RECKLESS ASSOCIATIONS

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This Article provides a theoretical foundation and practical guide for a new form of liability that has proven necessary in the Internet era: the tort of Reckless Association. This tort would hold de facto leaders of informal networks responsible when radicalized members of the network cause physical harm to others. Recent prosecutions of the leaders of the Oath Keepers and other white supremacists who organized the Charlottesville protest, and rumblings of a similar prosecution against Donald Trump, demonstrate that there is a public appetite for this form of legal responsibility. To date, these prosecutions proceed on theories of incitement or conspiracy, but those doctrines are poor fits for cultural leaders, like Trump, whose media habits have created a drumbeat for increasingly paranoid thinking and action while also studiously avoiding making discrete statements that fit the heightened requirements of incitement.

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

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INTRODUCTION

Social media platforms enable like-minded individuals to find each other and communicate freely about shared interests. This is the reason social media exists, and it works well for many purposes—entertainment, shopping, and general communing. But it has come at a cost. Individuals who share preexisting political beliefs can become extremely radicalized and emboldened. Eventually, predictably, some of them will do extreme and harmful things. There is no better

1 See infra notes 69-75 and accompanying text.
2 See infra notes 76-94 and accompanying text.
symbol of this problem than the crowd who stormed the Capitol on January 6th after years of social network communications had left them deluded about the integrity of U.S. institutions and elections.

Legal scholars and policymakers have begun to explore new forms of law that might mitigate these risks without impeding the beneficial qualities of social media, but so far, the interest in new forms of regulation has focused primarily on the platforms. This Article takes a different tack. We explore how legal liability can be responsibly extended from radicalized individuals who physically assault officers, counter-protesters, and other bystanders to the central nodes of their networks. These individuals, such as former President Trump and the figureheads of fringe groups like the Proud Boys, the Oath Keepers, QAnon, and Breitbart Media, are the actors within a complex communications ecosystem who have the greatest moral responsibility and practical chance to deter violence. They are the most trusted and influential nodes in radicalized networks, and are therefore the best subjects of legal deterrence.

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

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3 Chris Riley & David Morar, Legislative Efforts and Policy Frameworks Within the Section 230 Debate, BROOKINGS TECH STREAM (Sept. 21, 2021) (summarizing proposals by scholars and lawmakers to remove Section 230 liability for platforms that take or fail to take certain actions related to content moderation, machine learning, or transparency). One exception is work by Justin Hyland that proposes extending conspiracy liability to individuals who actively moderate an online forum. Justin Hyland, Conspiracy Speech: Reimagining the First Amendment in the Age of QAnon, 44 HASTINGS COMM. & ENT. L. J. 1 (2021).

4 Neil MacFarquhar, Jury Finds Rally Organizers Responsible for Charlottesville Violence, N.Y. TIMES (Nov. 23, 2021) (describing a jury award in a civil case in Sines v. Kessler, Civil Action No. 3:17-cv-00072-NKM (W.D. Va. filed Sept. 17, 2019), as well as the outcomes of criminal prosecutions. We discuss the case in detail infra Part II-D because based on the pleadings, it is not obvious to us that these outcomes are compatible with established First Amendment precedent based on theories of incitement.)

5 Again, the commentary tends to quickly move from the culpability of these individuals to the culpability of the platforms. Adrienne LaFrance, The Most Powerful Publishers in the World Don’t Give a Damn, THE ATLANTIC (Aug. 8, 2018); Kevin Roose, What Is QAnon, the Viral Pro-Trump Conspiracy Theory?, N.Y. TIMES (Sept. 3, 2021).
often fail when applied to group leaders who were not giving explicit orders in real time, or themselves committing crimes.\footnote{See discussion of the mismatch between incitement and conspiracy elements and the problems of radicalized networks \textit{infra} Part II-D.}

As a result, leaders of radicalized groups can skirt liability by restricting their words and deeds so that they can deny sharing a specific criminal end goal. The central nodes in radicalized networks can avoid doing the dirty work—attacking Capitol police officers, or mowing counter-protesters down with a car—while creating the communication environment that made those attacks highly foreseeable. Worse still, they are in the best position to shield themselves in this way. The de facto leaders of radicalized groups have been able to avoid legal risks even though the real-world dangers that their persistent media practices created must have been obvious to them. They surely observed members of their unofficial associations sink slowly into irreversible paranoia. While the earnest, true believers go to jail for action taken in the real world, the self-serving leaders of their movements can guard themselves with plausible deniability.

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

As an illustration: Alex Jones could be held civilly liable for the physical harm caused by the shooting at Comet Ping Pong pizzeria if the victim, through discovery of Twitter, Facebook, and other social networking data, could show that Jones was (one of) the most influential node(s) in the shooter’s network that persistently trafficked in Pizzagate pedophile conspiracy theories.\footnote{James Doubek, \textit{Conspiracy Theorist Alex Jones Apologizes for Promoting 'Pizzagate'}, NPR (March 26, 2017), available at https://www.npr.org/sections/thetwo-way/2017/03/26/521545788/conspiracy-theorist-alex-jones-apologizes-for-promoting-pizzagate.} Jones would have a defense based on lack of sufficient mental state (reckless indifference) if he could show that he had made even a modest attempt to correct the record or dampen the hostility—a defense we believe he would not actually be able to muster.\footnote{Unlike conspiracy or liability for aiding and abetting, the responsible actor does not have to share a purpose or specific intent with the person at the edge of their network who ultimately commits the illegal act. This solves both an evidentiary problem for individuals, like President Trump, who may in fact share the intent but will disclaim it later, as well as a problem with the mental state element in cases against defendants like Alex Jones who may in fact lack a specific purpose to cause the ultimate injury and instead is merely aware and indifferent to the risk. For discussion of the importance of mental state in laws that penalize expression, see Leslie Kendrick, \textit{Electronic copy available at: https://ssrn.com/abstract=4053964}.}
This form of liability based on Reckless Association is simultaneously modern and traditional. It is modern because it makes use of forms of evidence like communications metadata, network analyses, and machine learning that are a product of the new information age. These forms of evidence will be critical for a plaintiff who must prove that a defendant actually caused an attack to occur and was aware of the risk. But it is also traditional because it is grounded in political theories that balance duties and liberties across members of society and go no further than necessary to reduce unjustified risks.

Scholars and policymakers are aware of the negative effects of radicalized online networks, but policy proposals are often directed at social media companies based on theories that they amplify or fail to remove radical content (from the progressive perspective) or exacerbate polarization by engaging in biased content moderation (from the conservative perspective). If policymakers are ready to blame Facebook and Twitter for this fiasco, surely the de facto leaders of radicalized, violent groups are more blameworthy. And yet, there has not been a serious effort to apply liability to these leaders unless their posts, tweets, and actions satisfy the requirements for incitement, conspiracy, defamation, or sedition.

We suspect this omission is the result of tacit assumptions and misconception about the First Amendment. The implicit logic of contemporary debate is that courts cannot reach central nodes of a radicalized network without causing a chilling effect that would inhibit speech and free association. While this is true—liability will cause individuals to avoid becoming authority figures in groups that aggressively traffic in zany theories—if liability is appropriately constrained, it should meet the requirements of constitutional scrutiny for the

Free Speech and Guilty Minds, 114 COLUM. L. REV. 1255 (2013); Eugene Volokh, Crime-Facilitating Speech, 57 STAN. L. REV. 1095, 1174-1185 (discussing how heightened mens rea standards are constitutionally necessary for secondary liability based on speech but also make these cases much harder to bring.) We justify reducing the mental state requirement in cases of Reckless Association infra Parts IV and V by increasing other protections for the defendant: namely, requiring proof of actual physical harm (not just risk) and proof of persistence on the defendant’s part.


10 The Online Freedom and Viewpoint Diversity Act, Senate Bill S.4534 (introduced Sep. 8, 2020); The Stop Censorship Act, House Bill H.R.7808 (introduced July 29, 2020); Mark Lemley, The Contradictions of Platform Regulation, 2021 J. FREE SPEECH L. 303, 307-308 (2021) (pointing out that political partisans have contradictory goals when they agree on reforms to platform liability rules).
same reasons that narrow versions of defamation and incitement law do.\footnote{New York Times Co. v. Sullivan, 376 U.S. 254, 285-88 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323, 384-92 (1973). In brief, while incitement liability requires purpose and imminence, our tort proposal would be constrained by requiring persistence and physical injury. See discussion of the limits of incitement law infra Part II-D.} Moreover, to the extent the First Amendment constrains liability based on Reckless Association, it would likewise constrain laws that would force major platforms to purge content and users.\footnote{Smith v. California, 361 U.S. 147, 153-54 (1959) (finding that liability of a bookstore for unknowingly selling obscenity would cause self-censorship on the bookstore’s part, and “the bookseller’s burden would become the public’s burden, for, by restricting him, the public’s access to reading matter would be restricted”). See also Daphne Keller, Amplification and Its Discontents: Why Regulating the Reach of Online Content Is Hard, 2021 J. FREE SPEECH L. 228, 239-46 (2021) (describing how First Amendment precedent and consumer demand conflict with laws that deter platforms from amplifying lawful but distasteful speech).} Policy remedies that target social media platforms are probably more offensive to First Amendment values because if platforms face risks of liability, they are bound to over-censor. It’s difficult for outsiders to predict which groups pose a risk since no one platform can see coordination and communications that are taking place in other online and offline fora, and platforms will not be highly motivated to keep censorship to a minimum if there is significant risk of liability for only one form of error (wrongly permitting misinformation to be communicated).

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

Given the uncertainty about how the First Amendment will constrain theories of liability that are premised primarily on patterns of association, we start in Part I with an elucidation of the individual right to freely associate in the context of social media. Part II explains how the radical freedom to associate, made possible by social media, has brought tremendous benefits as well as some risks to society. The risks are predictable given the theory and available evidence about how people form beliefs and act under the influence of highly selective, frictionless associations, but they nevertheless fall in a liability vacuum. Part III explains why secondary tort liability, imposed on central nodes of a radicalized...
network, is the most incisive response to the problem, and it shows that such liability is consistent with the goals and purposes of tort law. Part IV serves the main course: it lays out the elements for a new tort of Reckless Association and explains how two of the most important elements—causation and mental state—can be proved using network analyses. Part V addresses objections.

I. THE AMBIGUOUS RIGHT TO FREELY ASSOCIATE

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

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

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

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

A. Group Theory

Groups are necessary to extract the full value from the freedom of speech. They provide a forum for members to exchange information, discover and debate shared interests, and to make and execute plans. All of these functions—except the execution part—are forms of protected expression. But they take on a different nature when they are done by individuals who are in sustained and
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insular contact with each other. In short, while each individuals has agency over their own beliefs, it is only groups that individuals can form collective beliefs, organize movements, and create cultures.

The Supreme Court recognized the unique value of expression within groups of members with a common interest in *NAACP v. Alabama ex rel. Patterson*, the first case to explicitly identify and recognize the modern form of a right to free association.

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.13

The earliest free association cases concerned laws passed in southern states for the purpose of intimidating and interfering with the work of the NAACP. These cases were easy, at least with the benefit of time and social progress, because the statutes challenged in these cases, which required the NAACP to reveal the identities of its members or else refrain from conducting business in the state14, were enacted out of hostility to the political ideas espoused by the association.15 The laws had the very purpose of thwarting the cultural and political persuasion of the NAACP's message.

Subsequent cases were less easy. In *Shelton v. Tucker*, for example, the Court struck down a law that required public school teachers to disclose the names of organizations for which they were donors or members.16 The Court recognized that, unlike the NAACP cases, the state had a strong interest in collecting information of various sorts about their teachers in order to vet the competence of those hired by the state to educate and indoctrinate the next generation of residents.17 (To put this into modern context, consider what interest a school board might have in knowing that an elementary school teacher is a member of the Proud Boys or a Q Anon fan group.) Nevertheless, the Court found that this valid state interest was insufficient to outweigh the teachers' interest in uninhibited association, particularly since the looming threat of job loss was severe enough to cause significant chilling effects among teachers.18 The *Shelton* opinion linked the freedom of association to the freedom of thought itself. “Scholarship cannot flourish in an atmosphere of suspicion and distrust.

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14 Id. at 451-52.
15 Id. at 462.
17 Id. at 485.
18 Id. at 486-87.
Teachers and students must always remain free to inquire, to study and to evaluate. Thus the Court implied (though did not exactly say) that free inquiry is stunted if thinkers can’t have access to groups.

To understand why the Court believes this, we must meet it more than halfway. The best way to synthesize the cases is to understand freedom of association as highly influential on the freedom of thought, while also posing serious, if infrequent, threats to democratic values and liberties. If a person is not free to participate as a member in a group, the information and ideas that she will have access to, and decide to act on, will differ. “Freedom of expression embraces more than the right of an individual to speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective.” A person’s access to groups will influence the course of a person’s beliefs and intentions. It will shape their “character and potentialities as a human being.” Individuals have new thoughts and preferences, but it takes a group to have a culture.

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

This is, at least, the theory underlying constitutional protection of the right to free association. However, common law, statutes, and constitutional precedents suggest the right to free association is more limited than the lofty pronouncements quoted above might suggest. The courts have had no difficulty

19 Id. at 487 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).
20 NAACP v. Button, 371 U.S. 415, 452 (1963); John J. Dystel, Note, 79 Yale L. J. 872, 874 (1970) (“A legal system which strongly endorses freedom of expression and its underlying values should also protect the individual’s right to associate with others of like mind in order to make his expression of opinion more effective.”).
22 Roberts v. Jaycees, 468 U.S. 609, 622 (1984) (“An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.”)
upholding laws that greatly interfere with the membership and management of associations if there is a plausible state interest for doing so and as long as the law does not directly burden the expression of a group or its members.23

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

Free speech has a beneficial effect on society when it serves as "a method of achieving a more adaptable and at the same time more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus."24 Groups of like-minded individuals can certainly foster both healthy cleavage from the mainstream culture and necessary consensus between its members, or between the group and society at large. But they can also do the opposite. They can entrench false beliefs, organize harmful movements, and create a culture that demonizes the outgroup. They can reduce the practice of independent thought and exacerbate the risks and excesses of free speech. Thus, the freedom of association and its caselaw has an awkward relationship to other First Amendment liberties.

B. Strict in Theory, Looser in Fact

In theory, “state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”25 But it’s not surprising, given the lack of rigor or empirical accuracy in its standard justifications, that courts frequently find their way to upholding laws that directly intervene in the membership or management of associations.

First, many regulations that have significant impact on who associates with whom are fairly categorized as regulations of conduct, and will not be struck


24 Emerson, supra note 21 at 879.

down unless the imposition is significant and the state interest is slight. Moreover, even when a law directly burdens membership or management of a group, the reasoning of Supreme Court opinions reveals that the onus is on the association to prove that the burden is significant and not outweighed by the state interest.

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

For example, in a later set of cases considering freedom of association challenges to public accommodations and antidiscrimination laws, the Court has said in dicta that regulations of organizations that effectively force an association to abandon its expressive goals would also violate the right to freedom of association. Yet the organizations that have challenged antidiscrimination laws are often not able to meet that standard. Having determined that the state interest in such laws was compelling, the Court placed the burden of proof on the associations, rather than the government, to prove that their expressive activities were unduly affected. Free speech cases have no such burden-shifting, even when the government has a compelling state interest to regulate speech.


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


Thus, the reality of freedom of association is more muddled than the soaring language in its most famous cases would suggest.

Moreover, the right protects associating only when the group exchanges information, gives advice, or organizes plans related to licit activities. A group that organizes criminal activities is a criminal conspiracy, and membership alone can send a person to prison. Even groups that have something less than a solid agreement to commit a specific crime seem to fall out of First Amendment protection. Membership in a recognized gang can cause a convicted criminal to receive an enhanced sentence, and this is so even though gangs are an engine of cultural change and have a mix of licit and illicit goals. The same is true for organizations on the U.S. designated terrorist list. Domestic hate groups are monitored with greater zeal, and membership in such a group will affect law enforcement’s analysis of probable cause to conduct searches or make arrests. Thus, groups have been regulated, and individual members have shouldered legal penalties, even when there is only a loose agreement between the members to support or engage in some kind of criminal conduct.

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

C. Toward a Theory of Secondary Liability

What is missing, we believe, is a solid theory (or patchwork of theories) about what makes a “good” or “bad” association. If the markers of healthy associating are understood, or conversely if there are telltale signs of dangerous associations, the freedom of association can begin to copy the hierarchical structure of free speech by recognizing categories of unprotected or low-value associations.

Consider, for a moment, the current state of free speech precedent and scholarly debate as it concerns unprotected or low value expression. Incitement is a form of secondary liability: the individual inciting violence with their speech is held as a factual and moral cause of lawless action that their audience causes to others. Defamation is also a form of secondary liability in the sense that the harm suffered by the victim is suffered as a result of the audience giving credence to the speech of the defendant and changing their esteem of the victim. If a plaintiff loses a job prospect because an employer ran across a false accusation about the plaintiff, the defamation defendant is found to be as factually responsible (and more morally responsible) than the employer. And under traditional publisher liability rules, book and newspaper publishers can be

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37 Martin H. Redish & Michael J.T. Downey, Criminal Conspiracy as Free Expression, 76 ALBANY L. REV. 697, 730 n. 85 (2013) (“The crime of conspiracy serves two commonly accepted functions: preventing the —specific object of the conspiracy from being realized, and stemming the —general danger incident to group activity with criminal purpose.”)


39 “But since the first amendment does not afford absolute protection to all forms of individual expression, it could hardly be claimed to offer full protection to all forms of association.” John J. Dystel, Note, 79 YALE L. J. 872, 874 (1970).
held liable for disseminating (essentially repeating) the unlawful speech of the original author. All of these doctrines of provide a route to secondary liability based on the expressive activity of the defendant, and they have all gone through the process of defining and time-tested winnowing through case law. The Court has explicitly and implicitly found that other forms of speech has low value and is protected differently from other forms of expression. These include graphic content made accessible to children, privacy-invasive communications, and expression that copies the copyrighted works of others.

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

Scholars have been engaged in sustained debates about whether the First Amendment really does or should cover all forms of expression outside the specific categories of unprotected speech, and whether there should be reduced protections for so-called low value speech. Nevertheless, it is clear that when the state is confronted with a First Amendment challenge to a regulation of speech, it will have an easier time meeting its burden and surviving scrutiny if the speech has been recognized in the past for causing social problems. If courts deviate from the traditional categories of unprotected expressive activity, they will have to explain why a new form of unprotected or less-protected

expression should be recognized now despite being (apparently) unnecessary during the previous generations.

The answer, if there is one, must relate to broad accessibility to the Internet. Perhaps in a pre-Internet world, the risks of chilling effects from forms of secondary liability were not worth the benefits since the speech of extremists and outcasts rarely found an audience, and the audience rarely had the means to coordinate and persistently interact with each other. Changes to the patterns of communications and associations raises the possibility that there may be as-yet unrecognized exceptions to the general rule of thumb that new forms of liability based on expressive activities are unnecessary. In other words, there may be evidence that the stakes of uninhibited associations, particularly in terms of its externalities and damage to others, may be quantitatively and qualitatively greater than in previous communication ecosystems. We present the case that this is so in Parts II and III.

D. Proceeding With Caution

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

The first concerns overbreadth and strategic enforcement. Every important social transformation has been accompanied by overzealous individuals or satellite groups that have breached the bounds of protest and engaged in lawless violence. If a network's de facto leaders can be held responsible for the conduct of its members, that law could be exploited and abused to send the leaders of a large movement to jail for the conduct of a few, unrepresentative protesters. It could, in other words, create a new reason to throw Martin Luther King, Jr. in jail.

We see this as the key problem that must be avoided in the design of a constitutional constraint on low value associations. But the problem is not intractable.
The second practical problem with defining low value speech is that it’s likely to be unpopular. Today, the general public is enamored with the freedom of association, and this is particularly true when it comes to the Internet. Globally, while 73% of Internet users favor government censorship of speech to remove content that is “harmful to children,” that is “discriminatory,” or “racist,” only 39% believe the government should be able to monitor who communicates with each other. (Presumably the response to active interference with communicative associations would be even more negative.) The simultaneous contempt for hateful speech and love for freedom of association is the online world’s equivalent of “hate the sin, not the sinners.”

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

Nevertheless, criticism in the literature is rather narrow, and reserved primarily for offline associations and organizations.

48 There may be something culturally distinct about the United States in this regard, too. See DE TOCQUEVILLE, supra note _ at 219 (“In no country in the world has the principle of association been more successfully used, or more unsparingly applied to a multitude of different objects, than in America.”)
51 This is what Tarko and Gangotena describe as the negative externality problem of freedom of association. Vlad Tarko & Santiago J. Gangotena, Freedom of Association and Its Discontents: The Calculus of Consent and the Civil Rights Movement, 57 RES. IN HIST. ECON. THOUGHT & METHODOLOGY 197 (2019).
53 Most focus on the mixed nature of associations as being both expressive and conduct-oriented, and so the criticism explores, e.g., the impropriety of using freedom of association as a way to dodge generally applicable anti-discrimination laws. Gregory J .Wartman, Freedom of
the modern and more capacious sense that we study in this article—the freedom to choose and maintain online social ties—doesn’t attract as much negative attention.

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

Associations strengthen democracy in important part because they are places to bring friends, places to make friends, and places to organize friends. The role civic associations play in generating political action cannot be explained apart from the foundational role of social ties and organization.…

Relationships, affiliations, and organizations are at least as important as ideas, voice, or expression in the process of forming preferences and translating them into actions. The point is not that ideas do not matter at all, but rather that relationships matter a great deal.…\(^5^4\)

Katherine Strandburg and Peter Swire have also advocated for strong First Amendment freedom of association on networked communications. Strandburg is concerned about the chilling effects of network surveillance on formal and informal associations, implicitly arguing that any chilling is bad.\(^5^5\) Swire is concerned that European and U.S. regulation that directly interferes with channels of communication on social networks will interfere with the freedom of association.\(^5^6\) Both would apply strict scrutiny as soon as freedom of association is implicated, even indirectly, by state action.\(^5^7\)

Like these scholars, we agree that relationships are uniquely important to the formation of preferences and beliefs, but we don’t share their unbridled enthusiasm for the process.\(^5^8\) In fact, the radical freedom of association that is possible today on the Internet has an observable and explainable detrimental
impact on individuals’ knowledge about politics and other complex systems and, more worryingly, may lead individuals to commit violence against other individuals outside the association. Thus, it is high time that the freedom of association engages in the same soul-searching and careful adjustment that is frequently performed in free expression articles.

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

II.  RADICAL ASSOCIATIONS

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

This Part begins with a discussion of the epistemic value of social ties, and how social networking platforms have created radical associations that are not bound to some of the constraints that once made them useful for knowledge. We then show how radical associations serve some societal goals very well, but create new dangers in the political sphere.

A.  Associations Before and After the Internet

Social ties have a complex relationship to knowledge. On one hand, close ties like friendship and kinship are good for epistemic progress because people feel a moral obligation to friends and family to engage in empathic listening and to work toward a mutual understanding when they are in a disagreement. But the problem with close ties is that they often don’t supply a diversity of information that would come from other acquaintances. On the other hand,

59 In the Nicomachean Ethics, Aristotle famously described friends as mutual stewards over each other’s epistemic development. ARISTOTLE, NICOMACHEAN ETHICS, XII–IX (C.D.C. Reeve ed., 2014) (author’s translation). Because of the intensity of commitment required by (perfect) friendship, Aristotle explicitly predicted that the number of people with whom an individual can sustain a perfect friendship is very small. See id. This insight has been empirically validated by the experiments and replications of Robin Dunbar. For a summary of the findings and replications of “Dunbar’s number” (research finding that humans can only maintain meaningful social connection to about 150 people), see Maria Konnikova, The Limits of Friendship, THE NEW YORKER (October 7, 2014).

60 That is, epistemic progress cannot be abstracted away from the distribution of knowledge across individuals. Frederick Hayek is famous for recognizing the importance of distributed
those with access to diverse information may not share the trust that is necessary for empathic challenging of beliefs.

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

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

Moreover, the role of social ties was not as critical for epistemic pursuits as it had been before urbanization. Knowledge was also acquired through new or greatly expanded institutions like public education, modern universities, the industrial press, and broadcast media. These information aggregating enterprises were expensive, so their limited supply created natural bottlenecks. As a result, they tended to have the economic motivation to serve a common knowledge—that is, “the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess.” See Frederick A. Hayek, The Use of Knowledge in Society, 35 AM. ECON. REV. 519 (1945).


Id.

Id. at 645.
Or at least, in any event, they did not have extreme economic pressure that tense competition can cause to compromise truth-seeking in order to serve a niche viewpoint. So, like the increasingly random acquaintances, mass media tended to reflect the knowledge of a wide (but not perfectly representative) swath of the population. In the industrial age, average was king.

The increased access to information diversity brought about by the industrial era came with the cost of less commitment. It was during this era, that the trade-off between the enhanced engagement of friends or kin and the greater information diversity of larger social networks first became evident. Industrial era associations provided an effective way to address this trade-off.

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

These practices of deliberation, which created a healthy-enough equilibrium in the industrial era, have been eroded by online communications platforms. Just

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66 Here, we refer to voice and loyalty in their now classic Hirschmanian connotation. See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, Organizations, and States 30 (1970).
as industrialization caused a shock to patterns of social ties, the Internet era has brought another, altogether different one. As with the industrial era, people enjoy high levels of physical mobility. But the costs of finding and maintaining social ties have been dramatically reduced.  

Social ties that are partially or entirely maintained online use a variety of platforms (Facebook, Instagram, Twitter, TikTok, Reddit, even email listservs) that allow persistent contact over space and time. Each platform has its own emphasis, functionality, and audience appeal, of course. Older users tend to congregate on Facebook while Millennials and Gen Z prefer apps like TikTok. Nevertheless, all the platforms play similar roles in the development of each user’s online persona, allowing people to find or stay connected to social ties who would have otherwise become distant acquaintances or foggy memories. Social networks allow users to actively or passively exploit homophily—a preference to have contact with people “like us”—to more efficiently find the content that will be most engaging and salient to them. We can now select and de-select our associates at virtually no cost.

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

67 ALESSANDRO AQUISTI ET AL., DIGITAL PRIVACY: THEORY, TECHNOLOGIES, AND PRACTICES 437 (2007) (“Digital technology has lowered the costs of collective activity and decreased the importance of geographical proximity.”)

68 Sara Fischer, More Younger Members of Generation Z Use TikTok Than Facebook, AXIOS (Nov. 5, 2019).

69 See Miller McPherson et al., Birds of a Feather: Homophily in Social Networks, 27 ANN. REV. SOC. 415, 416 (2001). To be clear, what it means to be “like us” is flexible and fluid, and can just as well be defined by values like “tolerance” as it can by demographics like race, geopolitical status like nationality, or interests like sports. We may believe that our social ties are more similar to us than they really are; nevertheless, they are truly more similar than a person selected at random would be. Sharad Goel et al., Real and Perceived Attitude Agreement in Social Networks, J. PERS. & SOC. PSYCH. 1, 3-6 (2010).

70 Hampton & Wellman, supra note 62.

71 Brendan Sasso, Study Finds 18 Percent of Social Media Users Block, ‘Unfriend’ Over Politics, THE HILL (Mar 12, 2012). Consistent with this, there is at least some evidence that the persistence offered by online relationships doesn’t contribute to trust and intimacy as much as persistent offline relationships do. Craig Calhoun, The Infrastructure of Modernity: Indirect Social Relationships,
To date, lawmakers have not fully explored in sufficient detail the effect that modern communications technology has had on patterns of association-- the impact of “social networks” on our actual social networks. A possible explanation for this is that while the search engine and the World Wide Web supercharged the freedom of speech beginning in the 1990s, the freedom of association didn’t receive its dose of steroids until the popularization of social networking platforms like Facebook. Modern patterns of associations are therefore characterized by a combination of low mutual responsibility and low diversity. This style of associating works well in some contexts, but it creates an epistemic danger zone that can have serious consequences to outsiders and to society as a whole. We turn next to the work of disambiguating the fun zone from the danger zone.

B. The Mixed Effects of Radical Associations on Beliefs

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

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

Information Technology, and Social Integration, in SOCIAL CHANGE AND MODERNITY (Haferkamp, Hans and Smelser, Neil J., eds.) (1992); Deborah Chambers, Social Media and Personal Relationships 2013 (inquiring about whether digital modes of communication are generating new intimacies and new meanings of ‘friendship’ as features of a networked society); Thomas V. Pollet et al., Use of Social Network Sites and Instant Messaging Does not Lead to Increased Offline Social Network Size, or to Emotionally Closer Relationships with Offline Network Members, 14 CYBERPSYCHOLOGY, BEHAV. & SOC. NETWORKING 4 (2011) (finding that social networking ties have no effects on offline social ties); Alistair G. Sutcliffe et al., Activity in Social Media and Intimacy in Social Relationships, 85 COMPUTERS IN HUMAN BEHAVIOR 227 (2018) (finding that only more intimate support groups of social network users appear to be closely connected with offline social activities).

72 Hugo Mercier makes a similar point using movie reviews. See HUGO MERCIER, NOT BORN YESTERDAY 168 (2020).
unlikely to cause harm. To the contrary, the quirky recesses of online taste is part of what makes the Internet wonderful.

For topics where satisfying one person’s preference has no negative impact on others’ choices, homophily is an asset. When a user sees an endorsement of a cat video in her newsfeed, she will glean useful knowledge that drives down matching costs:73 “this person has a lot of my tastes, particularly when it comes to comedy, and he liked this video so much that he shared it. That means I will probably like it, too.”74 The new knowledge is the product of objective information about a subjective preference. “This particular video of a cat stuck in a slipper is likely to appeal to me.”

Some more profound social pursuits are also well-served by radical networks. We rely on our close social ties for advice, comradery, and mutual respect—all profoundly important ingredients for the human experience. Here, too, homophily is likely to work well without having unintended back-bending effects or negative externalities.75 People who are already similar are likely to provide advice and comfort that resonates more strongly. The analysis for the satisfaction of social preferences is quite simple because sharing information (and other communications) between friends is one of the ends, rather than a means, of socializing. Homophily works for us, individually and collectively, in the context of leisure and social belonging. Therefore, we would expect cheap and persistent communication to improve life on these dimensions.

Likewise, homophily is good for markets. A person with similar taste in goods is likely to provide more useful information than a random

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74 Because friends have a pattern of responding to, and engaging with, social media posts that express pride, anguish, and other poignant emotions, the newsfeed algorithm is well-trained to make sure that these types of communications are prominently displayed—that the information will be found and known. HOW NEWS FEED WORKS, FACEBOOK.COM, https://www.facebook.com/help/115550281178725 (last visited August 13, 2020); Josh Constine, How Facebook News Feed Works, TECH CRUNCH (September 6, 2016).

75 This is the least controversial aspect of social media’s influence over the attention economy. Tim Wu, Blind Spot: The Attention Economy and the Law (2017) (draft available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2941094). See also TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS (2016) (covering many of these themes). As with consumer information aggregation, concerns only arise if we suspend the expectation of rationality and consider problems related to time-inconsistent preferences or addictions. At this point, though, evidence mostly indicates that recommender systems are serving user preferences even when users are observed over time. See Tien T. Nguyen et al., Exploring the Filter Bubble: the Effect of Using Recommender Systems on Content Diversity, 2014 PROC. 23D INT’L CONF. ON WORLD WIDE WEB 677 (2014).
acquaintance. Consumption preferences can be realized simultaneously, without raising serious compatibility issues between individuals. That is, one user can buy a bright yellow truck that perfectly matches his aesthetic without affecting another user's ability to buy a sensible sedan. One person's liberty in the consumer market does not usually impede another's. So radical associations have largely beneficial impacts on markets.

Political beliefs are markedly different. One person's preference, carried out through political action, does interfere with another's. A well-working system of information aggregation is thus critical for epistemic improvement on political topics. For this type of factual information, unlike social and economic

Markets aspire to make sure “[e]very desire of each consumer, no matter how whimsical, is met by the voluntary supply of some producer. And this is true for all markets and consumers simultaneously.” John Geanakoplos, Arrow-Debreu Model of General Equilibrium, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 119 (John Eatwell et al. eds., 1987). Markets are not always able to match consumers to the right suppliers and vice versa. As a result, a tremendous amount of money and effort goes into matching institutions like advertising, clearinghouses, and physical or digital marketplaces. But incomplete markets get closer to the ideal with better and more accessible aggregations of information about preferences and supply. Radical associations reduce the search and matching costs, and therefore help to reduce market failures.

In fact, the very existence of a general market equilibrium requires the simultaneous satisfaction of all individual plans. Id. at 119.

Digital communications in general are understood to (mostly) drive down transaction costs and make markets more efficient. Avi Goldfarb & Catherine Tucker, Digital Economics, NBER WORKING PAPER NO. 23684 (2017).

In truth, the story is actually a bit more complex, and not merely because the three realms can overlap. See William H. Dutton & Bianca C. Reisdorf, Cultural Divides and Digital Inequalities: Attitudes Shaping Internet and Social Media Divides, 22 INFO. COMM. & SOCIETY 18, 29-30 (2019). Under some conditions, social media will have a negative epistemic impact on social and economic beliefs, and will have positive impact on political knowledge. An individual's beliefs about a social or economic choice can wind up suffering from the same selection effects that plague political beliefs. Conversely, social networks can be a perfectly functional source of political information when the conditions are right: i.e. when the members of the group are similarly attuned to aggregating non-distorted information, or when the political topic that is being discussed has direct and immediate impact on the members so as to make false beliefs hard to sustain.


It is worth observing that while the expansion of the utility maximization problem to this further categories of preferences is grounded at the interconnection of political theory and economics, the analytical methodology remains exclusively economical and draws, in particular, on game theory. See, e.g., D. Austen-Smith, Information Transmission in Debate, Am. J. Pol. Sc. 124 (1990); Peter J. Couglan In Defense of Unanimous Jury Verdicts: Mistrials, Communication and Strategic Voting, 94 AM. POLITICAL SC. REV. 375 (2000) (both studying how existing voting rules affect deliberation outcomes depending on individual preferences, information structures and transaction costs). For a review of theoretical and empirical studies on deliberation, see Tali
knowledge, radical associations bring epistemic risks—that is, risks that people
can be driven to distorted beliefs. When they take action based on those beliefs,
it can negatively affect others.

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

First, reduced diversity of information may lead to distortions in the
aggregation of political knowledge when individuals associate primarily with
others who already share their beliefs. The proverbial filter bubbles are produced
not only or even mainly by Big Tech algorithms but, as we showed elsewhere,
by our social ties.\(^\text{82}\) Social media is increasingly used as the primary source for
news information, and our online friends are the main filter through which that
information passes. While it’s true that automated algorithms like the Facebook
newsfeed will prioritize some political content of some friends over others, the
algorithm is no more (and in fact, often somewhat less) bias
\(^\text{83}\) ed than the users’
own past engagement with posted material.\(^\text{83}\) Cass Sunstein’s theory of “enclave
deliberation” is consistent with this idea. Sunstein’s research finds that groups
that are more homogeneous at the start of an experiment are more likely to draw
their information and construct their beliefs from overlapping evidence and
“argument pools.”\(^\text{84}\) Bias in the evidence and argument pools in turn decreases

Mendelberg, The Deliberative Citizen: Theory and Evidence, in VI Research in Micropolitics:
Political Decision-Making, Deliberation and Beyond 151 (2002).

82 Jane R. Bambauer, Saura Masconale, and Simone M. Sepe, Cheap Friendship, 54 U.C. Davis L.
Rev. 2341 (2021); Jane R. Bambauer, Saura Masconale, and Simone M. Sepe, The Nonrandom

83 Companies can also make predictions based on “doppelgangers”—people who are similar but
not necessarily known to the user. Seth Stephens-Davidowitz, Everybody Lies 201-204
(2017). Friends can do some of that work for the predictive analytics by being verified real-life
doppelgangers.

84 See Cass R. Sunstein, The Law of Group Polarization, 10 J. Pol. Phil. 175, 177 (2002); see also
Cass R. Sunstein & Reid Hastie, Wiser: Getting Beyond Groupthink to Make Groups Smarter 44-45
(2014). Sunstein, however, leaves open the question of why deliberating groups would be homogeneous in the first place. While there are multiple explanations for the decreased role of randomness within groups, enclave deliberation is the
effect and the very purpose of social media. Radical online freedom of association encourages
constant bonding and information exchange between friends, creating intense selective exposure
to information.
the epistemic ambivalence that each participant had started with, causing beliefs to become more extreme and more strongly held.\textsuperscript{85}

Second, modern associations don’t have mechanisms for internal self-correction. Radical networks are more contingent, and have less incentive and intrinsic sense of duty to resolve disagreement. Real-life associations have the qualities of loyalty and voice that prevent social ties from disengaging if they think the other is mistaken.\textsuperscript{86} Online associations lack these procedures. Conflicts in beliefs will only be resolved through open-minded exchange if an offline relationship or individual personalities drive each participant to take on those duties.\textsuperscript{87} Otherwise, voice and loyalty are costly for social media users. There is simply too much errant information coming through the transom to respond thoughtfully, as this classic XKCD cartoon reminds us:

Moreover, sincere expressions of doubt or disagreement are costly if they might trigger a hostile reaction (which is more likely to occur in an unconstrained, online environment).\textsuperscript{88} Indeed, the fear of social opprobrium when unpopular views are shared can lead not just to disengagement but even proactive belief falsification.\textsuperscript{89} There are not enough reasons for members of a

\begin{itemize}
\item \textsuperscript{86} See supra text accompanying notes ---.
\item \textsuperscript{87} People have fewer “close friends” with whom we discuss important matters (and, presumably, trust enough to have productive disagreement) than they did in 1985. Matthew Brashears, \textit{Small Networks and High Isolation? A Reexamination of American Discussion Networks}, 33 SOCIAL NETWORKS 331 (2011).
\item \textsuperscript{88} John Suler, \textit{The Online Disinhibition Effect}, 7 CYBERPSYCH. & BEHAV. 321 (2004).
\end{itemize}
radical network that is starting to traffic in wild claims to establish trust and work to correct other members’ errors. Further, political beliefs are different from leisure and consumerism-related beliefs because there often isn’t a clear feedback loop that rewards individuals for correct beliefs and penalizes them for incorrect ones. If an individual starts to believe wild political theories and our social institutions don’t provide a check, there isn’t much else that can help discipline false political beliefs.

On top of the features that make online associations radical—low diversity and low accountability—there are also the usual culprits: cognitive distortions like confirmation bias and psycho-social phenomena like tribalism that can


92 Lillian Mason, *Uncivil Agreement: How Politics Became Our Identity* 42, 210-11 (2018); Bernard R. Berelson et al., *Voting: A Study of Opinion Formation in a Presidential Campaign* (1954); Raymond R. Reno et al., *The Transsituational Influence of Social Norms*, 64 J. PERSONALITY & SOCIAL PSYCH. 104 (1993) (when political preferences are made visible, individuals will adapt their own political preferences to be more similar to the group). In a famous study that was able to disentangle the effects of cognitive function (specifically, numeracy) and ideology, Dan Kahan found that a person’s ideology could interfere in the performance of an epistemic analysis (essentially, solving mathematics word problem) if the correct answer went against the participant’s political priors. Dan M. Kahan et al., *Motivated Numeracy and Enlightened Self-Government*, 1 BEHAVIORAL PUB. POLY 54 (2017). More interesting still, the study subjects who scored highest on numeracy had a greater degradation on performance with the politically salient math problems that ran against their beliefs than the subjects who scored lowest on numeracy. This led Kahan to conclude that the cognitive errors like the confirmation bias are less important than a form of highly motivated reasoning that operates through cold cognition and logical reasoning. Analytical people have more mental tools at their disposal to contort new facts into arguments, to themselves and others, that corroborate their preexisting beliefs. *Id.* See also Peter K. Enns & Gregory E. McAvoy, *The Role of Partisanship in Aggregate Opinion*, 34 POLIT. BEHAV. 627 (polarized individuals are impaired from
cause people erroneously to look for or retain information that is consistent with their prior beliefs or their group identity.

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

C. From Radical Associations to Physical Harm

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

In one sense, these events were the result of a long process years in the making; widespread belief that the 2020 election was stolen is just one example of a long pattern of communications that sow distrust in institutions. The January 6th riot is one point on a timeline that extends past Trump through Infowars and the Arab Spring all the way to the early days of talk radio. In another sense, the particular motivation, organization, and execution of the riot was a rapid and chaotic development.

understanding objective economic information); James N. Druckman et al., How Elite Partisan Polarization Affects Public Opinion Formation, 107 AM. POL. SCI. REV. 57 (2013) (individuals in polarized groups are less affected by substantive information on policy). In some sense, tribalism is not a break from rationality. For the small price of a false belief (often about something that we cannot control anyway, see BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES 114-141 (2007)), we achieve the hardwired goal of forming and defending social cohesion.

93 Glenn Kessler and Salvador Rizzo, President Trump’s false claims of vote fraud: a chronology, WASH POST (Nov. 5, 2020).


Social media has ushered in an era of unstructured, dynamic social movements. Radical associations are like weather systems. Even when it is obvious that a storm is brewing, it is not clear when and where lightning will strike. This poses a problem for legal systems. Law and policy take for granted that many social problems can be modeled and explained, at least partly, by relationships of cause and effect. Even when those models are multilayered a problem should be able to be broken down into its constitutive parts and tackled using straightforward interventions. But radical networks are complex systems, and complex systems are different.\(^6\) What is true of the individual parts is not necessarily true of their sum.

As explained by the 2021 Nobel laureate in physics Giorgio Parisi,\(^7\) complex systems have their own laws of nature that cannot be approximated by scaling up the behavior of individuals or small systems.\(^8\) In a general sense, it is common knowledge that phenomena such as global economies and biology are complex systems that require new models in order to explain or predict how they will behave. All of these involve multiple layers of interacting units that co-evolve and simultaneously influence one another.\(^9\) More recently, sociologists and economists have studied highly interactive social environments as another example of a complex system and have documented that networks of people are indeed complex—behaving as if they are their own entities with habits and rules that do not simply correspond to individual choices and behaviors.

One of the best examples and partial explanations of social networks as complex systems is captured by the idea of “peer effects.”\(^10\) These are behaviors that individual members of some group take on that cannot be explained simply by selection into the group. For example, studies of college student behavior find that dormmates and friend groups have a large influence on whether the

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\(^6\) On complex systems, see generally Stefan Turner et al., Introduction to the Theory of Complex Systems (2018).


\(^8\) Parisi’s work was inspired by a very influential study published in Nature in 1972 by P.W. Anderson, titled “More is Different: Broken Symmetry and the Nature of Hierarchical Structure in Science.”


student drinks heavily, uses drugs, or engages in crime.\textsuperscript{101} The rules that these social interactions seem to follow are better understood and explained when the economic models for human behavior are combined with the findings from psychology, ethnographic studies, and history, so with time and wisdom, we may come to understand how social interactions influence all parties involved. But when those interactions take place at the speed of Broadband, human behavior is bound to be less independent and less predictable.

To help ground and clarify a theory of legal responsibility for reckless associations, we will adapt some of the terminology from the network theory\textsuperscript{102} and complex systems literature. We will begin to refer to individuals who participate in one or more association as “nodes” within “networks.” Now, if these networks evolved independently, the multilayer networks that make up actual human interactions would simply be a superposition of different networks. But of course, this is not the case. Individuals participate in multiple networks, and so there are frequent interactions within and across networks, causing each network and the ecosystem as a whole to co-evolve over time.

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

While some complex systems involve interactions between elements that can be described as deterministic—such as the chaotic-looking movements of a double pendulum—other systems (like social networks) are not deterministic; they are stochastic. That is, we can hope to understand the chance that some result or reaction will occur as a result of prior actions, but these discovered rules will always be probabilistic in nature rather than a certainty.

Finally, the last concept from the complex systems literature that we need to import is the concept of “states.”\textsuperscript{103} These are the qualities of the individual elements (in our case, people) that describe how they are likely to behave and interact with other elements. In our case, the states that each individual will be

\begin{footnotesize}
\textsuperscript{101} Bruce Sacerdote, \textit{Peer Effects in Education: How Might They Work, How Big Are They, and How Much Do We Know Thus Far?}, 3 HANDBOOK OF ECON. OF EDUC. 249 (2011). Studies of peer effects have had to overcome what’s known as the “reflection problem.” If we try to predict the behavior of an individual based on the behavior of the group of which they are a member, how do we know which direction the causal arrow points? \textit{See Charles Manski, Identification Problems in the Social Sciences} (1995).


\textsuperscript{103} \textit{See Turner, supra note 97} at 4, 21 (defining the concept of “states”).
\end{footnotesize}
in relate to their beliefs, identities, and propensities to take action. These are the qualities of individuals within informal associations that will be altered based on the interactions that they have with others. An omniscient onlooker might be able to see how a person’s preferences for movies changes over time depending on how she interacts with others over various platforms and real-life social groups.

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

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

D. Strained Legal Theories

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

Incitement requires speech directed at an audience designed to cause imminent unlawful action. It is a strange legal claim because it is extremely narrow thanks to constitutional requirements that require the inciter’s speech to be temporally and motivationally bound to the lawlessness, and yet it is also mysteriously permissive, potentially holding a speaker responsible for the rash conduct of a stranger who has no previous engagement with the speaker. This appears, to modern eyes at least, to be a form of liability that undermines the

\[\text{104 Brandenberg v. Ohio, 395 U.S. 444, 447 (1969).}\]
assumption that the listener who engages in the illegal conduct ordinarily has control over his reactions.\footnote{Indeed, attempts by government to censor a speaker because the speech might make the audience hostile and violent to the speaker (what is sometimes referred to as the “hostile audience” doctrine) has been all but abandoned. Fred Schauer, Costs and Challenges of the Hostile Audience, 94 NOTRE DAME L. REV. 1671 (2019).}

Where it has been successfully used, for example to prosecute attendees and organizers of the “Unite the Right” rally in Charlottesville, it has accompanied allegations that the defendants also engaged in the violence themselves (and therefore adds little deterrence value.)\footnote{U.S. DEPT OF JUSTICE, Three Members of California-Based White Supremacist Group Sentenced on Riots Charges Related to August 2017 “Unite the Right” Rally in Charlottesville, The United States Attorney’s Office Western District of Virginia (July 19, 2019), https://www.justice.gov/usao-wdva/pr/three-members-california-based-white-supremacist-group-sentenced-riots-charges-related.} Organizers of the Charlottesville protest admitted to shoving and pushing counter-protesters without justification, and thus faced direct legal liability for their actions. If this were not the case, the incitement claims standing alone would founder.

Several individuals who were harmed by the Charlottesville rally have brought a civil claim for incitement against leaders of groups and loose-knit organizations who encouraged people to attend the “Unite the Right” rally using incendiary racist and antisemitic appeals.\footnote{Sines v. Kessler, Complaint, Civil Action No. 3:17-cv-00072-NKM (W.D. Va. filed Sept. 17, 2019).} Except for the named defendants who actually committed batteries and assaults against the plaintiffs\footnote{Id. The count for assault and battery lists only one of the defendants—Fields. \textit{Id.} at 108. We cannot tell from the complaint alone whether plaintiffs had evidence that the other defendants committed acts of physical violence.}, we expect this claim to eventually fail. After all, the U.S. Supreme Court case that constrained the law of incitement—\textit{Brandenberg v. Ohio}—involved a KKK leader who stated at a rally that if the white race continues to be oppressed, “there might have to be some revengeance taken.” The Court found that advocating violence is constitutionally protected. An incitement prosecution is only permissible if the speaker incites \textit{imminent} unlawful conduct.\footnote{Brandenberg, 395 U.S. at 446.}

In the case of Charlottesville organizers, with a few possible exceptions, the defendants who did not actually carry out physical assaults did not seem to meet the standards for incitement. Very little in the over 100-page complaint demonstrates an explicit direction or order to immediately start physically attacking peaceful counter-protesters.\footnote{Sines v. Kessler, Complaint, Civil Action No. 3:17-cv-00072-NKM. One exception are communications sent in real time while the Charlottesville police were attempting to clear out a}
organizers had the intent and purpose to commit murder (as opposed to a cold indifference to the potential result.) Given the defendants’ credible claims that their purpose was to make an expressive mark in the political discourse using offensive, incendiary, and even intimidating language, their conduct and mental state look indistinguishable from other organizers of other ugly spectacles. For example, in *Village of Skokie*, the Supreme Court recognized a First Amendment right for Nazis to organize a march.\(^{111}\) When the attorneys for the plaintiffs who successfully sued the Charlottesville organizers explained that they wanted to hold march organizers responsible to deter other hate groups from mounting “similar toxic spectacles in the future”\(^{112}\) it puts in sharp relief the tension between the case and the constitutional precedent that fully protects toxic spectacles.

Claims brought against the group leaders for conspiracy to commit violence are also on shaky ground because much of the evidence demonstrates a plan to prepare for self-defense and a sort of blood-lust desire to be in a position where self-defense would become necessary. There is less evidence that the defendants actually “executed a common plan” to engage in unprovoked violence.\(^{113}\)

Nevertheless, even if the vehicles for recovery are misfits for a case of this nature, we are convinced that the plaintiffs in the Charlottesville case should have a meritorious claim against the de facto leaders of the various radical networks that participated in the violent Charlottesville protests. The lawsuits are just, even if elements of conspiracy and incitement are not met, because the organizers were critical actors in a communications network that did nothing to discipline the increasingly paranoid beliefs of its members before the highly predictable and violent results. The trove of communications at the plaintiffs’ disposal clearly shows that associations like the Proud Boys or the Daily Stormer’s readership are led by individuals who take precautions against their own risk of violating law (indeed, there was an entire channel on the social media platform Discord dedicated to explaining Virginia law) but make no attempt to curb the excesses and obvious pandemonium of the network as a whole. Moreover, the visible and well-organized events in Charlottesville and at the Capitol riot on January 6\(^{th}\) are not the only examples of physical harm that were caused by leaders of radical networks. The QAnon network alone has inspired individuals at the edge of the networks to make bombs, to drive an armored park that rally attendees should “HOLD YOUR FUCKING GROUND. DON’T RETREAT. DON’T GIVE AN INCH.” Id. at 73.

\(^{112}\) Neil MacFarquhar, Jury Finds Rally Organizers Responsible for Charlottesville Violence, N.Y. TIMES ((Nov. 23, 2021)
vehicles with 900 rounds of ammunition onto the Hoover Dam, to commit murder and kidnapping, and to derail a train. These scattered events have the same causal sources (Q and the leading QAnon interpreters), but secondary liability wouldn’t reach them even under significantly looser conceptions of conspiracy and incitement liability.

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

III. RADICAL ASSOCIATIONS AND TORT FIRST PRINCIPLES

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

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

A. The Compensation and Harm Principles

One of the primary functions of the state (and of tort law) is to limit the conduct of individuals when that conduct unduly impedes the freedom of others. Even dyed-in-the-wool libertarians like Robert Nozick understand that the state must mediate freedom versus freedom clashes in order to achieve a minimum (or optimal) level of freedom for everybody.115 The rules for fair play are in a persistent state of contestation and revision. Some rules, like those that forbid individuals from committing violence on one another, are highly stable because the costs to the victims’ liberty is so obviously greater than the costs to an inhibited actor who might like to perform violence. But the less obvious and well-settled areas of liberty versus liberty trade-offs must find balance between competing claims of right.

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

Nozick anticipated that law might forbid an activity and compensate those for whom it is forbidden.116 This works well enough for some purposes (like eminent domain) but the administrability and potential for strategic claims are too great in many contexts. A similar form of partial prohibition could involve a preclearance process, where an activity is banned unless an actor affirmatively proves to the state that its conduct is justified. This describes the processes we currently use for introducing new pharmaceutical drugs and medical devices into the market. A property rule, where property rights are assigned to the potential victims, is another example of a partial ban. An actor would have to engage in a preclearance process, but with individuals (the potential victims) rather than with the government.117

116 Id. at 78, 83.
The alternative to partial bans is partial liberty. A liability rule allows risky activities to take place, but requires those who engage in them to compensate individuals if the conduct results in harm. This compensation principle, which is the bedrock of tort law, is the most apt to address problems caused by radical associations. First, it is clear that freedom of association is not the sort of activity that is so inherently risky (akin to murder or violence) that it should be banned outright, and without compensation. The benefits of shared bonds (not to mention the biological and psychological need for them) are great, and radically free associations produce value to society as we discussed in Part II.

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

This leaves us with the two possibilities in the murky middle—partial prohibitions (where an activity is presumptively prohibited regardless of risk) or partial freedoms (where an activity is presumptively permitted). First Amendment precedent would very likely preclude partial prohibitions of associations for the same reason that prior restraints on speech are highly suspect and rarely constitutional. A system that generally prohibits First Amendment-protected activities and puts the state in charge of exceptions to those bans would have to satisfy the strictest scrutiny. The Supreme Court has also cast doubt on legal rights that require speakers to receive permission and consent from private individuals before engaging in First Amendment-protected activities. If ex ante oversight and permission schemes cannot be imposed, the best way to deter risky behavior is to use ex post enforcement. That is, we must live with a general rule of freedom and permissiveness accompanied, though, by

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118 See Joel Feinberg: The Moral Limits of Criminal Law – Harm to Others 10-12 (1987), (discussing the “harm to others” principle as the basic principle to justify liberty-limiting principles).
a compensation rule that forces actors to pay for the harm they have caused. From a First Amendment perspective, an ex post liability rule ensures that regulation is not based on a speculative or exaggerated sense of threat since a plaintiff would have to prove damages in order to clear the summary judgment bar.122

Finally, there is the matter of which actors should compensate victims based on the illegal conduct of group members. One option—the one that most readily comes to mind to most policymakers and legal scholars given their choice place as a communications bottleneck—are the platforms. These are the actors who provide the infrastructure for networks of individuals to form informal (or formal) groups that go on to cause unlawful conduct based on delusional beliefs. But platform liability is likely to be both under- and over-inclusive. For the former, a liability rule applied to platforms will miss the applications such as Telegram, WhatsApp and Signal that are specifically designed for end-to-end encrypted communications. While it is tempting to assume public forums like Facebook and Twitter are the main sources of dysfunction and harm arising from radical associations, WhatsApp and Telegram have become semi-public forums as well, hosting chats with dozens or hundreds of people at a time. If Facebook and Twitter alone faced potential liability, they would do more purging of their rosters, and the end-to-end encrypted applications will become the primary venue for frictionless associations (if they aren’t already.)

Imposing a liability rule on platforms is also overinclusive. It would be sure to cause an excessive amount of content moderation and user bans because the costs of liability outweigh the benefits to the platforms, even if the benefits to its users are great. This is particularly so in cases where a platform might suspect that risky hate groups are speaking in code or will be playing with the boundary between sarcasm and earnest communications. Thus, a liability rule imposed on platforms would very likely produce more chilling effects than necessary, and for that reason may not be able to survive a First Amendment tailoring analysis.123

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

122 Rest. (2d) Torts §281. This limitation is becoming increasingly necessary for any lawsuit that proceeds in federal court. TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021); Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016).
123 We discuss this at length infra Part VI.
Ultimately, the goal is to identify the de facto leaders of radical associations that have caused not only epistemic dysfunction but disordered conduct that has harmed others. The liability rule that we will propose is similar to treating the agents or trustees of a formal entity (like a corporation) responsible for the harm caused by that entity. We lay out the specific principles and standards for liability in the next Part, but at a high level, what we propose is a new layer of legal responsibility that identifies actors whose relationship to wrongdoers is not quite as formalized as the typical principal-agent or corporate relationships, but whose relationship to others is still clear and consistent enough to apply secondary liability for reasons similar to tort liability for dram shops that overserve their patrons.

B. Filling Pockets of Underdeterrence

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

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

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

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

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

Cases involving the “negligent entrustment of a dangerous instrumentality
to an incompetent user” follow this pattern as well. In Hamilton v. Accu-Tek,
for example, a New York court held that a gun manufacturer could be sued for
negligently marketing and distributing guns in a manner that foreseeably found

124 Rest. (2d) Agency § 220 (listing factors when determining if there is a principal-agent
relationship.)
125 See discussion of the incitement and conspiracy cases supra Part II.
126 Review of Statutory Provisions, 1 LIQUOR LIAB. L. §5.03; Peter A. Slepchuk, Note, Social Host
(2011);
127 Benjamin Zipursky and John Goldberg, The Restatement (Third) and the Place of Duty in Negligence
their way onto the black market through gun show loopholes when one such gun was used by a third party to shoot the plaintiff during an armed robbery.\textsuperscript{128} Parents of teenagers who committed school shootings have also been held criminally responsible for failing to secure their guns. In one case, the parents were charged with involuntary manslaughter for homicides committed by their son because the school had provided notice just one day earlier that their son was searching for ammunition online, and the parents not only continued to give him access to a gun but joked that he needs to learn to not get caught.\textsuperscript{129}

An even more analogous case, because it should be similarly covered by the scope of the First Amendment, is \textit{Weirum v. RKO}.\textsuperscript{130} In this case, a radio station set up a contest where the first listener to locate a popular radio DJ out in the streets would win a prize. Although the contest did not require, or explicitly encourage, listeners to drive unsafely in their pursuit of the DJ, the court concluded that it was entirely foreseeable that the contest would have that effect and would consequently put third parties who weren’t participating in the contest at heightened risk. This case is controversial; cases following a similar theory have been brought against Snapchat based on the design of its speed filter, which many young drivers were using to document the high speeds with which they drove their car (right before smashing into the plaintiffs), and courts have been unwilling to extend negligence or products liability under those facts.\textsuperscript{131}

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

\textsuperscript{130} Weirum v. RKO General, Inc., 15 Cal.3d 40 (Cal. 1975). Note, though, that this case involves facts that would probably fall under the less protected category of commercial speech. Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983).
\textsuperscript{131} Maynard v. Snapchat, Case No. A20A1218 (Ga. Ct. of Appeals 2020). But see the dissenting opinion, noting “The novelty of the technology and the circumstances at issue should not distract us. There is nothing novel about the legal questions before us. The Maynards’ allegations fall squarely within the requirements for stating a claim for defective design…Contrary to the majority’s new rule, the existing rule is that ‘reasonably foreseeable product use or misuse is a factor in considering whether a manufacturer may be liable for a defective product which was a proximate cause of harm resulting from the failure to adopt a reasonable alternative design.’"
normally be the case, and the central nodes—the actors who encouraged increasingly paranoid and antisocial thinking over a sustained period of intense interactions—to be somewhat more morally culpable, extension of liability is appropriate.

C. New Opportunities for Ex Post Enforcement

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

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

IV. SECONDARY LIABILITY FOR RECKLESS ASSOCIATION

At last, we have the background necessary to work out the appropriate elements and limitations of a liability rule for reckless association. This Part

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

A. The Elements

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

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

The damages required, we suggest, should relate to intentional physical harm. While property damages and severe emotional distress can also be compensated when accompanying physical harm, the novelty of this form of secondary liability requires strict limitations in its application, especially as courts and society come to understand and adjust to it. A radical movement that produces physical violence is qualitatively different from one that maintains enough discipline to cause fear and property damage but no intentional physical injury (or so it seems to us.)

The defendant’s act, “assuming a position of leadership,” requires the plaintiff to prove that the defendants were such active and influential members of the association that a network graph can easily identify them as central nodes. There are a number of ways to measure centrality in network and graph theory, and thus, there are a range of threshold criteria that could be set to ensure that an identified central node is very likely to have the quality of a de facto leader of a network.134 Courts could even require a plaintiff to prove that the defendant meets more than one criteria for network centrality. The essential purpose of this element, in any case, is to ensure that the defendant was highly active within a radical network, and was also highly influential and knowledgeable about it. These qualities will be necessary anyway for the plaintiff to prove causation and recklessness.

The rest of this Part will elaborate those elements—causation and recklessness. Since a putative defendant’s acts are constituted entirely by First

Amendment-protected conduct (communicating and associating), liability can only survive a constitutional challenge if it is firmly connected to harm, caused by the defendant, and with a sufficient mental state. Since we propose limiting liability to cases where the plaintiff has become the victim of a crime that causes physical injury, the constitutional requirement for concrete harm is easily met. Causation and mental state are the requirements that need the greatest care and shoring up.

B. Sufficient Causation

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

Generally speaking, tort law requires the plaintiff to prove that the defendant’s conduct was a necessary condition, but does not require proof that the defendant alone was sufficient to cause the accident. The black letter law asks whether the accident would have occurred in the absence of the defendant’s tortious conduct. If the defendant’s negligent conduct (e.g. an oil spill) was insufficient on its own to cause the accident (a fire), this will not stop the plaintiff from being compensated when other necessary conditions (e.g. a spark) interact with the defendant’s negligence. But if the defendant’s negligent conduct, such as an oil spill, is an unnecessary condition for the accident, for example because a fire of much greater proportion was already racing through the town on a trajectory certain to reach and destroy the plaintiff’s property on the same schedule, then the plaintiff will fail to prove factual causation. However, there are exceptions to this general rule when evidentiary disadvantages are likely to plague every case of a certain sort, causing unjust pockets of effective immunity.

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136 Rest. 3d Torts §26.
137 For example, the loss of chance doctrine was developed and continues to be used in the context of medical malpractice even though doctor negligence isn’t a “but for” cause of death because otherwise, the class of terminally ill patients would be effectively barred from suing negligent doctors, causing compensation gaps and deterrence problems. Rest. 3d §26 comment
Network Causation Versus Correlation. It is critical to differentiate the acts of reckless associations from the acts of “lone wolf” actors with mental illness or other traits that make them equally likely to commit the crime irrespective of the association’s activity. The indicia of a reckless association would have to rely on two sources of evidence. Either the actor’s own speech and media diet provide strong evidence that his motive was greatly influenced (caused, in other words) by a radical association, or the actor was one of a series of criminal attacks committed by members of network who are not directly connected to each other. When either of these patterns is discovered, the central node of the apparent radical network can be sued for breaching a duty owed to their group.

Using January 6th again, if a network defined by Trump’s Twitter following had 88 million individuals in it, and only a few thousand stormed the Capitol, can it be said that Trump or other de facto leaders of the march on the Capitol caused members of their group to engage in criminal acts? Harder still, if only one person took on the task of raiding Comet pizza in order to release children he believed were locked in the basement, was that conduct caused by an insider like Alex Jones? Here, too, tort doctrine has already supplied an answer and explanation. Even if there is only one seemingly isolated event, if the defendant made the event much more likely to occur as compared to the background, baseline risk, then that increase in risk can be attributed to the defendant. A person who intensively engages with a social network dominated by hate speech and conspiracy theories is much more likely to engage in violent action than an individual interacting in a more typical social network, even though there is of course some baseline risk that somebody in the more typical social network will also commit a crime.

The DES cases like Sindell work the same way: even the daughters of women who took DES were very unlikely to get cancer as a result of the pills. However, the form of cancer was so exceedingly rare in “the wild” that it was obvious the pills caused the risk to increase by an order of magnitude or more. (And because that increase in risk was known to the manufacturers and could not be justified by offsetting benefits, the pharmaceutical manufacturers not only caused the cancer, but negligently caused it.)

Multiple sufficient radical networks. Black letter law can easily address questions of causation that involve multiple necessary causes, some of which are tortious (e.g., the oil spill and the spark.) A separate, more exceptional caselaw has

developed to address multiple causes each of which may have been sufficient to cause the harm.\footnote{Elam v. Alcolac, Inc., 765 S.W.2d 42, 174 (Mo. Ct. App. 1988).} In these cases, the plaintiff’s injury is “overdetermined” because harm could only be avoided by eliminating multiple sources of causation. Two fires of equal size that reach the same property at the same time is the simple analogy: the plaintiff’s property could not be saved by imagining the counterfactual where one (and only one) of the fires is eliminated. To avoid under-deterrence, courts have lifted the requirement to prove but-for causation in cases where the plaintiff’s harm was (probably) caused by multiple acts which each would have been a sufficient cause.\footnote{Rest. 3d Torts §27.}

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

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

A natural instinct is to look at the content of the defendant’s communications to see if, e.g., the defendant was the first to float the idea of a conspiracy theory. But this would be a mistake, both in terms of avoiding a clash with the First Amendment and in terms of identifying the actors who do the most to keep a paranoid theory churning and growing. Network activity, rather than the content of speech, is at the heart of this particular form of liability. Thus, network analysis of the centrality of each node will reveal the extent to which each member of an association assumed a position of authority in the actor’s sphere of influence.
A causation analysis will have to rely on an analysis of each node. A node is more likely to be a cause of group disorder if they have a higher “degree” (or connections to other nodes, and particularly “out degrees” which measure the communications connections for which the node is a source of information rather than a recipient) and a greater amount of “centrality.”\(^\text{140}\) As we said, there are several ways to measure centrality, but some (closeness and betweenness centrality) are more fitting than others. Together, these two measures can establish the frequency with which the actor who harmed the plaintiff was targeted by each node. In some cases, some nodes will emerge as more-likely-than-not causes of their network’s derangement because the removal of a central node would leave the third-party actor with dramatically fewer impressions and communications received.

If the defendant, a central node in one of the radicalizing networks, can be shown to be a but-for cause of the network’s radicalization, there would be no causation problem. For example, if it were the case that by removing Donald Trump’s communications (including re-tweets and posts referring to his messages), the remaining “Stop the Steal” messages would have been less than half in number, then Trump would be a but-for cause of the radicalization of a network that produced the conduct of the rioters. In these cases, defendants like Donald Trump would fit what some have called the “INUS” condition—he would be an Insufficient-but-Necessary part of an Unnecessary but Sufficient Cause\(^\text{141}\)—and this now fits comfortably within tort theories of causation.

Harder cases occur when the removal of one node still leaves combinations of other nodes that sustain nearly as much interaction with the third-party actor such that even in the defendant’s absence, the third-party actor was still likely to harm the plaintiff.\(^\text{142}\) This, too, is a sufficiently common problem that it has made its way into case law and the Third Restatement of Torts.\(^\text{143}\) Consider the following illustration:\(^\text{144}\):

\(^{140}\) TURNER, supra note 97 at 150 (defining centrality).

\(^{141}\) See J. L. Mackie, Causes and Conditions, 2 AM. PHIL. QUART. 245 (1965).

\(^{142}\) A similar problem the defendant’s conduct is tortious because it is marginally more risky than other, non-tortious, conduct. In these cases, courts are supposed to imagine a counterfactual in which the defendant uses behavior that falls just short of the negligence line. Courts are not supposed to imagine the counterfactual world in which the defendant simply does not exist, or stops his activities completely. Rest. 3d Torts §26 (Illustration 2 and accompanying text).

\(^{143}\) The Third Restatement of Torts would treat the defendant’s conduct as part of a “causal set” within the multiple sufficient causes of the plaintiff’s injury. Rest. 3d Torts §27 comment (a) and (f).

\(^{144}\) Rest. 3d Torts §27 comment (f).
Illustration 3. Able, Baker, and Charlie, acting independently but simultaneously, each negligently lean on Paul’s car, which is parked at a scenic overlook at the edge of a mountain. Their combined force results in the car rolling over the edge of a diminutive curbstone and plummeting down the mountain to its destruction. The force exerted by each of Able, Baker, and Charlie would have been insufficient to propel Paul’s car past the curbstone, but the combined force of any two of them is sufficient. Able, Baker, and Charlie are each a factual cause of the destruction of Paul’s car.

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

Putting it together. Is it appropriate to hold a defendant accountable for being a necessary part of a radicalized network that was a sufficient cause of harm to the plaintiff if the causal chains still depend on the intentional and illegal conduct of a third party—the member of the network who actually attacks the plaintiff? The form of tort liability we propose requires some flexibility across several dimensions in order to work. The doctrine of unnecessary but sufficient cause is not usually combined with doctrines related to secondary liability—where the accident that is caused is another, presumptively agentic, person doing something illegal. But the rationales for both secondary liability (discussed in the Part III) and for accepting sufficient causes (discussed here) survive the combination. A de facto leader of a radical online association greatly increases the risk of victimization to outsiders, and when those risks come to pass, the leader is a factual cause of the harm. Although the instrumentality in these cases is another person—a member of the association—the leader is as factually connected to the harm as any other defendant in similarly complex accidents (for example in the context of medicine, where multiple actors and multiple preexisting or natural causes combine to produce a negative outcome.)

Factual causation is an analytically difficult element in the tort, but in the right cases with the right facts, we have little doubt there can be evidence that easily clears the bar. For example, an analysis of QAnon conspiracy theories on YouTube found that QAnon messaging was highly concentrated: just 11 channels were responsible for producing 80% of all videos mentioning QAnon.
within the universe of YouTube’s most popular news channels. If an avid viewer commits an act of physical violence based on a conspiracy theory, it is likely the plaintiff would be able to prove that one or two of the channel owners meets the qualifications for factual causation.

As for the moral case against the defendant, we consider this next.

C. Sufficient Mental State

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

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

145 Four of the eleven channels mentioned QAnon in more than half of their videos. 5 Facts About the Q-Anon Conspiracy Theories, PEW RESEARCH CENTER (Nov. 16, 2020).

146 With respect to policy, tort law generally restricts strict liability to inherently dangerous activities for which there is little social loss if the activity level goes down. Steven Shavell, Strict Liability Versus Negligence, 9 J. LEG. STUD. 1 (1980). With respect to the First Amendment, courts would probably rely on cases like Gertz v. Robert Welch, Inc. and find that defendants need to have at least a negligent mental state in order to be forced to pay damages based on expressive activities. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

147 At the risk of referencing nearly every unusual doctrine within the law of negligence, we can’t help but point out that this burden shifting is similar to the procedures that accompany cases based on the Res Ipsa Loquitur doctrine. William L. Prosser, The Procedural Effect of Res Ipsa Loquitur, 3 MINN. L. REV. 241 (1936).
Put another way, recall that in Part III, we suggested that a problem with modern, Internet-connected associations is that the probability distribution of each member’s likelihood of doing something foolish or committing a harmful act can shift suddenly because of feedback loops and peer effects. The central nodes of a radicalized social network has the best possible view—better than employees and even AI algorithms of an online platform—to see the changes in the probability distributions of its members.

A defendant can challenge the plaintiff’s case by demonstrating that he or she attempted to redirect the energy of the group into a non-criminal direction. Indeed, even the most conscientious leaders of social movements will not have perfect success maintaining peace and fairness throughout the movement’s ranks. Mahatma Gandhi and Martin Luther King, Jr., were both leaders of social movements that had moments of violence and destruction. Yet both made compelling arguments and earnest pleas to their respective associations’ members to refrain from physical violence, and these statements were of a piece with their other speeches, teachings, and activities.

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

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

\[\text{148}\] In Gandhi’s case, early in his career, protesters set a liquor shop and police station on fire. Gandhi personally intervened to ensure that the individuals trapped in the liquor shop were saved. MARK L. SCHRAD, SMASHING THE LIQUOR MACHINE 208-09 (2020). A march that Dr. King led in Memphis resulted in looting. King’s Last March, APM REPORTS, at https://features.apmreports.org/arw/king/c1.html.

\[\text{149}\] In response to the violence, Gandhi called off his civil disobedience campaign for a period and engaged in prayer and fasting for penance, writing “If I can have nothing to do with the organized violence of the Government, I can have less to do with the unorganized violence of the people. I would prefer to be crushed between the two.” SCHRAD, supra note 149 at 209. King considered a similar fast to unify and discipline the movement. APM REPORTS, supra note 149. In other speeches and writing, King showed that he understood and empathized with violent protest, but also made strong distinctions between property damage and physical violence. “Occasionally in life one develops a conviction so precious and meaningful that he will stand on it till the end. This is what I have found in nonviolence.” Martin Luther King, Jr., WHERE DO WE GO FROM HERE (1967).
Finally, two features of this sort of liability are worth highlighting. First, unlike many forms of unprotected speech, secondary liability for leaders of dysfunctional associations does not hinge on proof of a malicious intent—that is, having knowledge or purpose of causing harm to the plaintiff. This means that, when analogizing to unprotected speech, the form of liability we propose is less similar to incitement (which requires the intent to produce imminent lawless action\textsuperscript{150}) and more similar to negligent speech cases (which do not.)

Negligent speech cases have imposed liability on speakers who should have known that their speech would persuade a listener or reader to engage in lawless conduct. For example, in \textit{Rice v. Paladin} (the “hitman case”), the publisher of a how-to book that described how to get away with a murder was found liable for aiding and abetting a wrongful death when a reader used the book to plot a homicide.\textsuperscript{151} And yet, while the actual hitman had the purpose to kill the victim, the publisher did not. So, despite the “aiding and abetting” language, the case stood on a theory that required only a negligent or reckless mental state. \textit{Weirum}, the case where the defendant radio station was held liable for harm caused to a third-party victim when they negligently incentivized listeners to drive recklessly through public streets, is also an example of a negligent speech case.\textsuperscript{152}

To be sure, it is not unambiguously clear that these forms of liability for negligent speech can actually survive First Amendment review if they were truly put to the test, particularly since liability in these cases is based on the content of the speech. After all, if the First Amendment requires prosecutors to prove that a person who has incited violence has not only caused the result but intended it too, why should the state be able to punish speech that causes accidents without proving a knowing or purposeful mental state?\textsuperscript{153}

These cases strike us as troubling when the state punishes individuals based on their speech and nothing more, as is arguably the case in both \textit{Paladin} and \textit{Weirum}. However, secondary liability for reckless association is not content-

\textsuperscript{150} Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam) (extending First Amendment protection to speech advocating crime unless it is—directed to inciting or producing imminent lawless action and—likely to incite or produce such action).

\textsuperscript{151} Rice v. Paladin, 128 F.3d 233, 239, 241-42 (4th Cir. 1997). The court relied on stipulations of the publisher that it knew and intended that the book would be used by would-be criminals to find purposeful aiding and abetting in the case.

\textsuperscript{152} Weirum v. RKO General, Inc., 15 Cal.3d 40 (Cal. 1975). See also Navarette v. Meyer, 237 Cal.App.4th 1276 (2015) (holding a passenger in a car liable to harm caused to others by telling the driver to “go faster”).

\textsuperscript{153} Note, though, that liability for material support to a recognized terrorist organization requires only that the defendant know that the organization they are assisting is a designated organization. It does not require knowledge or purpose that the aid provided will assist the group. Heidi Kitrosser, \textit{Free Speech and National Security Bootstraps}, 86 FORDHAM L. REV. 509, 514 (2017).
based. It is not even speech-based. Rather, while speech will form a significant part of the evidentiary support for a plaintiff’s case, the liability is imposed based on long-term malevolent association. No one utterance within that association will trigger liability on its own.

In fact, because liability of the sort we propose does not depend on any particular communications of the actor, it has the greatest chance of piercing through the immunity that shields Trump and Jones from liability based on their speech (which will often studiously avoid the bounds of incitement or true threats). To the contrary, liability is assigned based on emergent qualities of a group that have unknown relationship to the specific messages shared within the group. It is the conduct of group members, and the de facto leadership of the defendant, that matter.

V. Objections

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

A. Chilling Effects

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

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

The risk of overdeterrence is mitigated in the design of the elements. Some of the work is done by the harm requirement: since a plaintiff cannot sue unless he or she has been physically harmed, leaders of networks do not need to fear that they will be penalized for the creation of unrealized risk. In order to prove that a network caused a member of the network to make a physical attack, the plaintiff will also have to offer proof of a sort that would fail in cases where the third-party actor more likely than not would have harmed the plaintiff regardless of the network’s activity. A semantic and network analysis of the defendant’s body of communications to the third-party actor, or the third-party actor’s own communications before and after he started interacting with the defendant, will protect defendants who unwittingly (or even intentionally) attracted already-radicalized members.

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

Thus, our hope and expectation is that liability based on recklessly leading a dysfunctional association is narrow enough to avoid creating a chilling effect for

154 This is one way in which Reckless Association is narrower than liability for incitement or conspiracy, which can be applied based on inchoate harms.
155 The persistence of the defendant’s communications to network members helps separate these cases from constitutionally suspect forms of liability that would apply to artists or entertainers who produce works that reach large audiences. Volokh, supra note 8 at 1162 (describing how purely entertaining crime-facilitating speech has high value and should be fully protected). To be sure, this tort does not require that a defendant share a purpose with the actor to commit an act of physical violence, and so falls short of the heightened mental state requirements that Volokh argues should be required in the somewhat related context of crime-facilitating speech. Id. at 1178-79.
legitimate associations. A leader of a group can avoid liability by either leading in a more responsible way or by willfully abandoning his position of authority.

Finally, and perhaps most importantly, the problem with holding leaders of a movement responsible for the actions of their members is not as fraught as it might seem. The leaders in the Civil Rights era intentionally violated laws that we now understand to be irredeemably flawed. By participating with other members of the movement, civil rights leaders had skin in the game. King engaged in civil disobedience himself, and exposed himself to the same legal repercussions as his followers. (And at the same time, he disavowed violent disobedience.) Bobby Seale and Huey P. Newton plainly and honestly advocated for violent protest, participated in it, and exposed themselves to the same legal repercussions as other members of the Black Panthers. Thus, for high integrity group leaders, secondary liability is no threat because they take joint responsibility for the actions of their members. Secondary liability internalizes the externalities for low integrity group leaders who gradually agitate their members into violence without sharing the legal risks.

B. A Deluge of Disclaimers

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

No doubt some individuals will engage in strategic behavior to avoid the risk of liability under this new tort. And some defendants may indeed avoid liability using disclaimers despite being morally guilty in some cosmic sense. But this will certainly not render the tort moot or wasteful. First, in some cases, plaintiffs will be able to convince a fact-finder that the defendant’s disavowal was designed to be weak, or to use code that the network would understand should be ignored. In these cases, the plaintiff will be able to succeed despite the defendant’s efforts to shield himself. Moreover, a network that circulates messages that are contradictory, like “we need to ACT NOW to TAKE BACK OUR COUNTRY” and “our protest should be peaceful,” are in fact likely to instill some confusion and uncertainty among the members. As a result, the edge nodes of a network will be less likely to act. Thus, even if they are inauthentic,

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156 At the very least, ex post liability does not impose across-the-board burdens on groups of every sort the way a registration requirement or campaign contribution limit would. Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290 (1981)
the disclaimers will have precisely the sort of moderating effect that the tort is designed to induce.

C. Biased Enforcement

The examples we have provided to illustrate (and indeed motivate) this Article come from the Republican side of the political spectrum. We believe this has less to do with our personal biases and more to do with the fact that radicalizing trends have been prevalent in right-wing media circles for longer than they have been on the left.\textsuperscript{157} Nevertheless, the asymmetry in our examples should raise eyebrows: is the tort likely to be wielded in a politically biased manner? And even if cases are decided fairly, is it likely to be \textit{perceived} as an instrument of political subjugation?\textsuperscript{2}

At the outset, it is worth noting that any law can be enforced unevenly, and can therefore be exploited by adherents of one political party to harass activists of another. But liability based on expressive activity is particularly vulnerable to the problem since the speech that is likely to be used as evidence in a case is also likely to have a political valence. It will be more difficult to separate a fact-finder’s political orientation from the facts of a Reckless Association tort case than it will be to separate it from the facts of a car accident case, or any other case where speech and beliefs are not part of the analysis.\textsuperscript{158}

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

Nevertheless, perceptions of bias must also be taken seriously. Most Americans believe that social media fact-checking is biased, and yet progressives largely favor more fact-checking while conservatives want platforms to do

\textsuperscript{157} Benkler, \textit{supra} note 96 at 82-90.

\textsuperscript{158} This is not to say that these non-speech laws can’t be enforced with bias, of course. Glenn Harlan Reynolds, \textit{Ham Sandwich Nation: Due Process When Everything Is a Crime}, 113 COLUM. L. REV. SIDEBAR 102, 105 (2013).
less. This is especially troubling given the level of political polarization in operation. If tort liability for Reckless Association were introduced ten years ago, perceptions of bias might be a minor problem. Today in part because of the paranoia and conspiracy thinking brought on by radical freedom of association, any unevenness in enforcement will be understood as evidence of bias. Another way to put this is that de facto leaders of large radical networks pose an odd challenge: on one hand, holding them responsible for downstream violence offers the greatest chance of effective deterrence. On the other hand, those cases are the most likely to create distrust in courts for a significant portion of the population. Nevertheless, while these concerns are real, they are again less bad in the context of tort liability than they are for criminal prosecutions and other overinclusive reforms.

CONCLUSION

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

It is clear enough that the radical freedom of online associations predictably causes individuals to associate in likeminded groups where peer effects and feedback loops lead to increasingly deluded beliefs. Society needs law and social norms to place responsibility for these dynamics on the set of people who can most easily monitor and avoid the problems. Contrary to popular belief, that set of people is not the executives and employees of major tech platforms. It is the users themselves—particularly the informal leaders who benefit from the fame

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159 David Kemp & Emily Ekins, Poll: 75% Don’t Trust Social Media to Make Fair Content Moderation Decisions, 60% Want More Control Over Posts They See, CATO (Dec. 15, 2021).

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

161 Indeed, the very notion of trustworthiness is meant to be a bulwark against the threat of false claims. MASON, supra note 27 at 38 (discussing the political consequences of shared affinity and association with our social ties).
and financial rewards of the radicalization process without shouldering any of the risk.

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