to create cohesive social groups—and our sense of clannishness. Section B discusses how this need for belonging and validation manifests in a desire to feel included based on one's identity, and how discourse around identity has, in combination with mass mobilization of social media and academic culture, chilled speech that might add nuance to issues relating to identity groups as they have been defined.

These different types of pathologies in discourse—problems of speech quality and problems of speaker identity—may not be of the same magnitude; however, they likely reinforce each other, continuing a vicious cycle of polarization and toxic breakdowns of discourse and rational deliberation. Additionally, depending on where one sits on the political spectrum, some of these problems may appear to be greater in magnitude than others, so the very same biases described in these Sections may contribute to how one views the significance of the different types of pathologies in our discourse.

### A. Fake News and Simplified Narratives: Problems of Speech Quality

Many across the political spectrum believe that discourse is broken and question whether the marketplace of ideas still operates to achieve truth.<sup>116</sup> Well-connected, politically engaged members of society have been accused of misleading the public,<sup>117</sup> and even sophisticated listeners form conclusions based on reflexive emotions or simplified narratives without understanding complete and accurate information.<sup>118</sup> Some believe people do not actually engage in rational deliberation, and now there is scientific evidence to show that “rational deliberation is based on a view of the electoral and public policy discourse that is not descriptively accurate.”<sup>119</sup> Confirmation bias means we attend most to facts and arguments that support our pre-existing worldviews.<sup>120</sup>

Although incidents of spreading false narratives to injure one’s political opponents date back to ancient times,<sup>121</sup> social media and Internet culture may exacerbate these problems<sup>122</sup> by empowering us to select information based on our

116. See Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 440–41 (2019) (describing how the “marketplace of ideas model was ‘virtually canonized’ for generations” but that “[m]any people seem ready to conclude that the experiment has failed”). According to Blocher, “[d]evelopments in psychology, economics, history, sociology, and other scholarly fields have drawn attention to the host of problems—cognitive limitations, motivated reasoning, racism, sexism, resource inequalities, and the like—that make it impossible for the marketplace of ideas to reliably deliver on its promise of identifying ‘truth.’” *Id.* at 441.

117. According to Alan Chen, during the 2016 presidential election, “[a]ccusations of lying were directed at political candidates, mainstream news media, interest groups, and other individuals and organizations posting stories meant to be understood as legitimate news on various social media platforms.” Allen K. Chen, *Free Speech, Rational Deliberation, and Some Truths About Lies*, 62 WM. & MARY L. REV. 357, 366 (2020).

118. In our news media, “[t]he spread of inaccurate reporting encompasses topics including voter fraud, climate change, genetically modified organism (GMO) food products, vaccinations, and fluoride in drinking water. Most recently, fake news stories have emerged in reporting about the COVID-19 pandemic and the Black Lives Matter movement.” *Id.* at 374.

119. *Id.* at 395.

120. Studies demonstrate that confirmation bias—or the tendency to over-weigh evidence that supports a pre-existing belief—exists even when people are incentivized to be objective, and this would be even more deleterious when people have emotional reasons to cling to mistaken or simplified beliefs. See George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 139 (1993).

121. See Chen, *supra* note 117, at 368–69 (detailing the chronology of “fake news,” including a case where the “historian Procopius . . . in the sixth century AD reportedly wrote false stories to damage the reputation of the Roman Emperor Justinian”).

122. See Jeff Hermes, *The Challenges for Free Speech Advocates in a Time of Turmoil*, 46 NO. 1 LITIG. 49, 53 (2019) (“When one person in a city of 100,000 speaks from a soapbox in the park, we tend to dismiss that person as a lone voice in the wilderness; but when 3,000 users out of 300 million on Twitter form a vocal bloc, they can have a significant effect. The special dynamics of social media allow messages that would otherwise be weeded out by the traditional marketplace of ideas to survive and flourish instead.”).

cognitive biases and clannishness.<sup>123</sup> Indeed, scientists found that false information “diffuses significantly farther, faster, deeper, and more broadly than the truth, in all categories of information, and in many cases by an order of magnitude.”<sup>124</sup> Although there is a distinction between purposely misleading the public and sharing a simplified narrative that one believes, the corrosive effect on discourse is apparent regardless of the intentions of speaker and listener.

Emotional bias also corrodes free speech. We enjoy creating communities around ideas, and this emotional balm has intensified as there are newer ways to create communities by excluding those who do not share our values, however specified. Professor Alan Chen provocatively contends that even “fake news,” which he defines as “the deliberate, public communication as truthful of a verifiably false and material statement of fact regarding a matter of public concern, in which the original source is an entity representing itself to be a legitimate journalistic enterprise or otherwise reliable source of news stories,”<sup>125</sup> can serve a social cohesion function among listeners who feel a sense of belonging through sharing a reality.<sup>126</sup> This explains “why fake news is not only effective but also may be valuable to its consumers without regard to objective truth.”<sup>127</sup> Like classical music or abstract art, fake news can communicate emotionally, create feelings of connectedness, and allow listeners to self-actualize through the creation of identity.<sup>128</sup>

In this environment of emotional selection of speech that reaffirms pre-existing ideologies and builds communities through shared realities and noncognitive processes, false, incomplete, or logically inconsistent information spreads rapidly, often unchecked. Intellectual laziness and lack of time has further inspired us to find the information that confirms our worldview and spread it to our communities, giving people the outrage and motivation needed to either take action or further shut down dialogue with others who might add nuance to their accounts. Memes on complex topics that have stumped great thinkers for decades allow those with more outrage than attention span to feel quite confident in their reductive views. Speech is weaponized against speech—troll armies,<sup>129</sup> bots, and those insistent on misleading the public for their own gain can use the First Amendment’s protections to degrade the marketplace of ideas.

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123. See Mostafa M. El-Bermawy, *Your Filter Bubble Is Destroying Democracy*, WIRED (Nov. 18, 2016, 5:45 AM), <https://www.wired.com/2016/11/filter-bubble-destroying-democracy/> [<https://perma.cc/6VM9-SNHV>].

124. Peter Dizikes, *Study: On Twitter, False News Travels Faster Than True Stories*, MIT NEWS (Mar. 8, 2018), <https://news.mit.edu/2018/study-twitter-false-news-travels-faster-true-stories-0308> [<https://perma.cc/798X-QBV7>].

125. Chen, *supra* note 117, at 367.

126. *Id.* at 411–14.

127. *Id.* at 412.

128. *Id.* at 407–11.

129. See Tim Wu, *supra* note 17, at 560 (“Among emerging threats are the speech-control techniques linked to online trolling, which seek to humiliate, harass, discourage, and even destroy targeted speakers using personal threats, embarrassment, and ruining of their reputations.”).

The First Amendment's protection of information that appeals to, I would argue, our baser natures—our clannishness, our laziness, or simply that we lack the time to truly understand an issue—creates problems of information quality. As speakers compete for listeners' limited attention and resources, they often thrive by exploiting our emotional biases and needs. As a result, there is more information of a low quality entering the marketplace of ideas. Compounding this, people often filter to seek out information based on how much the information confirms their priors and makes them feel validated, not on how accurate or sophisticated the information is, so this lower-quality information—which is either incomplete, sensationalized, or downright false—gets more purchase with listeners with strong priors. This low-quality information then affects how people vote, what they believe, how they conduct themselves, and for what causes they are willing to make sacrifices.

### ***B. Discourse Around Identity and Inclusion: Problems of Speaker Identity***

In addition to pathologies in discourse stemming from problems of information quality, there are problems relating to speaker identity. Our increased sensitivity to people's emotional well-being is 'chilling the speech of those who either belong to certain identity groups or wish to speak on topics deemed related to a listener's identity. Members of marginalized groups, such as women and racial minorities, have argued for some time that there is a "tax" on their speech in the form of online trolls and Internet harassment.<sup>130</sup> Now, members of nonmarginalized groups may also feel chilled against speaking on certain topics that pertain to identity groups,<sup>131</sup> or even speaking at all, especially in academic settings.<sup>132</sup> These two seemingly opposing forces—marginalized speakers and nonmarginalized speakers feeling chilled from participating in discussions—unfortunately do not cancel each other out and equalize speech opportunities, adding pluralism to the marketplace of ideas. Instead, this phenomenon leads to those with more extreme, ardent viewpoints who are most passionate about a topic and least daunted by social pressures feeling the most at liberty to voice their views. This situation presents a significant First

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130. See, e.g., Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 701 (2016) ("The Internet, a medium that provides unprecedented access to speech for those without great resources, is the locus of calls for reforms that suppress speech, especially anonymous speech, by some feminists, who believe that misogynist reactions to blogs place a 'tax' on women seeking to participate in Internet conversations.").

131. As examples, men often feel—or are influenced to feel—like they cannot participate in the abortion debate, because they do not have as large a stake as women. See, e.g., Monica Hesse, *It Can Be Awkward for Men to Speak Out on Abortion Rights. But We Need Them to Try*, WASH. POST (May 22, 2019), [https://www.washingtonpost.com/lifestyle/style/it-can-be-awkward-for-men-to-speak-out-on-abortion-rights-but-we-need-them-to-try/2019/05/22/61cd84f4-7803-11e9-b7ae-390de4259661\\_story.html](https://www.washingtonpost.com/lifestyle/style/it-can-be-awkward-for-men-to-speak-out-on-abortion-rights-but-we-need-them-to-try/2019/05/22/61cd84f4-7803-11e9-b7ae-390de4259661_story.html) [https://perma.cc/RL53-F2QK].

132. See Daniel Craig, *Penn TA Says She Calls on Black Women First; Incites Critics, Supporters, and Nazi Trolls*, PHILLY VOICE (Oct. 21, 2017), <https://www.phillyvoice.com/penn-ta-says-she-calls-black-women-first-incites-critics-supporters-and-nazi-trolls/> [https://perma.cc/7CM8-LKX3] (discussing a device called "progressive stacking," where one graduate student tweeted that she "will always call on my Black women students first. Other POC get second tier priority. WW [White women] come next. And, if I have to, white men").

Amendment contradiction. Our sense of identity is impeding necessary conversations about important social issues, even though discourse is a way to self-actualize and create identity.

This pathology of the problem of speaker identity is not simply a resurrection of fears about “political correctness” that inspired universities to enact “speech codes” and anti-harassment policies in the 1990s.<sup>133</sup> Senses of belonging are important, and alienating vulnerable members of the population does not benefit discourse. However, the combination of an unproductive hyperfixation on emotional well-being, the view that those emotionally impacted by certain policies or practices are best suited to speak about them (a view that turns the concept of objective, rational discourse on its head), post-modern and critical theories that question the very concept of truth, and strong associations between political opinions and people’s sense of identity have engendered motivated reasoning, squashed and corrupted entire lines of inquiry, and threaten to overwhelm the way we discuss important topics.

Both in terms of academic and legal developments,<sup>134</sup> and in terms of social movements, there has been increased attention to emotional well-being in recent years.<sup>135</sup> This increased attention may be counterproductive, however—not simply to the search for truth but also to our emotional growth and welfare.<sup>136</sup> Attending too much to emotions affects our free speech culture, especially our First Amendment institutions—like academia—best suited to facilitating the search for truth.<sup>137</sup> In conjunction with, and perhaps amplified by, increased sensitivity to emotions is increased attention to identity, identity-based issues, and fostering a sense of inclusion. Attention to identity-based issues is often motivated by important factors like diversity-based rationales for affirmative action,<sup>138</sup>

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133. For a nice discussion on campus speech policies, see Vince Herron, Note, *Increasing the Speech: Diversity, Campus Speech Codes, and the Pursuit of Truth*, 67 S. CAL. L. REV. 407 (1994).

134. See generally Laura E. Little, *Negotiating the Tangle of Law and Emotion*, 86 CORNELL L. REV. 974, 975 (2001) (“[F]rom the academy’s vantage point, emotions and their influence on scholarly projects are stronger than ever.”).

135. See Anna Choi, *Why Schools Should Pay More Attention to Students’ Mental Health and Well-Being*, OECD EDUC. & SKILLS TODAY (Mar. 14, 2008), <https://oecdeditoday.com/why-schools-should-pay-more-attention-to-students-mental-health-and-well-being/> [<https://perma.cc/73M7-ZPEN>] (“The notion of well-being and happiness has increasingly taken centre stage in our societies over the recent years.”).

136. LUKIANOFF & HAIDT, *supra* note 11, at 30 (“When children are raised in a culture of safetyism, which teaches them to stay ‘emotionally safe’ while protecting them from every imaginable danger, it may set up a feedback loop: kids become more fragile and less resilient, which signals to adults that they need more protection, which makes them even more fragile and less resilient.”).

137. *Id.* at 24–29 (discussing the “concept creep” from physical safety to emotional safety that has led to “safe spaces” and cancellations of speakers on contested topics on college campuses).

138. See *supra* Introduction.

inclusiveness trainings, and the triumph of “critical legal studies”<sup>139</sup> and its successors—like critical race theory. These areas of attention raised needed awareness on the effects of certain policies and practices on marginalized groups<sup>140</sup> but may have rendered many (including students) hyper-fixated on distributional effects and identity groups in divisive and counter-productive ways.<sup>141</sup>

Fixation on one’s identity as part of a group and over-attending to one’s emotional need to feel validated as part of that group, although important to parts of our sense of self and understanding of the world, can be damaging to analytical reasoning. The emotional desire to form identities and reaffirm belonging in identity groups fosters “motivated reasoning,” or “the unconscious tendency of individuals to process information in a manner that suits some end or goal extrinsic to the formation of accurate beliefs.”<sup>142</sup> In one engaging in motivated reasoning, the goal of seeking truth is superseded by some other goal or emotional desire. The desire to form and protect one’s identity as part of a group is a particularly strong driver of motivated reasoning, which means our desire for inclusion (admirable in many situations) exists in tension with the marketplace-of-ideas model of truth-seeking. Indeed, “[r]ecent research suggests that one of the primary goals of motivated reasoning is the expression and protection of group identity—such as one’s cultural or political identity.”<sup>143</sup>

Dan Kahan and Keith Stanovich have posited a theory of expressive rationality where “individuals of opposing cultural identities can be expected to use all the cognitive resources at their disposal to form identity-congruent beliefs.”<sup>144</sup>

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139. Critical legal studies is a movement designed to counter the view that the law is a neutral, apolitical force. It also attacks liberal political theory to the extent liberalism relies on formalism and the idea that formalities in the law and legal doctrine have inherent meaning. See David C. Caudill, *Disclosing Tilt: A Partial Defense of Critical Legal Studies and a Comparative Introduction to the Philosophy of the Law-Idea*, 72 IOWA L. REV. 287, 290–91 (1987).

140. See *id.* at 291 (describing a theme of critical legal studies as “the idea that law legitimates oppressive social orders and hides the tensions in those orders”).

141. See Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES (July 27, 2021, 5:19 PM), <https://www.nytimes.com/article/what-is-critical-race-theory.html> [<https://perma.cc/8PTQ-66CU>] (outlining the contentious debate between proponents and opponents of teaching critical race theory in schools). Because critical race theory focuses on the effects of United States policy on different racial groups and argues that racism is embedded in the American experience, many of its opponents believe it is teaching children a divisive ideology and lens with which to understand history that classifies people based on race, not simply providing students with facts about history. See Conor Friedersdorf, *Critical Race Theory Is Making Both Parties Flip Flop*, ATLANTIC (July 8, 2021) <https://www.theatlantic.com/ideas/archive/2021/07/north-carolina-critical-race-theory-ban-free-speech/619381/> [<https://perma.cc/AW92-8JB5>].

142. Dan M. Kahan, *The Supreme Court, 2010 Term, Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19 (2011).

143. Ronnell Andersen Jones & Lisa Grow Sun, *Freedom of the Press in Post-Truthism America*, 98 WASH. U. L. REV. 419, 443 (2020).

144. Dan M. Kahan & Keith E. Stanovich, *Rationality and Belief in Human Evolution* (Annenberg Pub. Pol’y Ctr., Working Paper No. 5, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2838668](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2838668) [<https://perma.cc/CS6F-ERVF>].



Their study tested whether individuals better equipped with logical reasoning skills had the disposition to re-examine their intuitions in light of available evidence.<sup>145</sup> Instead, they found that higher cognitive reasoning “scores magnified the division between relatively religious and relatively nonreligious study subjects.”<sup>146</sup> Participants with higher cognitive reasoning and reflection skills were more likely to believe in evolution if they were relatively secular; however, higher cognitive reasoning and reflection scores did not make participants more likely to believe in evolution if they are relatively religious.<sup>147</sup> Thus, they concluded that people “use their critical reasoning capacities to reinforce beliefs that effectively signal who they are—whose side they are on—in the struggle for the cultural supremacy that public acceptance of their position has come to connote.” In essence, our reasoning skills in light of new evidence do not always promote the search for truth but instead serve the stabilization of cultural identity.<sup>148</sup>

This motivated reasoning means that the more we view the world in terms of identity and connect viewpoints with identity groups, and the more we prioritize satisfying the emotional comfort of belonging based on identity, the more the search for truth may be thwarted in favor of finding and preserving identity. This will not only cause people to compromise their reasoning skills and intellectual rigor—for example, acknowledging only the facts that support their narrative and dismissing facts that undermine their position—when issues touch upon their sense of identity and the viewpoints associated with that identity. Motivated reasoning based on securing one’s identity will also cause (and perhaps already has caused) them to want to silence those whose identities do not align with their views or whose views seem to undermine their sense of identity. This is happening on college campuses, where legitimate scholars (and some illegitimate scholars) are being silenced by crowds for being sexist, racist, or taking positions that undermine one’s identity.<sup>149</sup> Simply debating whether America is a “rape culture” is, in the view of some students, “damaging,” because it “could serve to invalidate people’s experiences.”<sup>150</sup>

Issues that touch upon one’s sense of identity become inflammatory and often toxic to productive discourse. This does not mean we should not acknowledge the roles that identity plays in creating our sense of selves, nor should we deny the costs some members of society pay, in different contexts and throughout history, due to their identities. Yet we have over-defined and committed too much to our place in certain identity groups in a way that has become illiberal and contrary to America’s free speech culture. Our discourse is dominated by membership in particular identity groups and how particular policies or cultural practices affect those identity groups. An over-emphasis on identity groups and the tension between them is undermining our ability to have nuanced discussions of important social

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145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. See LUKIANOFF & HAIDT, *supra* note 11, at 47–50 (detailing disinvitations and disruptive protests on college campuses that escalated around 2013).

150. *Id.* at 26–29.

issues—from gender expression and identity<sup>151</sup> to racial justice issues—without fear of reprisal or major social consequences.<sup>152</sup>

More importantly (and abstractly), those entrenched in their views and their connection to identity have increasingly abandoned a belief in free speech and its commitments to viewpoint neutrality and process in order to achieve truth.<sup>153</sup> A process-based method of achieving truth requires buy-in from individuals that we, as a collective, can work together to achieve truth and, importantly, requires a belief in process-based methods as opposed to results-oriented thinking. Yet, with the rise of identity-group thinking, many no longer believe in discussions, even academic discussions, that occur within a sphere of the neutrality necessary to sustain rational inquiry and the search for truth.<sup>154</sup> Neutrality favors the oppressor, they argue, and discussions of issues reduce to whether one is on the side of the oppressor or the oppressed.<sup>155</sup>

The last Part of this Article will end on both an optimistic and a pessimistic note. I will first discuss how to continue to manage the contradictions created by reason and emotion in First Amendment doctrine. I will then address some of the proposals other scholars have suggested for dealing with, specifically, the problem

151. The discussion surrounding debates between certain feminists and trans thinkers and activists often revolves around whether certain viewpoints, for example, are “transphobic.” See Aja Romano, *Chimamanda Ngozi Adichie’s Cancel Culture Screed Is a Dangerous Distraction*, VOX (June 18, 2021, 8:30 AM), <https://www.vox.com/22537261/chimamanda-ngozi-adichie-transphobia-cancel-culture-jk-rowling-akwaeke-emezi-olutimehin-adegbeye> [<https://perma.cc/YK28-JYZP>] (arguing, in response to “a lengthy and eloquent takedown of cancel culture” that the more salient question is whether Chimamanda Ngozi Adichie has transphobic views).

152. As another example, condemning arson as an effective method of protest in the wake of George Floyd’s murder by police officer Derek Chauvin resulted in composer Daniel Elder being barraged with comments calling him a white supremacist and being blacklisted as a composer. See Robby Soave, *A Composer Condemned Arson. Now No One Will Hire Him*, REASON (June 15, 2021, 9:00 AM), <https://reason.com/2021/06/15/daniel-elder-cancel-culture-choral-composer-antifa-blm-gia/> [<https://perma.cc/T8GK-R3W8>]. A North Korean defector described attending Columbia University as indoctrination similar to the North Korean regime, where expressing a penchant for reading Jane Austin novels labeled her as “brainwashed” in a “colonialist mentality” by the books. Collman, *supra* note 13.

153. See generally Erica Goldberg, *First Amendment Cynicism and Redemption*, 88 U. CIN. L. REV. 959 (2019).

154. At the College of William and Mary, for example, student protesters disrupted a speaker from the American Civil Liberties Union because “liberalism is white supremacy.” See Robby Soave, *Black Lives Matter Students Shut Down the ACLU’s Campus Free Speech Event Because ‘Liberalism Is White Supremacy’*, REASON (Oct. 24, 2017) <https://reason.com/2017/10/04/black-lives-matter-students-shut-down-th/> [<https://perma.cc/58DG-N4GQ>].

155. The famous quote often attributed to Desmond Tutu, “If you are neutral in situations of injustice, you have chosen the side of the oppressor” has been applied out of context by those who believe that any airing of a variety of views for academic debate perpetuates injustice, as does the viewpoint neutrality of the First Amendment. See OXFORD ESSENTIAL QUOTATIONS (Susan Ratcliffe ed., 5th ed. 2017), <https://www.oxfordreference.com/view/10.1093/acref/9780191843730.001.0001/q-oro-ed5-00016497#:~:text=Desmond%20Tutu%201931%E2%80%93&text=If%20you%20are%20neutral%20in,will%20not%20appreciate%20your%20neutrality> [<https://perma.cc/UFN2-B2Y2>].

of “fake news” and deceptive or reductive speech. There is not much First Amendment doctrine can do to cure our pathologies in discourse and undo the contradictions its jurisprudence creates, but retaining its general wisdom is needed now more than ever.

### III. CURING FIRST AMENDMENT CONTRADICTIONS

With so much distrust of the First Amendment and, specifically, the marketplace of ideas, there is an opportunity for courts to either find ways to correct speech pathologies that have arisen or reaffirm the value of our current system. In this last Part, I propose that correcting these pathologies in discourse can be corrected not by restricting First Amendment rights but by reaffirming them. Cynicism about a process-based First Amendment and a prioritization of other goals besides truth is creating our problems—it is skepticism of free speech, not free speech itself, that requires the most adjustments.

First, courts and actors in educational institutions must signal that not only are reason and emotion, although interrelated, distinct processes but that rational deliberation requires that ideas of speech and conduct be kept separate. The idea of “speech as violence” must be resoundingly rejected, and courts must enshrine new applications of the doctrine that preserve the distinction between physical, concrete harm and certain types of emotional harm. Second, along with this cementing of our paradigms, courts should hold that “fake news” can be remedied and regulated only when it relates to a specific, concrete harm—not a generalized harm to the “public.” This specific, concrete harm requirement both protects speech as a special category whose emotional harms we must generally bear and ensures that courts and juries can attach punishments to speech only when the speech is verifiably true or false, not when it expresses a view on open, public debates or simplifies important public issues. While these types of speech are surely problematic, the solution is for people to better understand their own emotional natures and cognitive biases, not for juries and courts to begin enshrining them as First Amendment doctrine.

#### *A. Emotional Harms from Speech*

Many of our speech pathologies stem from a desire to cater to our collective and individual emotional frailties or to remedy, either legally or socially, the emotional harms that come from speech. People chill themselves (or shout down others) for fear of emotional reactions to speech. People are too often guided by the initial, emotional response to speech that may or may not represent the most accurate, comprehensive, nuanced facts and conclusions about a topic. Recent attention to emotional harm—and perhaps an over-emphasis on protecting people’s mental health—may actually be making us more emotionally fragile and less tolerant of speech. This vicious cycle (fixating on mental health and reducing people’s exposures to stressors, which generally leads individuals to be less equipped to handle emotional strife) reduces freedoms and erodes free speech and should not be enshrined in the law.

We cannot rid ourselves of our passions and our prejudices, be they emotional or cognitive, but courts can signal—through doctrine and through the language of their opinions—which virtues improve the quality of speech. Deeper reasoning, confronting our confirmation biases, and appreciating the ways in which

our identities are bound up in viewpoints are each necessary to improve the goods in the marketplace of ideas. Better quality, less ideologically motivated education is also necessary, and intellectual shortcuts and politics via simplified meme should be discouraged. Some of this social evolution must be cultural and not legal, but there are a few ways courts can help.

First, educators polarizing over what to include in curriculum and how to present certain courses would be better served by recognizing which aspects of certain subjects are about imposing perspectives or conclusions on students and which are about teaching them to think and giving them the facts, both convenient and inconvenient to their narratives. Courts can facilitate this process through doctrines involving academic freedom, by specifying what academic freedom means and when it should be applied. If courts are to give educational institutions like universities academic freedom, they must demonstrate a paramount commitment to academic inquiry, not an ideological mission that trumps the search for truth.

Second, courts can safeguard the rational process and distinguish it from the emotional joys and downsides of speech. Courts must signal that emotional harm is a necessary byproduct of a robust, healthy free speech culture and that our emotions may not be the best guide of what is reasonable discourse. Not only can the government generally not intervene to protect emotional well-being at the cost of censorship, but the government must be proactive in protecting citizens from the heckler's veto—shutting down others' speech through force or negating a platform someone has been freely provided—or guarding against those who claim that speech is too damaging to others' emotions.

Courts and academic institutions cannot demonstrate that emotions are a sacred realm to be protected at the expense of speech. Indeed, often our emotions are not interpreted correctly or are based on factual inaccuracies or biased thinking and lead us in damaging directions for discourse. Filter bubbles, fake news, and appeals through reductive, oversimplified speech are all ways that our emotional indulgences are damaging discourse. Courts should embrace doctrine sensitive to the idea that our emotions are not the be-all-end-all and can and should, in many cases, be overlooked. Our emotions can lead us in new directions and inspire us to think further on topic or they can show us what we find important, but they are not the same as logical conclusions on a topic.

For those skeptical of the First Amendment and its current level of protections, however, these solutions may not be satisfying. Indeed, some may argue that artificial intelligence in the form of bots has eroded the speech-conduct distinction, or that our First Amendment jurisprudence favors the status quo. Courts must do a better job setting boundaries on what is actually speech and explaining why certain protections are necessary. The next Section details certain doctrinal changes courts should and should not make.

### *B. Doctrinal Tweaks and Fake News*

As mentioned previously in Part II, listeners often seek out and believe information that confirms their prior beliefs, solidifies their sense of identity, and helps form social cohesion based on ideological similarities. Speakers can exploit this by using sensationalist headlines that do not capture the nuances of the truth

(knowing some people will not read the full article); by creating simplistic, reductive narratives about events; and even sometimes by outright lying about facts and events.

Scholars believe that current pathologies in discourse arise from this weaponization of speech against speech, often in the form of “fake news.” Fake news has been defined variously by different scholars, but most definitions involve (1) an element of intent or purposefulness, (2) dissemination of verifiably false information, and (3) that dissemination somehow harming the public good.<sup>156</sup> Under our current doctrine, fake news likely cannot be proscribed because, unlike fraud or defamation, the harm is not specific and concrete (like economic harm from fraud or reputational harm from defamation) but rather to the public trust and to public discourse. In *United States v. Alvarez*, which invalidated a statute that criminalized lying about receiving a military honor, the Supreme Court required a “clear, limiting principle” before lies could be proscribed.<sup>157</sup> According to the Court, “[o]ur constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.”<sup>158</sup> Perhaps someone who contracted the novel coronavirus could claim that Fox News spread fake news about the vaccine approval processes, and this caused concrete, material harm in that they contracted coronavirus. Allowance of that type of lawsuit would give courts and juries the power to adjudicate what is generally true and false, potentially chilling a great amount of speech and putting great powers in the hands of the government.

Further, even if fake news could be restricted, any definition of fake news would be both overinclusive and underinclusive. Any definition of fake news would be overinclusive, because, if the material and concrete harm element of *Alvarez* were broadened, it would be difficult to separate what is true and incomplete from what is a lie, especially about important, contested issues. Juries, under a court’s direction, may end up attaching penalties to speech that actually turns out to be true. As Alan Chen notes, “[i]t simply may be too difficult to provide a workable legal definition of truth or falsity in the context of public discourse.”<sup>159</sup> In defamation, plaintiffs must allege a reputational injury based on a false statement about themselves. This not only ensures that individuals are not punished for generalized lies, which may serve some social function or have political value, but also narrows the range of punishable speech to that which is generally verifiable. Whether a politician had an affair is much more easily proven or disproven than broader conclusions from facts and data, such as whether Iraq had weapons of mass destruction, whether vaccines carry too much risk, or whether genetically modified organisms are unsafe to consume. Although there is scientific or other consensus on many of these topics, it is based on interpretations of data on a large scale, not single pieces of information that are more easily proven true or false. If even defamation requires a high standard of intentionality and verifiably false facts to give breathing room to those whose

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156. See Lili Levy, *Real “Fake News” and Fake “Fake News,”* 16 FIRST AMEND. L. REV. 232, 245 (2017) (collecting sources).

157. *United States v. Alvarez*, 567 U.S. 709, 723 (2012).

158. *Id.*

159. Chen, *supra* note 117, at 380.

speech might be chilled, punishing fake news about topics of public interest would certainly chill important speech that is less falsifiable.

Attaching legal remedies to fake news would also be underinclusive because many of the harms to public discourse come not from speech that is intentionally false but from those who repeat false speech (although punishing the originators would mitigate this to some degree) and from those whose narratives, on topics from Israel to policing in America, are oversimplified and sensationalistic. The solution to this problem of lower quality information cannot be legislated or imposed by courts. We must all discipline ourselves not to extrapolate from every anecdote and to seek out information that may undermine our priors, not just confirm them. Social media companies (private actors not subject to First Amendment constraints) must be free to experiment with their own policies, which hopefully will move away from encouraging the spread of inflammatory information and toward bolstering people selecting for nuanced takes.<sup>160</sup> Social media platforms, understanding human psychology and the emotional impacts of speech, should (without targeting viewpoint) take some responsibility in exposing people to a broader range of speech and encouraging them to engage in meaningful dialogue with each other to reveal facts to which they may not have been exposed.

Perhaps this is too optimistic. There are some, as Toni Massaro and Helen Norton describe, “tweaks” that can be made in the doctrine to address major pathologies in discourse, such as the spread of fake news. One class of tweaks is speaker-based restrictions, such as election laws that “regulate speakers based on their foreign identity by barring foreign actors from influencing U.S. elections.” This type of law could create an easily administrable category that is actually unrelated to the content or viewpoint of the speech and thus would not embroil courts or government officials in choosing worthy versus unworthy speech and render them vulnerable to their own emotional and cognitive biases. (This would somewhat undermine Massaro and Norton’s claim that the “neutrality” of free speech doctrine is a false narrative.)<sup>161</sup> Election laws of this nature simply target an easily identifiable class of speakers less entitled to First Amendment protection because of their diminished interest in our election and the significant concern of foreign manipulations of our elections. Further, the use of computer-generated speakers or bots, especially bots from foreign countries, could be susceptible to restrictions. The regulation of bots can be considered a time, place, and manner restriction on speech at the margins between speech and conduct because it is not uttered or created by a human being and is designed to be disruptive to discourse.

Not all tweaks are as easily administrable or as benign to our free speech fundamentals as others. One reason for increased skepticism of strong free speech protections has been cases like *Citizens United*, which invalidated campaign finance reforms like limitations on corporate and nonprofit expression, such as the

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160. Kate Klonick calls social media platforms “[t]he New Governors . . . . They are private, self-regulating entities that are economically and normatively motivated to reflect the democratic culture and free speech expectations of their users.” Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1603 (2018).

161. Massaro & Norton, *supra* note 20, at 1675–76.

documentary at issue in the case.<sup>162</sup> Some argue that the outcome of *Citizens United* is corrosive to democratic values and has created a toxic environment for speech where the many can speak over the few.<sup>163</sup> However, *Citizens United* is justified in ways that go far beyond campaign finance reform, and better education about this to the public could reduce some of the skepticism.<sup>164</sup> Targeting corporations for being less worthy of influencing elections, for example, would affect our expressive associational rights and punish those for amassing wealth, truly compromising some of the First Amendment's formal neutrality and stance against re-distributing speech opportunities through government intervention. Similarly, dismantling the state action doctrine to allow more regulation of social media platforms and redistribute speaking power would allow government actors—with emotional and cognitive biases similar to the population—too much power in controlling the marketplace of ideas. However, when government actors threaten private parties to induce them to censor speech or investigate private parties about their speech policies, the state action threshold has likely been crossed.

Indeed, our foundational First Amendment values are needed now more than ever. These values can signal how to have productive discourse. Because the First Amendment generally does not regard the emotional harm caused by speech on a matter of public concern as compensable,<sup>165</sup> courts are signaling that we cannot let cognitive or emotional biases drive discourse—either through stifling discourse due to the distressing nature of speech, which sometimes undermines our sense of self to the very core, or through allowing those emotionally upset by speech to turn to violence to combat speech. The speech–conduct distinction preserves and elevates rational processes, even while forbidding courts to censor the tenuous differences between rational and emotional appeals. The speech–conduct distinction is needed now more than ever, as people sometimes turn to or justify violence based on others' speech. Ensuring a high bar before speech becomes violence signals, as Judge Royce Lamberth did when he rejected “Q-Anon Shaman” Jacob Anthony Chansley's motion for pretrial release,<sup>166</sup> that we must exercise our own judgment in response to speech and are responsible for our rational processing. Lawmakers should strengthen penalties for engaging in violence in response to speech, and individuals should sue institutions for not better safeguarding them against the heckler's veto when audiences shout down or threaten speakers.

We also need people to show intellectual and emotional fortitude, including a willingness to speak out despite the unpopularity of adding nuance to debate within one's own political circles. We need social media platforms to reflect better on how

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162. See generally *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

163. See, e.g., Ofer Raban, *Constitutionalizing Corruption: Citizens United, Its Conceptions of Corruption, and the Implications for Judicial Elections Campaigns*, 46 U.S.F. L. REV. 359, 381 (2021).

164. For example, the Justices noted during oral argument that the campaign restrictions at issue in *Citizens United* would have applied to banning books and pamphlets, and could have potentially applied to editorials run by the *New York Times*. Transcript of Oral Argument at 64–67, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (No. 08-205).

165. See *Snyder v. Phelps*, 562 U.S. 443, 447, 460–61 (2011).

166. See *supra* Part I.

best to combat discourse pathologies and encourage sophisticated interactions. And we need our viewpoint-neutral First Amendment, which accounted for concerns of cognitive and emotional biases in government actors before behavioral science studied how these biases affected listeners, to give them the freedom to do so. Indeed, the very essence of the First Amendment contains the signals for how to proceed. It is those who are skeptical of the foundational values of the First Amendment and of the idea that clashing debates will lead to truth—those who wish to censor through online harassment or mass retaliation, those who spread misleading information to win over supporters for their cause, and those who tie speech to identity so closely that they do not examine their own view—who are aggravating our speech pathologies.

### CONCLUSION

We live in an age of skepticism about the marketplace-of-ideas metaphor and about the Supreme Court's First Amendment jurisprudence more generally. When low-quality speech proliferates and people feel threatened by retaliation just for entering the marketplace of ideas, the contradictions created by free speech doctrine and the pathologies present in our current state of public discourse become even more apparent. Yet these contradictions of the First Amendment's doing cannot be solved by restructuring First Amendment doctrine.

Those who truly, as a matter of principle, accept the marketplace-of-ideas metaphor are least likely to purposely contribute to discourse pathologies. Courts and educators need only embrace this aspirational notion that the clash of ideas leads to truth for it to increasingly become a self-fulfilling prophesy. Traditional free speech doctrine does not allow emotion to eclipse the need for people to expose themselves to uncomfortable speech. This process perhaps inoculates them and makes them stronger so they can challenge their own emotional responses and rational biases, and truly engage in nuanced discussions. The speech-conduct distinction permits speech unless it gets exceptionally close to yielding conduct (such as incitement), and courts and lawmakers should encourage people to express themselves and discourage the use of violence or the heckler's veto in response to speech. Signaling strongly that speech is for rational, safe, informed discourse but that any violence in response to speech will be seriously punished may even incentivize those looking to inflame or appeal to emotions to use other tactics. Courts would do a great service to free speech protections and free speech culture to prioritize the truth-seeking functions of speech. We must all be attentive to corrosive influences on the marketplace of ideas.