

The “Social Media Discount” and First Amendment Exceptionalism

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I. INTRODUCTION

Angered over the fatal shooting of twelve people at the Navy Yard in Washington, D.C., a University of Kansas journalism professor took to Twitter to vent his rage at the National Rifle Association: “The blood is on the hands of the #NRA. Next time, let it be YOUR sons and daughters. Shame on you. May God damn you.”¹ David Guth’s post provoked an immediate outcry from gun-rights supporters, with state legislators threatening to cut the public university’s funding unless administrators took punitive action.² Guth was removed from the classroom for the remainder of the fall 2013 term and left on sabbatical shortly afterward.³

The uproar prompted the Kansas Board of Regents to revise its employment policies, enacting new punitive standards specifically directed at employee speech on social media.⁴ As a result, employees

1. Scott Rothschild, *KU Journalism Professor Guth Placed on Leave as School Reviews Comment He Made on Twitter on Shootings*, LAWRENCE JOURNAL-WORLD (Sept. 20, 2013, 10:55 AM), <https://www2.ljworld.com/news/2013/sep/20/ku-journalism-professor-guth-placed-leave-school-r/>.

2. Brad Cooper, *KU Prof Who Tweeted Controversially Back at Work, but not Classroom*, KAN. CITY STAR (Oct. 24, 2013, 4:48 PM), <https://www.kansas-city.com/news/local/article330260/KU-prof-who-tweeted-controversially-back-at-work-but-not-classroom.html>.

3. *Id.*

4. Scott Jaschik, *Fireable Tweets*, INSIDE HIGHER ED (Dec. 19, 2013), <https://www.insidehighered.com/news/2013/12/19/kansas-regents-adopt-policy-when-social-media-use-can-get-faculty-fired>.

may be disciplined, up to and including firing, for speech on social media made “in furtherance of” official duties that is deemed “contrary to the best interests” of the university.⁵ Even if the speech is unconnected with official duties, it still is regarded as punishable if it

impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker’s official duties, interferes with the regular operation of the employer, or otherwise adversely affects the employer’s ability to efficiently provide services.⁶

This regulation creates the anomaly that speech on social media is uniquely singled out as punishable, even when posted outside of work hours and wholly unconnected with work duties. No comparable regulation addresses any other mode of off-duty speech.

Across American society, regulatory authorities—often with the acquiescence of credulous judges—are policing speech on social networking sites as if social media constituted a “First Amendment-free zone” to which traditional free-speech principles no longer apply. The phenomenon is perhaps most pronounced in public schools and colleges, where students’ speech on social media is being subjected to greater scrutiny and control than any other form of expression. As a result of recent court rulings, the federal judiciary increasingly accepts that a public university may expel a student for posting material to social media regarded as contravening “established professional conduct standards,”⁷ a level of governmental control that does not extend to any off-hours behavior other than social media speech.

Government agencies are extending their punitive authority regarding speech into what people type in their living rooms just as social

5. KAN. BD. OF REGENTS, KANSAS BOARD OF REGENTS POLICY MANUAL 98–99 (2018), http://www.kansasregents.org/resources/062018_Policy_Manual_revised.pdf; Jaschik, *supra* note 4.

6. KAN. BD. OF REGENTS, *supra* note 4, at 99; Jaschik, *supra* note 4.

7. *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 521 (Minn. 2012) (coining “professional conduct standards” exception to the First Amendment for college students’ online speech and upholding legality of college’s decision to discipline student for off-campus Facebook posts).

networking sites become a primary means of political expression and advocacy.⁸ Social media is a uniquely democratizing media that empowers ordinary citizens to interact directly with elected officials, candidates, and celebrities. If First Amendment standards are not rigorously honored and enforced because of our collective societal phobia about the perceived dangerousness of social media, authority figures will be in a position to silence their critics on the very medium that most equalizes the power disparity between the governors and the governed.

This Article examines American society's growing willingness to accept intrusive regulation of online expression in ways that would never be countenanced if applied to other mediums. It questions the proposition that individuals must accept as a matter of course that punishing out-of-office speech based on subjective determinations of "professionalism" or "appropriateness" is now standard practice for supervisors. The extension of "good-conduct policing" into individuals' social media lives risks, counterproductively, excluding those with the greatest subject-matter expertise from the marketplace where discourse should be the most freewheeling. Additionally, the growing creep of educational institutions' disciplinary authority into their students' off-hours lives, this Article argues, "normalizes" this authoritarian drift. The risks are especially serious for the young and people of color, whose speech may be most discomfiting to—and subject to contextual misinterpretation by—authority figures.

The bottom line of this Article is simple: the legal system is failing to protect innocent people against life-altering consequences when speech on social media, devoid of context, is overblown or misunderstood by audiences the speaker neither intended nor reasonably expected to reach. Consequently, our laws and the judiciary's enforcement of them must catch up with the new cultural reality that people's unserious musings will be memorialized for a public audience, and that—with rare and extreme exceptions—those musings should be no

8. See Monica Anderson et al., *Activism in the Social Media Age*, PEW RES. CTR. (Mar. 1, 2018), <https://www.pewresearch.org/internet/2018/03/01/social-media-use-in-2018/> (reporting nationwide survey results showing that nearly half of Americans have used social networking sites over the past year to engage in political or social-minded activity and that most Americans regard social media as an important tool for communicating with elected officials or for organizing social movements).

more punishable than idle daydreams merely because they are now visible.

Part II sets out the guiding legal principles that normally protect speakers against being sanctioned for the content of their speech—including online—and explains how those standards can vary in the workplace and educational settings. In Part III, the Article presents illustrative case studies that demonstrate how authority figures regularly overreact to harmless speech posted on social networking sites, at times resulting in innocent people facing expulsion from school, loss of employment, and even arrest and prosecution. Paradoxically, the Article observes, speech on social media frequently is treated *more* literally than speech in other contexts, disregarding the jokey informality that is the signature of the medium. As a result, although the First Amendment affords speakers in other mediums the benefit of any ambiguity,⁹ that presumption increasingly is inverted when speech is posted to Facebook or Twitter—the “social media discount” from which the Article takes its title. Part IV examines the unique qualities of social media speech, explaining why it is so dangerous for the justice system to respond to momentary lapses in taste and judgment with the gravity that the First Amendment normally reserves for unambiguously harmful speech, such as “true threats.”

As an alternative way of evaluating social media speech, Part V looks at how the courts have successfully navigated the first generation of “libel by tweet” claims, recognizing that speech on social media does not carry the same credibility as speech on the printed page—a very different form of “social media discount.” In the context of defamation law, courts have readily understood that social media is a habitat for loose, figurative expression that reasonable readers do not take literally. The Article concludes in Part VI that the same approach should apply to evaluating challenges to content-based punishment for online speech. By adapting First Amendment standards to put a thumb on the speaker’s side of the scale to account for the heightened risk of misunderstanding when speech takes place on Facebook and Twitter, courts can restore the “social” to social media.

9. “Where the First Amendment is implicated, the tie goes to the speaker, not the censor.” Fed. Election Comm’n v. Wis. Right to Life, Inc., 551 U.S. 449, 474 (2007).

II. FIRST AMENDMENT FUNDAMENTALS

The First Amendment is powerful medicine. It constrains the government from enforcing content-based prohibitions or after-the-fact penalties on speech, except for a handful of rather extreme categories of unprotected expression. While protection at times diminishes within the institutional setting—schools, prisons, the workplace—it remains unconstitutional for government authorities to penalize people for espousing extreme or unpopular views, particularly where issues of public concern are implicated. These foundational First Amendment principles, put in place during the twentieth century, have endured wave after generational wave of evolution in communication technology.

A. The Starting Point: Content-Based Regulation Gets Skeptical Scrutiny

Government constraints on the content of speech are viewed with justifiably deep skepticism. As the Supreme Court declared in a 1992 ruling, *R.A.V. v. City of St. Paul*: “The First Amendment generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.”¹⁰ Regulations that target the content of private individuals’ speech on private property—for instance, restricting the types of books that may be sold or films that may be exhibited—almost never survive constitutional scrutiny.¹¹

When a government restraint on speech is not narrowly tailored so as to restrict only the speech that the government has a compelling interest in preventing, the restraint is vulnerable to challenge under the overbreadth doctrine. In invalidating the Stolen Valor Act, which criminalized lying about having won military honors, the Supreme Court explained, “[t]he First Amendment requires that the Government’s chosen restriction on the speech at issue be ‘actually necessary’ to

10. 505 U.S. 377, 382 (1992) (citation omitted).

11. See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217–18 (1975) (invalidating ordinance that banned drive-in movie theaters from exhibiting films depicting nudity); *Smith v. California*, 361 U.S. 147, 155 (1959) (striking down a statute that criminalized possession of “indecent” books in establishments where books are displayed or sold).

achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented.”¹² A law may be invalidated as facially overbroad if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”¹³ Assurances that enforcement discretion will be used judiciously do not salvage a facially overbroad statute. As the Court stated in striking down a federal statute that criminalized the distribution of images depicting animal cruelty, “the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”¹⁴

Only the narrowest subset of speech is categorically unprotected by the First Amendment, including “true threats” to commit violence, the incitement of imminent unlawful activity, or patently offensive sexual material that is so lacking in any redeeming value as to be legally obscene.¹⁵ Particularly in recent years, the Supreme Court has reasserted just how limited these exclusions are, refusing to legitimize content-based restraints even on speech of exceedingly low value, such as the anti-gay hate speech of military-funeral protesters affiliated with Westboro Baptist Church.¹⁶ As the Court has said again and again, the government may not proscribe or sanction speech merely because it is offensive or extreme: “[t]he hallmark of the protection of free speech is to allow ‘free trade in ideas’—even ideas that the overwhelming majority of people might find distasteful or discomforting.”¹⁷ Importantly, outside the online-speech context, it is well-recognized that a speaker may not be silenced merely because the speech provokes, or is expected

12. *United States v. Alvarez*, 567 U.S. 709, 725 (2012) (citing *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011)).

13. *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

14. *Id.* at 480.

15. See Geoffrey R. Stone, *Sex, Violence, and the First Amendment*, 74 U. CHI. L. REV. 1857, 1863–64 (2007).

16. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011).

17. *Virginia v. Black*, 538 U.S. 343, 358 (2003) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

to provoke, an extreme reaction from some in the audience. The Supreme Court refers to this notion as the “heckler’s veto”¹⁸ and has cautioned against allowing the most volatile or easily offended listeners to dictate what everyone else may hear.

Conflicts over online speech frequently involve references to violence that authority figures treat as portending violent behavior. Offline, hyperbolic remarks about violence are an everyday occurrence; many an exasperated parent has vented to a misbehaving teenager, “I could wring your neck.” Distinguishing an unserious throwaway remark from a constitutionally unprotected “true threat” can present a challenging line-drawing exercise, but the Supreme Court has set the bar of proof quite high, especially where criminal penalties are at stake.

In its seminal 1969 case, *Watts v. United States*, the Court emphasized the essential role of context in assessing the genuineness of a threat.¹⁹ The speaker’s statement to a small gathering of antiwar activists near the National Mall—“[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.”²⁰—was deemed insufficient to support a felony charge of threatening the life of the President because of the accompanying circumstances: the comment was made at a political gathering, the speaker was unarmed and laughing, the remark was phrased conditionally, and the crowd reacted with laughter.²¹ “The language of the political arena . . . is often vituperative, abusive, and inexact,” the *Watts* Justices concluded in a brief, unsigned opinion.²²

For purposes of this discussion, the most noteworthy of the Supreme Court’s threat-speech pronouncements came in the context of an office watercooler conversation—i.e., what we did before Twitter—in which a county employee made a comment wishing ill on then-President Ronald Reagan.²³ Ardith McPherson, a clerk in the Harris County,

18. *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966) (citation omitted).

19. 394 U.S. 705, 708 (1969).

20. *Id.* at 706.

21. *Id.* at 707.

22. *Id.* at 708.

23. See Eric Goldman, *Police Department’s Social Media Policy Is Unconstitutional*—Liverman v. Petersburg, TECH. & MARKETING L. BLOG (Dec. 17, 2016), <https://blog.ericgoldman.org/archives/2016/12/police-departments-social-media-policy-is-unconstitutional-liverman-v-petersburg.htm> (“[S]ocial media chatter about

Texas, Sheriff’s Office, was fired for telling a co-worker after hearing a news report that Reagan had survived a 1981 assassination attempt: “shoot, if they go for him again, I hope they get him.”²⁴ The Supreme Court decided that the firing violated McPherson’s First Amendment rights, because the comment was intended and understood—in the context of a larger discussion about how Reagan’s policies adversely affected the poor—as an expression of disapproval of the President’s administration.²⁵ Preserving the ability to vigorously dissent from government policies, the Justices decided, requires protecting even disagreeable and offensive remarks about matters of public concern.²⁶

B. Context-Based Variants: Schools and the Workplace

The Supreme Court has recognized diminished levels of First Amendment protection in the unique contexts of school and the workplace. In those settings, supervisors receive an extra measure of deference in recognition of the need to maintain orderly and effective operations. Deference is especially great in a military-type setting where obedience to authority is regarded as important for safety.²⁷

In public schools, the default level of free-speech protection is that recognized by the Supreme Court in its landmark 1969 ruling, *Tinker v. Des Moines Independent Community School District*.²⁸ There, the Court memorably coined the oft-repeated aphorism that neither teachers nor students “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”²⁹ In the *Tinker* case, the Justices determined that it violated the First Amendment to suspend students who insisted, in violation of a school district rule, on wearing

work is similar to kvetching about your job around the office water cooler or while knocking back a cold one at the local watering hole . . . except that social media chatter tends to lead to more employee firings.”).

24. Rankin v. McPherson, 483 U.S. 378, 381 (1987).

25. *Id.* at 387.

26. *Id.*

27. See Parker v. Levy, 417 U.S. 733, 744 (1974) (citing historical practice and tradition of heightened obedience to authority in military settings “to maintain the discipline essential to perform its mission effectively”).

28. 393 U.S. 503 (1969).

29. *Id.* at 506.

black armbands to express support for an end to the fighting in Vietnam.³⁰ Recognizing that free-speech rights at times must yield to the necessity of keeping order during the school day, the Justices recognized a half-measure of First Amendment protection that prevents a school from proscribing or punishing speech up to the point where the speech portends a “material” or “substantial” disruption of school functions.³¹

The *Tinker* rule has been eroded somewhat by later interpretations by more deferential Justices, carving out additionally unprotected categories of speech. Chief Justice John Roberts, for instance, wrote for the majority in 2017’s *Morse v. Frederick* that schools may punish even non-disruptive student speech if it is reasonably interpreted as encouraging students to use illegal drugs.³² Nevertheless, the core principle of *Tinker*—that student speech may not be censored solely because it involves a divisive or controversial matter that would offend some listeners—remains intact and has been reaffirmed on multiple occasions.

In the government workplace, the federal courts perform a comparable balancing act to decide whether a public employee is subject to discipline for the content of speech. The Supreme Court created what has become known as the “*Pickering* balancing test” in a 1968 case, *Pickering v. Board of Education*, which involved a Pennsylvania schoolteacher fired for writing a letter to the local newspaper urging voters to oppose a tax referendum because the school district spent money improvidently.³³ The Justices decided that the plaintiff could prevail and recover his job if he could establish that his speech addressed a matter of public concern and caused no undue disruption to the workplace outweighing his interest in speaking.³⁴

As with student rights, the Supreme Court has retrenched in recent decades, affording more deference to supervisory authorities. Most notably, the Court decided in *Garcetti v. Ceballos* that, when a public employee is assigned to speak as part of official job responsibilities, the speech belongs to the employing agency, and the employee

30. *Id.* at 514.

31. *Id.* at 511.

32. 551 U.S. 393, 409–10 (2007).

33. 391 U.S. 563, 564–68 (1968).

34. *See id.* at 574–75.

has no First Amendment interest in it.³⁵ Thus, in that case, Los Angeles’s chief prosecutor was free to discipline a deputy district attorney, Richard Ceballos, who wrote a memo and gave testimony undercutting the prosecution of a criminal case by his agency.³⁶

Perhaps surprisingly, even in the private-sector workplace, where the First Amendment does not apply because the supervising authority is not a government agency, employees have significant free-speech protections by way of federal statute. Congress enacted the National Labor Relations Act in 1935 to guarantee workers the right to engage in “concerted activity” to improve working conditions.³⁷ The National Labor Relations Board (“NLRB”) has interpreted the statute to apply to discussing work-related issues even outside the workplace—and, lately, even on social media—because improving working conditions may require enlisting public support.³⁸ In recent years, the NLRB has ordered private-sector employers to rescind excessively broad rules that forbid using social media to criticize company policies or share information about company business.³⁹

C. Media-Based Variants on First Amendment Fundamentals

As each successive type of communications method has come into widespread public acceptance, it has been accompanied by fear of its influential power and calls for regulation. In invalidating a California statute making it a crime to distribute violent video games to children, Justice Antonin Scalia wrote that censors have regularly brought pressure to bear against “evil” new forms of expression, starting with

35. See 547 U.S. 410, 421–22 (2006).

36. See *id.* at 413–15, 424.

37. See 29 U.S.C. § 157 (2018).

38. See, e.g., *Hitterman v. Universal Sec., Inc.*, No. 17 C 2616, 2017 WL 3531519, at *1 (N.D. Ill. Aug. 17, 2017) (affirming NLRB’s finding that private security firm unlawfully fired two airport security guards for complaining to the news media about inadequate training).

39. See *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. 368, 370–71 (2012) (finding that a nonprofit company violated NLRA by firing two employees for an exchange on a Facebook wall complaining that a supervisor imposed unreasonable and unfair expectations, which NLRB found to be a precursor to concerted activity).

paperback detective novels and continuing through movies, radio dramas, comic books, and rock music.⁴⁰ With each innovation, critics have declared that the new form of expression is categorically more dangerous than anything that has come before, justifying greater government control over content and diminished First Amendment protection—and, in each instance, the courts have stepped in to say that speech is speech is speech, no matter the medium.⁴¹

1. FCC-Regulated Broadcasting: The Supreme Court Recognizes a Medium-Specific “First Amendment Discount”

Only once has the Supreme Court yielded to pressure and categorically diminished the protection of speech based on its medium: over-the-air broadcasting. The Federal Communications Commission has been given authority to penalize “indecent” speech over the public airwaves during daytime listening hours, even though the same sort of language would be constitutionally protected in movies, books, magazines, or other media.⁴² In its seminal case upholding the (since-repealed) “Fairness Doctrine” dictating that broadcasters must permit response time for opposing political viewpoints, the Court recognized broadcasting as a uniquely less-protected means of communication, stating:

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique

40. *Brown v. Entm’t Merch. Ass’n*, 564 U.S. 786, 797–98 (2011).

41. *See, e.g., Kingsley Int’l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 685, 689–90 (1959) (invalidating state licensing system for movie theaters that denied licensure to anyone exhibiting a film found to be “obscene, indecent, immoral, inhuman, sacrilegious, or . . . of such a character that its exhibition would tend to corrupt morals or incite to crime”); *Winters v. New York*, 333 U.S. 507, 508, 512 (1948) (finding that state statute making it a crime to sell magazines or other periodicals principally made up of “stories of deeds of bloodshed, lust, or crime” was an unconstitutional content-based restraint on speech); *Katzev v. Los Angeles*, 341 P.2d 310, 312–13 (Cal. 1959) (striking down city ordinance that criminalized selling crime-themed comic books to minors).

42. Jordan Butler, Comment, *The FCC in 2010: Seventy-Six Years of Obscenity, Indecency, and Inconsistency*, 39 CAP. U. L. REV. 621, 627–28 (2011) (discussing *FCC v. Pacifica Found.*, 438 U.S. 726 (1978)).

medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.⁴³

The Court reaffirmed the scarcity rationale in the iconic “Filthy Words” George Carlin monologue case, *FCC v. Pacifica Foundation*,⁴⁴ accepting the FCC’s rationale that broadcasting deserves “special treatment” for several reasons:

(1) [C]hildren have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people’s privacy interest is entitled to extra deference; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest.⁴⁵

In other words, the Supreme Court has created a technology-specific step-down of First Amendment protection based on the unique qualities of broadcasting, including the medium’s ability to interject unexpected and unwanted content into the listener’s car or home.

2. Online Speech: No First Amendment Discounting (So Far)

As personal computers and home internet service became ubiquitous, Congress made several attempts to force Internet Service Providers to block content unsuitable for children, relying on a broadcast-like rationale that websites are easily available to unsupervised minors. The Supreme Court invalidated these regulations on First Amendment grounds, most notably in the 1997 case of *Reno v. American Civil Liberties Union*.⁴⁶ In that ruling, the Justices struck down key provisions

43. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (citations omitted).

44. 438 U.S. 726 (1978).

45. *Id.* at 731 n.2 (citations omitted).

46. 521 U.S. 844 (1997).

of the 1996 Communications Decency Act (“CDA”) that outlawed conveying “indecent” or “patently offensive” material to minors.⁴⁷ Rejecting attempts to consign online speech to a categorically lesser-protected status, Justice John Paul Stevens wrote for the *Reno* majority in rejecting the analogy to broadcasting: “Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as ‘invasive’ as radio or television.”⁴⁸

Since that time, the Supreme Court has had surprisingly little to say about online speech and even less about the application of First Amendment standards.⁴⁹ The Court’s most elaborate exposition was in the 2017 case of *Packingham v. North Carolina*, which recognized the growing societal importance of access to social media as a form of virtual “public square.”⁵⁰ In the *Packingham* decision, the Court found that a North Carolina law forbidding convicted sex offenders from using social networking sites was unconstitutionally broad in derogation of the First Amendment.⁵¹ Writing for the Court’s 5-3 majority, Justice Anthony Kennedy emphasized the value of social media as a tool of rehabilitation, enabling released offenders to look for jobs, maintain family relationships, and participate in political discussions: “While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general and social media in particular.”⁵² The Court found that the state’s admittedly compelling objective of preventing predators from reaching potential victims online could not justify a sweeping prohibition that would also foreclose activity unlikely to result in predation, such as responding to a job posting on the professional networking site LinkedIn.⁵³

47. *Id.* at 885.

48. *Id.* at 868–69 (footnote omitted).

49. According to a search of the Westlaw Supreme Court database, the word “Facebook” did not appear in a published Supreme Court decision until 2015.

50. 137 S. Ct. 1730, 1737 (2017).

51. *Id.* at 1737–38.

52. *Id.* at 1735 (citation omitted).

53. *See id.* at 1737.

3. Cert(ainty) Denied: Justices Hesitate to Address Social Media Cases

The Justices have declined repeated opportunities to clarify the extent to which the online context does, or does not, change traditional First Amendment modes of analysis. The 2015 case of *Elonis v. United States*⁵⁴ provided a much-anticipated opportunity for the Court to clarify the constitutional status of speech on social media platforms. In *Elonis*, a Pennsylvania man appealed his conviction for threatening his estranged wife and law enforcement agents in gruesomely violent social media postings that he insisted were some combination of jokes and amateurish rap lyrics.⁵⁵ The case turned on a somewhat arcane legal point: can a conviction for making threats be sustained without a jury finding that the speaker knew or intended that a particular target of the speech would be placed in apprehension?⁵⁶

Though expectations ran high that the Court would use *Elonis*'s case as an invitation to clarify how First Amendment principles apply to jokey and informal remarks on social media, the Court instead punted.⁵⁷ The resulting opinion resolved nothing about the Constitution and said only that the trial judge had erroneously instructed the jury in applying the federal threat-speech statute,⁵⁸ 18 U.S.C. § 875(c), which prohibits the interstate transmission of “any communication containing any threat . . . to injure the person of another.”⁵⁹ The statute, the justices ruled, requires proof of some culpable mental state on the part of the speaker, not just a finding that the speech caused a recipient

54. 135 S. Ct. 2001 (2015).

55. *Id.* at 2004–06.

56. *Id.* at 2008, 2011.

57. See Tim Cushing, *First Post-Elonis Threat Case Handled by Appeals Court and We're Still No Closer to Discussing the First Amendment*, TECHDIRT (July 10, 2015, 1:54 PM), <https://www.techdirt.com/articles/20150709/13253731602/first-post-elonis-threat-case-handled-appeals-court-were-still-no-closer-to-discussing-first-amendment.shtml> (describing disappointment that the Court decided *Elonis* case narrowly without grappling with constitutional issues).

58. *Elonis*, 135 S. Ct. at 2012.

59. *Id.* at 2004 (quoting 18 U.S.C. § 875(c) (2012)).

to be placed in alarm.⁶⁰ The Court thus decided the case on the narrowest possible grounds, sending it back to the lower courts for reconsideration.⁶¹

Once more in 2016, the justices faced—and evaded—the opportunity to resolve a difficult First Amendment issue confounding the lower courts: when can a public-school exercise jurisdiction to discipline a student for entirely off-campus online speech? Since the earliest days of social media, courts struggled to arrive at an intelligible legal boundary for school punitive authority.⁶² The case of a Mississippi high-school rap artist, Taylor (“T-Bizzle”) Bell, offered a promising vehicle for clarification.⁶³

Bell was expelled from his Mississippi high school in 2011 for recording a music video replete with profanity and references to firearms—an effort, he explained, to blow the whistle on sexual harassment of female students by the two male coaches who were unflatteringly depicted in the song.⁶⁴ After recording the video at a local studio, Bell uploaded it to his personal YouTube channel and shared the link on Facebook—all during off-hours personal time.⁶⁵ Still, a deeply divided federal appeals court found no affront to the First Amendment in

60. *Id.* at 2012.

61. *Id.* at 2013; *see also* Enrique A. Monagas & Carlos E. Monagas, *Prosecuting Threats in the Age of Social Media*, 36 N. ILL. U. L. REV. 57, 60 (2016).

62. *See, e.g.*, William Calve, Comment, *The Amplified Need for Supreme Court Guidance on Student Speech Rights in the Digital Age*, 48 ST. MARY’S L.J. 377, 401–02 (2016) (“Because ‘lower courts have not spoken with a unified voice’ on the issue of off-campus speech, schools and students are both left without clues as to how to proceed within the law. . . . In light of the conflicting standards for student speech across the circuit courts, current ‘lack of guidance leaves schools in limbo, fearful of overstepping their boundaries, or not acting in time to prevent student harm.’ Absent clear authority from the Court, schools may attempt to devise constitutionally overbroad policies monitoring student speech away from school. By the same token, students are now at a loss for what they have the right to say online.” (footnotes omitted)).

63. *See* Adam Liptak, *Hip-Hop Stars Support Mississippi Rapper in First Amendment Case*, N.Y. TIMES (Dec. 20, 2015), <https://www.nytimes.com/2015/12/21/us/politics/hip-hop-stars-support-mississippi-rapper-in-first-amendment-case.html?searchResultPosition=1>.

64. *See* Bell v. Itawamba Cty. Sch. Bd. (*Bell I*), 774 F. 3d 280, 283 (5th Cir. 2014), *rev’d en banc*, (*Bell II*) 799 F.3d 379 (5th Cir. 2015).

65. *Bell I*, 774 F.3d at 285.

the school’s exercise of disciplinary authority.⁶⁶ A plurality of the Fifth Circuit U.S. Court of Appeals decided that, when a student’s online speech is “directed intentionally at the school community and reasonably understood by school officials to be threatening, harassing, and intimidating,” the speech loses its constitutional protection.⁶⁷ In effect, these judges afforded social media speech no greater constitutional protection than speech inside of a classroom, hallway, or cafeteria. But the remaining judges fractured among five different opinions, leaving no clear guidance for schools, students, or the lower courts.⁶⁸ That confusion seemed tailor-made for Supreme Court resolution.

Bell petitioned the Supreme Court to take the case, with the support of an all-star lineup of rap artists including T.I., Big Boi, and Killer Mike.⁶⁹ In their supporting brief, the rappers pointed out that contemporary recording artists frequently employ figurative references to violence harmlessly, citing among others the lyrics on rapper Rick Ross’s 2014 album, *Mastermind*, that called out the man acquitted of murder in the fatal 2012 shooting of Florida teenager Trayvon Martin: “George Zimmerman, when I see you, you gotta burn.”⁷⁰ But the Court declined Bell’s petition, leaving the Court of Appeals’ ruling to stand—along with continued uncertainty about whether students should have greater freedom to speak on social media than they do on campus.

Again in 2019, the Justices rejected a highly watched case raising the question of how literally speech can be interpreted when presented in a social media post.⁷¹ The Justices refused to review the conviction of a Pittsburgh man, Jamal Knox, who was prosecuted for a homemade YouTube rap video that he shared on Facebook.⁷² The rap

66. *Bell II*, 799 F.3d at 400.

67. *Id.* at 383.

68. *See Calve, supra* note 62, at 400–01 (referencing “fractured” rationales offered by the authors of the *Bell II* opinions, highlighting a need for Supreme Court clarification).

69. Liptak, *supra* note 63.

70. Brief for Erik Nielson et al. as Amici Curiae Supporting Petitioner, *Bell v. Itawamba Cty. Sch. Bd.*, 744 F.3d 280 (5th Cir. 2014) (No. 15-666), 2015 WL 9315591, at *18.

71. *Commonwealth v. Knox*, 190 A.3d 1146 (Pa. 2018), *cert. denied*, 135 S. Ct. 1547 (2019).

72. *Id.*; *see also* Tracie Mauriello, *A Local Rapper Hopes the Song that Landed Him in Prison Will Find Its Way to the High Court*, PITT. POST-GAZETTE (Mar. 7,

was a bitter diatribe against the police—with lyrics like “Let’s kill these cops cuz they don’t do us no good/Pullin’ your Glock out cause I live in the hood”—and it mentioned by name the two officers who had arrested Knox on pending drug charges.⁷³ That was enough for a jury to find Knox guilty on charges of witness intimidation and terroristic threats.⁷⁴ Knox challenged the convictions under the First Amendment, arguing that the remarks would reasonably be understood, in context, as figurative boasts of the type endemic to rap.⁷⁵ Commentators hoped that the case would provide a vehicle for the courts to admonish against literalism in inferring criminal intent from lyrics.⁷⁶ But Pennsylvania appellate courts upheld the convictions, and the Supreme Court declined *certiorari*.⁷⁷

The Supreme Court’s hesitance to hand down lasting pronouncements about nascent and still-evolving technologies is understandable. Social media companies themselves continually tweak their operating models in ways that might alter a constitutional analysis. To cite just one example, both Facebook and YouTube have recently ventured into hosting programming such as Major League Baseball telecasts, perhaps signaling that the medium is evolving in the direction of broadcasting.⁷⁸ Still, refusing to decide is itself a decision. By leaving questionable decisions such as the *Bell* case to stand, the Justices leave

2019, 5:10 PM), <https://www.post-gazette.com/ae/music/2019/03/07/Pittsburgh-rapper-Jamal-Knox-Supreme-Court-lyrics-threat-Meek-Chance-Killer/stories/201903070172>.

73. *Knox*, 190 A.3d at 1150.

74. *Id.* at 1158.

75. *Id.* at 1151.

76. Adam Liptak, *Hip-Hop Artists Give the Supreme Court a Primer on Rap Music*, N.Y. TIMES (Mar. 6, 2019), <https://www.nytimes.com/2019/03/06/us/politics/supreme-court-rap-music.html?searchResultPosition=1>.

77. *Knox*, 190 A.3d at 1161, *cert. denied*, 135 S. Ct. 1547 (2019).

78. Scott Soshnick, *Facebook Signs Exclusive Deal to Stream 25 MLB Games*, BLOOMBERG (Mar. 9, 2018, 10:22 AM), <https://www.bloomberg.com/news/articles/2018-03-09/facebook-says-play-ball-in-exclusive-deal-to-stream-25-mlb-games>; Dawn Chmielewski, *YouTube Snags Rights to 13 Major League Baseball Games*, FORBES (Apr. 30, 2019, 8:48 AM), <https://www.forbes.com/sites/dawnchmielewski/2019/04/30/youtube-snags-rights-to-13-major-league-baseball-games/#242d815c45cf>.

countless more speakers at risk. The Court should accept the next opportunity to reaffirm in the context of social media punishment what it has said already in *Packingham*: that First Amendment protections do not diminish just because social media may have a larger audience and lower barriers to entry than traditional media platforms.⁷⁹

III. CONTENT-BASED REGULATION AND PUNISHMENT OF SOCIAL MEDIA SPEECH

Facebook is fifteen years old,⁸⁰ and Twitter recently turned thirteen⁸¹—awkward teenage years for the platforms and regulators alike. The first generation of overreactions by authority figures to social media speech falls along two increasingly familiar patterns: (1) punishing relatively harmless behavior simply because it exists online or (2) treating what is discernibly figurative or hyperbolic speech as literal. The impulse to penalize online speech implicates well-established legal protections for speakers that, at times, are being pushed to their limits and beyond.

A. The Medium is the Message: Innocent Speech Becomes Punishable When Socially Shared

1. Adverse Employment Actions

In rural Barrow County, Georgia, first-year teacher Ashley Payne was summoned to her principal’s office and shown a series of posts from her personal Facebook page that had prompted a local parent to complain: a photo of Payne holding a glass of wine and a glass of beer during a vacation to Germany, along with a post to her Facebook wall stating that she was heading to a local restaurant for “Crazy

79. 137 S. Ct. 1730, 1735 (2017).

80. Sarah Phillips, *A Brief History of Facebook*, THE GUARDIAN (July 25, 2007), <https://www.theguardian.com/technology/2007/jul/25/media.newmedia>.

81. Christian Wolan, *The Real Story of Twitter*, FORBES (Apr. 14, 2011, 1:53 PM), <https://www.forbes.com/sites/christianwolan/2011/04/14/the-real-story-of-twitter/#9bddbf566af8>.

Bitch Bingo” night.⁸² Although there was no indication that Payne had made the posts on school time, and the page was not set to be publicly viewable, the complaint was enough for Principal David McGee to demand her resignation.⁸³ Payne sued to rescind her resignation and reclaim her job but was unsuccessful.⁸⁴

It seems beyond doubt that, had a parent reported Payne consuming the same two alcoholic beverages in front of families at the neighborhood Applebee’s restaurant—arguably a “worse” offense, since schoolchildren could see their teacher drinking before their eyes—school authorities would have recognized the teacher’s lawful behavior as beyond their legitimate punitive authority. This is “social media exceptionalism” in action: the notion that, because behavior is visible online, it is categorically “worse” than behavior in the real world and demands to be punished.

As a legal matter, expression gets more constitutional protection than behavior; logically, then, one would expect a government employer to be especially hesitant about punishing a public employee for what she says. While drinking beer is not an expressive act implicating the Constitution, posting a photo to Facebook is. If the underlying behavior is not punishable—Payne did not post a photo of herself snorting cocaine⁸⁵—then the act of sharing the image on social media almost certainly is not. Yet, employers regularly punish expression on social media more seriously than they would punish the equivalent behavior “I.R.L.”⁸⁶

82. Jamie Sarrio, *Barrow Teacher Fired over Facebook Still Not Back in Classroom*, ATLANTA J.-CONST. (Nov. 9, 2010), <https://www.ajc.com/news/local/barrow-teacher-fired-over-facebook-still-not-back-classroom/Uv0vZUfbpJyA5P5xagCdK/>.

83. *Id.*

84. David Ibata, *Ruling Goes Against Barrow Teacher Who Lost Job over Facebook Posting*, ATLANTA J.-CONST. (Oct. 11, 2011), <https://www.ajc.com/news/local/ruling-goes-against-barrow-teacher-who-lost-job-over-facebook-posting/yhQhGPbZiYkH5HYjb34byJ/>.

85. This happens. See Cindy Boren, *Dolphins Assistant Resigns After Video Shows Him Snorting a Powdery Substance*, WASH. POST (Oct. 9, 2017, 9:59 AM), <https://www.washingtonpost.com/news/early-lead/wp/2017/10/09/dolphins-assistant-resigns-after-video-shows-him-snorting-a-powder-substance/>.

86. *IRL*, URB. DICTIONARY (June 25, 2004), <https://www.urbandictionary.com/define.php?term=IRL>.

In Maryland, a state prison official lost his job after joking on Facebook about how heavily he was searched when entering a correctional institution (“haven’t been groped this much since the flight on the honeymoon”).⁸⁷ And a school staffer who managed the Frederick, Maryland, school district’s Twitter account was sacked after a good-natured joke—accompanied by a smiley-face emoticon—that poked fun of a student’s misspelled snow-day post (“close school tammarow PLEASE”).⁸⁸

2. Campus Discipline

It’s not just workplaces. Educational institutions, similarly, have begun exerting authority over expression on social media that would likely go unpunished if expressed offline. Aggrieved by President Obama’s 2012 reelection victory, New Mexico medical student Paul Hunt posted a profane anti-abortion rant on the wall of his Facebook page, condemning Democrats as “sick, disgusting people” who support “genocide against the unborn.”⁸⁹ Although the post neither mentioned the University of New Mexico nor anyone affiliated with it, Hunt’s screed came to the attention of administrators at the medical school, who found Hunt to be in violation of the university’s “Respectful Campus Policy,” which, in pertinent part, forbids “unduly inflammatory statements.”⁹⁰ The College of Medicine imposed disciplinary sanctions, including directing Hunt to rewrite the post using more “pro-

87. Jenna Johnson, *Maryland Corrections Official Fired for Facebook Joke About Prison Guards*, WASH. POST (Feb. 19, 2015), https://www.washingtonpost.com/local/md-politics/maryland-corrections-official-fired-for-facebook-joke-about-prison-guards/2015/02/19/c5d2c212-b88a-11e4-aa05-1ce812b3fdd2_story.html.

88. Tara Bahrapour, *Maryland School District Worker Fired After Correcting Student’s Spelling in a Tweet*, WASH. POST (Jan. 16, 2017), https://www.washingtonpost.com/local/social-issues/school-district-employee-fired-after-correcting-students-spelling-in-a-tweet/2017/01/16/fd548bf2-dc29-11e6-acdf-14da832ae861_story.html.

89. *Hunt v. Bd. of Regents*, 338 F. Supp. 3d 1251, 1256 (D.N.M. 2018). As of this writing, the case is awaiting review before the Tenth Circuit U.S. Court of Appeals.

90. *Id.* at 1255–56.

fessionally appropriate” language and submit it for approval by a student conduct committee.⁹¹ Hunt sued, but in a September 2018 opinion, a federal district judge found no actionable First Amendment claim and dismissed the case.⁹²

Even more remarkable than the outcome—allowing a state university to impose disciplinary sanctions for non-threatening, off-campus political speech about which there is no evidence anyone even complained—was the judge’s route to reach it. The judge accepted the university’s contention that a student in a pre-professional program has less constitutional protection than a child speaking inside a K-12 school because of the university’s duty to enforce standards of professionalism.⁹³ The ruling expanded on a pair of court rulings from Minnesota—*Tatro v. University of Minnesota*⁹⁴ and *Keefe v. Adams*⁹⁵—that, similarly, concluded that the Constitution presented no impediment to disciplining a college student for social media speech deemed contrary to “established professional conduct standards.” The judge’s decision in the *Hunt* case is especially noteworthy because, outside the social media context, it is accepted that disturbingly graphic images and language expressing opposition to abortion are constitutionally protected speech on college campuses, even when displayed in prominent physical spaces where, unlike on Facebook, speech may be encountered unwillingly and by surprise.⁹⁶

Suspension and expulsion for intemperate social media posts are more common at the K-12 level, even when the posts are made off-campus on students’ personal time using non-school devices. In one highly publicized case, a Minnesota honor student was expelled from school and threatened with prosecution on felony charges for posting “actually yes” in response to a joking query on a gossipy “confessions” chat page that asked whether he had “made out” with a particular

91. *Id.* at 1257.

92. *Id.* at 1267.

93. *Id.* at 1263–64.

94. 816 N.W.2d 509, 521 (Minn. 2012).

95. 840 F.3d 523, 528 (8th Cir. 2016).

96. *Ctr. for Bio-Ethical Reform, Inc. v. Black*, 234 F. Supp. 3d 423, 435–36 (W.D.N.Y. 2017).

teacher.⁹⁷ A New Jersey school suspended two students for three days because they shared images on Snapchat in which they posed at a gun range holding firearms; one boy captioned his photo with, “if there’s ever a zombie apocalypse, you know where to go,” hardly an intimation of violence toward the school.⁹⁸ In Minnesota, a 16-year-old was disciplined for tweeting, while on the way to a football scrimmage, “Im boutta drill my ‘teammates’ on Monday,” which the school treated as a threat to do harm.⁹⁹

3. Criminalization

Perhaps the most troubling, and certainly the most consequential, form of social media regulation is criminalization. A handful of states selectively criminalize speech when posted to social media or have attempted to do so legislatively. North Carolina, for instance, makes it an offense punishable by up to 60 days in jail for a student to post an image or likeness of a school employee on social media with the intent to “torment” the employee, even though there is no “tormenting speech” exception to the First Amendment in the offline world.¹⁰⁰

97. Sagehorn v. Indep. Sch. Dist. No. 728, 122 F. Supp. 3d 842, 849 & n.1 (D. Minn. 2015); see also Mike Schoemer, *Rogers Teen Who Was Suspended for Tweet Suing Elk River Schools, Rogers PD*, N. WRIGHT COUNTY TODAY (June 17, 2014), <https://northwrightcounty.today/2014/06/rogers-teen-suspended-tweet-suing-elk-river-schools-rogers-pd/>.

98. Jeff Goldman, *Teens Suspended for ‘Zombie Apocalypse’ Gun Pics Sue School District for Violating Their Rights*, NJ.COM (Apr. 10, 2019), <https://www.nj.com/ocean/2019/04/teens-suspended-for-zombie-apocalypse-gun-pics-sue-school-district-for-violating-their-rights.html>.

99. Pat Pheifer, *Suspended Over Tweet, Shakopee High Wrestler Files a Lawsuit*, STAR TRIB. (Oct. 24, 2013, 11:16 AM), <http://www.startribune.com/suspended-over-tweet-shakopee-high-wrestler-files-a-lawsuit/228872691/>.

100. N.C. GEN. STAT. § 14-458.2 (2017). The North Carolina Supreme Court struck down a companion statute, making it a crime to post information online designed to intimidate or torment a minor or parent, or to encourage others to do so, finding that the statute was an overbroad content-based infringement on speech not narrowly tailored to advance the state’s interest in preventing cyberbullying. *State v. Bishop*, 787 S.E.2d 814, 880 (N.C. 2016). But section 14-458.2 remains in force, despite suffering from the same infirmities.

Louisiana makes it a crime for someone who is a participant in a fight to share images of the fight on social media.¹⁰¹

Criminal penalties can be selectively enforced by government officials seeking to silence their critics. For instance, a critic of the mayor of Peoria, Illinois, was arrested on charges of “impersonating a public official” because of a mock Twitter account that portrayed the mayor as a crack-smoking degenerate.¹⁰² The July 2016 shooting deaths of five Dallas police officers were followed by a wave of arrests across the country for purportedly threatening anti-police speech on social media, including one Chicago-area woman whose only crime was speculating in a Facebook post that, if she were ever pulled over by police and ordered out of her car, she would “have no problem” shooting the officer because the police would “have no problem doing it to [her].”¹⁰³ An Iowa man was jailed because of a profane Facebook post calling the local sheriff “Dumbass” after witnessing what he believed to be a wrongful arrest by sheriff’s deputies; he sued for wrongful arrest and obtained a settlement to resolve the case.¹⁰⁴ Singling out people

101. See Megan Wyatt, *Mom Who Posted Video of School Fight Released from Jail; Lawyers Weigh In*, THE ADVOC. (Feb. 21, 2019, 1:45 PM), https://www.theadvocate.com/acadiana/news/crime_police/article_cf7f8b78-353c-11e9-a997-67c642358063.html.

102. David Kravets, *Arrest over Twitter Parody of Mayor Wasn't 'Unreasonable,' Peoria Says*, ARS TECHNICA (Aug. 18, 2014, 12:30 PM), <https://arstechnica.com/tech-policy/2014/08/arrest-over-twitter-parody-of-mayor-wasnt-unreasonable-peoria-says/>.

103. Naomi LaChance, *After Dallas Shootings, Police Arrests People for Criticizing Cops on Facebook and Twitter*, THE INTERCEPT (July 12, 2016, 2:26 PM), <https://theintercept.com/2016/07/12/after-dallas-shootings-police-arrest-people-for-criticizing-cops-on-facebook-and-twitter/>.

104. Rox Laird, *Iowa Man Sues Over Charge Stemming From Facebook Post*, COURTHOUSE NEWS SERV. (May 21, 2019), <https://www.courthousenews.com/iowa-man-sues-over-charge-stemming-from-facebook-post/>; *Lawsuit Over Profane Facebook Post Settled out of Court*, KCCI.COM (July 8, 2019, 1:20 PM), <https://www.kcci.com/article/iowa-man-sues-after-arrest-for-profane-facebook-post-against-deputy/27545970>.

for prosecution because they express anti-government views is constitutionally forbidden viewpoint discrimination.¹⁰⁵ But even if the arrest does not result in conviction, the mere threat can inflict a powerful chilling effect that inhibits future criticism.¹⁰⁶

B. Figurative, Hyperbolic Speech Treated as Literal

Time and again, young people have been arrested and prosecuted for speech on social media that caused alarm, even without proof that the speaker intended or anticipated the reaction, often for misfired jokes or momentary temper outbursts. A 16-year-old Chicago-area student was arrested for a frustrated Snapchat post, reacting to a false-alarm shooting threat that caused his school to close: “Y’all need to shut up about school shootings or I’ll do one.”¹⁰⁷ In Connecticut, a teenager who posted a wordless Snapchat image of his toy airsoft gun, emblazoned by the manufacturer with the logo “Have a nice day” was pulled out of class by police, arrested on misdemeanor charges of breaching the peace, and suspended from school, even though the post was unaccompanied by any threatening language.¹⁰⁸

In the immediate aftermath of the February 2018 shooting spree at South Florida’s Marjory Stoneman Douglas High School that took seventeen lives, hundreds of students across the country were arrested

105. See, e.g., *OSU Student All. v. Ray*, 699 F.3d 1053, 1067 (9th Cir. 2012) (holding that the university’s selective removal of only newsracks belonging to unauthorized upstart newspaper, and not university-sanctioned student paper, was unconstitutional viewpoint discrimination).

106. See *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (stating that the improbability of being successfully prosecuted does not salvage an unconstitutional statute criminalizing speech: “The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.”).

107. Matthew Wahlberg & Clifford Ward, *‘Annoyed’ Sophomore Charged with Threat Against Lake Park High School in Roselle*, CHI. TRIB. (Feb. 27, 2018, 4:30 PM), <https://www.chicagotribune.com/suburbs/ct-met-roselle-high-school-threat-20180227-story.html>.

108. Mark Keierleber, *A Toy Gun, a Snapchat Post, and an Arrest*, THE74 (Dec. 5, 2018), <https://www.the74million.org/article/a-toy-gun-a-snapchat-post-and-an-arrest/>.

for making references to school violence on social media. One Alabama student was arrested, resulting in his withdrawal from school, for a Facebook post that said merely: “Good Hope School, hum? Let me think about it.”¹⁰⁹ The reports were relentless: sixty arrested over a ten-day period in Houston;¹¹⁰ ten arrested in Virginia Beach in the two weeks following the Parkland shootings;¹¹¹ twenty arrested in the Atlanta area;¹¹² sixty-two arrested across Louisiana;¹¹³ twenty in Indiana,¹¹⁴ and seventeen in New Jersey.¹¹⁵ These roundups came in spite of overwhelming evidence that actual school shootings are exceedingly uncommon,¹¹⁶ that there has been no discernible increase in school

109. Alexander Derencz, *Cullman Co. Student Arrested, Withdrawn from School Over Facebook Comment*, ABC3340 (Feb. 22, 2018), <https://abc3340.com/news/local/good-hope-high-school-student-withdraws-following-facebook-comment>.

110. Samantha Ketterer, *More Than 60 Harris County Juveniles Charged with Shooting Threats*, HOUS. CHRON. (Feb. 23, 2018, 9:37 PM), <https://www.chron.com/news/houston-texas/article/More-than-Harris-County-60-juveniles-charged-with-12705004.php>.

111. Robin Sidersky & Lee Tolliver, *10 Children in Virginia Beach Have Been Charged with Making School Threats Since Florida Shooting*, THE VIRGINIAN-PILOT (Feb. 23, 2018, 2:30 PM), https://www.pilotonline.com/news/crime/article_62c7812a-1842-5489-8819-d5e043e9608e.html.

112. Joe Henke, *What Can Happen to Students Who Post School Shooting Threats?*, 11ALIVE (Feb. 26, 2018, 7:27 PM), <https://www.11alive.com/article/news/local/what-can-happen-to-students-who-post-school-shooting-threats/85-523534167>.

113. *FBI, LSP: Louisiana Law Enforcement Responds to 100-Plus Threats Since Parkland Shooting*, THE ADVOC. (Mar. 12, 2018, 4:53 PM), https://www.theadvocate.com/baton_rouge/news/crime_police/article_d9255994-263f-11e8-a2b0-df7ac269abc5.html.

114. *Ben Davis High School Student Arrested for Making Threat Against the School on Social Media*, THEINDYCHANNEL.COM (Mar. 1, 2018, 3:24 PM), <https://www.theindychannel.com/news/local-news/indianapolis/ben-davis-high-school-student-arrested-for-making-threat-against-the-school-on-social-media>.

115. Thomas Moriarty, *At Least 17 Charged in N.J. Threat Cases Since Florida School Shooting*, NJ.COM (Jan. 30, 2019), https://www.nj.com/essex/2018/03/at_least_17_charged_in_nj_school_threat_cases_sinc.html.

116. David Ropeik, *School Shootings Are Extraordinarily Rare. Why Is Fear of Them Driving Policy?*, WASH. POST (Mar. 8, 2018, 3:27 PM), https://www.washingtonpost.com/outlook/school-shootings-are-extraordinarily-rare-why-is-fear-of-them-driving-policy/2018/03/08/f4ead9f2-2247-11e8-94da-ebf9d112159c_story.html.

shootings or in school violence generally in recent years,¹¹⁷ and that an average of about thirty school shootings occur across the United States each year,¹¹⁸ making it implausible that hundreds of young people actually intended to commit shootings over a matter of several weeks. In other words, police jailed hundreds of young people knowing that the vast majority were, at best, guilty of a distasteful sense of humor and poor timing.

Social media literalism takes an especially perilous form when speakers are prosecuted for sharing violent rap lyrics, blurring the distinction between threat and performance that is understood when a performer uses the same language in a concert or on an album. As one legal commentator has observed: “[T]hanks to sites like SoundCloud, ReverbNation and YouTube, there are more lyrics than ever available to police, who routinely mine social media for information they can use to justify increased surveillance, to make arrests or to submit as evidence at trial.”¹¹⁹ Policing “threats by rap” on social media puts young people at risk of overzealous prosecution—such as the case of Massachusetts teen Cameron D’Ambrosio, who was charged with making terroristic threats, a felony carrying up to 20 years in prison, because he composed a rap about committing a bombing that would eclipse the 2013 Boston Marathon bombing and posted the lyrics on his Facebook wall.¹²⁰ D’Ambrosio spent thirty-seven days in jail before a grand jury

117. Dana Goldstein, *Why Campus Shootings Are So Shocking: School Is the ‘Safest Place’ for a Child*, N.Y. TIMES (May 22, 2018), <https://www.nytimes.com/2018/05/22/us/safe-school-shootings.html>.

118. Chip Grabow & Lisa Rose, *The US Has Had 57 Times as Many School Shootings as the Other Major Industrialized Nations Combined*, CNN (May 21, 2018, 5:08 PM), <https://www.cnn.com/2018/05/21/us/school-shooting-us-versus-world-trnd/index.html>.

119. Erik Nielson, *‘Rap on Trial’: Why Lyrics Should Be Off-Limits*, ROLLING STONE (May 3, 2017, 8:05 PM), <https://www.rollingstone.com/culture/culture-news/rap-on-trial-why-lyrics-should-be-off-limits-116368/>.

120. Laurel J. Sweet, *Teen Methuen Rapper Held Without Bail for Facebook Bomb Threat*, BOS. HERALD (Nov. 17, 2018, 12:00 AM), <https://www.bostonherald.com/2013/05/02/teen-methuen-rapper-held-without-bail-for-facebook-bomb-threat/>.

declined to indict him, ending the case.¹²¹ As Professor Lidsky has written, “it is dangerous, from a First Amendment perspective, to give police and prosecutors a broad mandate to punish fear-inducing speech by speakers from sub-communities perceived as deviant.”¹²² Singling out violent rap lyrics for punishment and prosecution places young people of color at heightened risk, widening what is already recognized as a “school-to-prison pipeline” that can place teens on a trajectory for failure based on a single stigmatizing interaction with authorities.¹²³

The widespread perception that social media is both more dangerous and less protected than other methods of speech has emboldened policymakers to consider, or enact, restrictions on social media expression that would never be seriously contemplated in other contexts. Oklahoma legislators considered a bill during their 2019 session to require all state and local government agencies to enact rules against “abusive” or “offensive” speech by their employees on personal social media accounts.¹²⁴ In the Atlanta suburb of Peachtree City, council members considered a resolution enabling city officials to draw on the municipality’s insurance policy to cover the expenses of suing speakers who defamed them on social media.¹²⁵ A city police chief in Virginia issued a directive forbidding officers from using their off-duty social media accounts to post “negative comments” or statements “that would tend

121. John Knefel, *Grand Jury Rejects Indictment of Teen Arrested for Rap Lyrics*, ROLLING STONE (June 6, 2013, 8:50 PM), <https://www.rollingstone.com/politics/politics-news/grand-jury-rejects-indictment-of-teen-arrested-for-rap-lyrics-201933/>; Douglas Moser, *Man Sues City for Violating Civil Rights in 2013 Arrest*, EAGLE-TRIBUNE (Aug. 20, 2016), https://www.eagletribune.com/news/merrimack_valley/man-sues-city-for-violating-civil-rights-in-arrest/article_577ab65e-8a17-5381-88f4-5be9d37c83f4.html.

122. Lyrisa Barnett Lidsky & Linda Riedemann Norbut, *Considering the Context of Online Threats*, 106 CALIF. L. REV. 1886, 1891–92 (2018).

123. Catherine J. Ross, *‘Bitch,’ Go Directly to Jail: Student Speech and Entry into the School-to-Prison Pipeline*, 88 TEMP. L. REV. 717, 723–24 (2016).

124. Lili Zheng, *Bill on Abusive, Offensive Language on Social Media Passes Committee*, KFOR.COM (Feb. 15, 2019, 6:22 PM), <https://kfor.com/2019/02/15/bill-on-abusive-offensive-language-on-social-media-passes-committee/>.

125. Cal Beverly, *Say Bad Stuff About Peachtree City Officials and Get Sued—by the City Government Itself?*, FAYETTEVILLE CITIZEN (Apr. 15, 2019), <https://thecitizen.com/2019/04/15/say-bad-stuff-about-peachtree-city-officials-and-get-sued-by-the-city-government-itself/>.

to discredit or reflect unfavorably upon” the city or any of its employees.¹²⁶ These type of restrictions would plainly be regarded as overreaching if applied to speeches, letters, or other means of expression. So, the question becomes: Is social media so qualitatively different from other media that it justifies disregarding established constitutional standards?

IV. THE PERILS OF RIGIDLY REGULATING SOCIAL MEDIA SPEECH

While playing a multiplayer online video game, League of Legends, Texas teenager Justin Carter used Facebook to chat with a fellow player about the action playing out on the screen. When the friend called Carter “messed up in the head” for his violent style of play, Carter responded—in a post he would regret for years to come: “I think I’m a SHOOT UP A KINDERGARTEN/AND WATCH THE BLOOD OF THE INNOCENT RAIN DOWN/AND EAT THE BEATING HEART OF ONE OF THEM.”¹²⁷ As reporter Doug Gross explained in a post for CNN.com, Carter immediately followed the message with “LOL” and “J/K”—indicating that the comment wasn’t serious—and the other online gamers apparently understood he was merely making a distasteful joke.¹²⁸ But the post came just two months after the mass killing of elementary-school students in Newtown, Connecticut, and in that environment of heightened alertness, a Facebook user thousands of miles away in Canada saw Carter’s post, tracked down his address, and alerted law enforcement to a potential school shooter.

Although Carter explained the circumstances and apologized, his contrition did not satisfy police and prosecutors in Comal County, Texas, who charged the eighteen-year-old as an adult with felony terroristic-threat charges carrying a potential twenty-year prison sentence.¹²⁹ Before a benefactor posted his \$500,000 bond, Carter spent four months in jail, where his father said he was beaten up several

126. *Liverman v. City of Petersburg*, 844 F.3d 400, 404 (4th Cir. 2016).

127. Lidsky & Norbut, *supra* note 122, at 1886.

128. Doug Gross, *Teen in Jail for Months Over ‘Sarcastic’ Facebook Threat*, CNN (July 3, 2013, 7:18 AM), <https://www.cnn.com/2013/07/02/tech/social-media/facebook-threat-carter/index.html>.

129. Lidsky & Norbut, *supra* note 122, at 1886.

times.¹³⁰ The case persisted from Carter's February 2013 arrest until March 2018, when the district attorney finally accepted a misdemeanor plea deal enabling him to avoid further incarceration.¹³¹

A. Unique Characteristics of Social Media

Harvard internet scholar danah boyd has identified four signature qualities of online speech: (1) "persistence: the durability of online expressions and content;" (2) "visibility: the potential audience who can bear witness;" (3) "spreadability: the ease with which content can be shared;" and (4) "searchability: the ability to find content."¹³² The "persistence" characteristic of online networks, boyd explains, means that "conversations conducted through social media are far from ephemeral; they endure."¹³³ Consequently, "those using social media are often 'on the record' to an unprecedented degree."¹³⁴ Online speech is distinguished by its "visibility," boyd writes, because most social media platforms are "designed such that sharing with broader or more public audiences is the default" setting, and privacy requires a manual effort to override the default.¹³⁵ Kathleen Sullivan, the former Stanford law dean and legal commentator, describes online speech as "unbounded" when compared with prior modes of communication, in which the speaker or publisher had, if not control over the nature of the audience, at least awareness of who and where the audience was.¹³⁶

The "spreadability" and "searchability" characteristics describe how the actions of the intended recipients of social media messages, as

130. Elise Hu, *As Supreme Court Considers Online Threats, an Update on Justin Carter*, IOWA PUB. RADIO (Dec. 1, 2014), <https://www.iowapublicradio.org/post/supreme-court-considers-online-threats-update-justin-carter>.

131. Zeke MacCormack, *Plea Deal Struck over Alleged Threat to Children Posted on Facebook in Comal County*, HOUS. CHRON. (Mar. 29, 2018, 11:10 AM), <https://www.chron.com/news/local/article/Plea-deal-struck-over-alleged-threat-to-children-12789272.php>.

132. DANAH BOYD, *IT'S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS* 11 (2014).

133. *Id.*

134. *Id.*

135. *Id.* at 12.

136. Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1667–68 (1998).

well as others perusing the web, can substantially expand the audience for any particular message. By design, social media facilitates the spread of information by encouraging the sharing of links, “providing reblogging or favoriting tools” that cause material to be recirculated or to receive greater prominence, and by “making it easy to copy and paste content from one place to another.”¹³⁷ All of these qualities heighten the stakes for social media speakers and expose them to greater risk of punishment. Remarks that once passed harmlessly among teens in the back of a school bus or in the shopping-mall food court are now memorialized, creating an evidentiary trail for disciplinarians, and the risk that an online “outrage mob” will insist on seeing the speech punished.¹³⁸

An important corollary to boyd’s characterization of social media speech is that, in comparison to more traditional forms of communication, a person publishing on Facebook or Twitter generally has far less control over the scope of the audience and the context in which the speech will be received. The interactivity of social media platforms allows receivers to use their own volition to “pull” speech, rather than having it “pushed” at them from speaker-initiated sources like the mail or the telephone.¹³⁹ A phone call, letter, or email is directed to a known, intended, and foreseen recipient, and because people have grown up with those more individualized forms of communication, they may assume the same about their social media comments—that the likely readership is not much greater than the intimate circle that, in simpler times, gossiped around the watercooler.¹⁴⁰

137. BOYD, *supra* note 132, at 12.

138. See Jeet Heer, *Weaponized Outrage Is a Threat to Free Speech*, NEW REPUBLIC (Dec. 6, 2017), <https://newrepublic.com/article/146117/weaponized-outrage-threat-free-speech> (“We live in an age of weaponized outrage, where bad faith actors use out of context statements to get people fired.”); Jacob Silverman, *Social Media Can’t Stop the Weaponization of Bad Faith*, N.Y. MAG. (Dec. 18, 2017), <http://nymag.com/intelligencer/2017/12/social-media-cant-stop-the-weaponization-of-bad-faith.html> (“[V]iral mobs can be marshaled to harass, confuse, and intimidate political opponents.”).

139. Thomas DeBauche, *Bursting Bottles: Doubting the Objective-Only Approach to 18 U.S.C. 875(c) in Light of United States v. Jeffries and the Norms of Online Social Networking*, 51 HOUS. L. REV. 981, 1004 (2014).

140. See Lauren Gelman, *Privacy, Free Speech, and ‘Blurry-Edged’ Social Networks*, 50 B.C. L. REV. 1315, 1328–29 (2009).

B. Lack of Contextual Cues and Risk of User Error

When the Supreme Court set forth the boundaries of prosecutable “true threats” in *Watts v. United States* in 1969,¹⁴¹ it did so with the aid of a readily identifiable framing context informing its interpretation of an alleged threat to the President made lightheartedly in the course of an anti-war political rally. Applying a *Watts* analysis to speech shared online, rather than in-person, presents formidable practical difficulties. The speaker is not standing amidst a political rally, so there is no assessing the “nature” of the gathering. The speaker is unable to signal demeanor by the usual body-language cues, or with the contextual aid of a lengthier speech. Nor will the “crowd reaction” be readily discernible; people will read the post at different times and places, and not always with the benefit of viewing the speaker’s entire Facebook or Twitter presence so as to gauge whether the speaker is a satirist or habitual exaggerator. Whatever “crowd reaction” is available on social media is often distorted by extremists and provocateurs, whose outrage is as likely to be feigned as genuine.¹⁴² All this means that judge and jury—or a school disciplinary tribunal—will have greater difficulty assessing how literally words and images on a social media stream should be understood.

One of the unique features of social media that counsels in favor of regulatory restraint is the ability for messages to reach unforeseen audiences devoid of context or manipulated to distort their original context. If an audience member is given a page torn from a magazine or book, or shown a thirty-second clip from a motion picture, the viewer immediately knows that the message is incomplete and may be subject to misinterpretation. The incompleteness signals the reasonable viewer to withhold judgment and inquire further. No such cues necessarily accompany speech on social media, and in the absence of those cues,

141. 394 U.S. 705, 708 (1969).

142. See Aja Romano, *The New Troll: How Bots and Puppets Make Internet Outrage Seem Louder Than It Is*, VOX (Oct. 24, 2018, 2:40 PM), <https://www.vox.com/culture/2018/10/24/17995502/twitter-trolls-bots-chuck-wendig-bethany-lacina> (describing case of comic-book writer who lost employment opportunities because of outraged responses to his political Twitter posts, much of which the author of the article suggests were automated accounts associated with right-wing extremist causes).

tragic misunderstandings like the Justin Carter case are the inevitable result. The Twitter platform, for instance, is built around the shareability of the “retweet,” enabling a remark to reach a potentially limitless audience of friends and strangers alike.¹⁴³ A Twitter user’s harmless musing about a violent passage from a movie, song or television program can, as with Carter’s video-game fantasy, take on ominous unforeseen meaning when viewed in isolation by unfamiliar eyes.

The vocabulary of social media platforms—Twitter, for instance, enables users to react to others’ posts in only three ways (commenting, retweeting, and “liking”)—itself invites misunderstandings.¹⁴⁴ An account holder might “like” a post or “follow” a speaker for reasons other than connoting agreement; for example, critics often retweet especially outrageous statements from the @realDonaldTrump Twitter account not to associate themselves with the president’s remarks, but to call them to greater public attention.¹⁴⁵ But an unfamiliar outsider might understandably ascribe unintended baggage to a post. In one memorable case, Ohio high-school students were threatened with discipline (reversed only after the ACLU made the case public) for redistributing a racist remark by one of their classmates, which they

143. See Margarita Noriega, *Why We Retweet*, DAILY DOT (Apr. 27, 2014, 10:00 AM), <https://www.dailydot.com/debug/why-we-retweet/> (explaining mechanics of “retweet” function and varying reasons people choose to redistribute posts, including at times ironically with an intent to hold the original author up to ridicule rather than to suggest support or agreement).

144. In 2016, Facebook introduced a more “nuanced” selection of ways in which users can interact with the accounts and posts of others. *Facebook Introduces Reactions Alongside Like Button*, CHI. TRIB. (Feb. 24, 2016, 7:44 AM), <https://www.chicagotribune.com/business/blue-sky/ct-facebook-reactions-20160224-story.html>. For instance, it is now possible to click on a range of emotional reactions to a post shared by another user, as opposed to just “liking” it. This array of choices is unique to Facebook, however. Other popular social platforms—Twitter, Instagram, YouTube—offer a simplistic up-or-down menu of potential reactions, so that a person who wishes to call an item to greater prominence may be misperceived as endorsing it.

145. In one of the judiciary’s first and most detailed examinations of the significance of the “Facebook like,” a federal court found that the act of clicking “like” on the page of a political candidate qualified as an act of constitutionally protected expression, sufficient to support a sheriff’s deputy’s claim for retaliatory discharge. *Bland v. Roberts*, 730 F.3d 368, 384–88 (4th Cir. 2013).

captured as a screenshot and re-posted in hopes of calling attention to it.¹⁴⁶ As Prof. Hendricks has written:

Depending on the context, a “like” may indicate sympathy, respect, encouragement, acknowledgement[,] or recognition, all of which have a positive or at least neutral connotation. But while it is often immediately clear how a “like” is to be interpreted, at other times it is utterly obscure. This is because many social networks don’t give an option for noting that you’ve registered something but don’t actually like it. There is rarely an opportunity to “dislike” or “downvote” a picture, a link[,] or an opinion on many social networks. And there is rarely an opportunity to register some other sentiment in between liking or disliking—let alone the reason or the intention behind the sentiment.¹⁴⁷

The always-on immediacy of social media publishing—especially with the ubiquity of pocket-sized smartphones—lends itself to mistakes that would never have reached a public audience under traditional publishing processes. It is widely recognized that smartphone users make embarrassing “fat-finger” errors that create unintended impressions (for instance, “liking” the Twitter post of a distasteful person).¹⁴⁸ Demonstrating the outsized real-world ramifications of momentary online slip-ups, a Nebraska man employed by the Marriott hotel chain to respond to customer-service messages on Twitter was

146. Eugene Volokh, *High School Students Disciplined for Critically Publicizing Classmate’s Anti-black Post*, WASH. POST (Nov. 14, 2016, 6:13 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/14/high-school-students-disciplined-for-critically-publicizing-classmates-anti-black-tweet/>.

147. Vincent F. Hendricks, *How Facebook Changed What It Means To ‘Like’*, THE CONVERSATION (Jan. 28, 2014, 4:43 AM), <http://theconversation.com/how-facebook-changed-what-it-means-to-like-22365>.

148. See, e.g., Chloe Bryan, *The Accidental Super Like: Tinder’s Most Awkward Phenomenon*, MASHABLE (Aug. 16, 2018), <https://mashable.com/article/tinder-super-likes-accidental/> (documenting complaints about how a careless swipe on a smartphone screen while using the popular online dating app Tinder can unintentionally convey a “super like” message to a prospective dating partner, and how people find the functionality of dating apps confusing because different gestures carry different meanings depending on the platform).

fired for—while logged onto the official Marriott Twitter account that he managed—unthinkingly clicking the “like” button in response to a tweet expressing a politically polarizing position about Tibet.¹⁴⁹ Colorful rock musician Courtney Love, a frequent subject of social media controversy, escaped liability for a false statement on Twitter about one of her former attorneys, convincing a jury that she misunderstood the technology and unintentionally posted a publicly viewable tweet that she intended as a private one-to-one message.¹⁵⁰

C. *The Dangers of Expansively Applying Punitive Authority to De-Contextualized Online Speech*

As exemplified by the Justin Carter case, for a variety of reasons, young people are particularly at risk of being misunderstood.¹⁵¹ To begin with, teenagers are transparently sharing the minutiae of their lives, and their unscripted and unedited thoughts and reactions to daily events, in ways unknown to prior generations; thus, their impulsive misstatements are memorialized for a public audience.¹⁵² “Many teens post information on social media that they think is funny or intended to give a particular impression to a narrow audience without considering how this same content might be read out of context.”¹⁵³ As author Boyd observes, “[t]he intended audience matters, regardless of the actual audience.”¹⁵⁴ Comments and images created by and intended for young

149. Matthew Hansen, *Nebraska Man ‘Liked’ a Tweet, and Then He Lost His Dream Job*, OMAHA WORLD-HERALD (Mar. 24, 2018), https://www.scnw.com/news/trending/article_7acaa1dc-5b43-5787-b49d-bd275ca3c8f4.html.

150. Kurt Orzeck, *Courtney Love Cleared of Defamation on ‘Twibel’ Suit*, LAW360 (Jan. 24, 2014, 10:11 PM), <https://www.law360.com/articles/504056/courtney-love-cleared-of-defamation-in-twibel-suit>.

151. Lidsky & Norbut, *supra* note 122, at 1921.

152. Mary Madden et al., *Teens, Social Media, and Privacy*, PEW RES. CTR. (May 21, 2013), <https://www.pewinternet.org/2013/05/21/teens-social-media-and-privacy/>.

153. BOYD, *supra* note 132, at 44.

154. *Id.* at 30.

audiences are subject to misinterpretation by older viewers, who may not understand the vocabulary or cultural references.¹⁵⁵

Psychologist John Suler has coined the term “online disinhibition effect” to refer to the distortive influence of social media publishing.¹⁵⁶ Clinicians and researchers have widely observed that “people say and do things in cyberspace that they wouldn’t ordinarily say and do in the face-to-face world.”¹⁵⁷ Suler identifies several explanations for people’s willingness to “vent” online in outsized ways, including the fact that online speakers do not have to see each other face-to-face, can log off to avoid reading how their remarks have affected others, and may experience the online world as a “fantasy game environment[.]” without real-world consequences.¹⁵⁸ Suler rejects the simplification that online publishing reveals the true inner self, so that one can infer a predisposition to act in the physical world on impulses expressed in the virtual world; rather, he contends, online sharing reveals another persona that exists uniquely in the uninhibited medium of cyberspace and not necessarily offline.¹⁵⁹

Because it is increasingly well-understood that social media presents a funhouse-mirror distortion of people’s true personalities and identities, it is perilous for the legal system to start from the assumption that people mean what they say online and are likely to behave in the same uninhibited way in the real world, where that behavior would be out of place and potentially injurious. Indeed, the marketplace theory of communication¹⁶⁰ expressly contemplates that people who are permitted to test extreme ideas through speech may reconsider or moderate their views in response to social approbation, which is one rationale for

155. *See id.*

156. *See generally* John Suler, *The Online Disinhibition Effect*, 7 *CYBERPSYCHOLOGY & BEHAV.* 321 (2004).

157. *Id.* at 321.

158. *Id.* at 322–24.

159. *See Id.* at 325.

160. Justice Oliver Wendell Holmes is credited with popularizing the theory that First Amendment freedoms exist to enable people to test the merits of their ideas against others in a competitive marketplace, with the strongest ideas that are able to attract a wide following gaining acceptance. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”).

protecting even the most distasteful expression, such as cross-burning.¹⁶¹ The instantaneous spreadability of online speech, which often involves layers of republishing to larger and more diverse audiences, has corresponding risks for misunderstanding. As Muresan and her co-researchers have written, speakers sometimes discernibly telegraph the sarcasm of their messages (“yeah, I really wanna be on public transportation ALL DAY. sounds GREAT!”), but just as often, the sarcasm is subtle and may assume familiarity with the writer’s back-story (as in the example of “that’s what I love about Miami. Attention to detail in preserving historic landmarks of the past.”).¹⁶²

The way that social media is delivered and consumed—in disaggregated snippets, only some of which even the most dedicated reader may end up seeing—makes the medium especially vulnerable to misinterpretation. In evaluating a defamation-by-tweet claim against the actor and conservative commentator James Woods, a federal district judge in Ohio detailed the analytical difficulty in evaluating how a reasonable reader understands a social media post “in context” as compared with the more familiar print or broadcast media around which defamation-law principles evolved:

[T]he nature of a “tweet” is fundamentally different from a statement appearing in the context of a longer written work, which itself appears in the context of a publication containing multiple written works. Each tweet, at the time in question, was limited in length to 140 characters. This is generally sufficient space to express a single coherent thought, but almost certainly insufficient to surround that thought with context and nuance. As each tweet is typically a complete, independent publication, there is no ‘general context’ in the sense provided by the balance of a newspaper or magazine article in which an allegedly defamatory statement appears. Moreover,

161. See *Virginia v. Black*, 538 U.S. 343, 358 (2003) (“The hallmark of the protection of free speech is to allow ‘free trade in ideas’— even ideas that the overwhelming majority of people might find distasteful or discomforting.” (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919))).

162. Smaranda Muresan et al., *Identification of Nonliteral Language in Social Media: A Case Study on Sarcasm*, 67 J. ASS’N FOR INFO. SCI. & TECH. 2725, 2725–26 (2016).

most Twitter users do not sit down and read an entire Twitter account in chronological order. More likely, each reader has a feed of Twitter accounts that is updated whenever one of the (perhaps large number of) accounts they follow posts a new tweet. The Twitter feed of a typical user therefore comprises a constantly changing, disjointed series of brief messages on multiple topics by multiple authors.¹⁶³

Research and a generation's worth of experience with social media point toward two essential realizations. First, people have a known propensity to use inflated or insincere language on social media that in no way translates into a disposition to do harm in the real world. Second, social media is uniquely susceptible to misinterpretation because of the absence of contextual cues and the risk that disaggregated fragments may reach unforeseen eyes and ears. Knowing this, the regulation of social media speech must afford a measure of leniency accounting for the heightened risk of "false positives."

More than two-thirds of U.S. adults—68%—report that they are Facebook users, and about three-quarters of those users access Facebook on a daily basis.¹⁶⁴ Those aged 18 to 24 are especially avid users, Smith and Anderson reported for the Pew Research Center in 2018, with 94% using YouTube, 80% on Facebook, 78% using Snapchat, and 71% on Instagram.¹⁶⁵ Social media has undeniable benefits, to its individual users and to society, in facilitating the maintenance of social ties, ameliorating loneliness and isolation, and promoting engagement in political and civic life.¹⁶⁶ Just as it seems quaint to refer today to an "online newspaper" when essentially all newspapers are online, it feels dated to refer to "online speech" as categorically different from simply "speech." As entire relationships are conducted through tweets, chat

163. *Boulger v. Woods*, 306 F. Supp. 3d 985, 1002 (S.D. Ohio 2018) (footnotes omitted).

164. Aaron Smith & Monica Anderson, *Social Media Use in 2018*, PEW RES. CTR. (Mar. 1, 2018), <https://www.pewresearch.org/internet/2018/03/01/social-media-use-in-2018/>.

165. *Id.*

166. See Keith N. Hampton et al., *Social Networking Sites and Our Lives*, PEW RES. CTR. (June 16, 2011), <https://www.pewresearch.org/internet/2011/06/16/social-networking-sites-and-our-lives/>.

messages, and disappearing fifteen-second videos, the norms of online speech are “the new normal.”¹⁶⁷ Legal principles that evolved in the paper-and-ink era must accommodate the more spontaneous, figurative, and inexact way in which people now speak and understand speech.

V. A WAY FORWARD: DEFAMATION AND THE CONTEXTUAL DISCOUNT

When President Trump was sued for his insulting tweets about a Republican political commentator who sharply criticized his fitness for office, his attorneys mounted a rather remarkable defense strategy: no one takes what the President posts on Twitter seriously.¹⁶⁸ In her 2016 libel suit, Republican commentator Cheryl Jacobus claimed she was defamed by a tweet on the widely followed @realDonaldTrump Twitter account, following her critical remarks about then-candidate Trump in an appearance on CNN: “Really dumb @CheriJacobus. Begged my people for a job. Turned her down twice and she went hostile. Major loser, zero credibility!”¹⁶⁹ Jacobus presented evidence that the Trump campaign had in fact approached her about a job, but it was insufficient to convince a New York court that the statements represented provably false assertions of fact.

To prevail on a claim of defamation, a plaintiff must show damages arising out of a statement that is identifiably about the plaintiff, is provably factually false, and is made with some degree of fault on the part of the speaker.¹⁷⁰ Falsity is assessed from the vantage point of the

167. See Cody C. Delistraty, *Online Relationships Are Real*, THE ATLANTIC (Oct. 2, 2014), <https://www.theatlantic.com/health/archive/2014/10/online-relationships-are-real/380304/> (reporting on survey of millennial generation’s internet usage habits, with one-third of respondents stating that they “draw no distinction between what happens online and what happens in real life”).

168. Maya Kosoff, *Nothing Trump Says on Twitter Should Be Taken Seriously, According to Trump’s Lawyer*, VANITY FAIR (Jan. 10, 2017), <https://www.vanityfair.com/news/2017/01/nothing-trump-says-on-twitter-should-be-taken-seriously-according-to-trumps-lawyer>.

169. *Jacobus v. Trump*, 51 N.Y.S.3d 330, 334 (N.Y. Sup. Ct. 2017).

170. Marc A. Franklin & Daniel J. Bussel, *The Plaintiff’s Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 825–27 (1984).

reasonable audience member, and if the statement is not reasonably understood as stating a fact, there can be no liability for defamation.¹⁷¹ It is that threshold requirement—proof of factual falsity—over which libel claims predictably stumble when based on social media invective.

In dismissing the case, the court accepted that Trump’s phrasing—that Jacobus “begged” for a job—was “reasonably viewed as a loose, figurative, and hyperbolic reference to plaintiff’s state of mind and is therefore not susceptible of objective verification.”¹⁷² The court emphasized “Trump’s regular use of Twitter to circulate his positions and skewer his opponents and others who criticize him, including journalists and media organizations whose coverage he finds objectionable.”¹⁷³ In light of that larger context, the court concluded, a reasonable reader does not treat statements on the Trump Twitter account as facts:

His tweets about his critics, necessarily restricted to 140 characters or less, are rife with vague and simplistic insults such as “loser” or “total loser” or “totally biased loser,” “dummy” or “dope” or “dumb,” “zero/no credibility,” “crazy” or “wacko,” and “disaster,” all deflecting serious consideration.¹⁷⁴

In effect, the @realDonaldTrump Twitter feed was afforded the same latitude as a parody publication,¹⁷⁵ viewing the account as a whole for its unserious tone and propensity for exaggeration.

The President again successfully invoked the “hyperbole defense” when sued by former mistress Stephanie Clifford, better known by her adult-film screen name, Stormy Daniels.¹⁷⁶ Daniels claimed the President defamed her in an April 2018 Twitter post, in which he characterized her account of being confronted by a stranger in a parking lot,

171. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16–17 (1990).

172. *Jacobus*, 51 N.Y.S.3d at 482–83.

173. *Id.* at 483.

174. *Id.*

175. *See Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (finding that hyperbolic parody advertisement lampooning influential televangelist was constitutionally protected speech).

176. *Clifford v. Trump*, 339 F. Supp. 3d 915, 925–28 (C.D. Cal. 2018).

who told her to stop talking to the media about the affair with Trump, as a “total con job.”¹⁷⁷

In evaluating Trump’s motion to dismiss the case, the federal district court considered not only the nature of the social media forum but also the extra latitude that the First Amendment affords to political discourse.¹⁷⁸ While sharply worded, the President’s tweet would reasonably be understood as his rejoinder to a critic of his presidency of the sort that is expected in the heat of political debate. The judge wrote:

If this Court were to prevent Mr. Trump from engaging in this type of “rhetorical hyperbole” against a political adversary, it would significantly hamper the office of the President. Any strongly-worded response by a president to another politician or public figure could constitute an action for defamation. This would deprive this country of the “discourse” common to the political process.¹⁷⁹

Court after court has recognized that statements posted to social media are, by nature, loose and figurative and not accepted as literal truth by the reasonable reader. As one experienced media litigator has commented: “The overall context and purpose of Twitter should be understood by courts to potentially mitigate the otherwise libelous effect of a ‘tweet.’ Tweets are not deep discourse . . . Rather, Twitter is a ‘buyer beware’ shopping mart of thoughts, making it an ideal public forum to spark imagination and further discussion.”¹⁸⁰

In *Feld v. Conway*, a federal judge in Massachusetts threw out a defamation claim over a Twitter post—“you are fucking crazy”—directed at a horse owner, Mara Feld, who unwittingly sold her retired racehorse to a purchaser who sent it to slaughter.¹⁸¹ The judge observed that the tweet was part of a heated exchange among multiple Twitter account-holders exchanging speculation about who was to blame for the loss of the horse:

177. *Id.* at 919.

178. *Id.* at 926–27.

179. *Id.* at 927.

180. William Charron, *Twitter: A “Caveat Emptor” Exception to Libel Law?*, 1 BERKELEY J. ENT. & SPORTS L. 57, 58 (2012).

181. 16 F. Supp. 3d 1, 2 (D. Mass. 2014).

The tweet cannot be read in isolation, but in the context of the entire discussion. In this case, the tweet was made as part of a heated Internet debate about plaintiff's responsibility for the disappearance of her horse. Furthermore, it cannot be read literally without regard to the way in which a reasonable person would interpret it. The phrase "Mara Feld . . . is fucking crazy," when viewed in that context, cannot reasonably be understood to state actual facts about plaintiff's mental state.¹⁸²

The Arizona Supreme Court decided in *Sign Here Petitions LLC v. Chavez* that a series of Twitter posts criticizing the business practices of a company that collects signatures on petitions for ballot initiatives was "incapable of bearing a defamatory meaning."¹⁸³ Andrew D. Chavez, the proprietor of a competing petition-signature company, used his personal Twitter account to criticize the effectiveness of Sign Here's petition drive on behalf of the City of Cholla, posting one tweet that claimed the city's zoning measure "will fail b/c of bad signatures. Company that failed in hot water for using felons."¹⁸⁴ The justices ruled that Sign Here Petitions could not sustain a libel claim based on the tweets, because a reasonable reader "would understand Chavez's statement in the context of the previous several tweets, which set a tone of puffery and exaggeration," not statements of literal truth.¹⁸⁵

Similarly, in *Ghanam v. Does*, the Michigan Court of Appeals found that a series of reader comments on a website discussion board questioning the honesty of a municipal public-works official could not support a defamation claim.¹⁸⁶ The judges concluded that the posts, which speculated that city official Gus Ghanam was involved in the theft of rock salt and tires from city warehouses, would reasonably be understood as non-actionable statements of opinion because of their context, including one post punctuated by a smiley-face emoji sticking its tongue out: "Internet message boards and similar communication

182. *Id.* at 4.

183. 402 P.3d 457, 465 (Ariz. Ct. App. 2017).

184. *Id.* at 461.

185. *Id.* at 464.

186. 845 N.W.2d 128, 146 (Mich. Ct. App. 2014).

platforms are generally regarded as containing statements of pure opinion rather than statements or implications of actual, provable fact.”¹⁸⁷

The importance of considering the entirety of a social media account for context, rather than assessing individual posts in isolation, was central to the resolution of a Michigan lawyer’s libel case against a college student operating a parody Twitter account.¹⁸⁸ The parodist, purporting to be tweeting as attorney Todd Levitt—using Levitt’s picture and a law-firm logo—spoofed both Levitt’s rigor as an adjunct professor as well as his proclivity for referencing drinking and pot-smoking on his own authentic Twitter account.¹⁸⁹ One tweet from the account (using the Twitter handle @levittlawyer, just a few characters off from the attorney’s real account, @levittlaw), purported to be telling Levitt’s Central Michigan University law students: “Buying me a drink at Cabin Karaoke will get you extra [credit], but it’s not like that matters because you are guaranteed an A in syllabus.”¹⁹⁰ Levitt sued for defamation, but the trial court granted the parodist’s motion for summary judgment.¹⁹¹

The court concluded that the @levittlawyer mocking posts were not capable of a defamatory understanding because a reasonable reader “would see defendant’s tweets as attempting to ridicule and satirize Levitt’s tweets about alcohol and marijuana use” and not as literal statements that any attorney would post about himself.¹⁹² The judge relied both on contextual cues from the setup of the Twitter account (which was styled “Todd Levitt 2.0,” signaling a new-and-different version of Levitt) and from previous tweets on unspecified earlier dates, two of which expressly referred to the account as a parody.¹⁹³

Notably, no authority cited in the court’s decision indicated that a typical Twitter user would predictably have gone back to the home page of the @levittlawyer account to discern the tone of the account’s other posts, rather than (as many readers do) simply scrolling

187. *Id.* at 144.

188. *Levitt v. Felton*, No. 326362, 2016 WL 2944824, at *3 (Mich. Ct. App. May 19, 2016).

189. *Id.* at *1–2.

190. *Id.* at *1.

191. *Id.* at *2.

192. *Id.* at *3.

193. *Id.*

through the “news feed” of recent tweets that Twitter displays as soon as the account holder logs in.¹⁹⁴ Parody accounts regularly provide explicit disclaimers directly in the “profile” section that identifies the account holder—indeed, Twitter’s current terms of service require such disclaimers of parody accounts, under peril of having the account deactivated¹⁹⁵—but the cues in the @levittlawyer account were less conspicuous and possible for a casual reader to overlook. Nevertheless, the court indulged the presumption that reasonable readers do not jump to conclusions based on individual social media posts, but rather, engage in further fact-finding to determine whether the post is meant to be understood literally.

A growing subcategory of online-defamation cases—“libel by Yelp,” one might say for shorthand—similarly is coalescing around the consensus that people view posts on “review” websites as mere statements of opinion.¹⁹⁶ For instance, the website TripAdvisor escaped liability for placing a hotel on a hyperbolic list of “Dirtiest Hotels in America,” based on consumer reviewers’ reports of a ripped bedspread and hair caked in the bathtub: “[R]eaders would discern that TripAdvisor did not conduct a scientific study to determine which ten hotels were objectively the dirtiest in America. Readers would, instead, understand the list to be communicating subjective opinions of travelers

194. While theoretically anyone following the @levittlawyer Twitter account would be shown every tweet posted to that account as the posts occurred, the reality is more complicated, as a result of Twitter’s ever-evolving algorithm, which gives greater prominence to accounts or posts that draw high reader interaction. For a thorough explanation of the mechanics of the Twitter feed, see the Wired.com primer, *How to Use Twitter: Critical Tips for New Users*, WIRED (Aug. 29, 2018, 5:25 PM), <https://www.wired.com/story/how-to-setup-twitter-search-hashtag-and-login-help/> (“If people tweet something and you’re not online, you might not see it until later. But the idea of Twitter isn’t to catch every single thing someone tweets, it’s to be on the internet at the same time as other people.”).

195. *Parody, Newsfeed, Commentary, and Fan Account Policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/parody-account-policy> (last visited Apr. 6, 2020).

196. See Joshua R. Furman, *Cybersmear or Cyber-SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 SEATTLE U. L. REV. 213, 217 (2001) (“Posters on Yahoo! message boards often make outrageous claims about the information that they have or about their position within a particular company. Most visitors are completely aware of the unreliable nature of these posts . . .”).

who use TripAdvisor.”¹⁹⁷ Similarly, as a California appeals court observed in finding that a former bank executive’s posts on a Craigslist discussion board—evocatively titled “Rants and Raves”—were constitutionally protected statements of opinion about the reliability of the bank rather than actionably defamatory facts:

[T]he reader of the statements should be predisposed to view them with a certain amount of skepticism, and with an understanding that they will likely present one-sided viewpoints rather than assertions of provable facts. “[A]ny reader familiar with the culture of . . . most electronic bulletin boards . . . would know that board culture encourages discussion participants to play fast and loose with facts Indeed, the very fact that most of the posters remain anonymous, or pseudonymous, is a cue to discount their statements accordingly.”¹⁹⁸

The subtlety and nuance with which courts have evaluated social media speech for purposes of defamation liability is lacking in other areas of the law. If bombastic social media insults do not cause reasonable people to lower their opinion of those targeted by the statements, as libel law increasingly recognizes, neither do reasonable people jump to the conclusion that bombastic references to violence on social media portend danger to school or the workplace. Extensive research is needed into whether violent language in social media posts correlates meaningfully with real-world wrongdoing. If not—if a person who uses Justin Carter’s hyperbolic imagery about video gaming is no more likely to commit violence than a person who does not—then we must ask what we are gaining when we fire, expel, or jail people for disturbing remarks on social networking pages. Disturbing languages and images should, to be sure, be investigated in a prompt and responsible way. But once it is determined that the speaker meant no harm and that any adverse reaction by readers was a “false alarm,” to then impose punishment anyway—as was done in the case of Minnesota college student Amanda Tatro, where misfired jokes on Facebook

197. *Seaton v. TripAdvisor LLC*, 728 F.3d 592, 598–99 (6th Cir. 2013).

198. *Summit Bank v. Rogers*, 142 Cal. Rptr. 3d 40, 60 (Cal. Ct. App. 2012) (quoting Lyrissa Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 936–37 (2000)).

about dissecting a laboratory cadaver resulted in disciplinary sanctions, even after campus police cleared her of wrongdoing¹⁹⁹—does not seem to advance any societally valuable objective. It is the online-world equivalent of punishing the cook whose burnt pork chops trigger the smoke alarm, causing neighbors to alert the fire department.

VI. CONCLUSION: THE IMPORTANCE OF REALISTICALLY “VALUING” SOCIAL MEDIA SPEECH

Reacting to the release of Independent Counsel Robert Mueller’s investigative report about the Trump administration and the 2016 presidential election, political commentator April Ryan called for “lopping the heads off” White House staffers, including the president’s press secretary, Sarah Sanders.²⁰⁰ Had Ryan not been a fifty-one-year-old nationally recognized White House correspondent, and instead been a fifteen-year-old with a Twitter account, the same remark would have been likely to result in school disciplinary action, if not criminal prosecution.

Regulators unquestionably are punishing social media speech more harshly than they would punish comparable behavior in the physical world. Consider the case of luckless Minnesota college student Craig Keefe, who was summarily expelled from community college—without notice or a formal disciplinary hearing—because he called a classmate a “stupid bitch” during an off-campus disagreement that unfolded on the wall of his Facebook page.²⁰¹ Had the same classmate complained of the same insult in a face-to-face encounter at an off-campus restaurant, it seems highly improbable that disciplinary authorities would have interceded at all, and if they did, that removal from college would have been their response. Yet, under the influence of “social media exceptionalism,” the federal courts refused Keefe a First Amendment remedy and upheld his expulsion.²⁰²

199. *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 513–14 (Minn. 2012).

200. Joseph A. Wulfsohn, *CNN’s April Ryan Calls for Sarah Sanders To Be Fired*, FOX NEWS (Apr. 18, 2019), <https://www.foxnews.com/entertainment/cnns-april-ryan-calls-for-sarah-sanders-to-be-fired>.

201. *Keefe v. Adams*, 840 F.3d 523, 527 (8th Cir. 2016).

202. *See id.* at 529–32.

At times, as with the Ashley Payne case, the act of sharing otherwise harmless images on social media is itself regarded as the “wrong.” At New Jersey’s Bergen Community College, an art professor was suspended without pay for eight days—and forced to undergo a psychiatric examination before being allowed to return to work—after he used Google+ to share a picture of his smiling seven-year-old daughter wearing an oversized T-shirt with a quote from the television show “Game of Thrones.”²⁰³ The quote—“I will take what is mine with fire and blood,” a signature phrase of featured character Daenerys Targaryen—was interpreted as a threat to shoot up the campus.²⁰⁴ Had the professor, Francis Schmidt, actually worn the shirt around campus—where he was in a position to do physical harm—the imagery undoubtedly would have been shrugged off because his peaceable behavior would have provided the contextual signaling that the slogan was not a “message.” It was the gesture of sharing the image on social media that, in the view of campus regulators, could be interpreted as conveying an intent to act, or at least an intent to instill fear.

Even some scholars are succumbing to the temptation of exceptionalism. Professor Segall has written that established legal frameworks for evaluating the sanctionability of threat speech “should not be applied to threatening speech posted on the Internet where the very idea of imminence has no real relationship to the possibility of speech causing actual harm.”²⁰⁵ But even Segall’s prescribed remedy is a narrow one, directed only to the subset of speech that would foreseeably provoke ill-disposed people to harm specifically targeted individuals,²⁰⁶ a category of speech that is arguably already unprotected under the existing “incitement” exception to the First Amendment.²⁰⁷

203. Sasha Goldstein, *N.J. College Suspends Professor Over ‘Game of Thrones’ Shirt Perceived as ‘Threat,’* N.Y. DAILY NEWS (Apr. 18, 2014, 5:08 PM), <https://www.nydailynews.com/news/national/n-college-suspends-professor-threatening-game-thrones-shirt-article-1.1761354>.

204. *Id.*

205. Eric J. Segall, *The Internet as a Game Changer: Reevaluating the True Threats Doctrine*, 44 TEX. TECH L. REV. 183, 185 (2011).

206. *Id.* at 195.

207. See *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (recognizing that “incitement” speech may lose First Amendment protection, but only if it is directed to inciting or producing imminent lawless action and is likely to incite or produce that action).

There is no doctrinal support in the law of the First Amendment for diminishing the protection of speech in a particular medium merely because it has the potential to be widely shared and read. *The New York Times* receives no less First Amendment protection than the *Roanoke Times* despite its exponentially greater readership, and a political sign receives the same First Amendment protection whether the homeowner's yard faces a dead-end cul-de-sac or is visible from Interstate 95. Moreover, the perception that social media is so much more powerful than prior forms of media that it demands stricter regulation is based on the outsized attention afforded to a tiny handful of "viral" posts wholly unrepresentative of the vast billions of videos, photos, and comments being shared harmlessly each day to a miniscule friends-and-family audience.²⁰⁸ What is frightening about social media—that people, including young people, may freely access it without the cost of a broadcast license or a printing press—is exactly what gives the medium its democratizing value.²⁰⁹ If we regulate the one medium accessible to the traditionally disenfranchised more rigidly than media owned, increasingly, by a handful of corporate conglomerates,²¹⁰ we

208. In an unintentionally humorous observation reflecting how fearfully judges view social media even when it fails to reach a significant audience, the majority in a case involving discipline for a MySpace profile mocking a Pennsylvania middle-school principal wrote that "due to the technological advances of the Internet, J.S. and K.L. created a profile that could be, and in fact was, viewed by at least twenty-two members of the Middle School community within a matter of days[.]" ignoring that a student with a paper-and-ink drawing could have reached twenty-two people in the school cafeteria in a matter of minutes. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 300–01 (3d Cir. 2010), *rev'd*, 650 F.3d 915 (3d Cir. 2011) (en banc).

209. See Kathryn R. Taylor, "Anything You Post Online Can and Will Be Used Against You in a Court of Law": *Criminal Liability and First Amendment Implications of Social Media Expression*, 71 NAT'L LAW. GUILD REV. 78, 80 (2014) ("With their ability to reach widespread audiences, to allow rapid exchange of information and to provide a low-cost place to gather and organize, it comes as no surprise that these social media sites have become a modern public forum.").

210. See Al Tompkins, *FCC Rolls Back Ownership Regulations for Big Media Companies*, POYNTER (Nov. 16, 2017), <https://www.poynter.org/business-work/2017/fcc-rolls-back-ownership-regulations-for-big-media-companies-2/> (reporting on federal regulatory changes that will make it easier for a single owner to operate more than one highly rated television station even in markets with little diversity of ownership); Ken Doctor, *The Megaclustering of the American Local Press*,

risk widening the already profound gap between expressive opportunities available to “haves” and “have-nots.”

In particular, social media has enabled people without money or fame to organize political movements and have input in the political process, even directly interacting with public officials who would be inaccessible to them in the offline world.²¹¹ The risk of inhibiting political discourse by “sanitizing” online speech—under threat of firing, removal from school, or prosecution—counsels in favor of forbearance.

Vivid metaphors and images, including at times violent ones, are an accepted staple of political rhetoric. For example, in a widely circulated YouTube video promoting his U.S. Senate campaign, West Virginia’s Joe Manchin tried to bolster his standing with gun owners and the coal industry by actually shooting a copy of federal air pollution legislation with a hunting rifle.²¹² Republican Brian Kemp won an election as Georgia’s governor in 2018 after gaining notice with a television commercial in which he pointed a rifle at a young man playing the role of his teenage daughter’s suitor.²¹³ To enforce a regime of “zero tolerance for discussion of violence” on social media ignores the

NEWSONOMICS (July 28, 2017), <http://newsonomics.com/newsonomics-the-mega-clustering-of-the-american-local-press/> (reporting that one-fourth of all daily newspapers in America are owned by three large companies and that 50 percent are part of “clusters” in which one corporate owner acquires multiple papers in a contiguous area to consolidate business operations).

211. See Julia Carrie Wong, *Florida Students Have Turned Social Media into a Weapon for Good*, THE GUARDIAN (Feb. 21, 2018), <https://www.theguardian.com/us-news/2018/feb/21/florida-students-have-turned-social-media-into-a-weapon-for-good> (describing how young activists supporting gun control and other causes have used social media tools as a leveler of entrenched power structures: “From the Arab Spring to the Ferguson uprising to the shooting in Parkland, social media has been a cudgel for participants in real life events to wield against the ossified frameworks that give shape to our political discourse.”).

212. Lucy Madison, *Democrat Joe Manchin Takes “Dead Aim” at Health Care, Cap-and-Trade*, CBS NEWS (Oct. 11, 2010, 2:12 PM), <https://www.cbsnews.com/news/democrat-joe-manchin-takes-dead-aim-at-health-care-cap-and-trade/>.

213. Samantha Schmidt, *Georgia Governor Candidate Aims Gun at Teen in Campaign Ad. ‘Get Over It,’ He Tells Critics.*, WASH. POST (May 2, 2018, 3:34 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2018/05/02/georgia-governor-candidate-aims-gun-at-teenager-in-campaign-ad-get-over-it-he-tells-critics/>.

reality of contemporary culture and risks excluding non-famous participants—who do not get the benefit of the doubt afforded to a Kemp or a Manchin—from political discussions.

This is not a speculative concern. Echoing David Guth’s case at the University of Kansas, a Missouri man, James Robert Ross, was jailed for a grim joke about gun violence on a friend’s Facebook wall, attempting to make a political point about his opposition to the spread of assault-style weapons.²¹⁴ Ross’s misadventure with the legal system began when a friend posted a meme to Facebook in support of gun rights.²¹⁵ The meme (“Why I need a gun”) contained multiple frames of images of firearms, each with an accompanying explanation (one to be used for hunting, one for self-defense, and so on).²¹⁶ Ross, who supports gun control, sarcastically posted: “Which one do I need to shoot up a kindergarten?” and then went to bed, believing he had made his point about the misuse of firearms.²¹⁷ A screenshot of Ross’s post was forwarded through multiple hands—a relative of the original Facebook account-holder, a relative of that relative, an off-duty police officer—before it landed at the City of Jackson (Missouri) Police Department, where officers treated the post as a serious threat and arrested Ross at his workplace.²¹⁸ Although Ross immediately explained to the officers that the remark was made in jest, he was held in custody for several days on charges of disturbing the peace, which eventually were dropped.²¹⁹ Ross’s experience demonstrates both the heightened risk of misinterpretation when speech is shared through the echo chamber of social media and also the need for law enforcement agencies to use discretion before proceeding straight to arrest when confronting ambiguous, out-of-context speech.

214. Stephen L. Carter, Opinion, *Context Matters When We Scrutinize Online Threats*, BLOOMBERG (Aug. 1, 2018, 1:45 PM), <https://www.bloomberg.com/opinion/articles/2018-08-01/online-threats-demand-law-enforcement-to-consider-context>.

215. *Id.*

216. *Ross v. City of Jackson*, 897 F.3d 916, 918 (8th Cir. 2018).

217. *Id.*

218. *Id.* at 919.

219. *Id.*

To be sure, there are extreme cases—as with any form of speech—in which a student or employee places people in fear, or otherwise indicates unfitness to be trusted. A police department is not obligated to retain an employee whose social media activity reveals him to be a white supremacist,²²⁰ and a teacher may be fired for posts denigrating her students.²²¹ But where speech merely indicates a lapse in professionalism, judgment, or taste, regulators should tread lightly, mindful of the Supreme Court’s admonition that, in doubtful cases, the default should always be to err on the side of “breathing space” for freedom of expression.²²² Existing First Amendment doctrines recognize that a government employee may be fired for speech that undermines the public’s confidence in the employee’s ability to effectively discharge governmental duties.²²³ When, however, the “public” consists of 320 million Twitter users with 320 million opinions, principles coined in the “letter-to-the-editor” era must be revisited so that the most thin-skinned person tweeting from two continents away—or the most prolific “outrage troll”—is not in charge of deciding who gets to hold a government job.

In arguing that threat-speech statutes should require a heightened showing of culpability by the speaker when the threat is made online, attorneys Enrique and Carlos Monagas identify the unique risk factors that make it unfair to prosecute speakers solely because a person

220. Tom Jackman, *Va. Police Sergeant Loses Job After Social Media Posts Referenced White Supremacy*, WASH. POST (Apr. 17, 2019, 3:09 PM), https://www.washingtonpost.com/local/public-safety/va-police-sergeant-with-alleged-white-supremacist-ties-is-fired/2019/04/17/dcba9d58-613a-11e9-9412-daf3d2e67c6d_story.html.

221. See Bill Reed, *Blogging Central Bucks Teacher Is Fired*, PHILA. INQUIRER (June 26, 2012, 9:41 PM), <https://www.inquirer.com/philly/blogs/bucksinq/160413996.html>.

222. NAACP v. Button, 371 U.S. 415, 433 (1963).

223. See, e.g., Pappas v. Giuliani, 290 F.3d 143, 146–47 (2d Cir. 2002) (upholding city’s dismissal of police officer who mailed racist and anti-Semitic letters to a charity, finding that a police department is uniquely dependent on the community’s confidence that laws will be enforced impartially: “If the police department treats a segment of the population of any race, religion, gender, national origin, or sexual preference, etc., with contempt, so that the particular minority comes to regard the police as oppressor rather than protector, respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired.”).

unfamiliar with the context and intent might reasonably read the words themselves, in isolation, as frightening:

A private message can be shared, retweeted, snapped, and reposted within seconds and quickly spread virally, and all without the speaker's consent. A communication meant as a joke between two friends can become a deranged threat to kill children . . . People's sense of what is threatening has yet to catch up with technology. They fail to appreciate their lack of context and do not have the sense to seek it out. Just because words can be misconstrued online does not mean that the default position should be that the speaker is punished for someone else's misinterpretation.²²⁴

As online platforms experience public pressure to more actively self-police abusive posts on their sites, rather than involving government authorities, we are seeing how challenging it can be to distinguish between harmless and harmful content, even for companies with vast resources and technological expertise. Platforms have regularly pulled down artistic or newsworthy photos and videos, only to later backtrack when the takedown turned out to be a misinterpretation.²²⁵ In 2016, Jillian York of the Electronic Frontier Foundation, whose job involved

224. Enrique A. Monagas & Carlos E. Monagas, *Prosecuting Threats in the Age of Social Media*, 36 N. ILL. U. L. REV. 57, 77 (2016) (footnote omitted).

225. See, e.g., Sarah McCammon, *Creators of Anti-Abortion Film to Testify That Twitter Censors Them*, NPR (April 10, 2019, 5:08 AM), <https://www.npr.org/2019/04/10/711693259/creators-of-anti-abortion-film-to-testify-that-twitter-censors-them> (recounting story of Christian conservatives whose account Twitter says was "mistakenly blocked by an automated system" and later restored); Jamey Keaten, *Unblocking Naked Venus: Facebook OKs Museum Nudes After All*, ASSOCIATED PRESS (Feb. 5, 2019), <https://www.ap-news.com/26dc0db03bba4a3980d1c40ea7c375b4> (quoting Facebook spokesman who said the platform "inadvertently rejected" a Swiss museum's advertisement on the grounds of nudity, because it contained images of two classical Greek statues of nude figures); Richard Lawler, *Slack Apologizes for 'Mistakenly' Banning People Who Had Visited Iran*, ENGADGET (Dec. 22, 2018), <https://www.engadget.com/2018/12/22/iran-sanctions-slack/> (explaining how chat app erroneously revoked posting privileges by people who had visited countries under U.S. trade embargo, though they were not located in or affiliated with those countries).

monitoring social media sites and their content-moderation policies, was herself briefly banned from the site—and told her account could be deactivated for future infractions—because she shared photos from a breast cancer awareness campaign containing partial nudity.²²⁶ When a social media moderator makes an overzealous judgment call, the speaker suffers a temporary loss of audience. But when a county sheriff makes the same overzealous call, someone goes to jail and, potentially, incurs the life-altering consequences of a criminal record and incarceration.²²⁷

Generations of first-year law students have been forced to memorize and recite the hoary case of *Palsgraf v. Long Island Railroad Co.* and its Rube Goldberg chain of unlikely mishaps that begins with a jostled passenger and ends with an explosion dislodging a scale that injures a bystander.²²⁸ From this slapstick chain of events, New York’s respected Justice Benjamin N. Cardozo set out enduring legal principles that continue to guide the way courts assign responsibility for injuries. The touchstones of liability, Justice Cardozo explained, are causation and foreseeability.²²⁹ The legal system holds people responsible for the injuries their negligence causes to foreseeable victims, not to people far removed from the initial act: “proof of negligence in the air, so to speak, will not do.”²³⁰ It asks too much to hold social media speakers accountable for how ripple after ripple of unintended and unforeseen audience members may overreact to what they say. Schools,

226. Jillian York, *Getting Banned from Facebook Can Have Unexpected and Professionally Devastating Consequences*, QUARTZ (Mar. 31, 2016), <https://qz.com/651001/getting-banned-from-facebook-can-have-unexpected-and-professionally-devastating-consequences/> (explaining that while York’s ban lasted just 24 hours, it prevented her from managing her professional Facebook pages, which could have had “devastating” professional consequences for a person whose livelihood depends on managing social media accounts).

227. See, e.g., Craig Malisow, *The Facebook Comment That Ruined a Life*, DALL. OBSERVER (Feb. 13, 2014, 4:00 AM), <https://www.dallasobserver.com/news/the-facebook-comment-that-ruined-a-life-6431863> (discussing impact of arrest and incarceration on Facebook poster Justin Carter).

228. 162 N.E. 99, 99 (N.Y. 1928).

229. *Id.* at 101.

230. *Id.* at 99.

workplaces, and the justice system would benefit from the healthy circumspection that the legal system is applying to claims of defamation by tweet.