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Changing Counterspeech

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CHANGING COUNTERSPEECH

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ABSTRACT

A cornerstone of First Amendment doctrine is that counterspeech — speech that responds to speech, including disfavored, unpopular, or offensive speech — is preferable to government censorship or speech regulation. The counterspeech doctrine is often invoked to justify overturning or limiting legislation, regulation, or other government action. Counterspeech forms part of the rationale for the "marketplace of ideas" that the First Amendment is arguably designed to promote. Yet critics assert that counterspeech is hardly an effective remedy for the harms caused by "hate speech" and other offensive words that are expressed in American society, given the realities of how speech is expressed. While increases in speech may be beneficial, limits on attention, structural inequalities, and the chilling effects that hate speech can create for counterspeakers can inhibit effective counterspeech from thriving.

This Article examines the evolution of the counterspeech doctrine throughout the 20th and 21st centuries and how academics, advocates, and the public have engaged with its premises and arguments since its popularization in First Amendment doctrine. It argues that the shifting justifications for counterspeech and the lack of clarity regarding its dynamics and defenses explains the growing criticisms and disapprobation of the doctrine. Yet counterspeech is also one of the most settled free speech doctrines — so much so that it has influence beyond the bounds of First Amendment-covered entities.

The Article begins by discussing how the Supreme Court initially formulated counterspeech in relation to its philosophical origins, and its development and evolution into a core doctrinal tenet. The Article then analyzes critiques of counterspeech that have proliferated as it has ascended to doctrinal permanence. The Article concludes by evaluating how counterspeech has become central to speech regulation in venues that are not subject to the First Amendment, and how our understanding of counterspeech should shift away from treating it as a cure-all to disfavored speech.

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I. INTRODUCTION

"Cancel culture" — a vague term that describes a milieu in which individuals with "problematic" views are "cancelled" like a television show with bad ratings and worse reviews — has hit the mainstream. In August 2020, The New York Times's popular podcast "The Daily" ran a two-part series that devoted over an hour to the topic.[1] That series was spurred in part by a high-profile letter that appeared the previous month in Harper's Magazine.[2]

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1 The Daily, *Cancel Culture, Part I: Where It Came From* (Aug. 10, 2020) [hereinafter The Daily, *Cancel Culture Part I: Where It Came From*], https://www.nytimes.com/2020/08/10/podcasts/the-daily/cancel-culture.html [https://perma.cc/CJZ6-6AK2]; The Daily, *Cancel Culture, Part II: A Case Study* (Aug. 11, 2020) [hereinafter The Daily, *Cancel Culture, Part II: A Case Study*], https://www.nytimes.com/2020/08/11/podcasts/the-daily/cancel-culture.html [https://perma.cc/A5D7-KGYH].

2 *A Letter on Justice and Open Debate*, HARPER'S (July 7, 2020) [hereinafter *Harper's Letter*], https://harpers.org/a-letter-on-justice-and-open-debate/ [https://perma.cc/X59P-B2MW]. Over 150 writers and public intellectuals argued that individuals were under increasing pressure to conform to certain norms when expressing controversial opinions or risk professional or personal consequences. The letter endorsed counterspeech, rather than silencing, as the best method to combat bad ideas. ("[I]t is now all too common to hear calls for swift and severe retribution in response to perceived transgressions of speech and thought . . . . The way to defeat bad ideas is by exposure, argument, and persuasion, not by trying to silence or wish them away."). The letter was the subject of much criticism. *See* Jennifer Schuessler & Elizabeth A. Harris, *Artists and Writers Warn of an 'Intolerant Climate.' Reaction Is Swift.*, N.Y. TIMES (July 7, 2020),

As The Daily acknowledged, "cancel culture" is so general a term as to be nearly meaningless. It seems to describe critiques of individuals whose comments or actions seem to violate commonly-held beliefs or norms — particularly beliefs held by the political left.[3] The Harper's letter argued that this "censoriousness" was a problem. The signatories argued that, while they upheld "the value of robust and even caustic counter-speech from all quarters" it has become "all too common to hear calls for swift and severe retribution in response to perceived transgressions of speech and thought."[4]

But it is quite challenging to separate "caustic counter-speech" from retribution. Indeed, critics of the Harper's letter noted just that.[5] If someone is ostracized for unpopular views, is it punishment or justice? Both? Neither? Disagreement over terms — including what counts as counterspeech and what counts as unwarranted "cancellation" — has led to confusion and frustration over what the actual problems are, whether they are new problems, and what should be done to address them.[6]

It's partially for these reasons that counterspeech has both a popularity problem and a definitional problem. What is counterspeech? The term itself describes speech that counters existing speech; more broadly, theorists generally use it to describe the range of responses, critiques, rebuttals, and disapproval that occurs after disfavored, unpopular, offensive, or hateful speech is uttered.[7] But curiously, those who laud counterspeech (and those who critique it) rarely define what counterspeech is. The term seems to only exist as a negative term in response to disfavored speech, and those who invoke it as a solution to "bad speech" generally rely upon a nearly 100-year-old U.S. Supreme Court decision to justify doing so.[8]

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https://www.nytimes.com/2020/07/07/arts/harpers-letter.html [https://perma.cc/5N59-H9YU] (describing the letter and critiques).

3 *See* The Daily, *Cancel Culture Part I: Where It Came From*, *supra* note 1.

4 *Harper's Letter*, *supra* note 2.

5 Multiple critiques of the *Harper's* letter followed, including a counterletter asserting that the signatories of the *Harper's* letter were uncomfortable about being held accountable for their potentially unpopular views and that many of the dynamics they critiqued actually fell within the category of counterspeech. *See A More Specific Letter on Justice and Open Debate*, OBJECTIVE (July 10, 2020), https://theobjective.substack.com/p/a-more-specific-letter-on-justice [https://perma.cc/5SY7-QMCS]; Jennifer Schuessler, *An Open Letter on Free Expression Draws a Counterblast*, N.Y. TIMES (July 10, 2020), https://www.nytimes.com/2020/07/10/arts/open-letter-debate.html [https://perma.cc/H2VM-HFKC] (describing the counterletter and additional critiques of the *Harper's* letter).

6 The discussion on *The Daily* noted this, analogizing "cancel culture" to the similarly broad and underspecified term "political correctness." *See* The Daily, *Cancel Culture, Part II: A Case Study*, *supra* note 1.

7 *See, e.g.*, NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP 128–32 (2018) (discussing "The Importance of Counterspeech" but not providing a definition of the term beyond contrasting it favorably against hate speech regulation).

8 In a related venue, Heidi Kitrosser has observed what she deems the "imprecision throughout the public discourse" regarding "political correctness." Because "free speech politics," as Kitrosser describes them, are powerful and pervasive in American political discourse, they deserve attention even though they may not implicate judicial decision making.

Counterspeech's longstanding service in American free speech jurisprudence began with Justice Louis Brandeis's stirring concurrence in Whitney v. California,[9] where he asserted: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[10] Despite counterspeech's subsequent incorporation as a main component of the Courts' current perspective on the First Amendment, the current controversies regarding unpopular speech demonstrate ambivalence, if not hostility, to counterspeech from some corners of American society.[11]

While some of these issues stem from the regulation of speech by private companies and universities, to which the First Amendment does not apply, those entities tend to apply an American ideal of free speech to govern their own content decisions.[12] And as a result, counterspeech and its cousin concept, "the marketplace of ideas," face criticism in an era when a hands-off approach to speech regulation seems, for some Americans, somewhat blind to the negative consequences that can readily flow from unpopular speech.[13] If counterspeech is to be exported to new

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See Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987, 1992–93 (2017).

9 Whitney v. California, 274 U.S. 357, 372–80 (1927).

10 *Id.* at 377.

11 For example, the signatories of the *Harper's* letter are inveighing against a form of counterspeech and, more broadly, tenets of liberalism. *See* Osita Nwanevu, *The Willful Blindness of Reactionary Liberalism*, NEW REPUBLIC: SOAPBOX (July 6, 2020), https://newrepublic.com/article/158346/willful-blindness-reactionary-liberalism [https://perma.cc/QF2L-5PEX] (arguing "[t]he tensions we've seen lately have been internal to liberalism for ages: between those who take the associative nature of liberal society seriously and those who are determined not to. It is the former group, the defenders of progressive identity politics, who in fact are protecting—indeed expanding—the bounds of liberalism. And it is the latter group, the reactionaries, who are most guilty of the illiberalism they claim has overtaken the American Left."). Those who advocate for hate speech regulation also demonstrate a skepticism that the marketplace of ideas can function effectively to allow counterspeech to successfully combat racist, offensive, or disfavored speech. *See, e.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 467–72 (1990).

12 Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1617–25 (2018); ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 111–13 (2017) (arguing that principles protecting free speech should apply to both private and public colleges and universities).

13 *See, e.g.*, Emily Stewart, *"We Don't Want to be Knee-jerk": YouTube Responds to Vox on its Harassment Policies*, Vox (Jun. 10, 2019, 6:54 PM), https://www.vox.com/recode/2019/6/10/18660364/vox-youtube-code-conference-susan-wojcicki-carlos-maza [https://perma.cc/89WN-NAM5]. For discussion of the "libertarian" turn in First Amendment law, see, for example, Julie Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1120 (2015) (discussing how free speech jurisprudence has become "a body of doctrine robbed of its animating spirit of expressive quality and enslaved in the service of economic power"); Jedidiah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Retrenchment*, 118 COLUM. L. REV. 2161 (2018) (describing how the trends in First

venues, this Article argues, those who choose to incorporate counterspeech into their content management policies should at least grapple with the doctrine's complicated history and the critiques of its assumptions.

Despite these critiques, counterspeech remains the preferred remedy for "the speech we hate" in American law.[14] Courts consistently ratify it as a far superior solution to government regulation of speech, even speech that is offensive or hateful.[15] But because the justifications for counterspeech frequently rely upon the maxim that "the only cure for bad speech is more speech" — which can sound impossibly reductive to those unpersuaded by the argument — it is not obvious to those unaware of the history of free speech jurisprudence why counterspeech is preferred.[16]

Current descriptions and understanding of counterspeech create additional complications. First, the justifications for our current free speech regime have shifted since the days of Justices Holmes and Brandeis. Their early writings, which provide the basis for the modern understanding of the First Amendment, focus on the need for robust public debate in order to ascertain truth.[17] Yet, the contemporary preference for counterspeech is based less on a search for truth and more on the structural, political, and practical problems that government regulation of speech entails.[18]

Additionally, the dynamics of speech have also changed in the century since Justices Holmes and Brandeis first formulated their views on the First Amendment. While it is important to avoid technology exceptionalism by claiming that new technologies create unprecedented problems, digital technology has changed the dynamics of speech in American society, particularly with respect to volume and

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Amendment law retrench political power within a small group of elites by translating unequal wealth into unequal political power).

14 *See, e.g.*, United States. v. Alvarez, 567 U.S. 709, 727 (2012) ("The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth.").

15 *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 458–61 (2011).

16 Fred Schauer has described how the First Amendment's protections flow from skepticism of government power and the distrust of state decisionmakers. *See* Frederick Schauer, *The Second Best First Amendment*, 31 WM. & MARY L. REV. 1, 1–2 (1989). This careful examination though, rarely comes through in judicial decisions interpreting First Amendment goals.

17 *See* Abrams v. United States, 250 U.S. 616, 630 (1919); Whitney v. California, 274 U.S. 357, 377 (1927).

18 Critiques of the trends in First Amendment decisions highlight a related, broader point — that the doctrine as a whole seeks to protect those in power rather than actually foster debate amongst the population at large. *See, e.g.*, Purdy, *supra* note 13, at 2162 ("Although the Supreme Court's 'weaponiz[ed]' First Amendment often comes dressed in rhetoric associating political and civic life with an idealized market, it is aimed less at advancing a perfect market than at impeding very imperfect politics. It aims centrally at averting partisan and bureaucratic entrenchment—at preventing political elites from picking future winners from among candidates, parties, and policies. The problem is that, even if it accomplishes this . . . it does so at the cost of supporting class entrenchment: the concentration of political power in a relatively small and privileged echelon of Americans. It does so by constitutionally protecting the translation of unequal wealth into unequal political power." (internal citations omitted)).

virality. Finally, courts and commentators have a propensity to speak imprecisely when analyzing counterspeech and the marketplace of ideas. While these two concepts are related, they are distinct. Yet, the relationship between the two is not always crisply drawn by the courts, leading to misapprehension by the public of what exactly the First Amendment does — and what it doesn't do. Even though counterspeech is one of the most settled components of First Amendment doctrine, its transfer to non-First Amendment venues means that the criticisms that many level at the doctrine's assumptions are relevant even if courts fail to adapt the doctrine.

Why does it matter that counterspeech is so heavily criticized? Constitutional law, after all, generally isn't subject to modification or reversal by the public. Many doctrinal areas, particularly in free speech law, are the subject of critiques by individual citizens, academics, and politicians.[19] Those critiques don't necessarily mean the doctrine should change in response; indeed, stare decisis might counsel against such reactivity.

There are a few reasons that critiques of counterspeech matter. First, many of these critiques are longstanding in academic circles, though they have proliferated to the larger public in recent years.[20] Second, the amount of speech that is produced, responded to, and (un)regulated has increased dramatically in an age of digital, networked communication. The viability of counterspeech as a remedy to disfavored speech is thus easier to observe and also easier to criticize. Finally, and perhaps most importantly, counterspeech and related First Amendment doctrines are expanding their reach beyond the courts. Non-First Amendment covered entities, like social media companies and private universities, often use counterspeech as justifications for their own speech regulations, even though they are not required to do so. As counterspeech extends its influence, understanding its strengths and weaknesses remains a vital endeavor.

This Article engages with the intellectual history of counterspeech in the United States in order to highlight some of the current controversies over speech regulation, which are relevant to both courts and to entities not covered by the First Amendment that use First Amendment doctrines as guiding principles. It argues that, due to the issues described above with how we conceive of and discuss counterspeech, it is no surprise that the public has serious qualms about the efficacy and primacy of counterspeech in free speech jurisprudence. Even if courts decline to address those qualms, the private entities that use counterspeech as an element of their speech regulation policies should consider how to respond to contemporary critiques of the doctrine.

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19 Commercial speech regulation and the *Citizens United* decision are two obvious examples, but even other doctrinal areas like antitrust and voting rights face similar critiques from the public at large. *See* Kara Swisher, *Here Come the 4 Horsemen of the Techopolypse*, N.Y. TIMES (July 1, 2020), https://www.nytimes.com/2020/07/01/opinion/anti-trust-tech-hearing-facebook.html [https://perma.cc/B9E8-UD3N] (describing Congressional hearings into the dominance of large technology companies and a reappraisal of federal antitrust policies); Talmon Joseph Smith, Opinion, *Legalized Bribery by Elites Is Here to Stay. Now What?*, N.Y. TIMES (Jan. 25, 2020), https://www.nytimes.com/2020/01/25/opinion/citizens-united-2020-spending.html [https://perma.cc/235C-Q3AY] (criticizing the ten-year-old decision in *Citizens United v. Federal Election Commission*, which "opened a floodgate for wealthy donors and corporate money's flow into politics.").

20 *See infra* Section III.B.

The Article proceeds in three parts. Part II analyzes the origins of counterspeech and its relationship to the marketplace of ideas from political philosophy to the U.S. Supreme Court's adoption of counterspeech throughout the twentieth and twenty-first centuries. It describes how counterspeech was initially formulated by John Milton and tracks its evolution through the last century of American jurisprudence, beginning with the Supreme Court's revitalization of the First Amendment in the early twentieth century.

Part III examines more deeply how the justifications for counterspeech have changed in American law. This evolution highlights some of the challenges with how counterspeech is received at the current moment, as the courts have not explicitly acknowledged how and why counterspeech's rationale has evolved. This lack of clarity contributes to some of the misunderstandings and criticisms of counterspeech today, which this Part also explores.

Part IV describes how, even if courts decline to re-evaluate or modify counterspeech, the increasing use of counterspeech in non-First Amendment contexts — most notably, social media platforms — requires engagement with criticisms of the doctrine. It argues that if courts and private entities that employ counterspeech doctrine as a justification for minimal regulation of speech fail to proactively articulate why counterspeech matters, popular support for counterspeech as the preferred remedy for disfavored speech may continue to erode — particularly in venues that are not required to rely upon judicial interpretations.

The Supreme Court's recent free speech jurisprudence demonstrates that counterspeech remains a cornerstone of First Amendment jurisprudence. While counterspeech itself might not be in danger, the growing public confusion and disapproval for counterspeech does not bode well for popular support for the doctrine. Amidst claims of "First Amendment Lochnerism" from a variety of fronts,[21] counterspeech needs to respond to its critics, even if it does not change in its contours.

Whether counterspeech ever functioned effectively to achieve the goals set out by philosophers or judges, it cannot bear the weight that judges and private entities have placed upon it. Counterspeech is not a silver bullet that always justifies overturning government regulation. It cannot successfully rebut every instance of offensive, incendiary, or threatening speech in the public square or in spaces governed by private actors. While it will always be a valuable element of public debate and in the marketplace of ideas, counterspeech cannot sustain all the legal, social, and rhetorical burdens that we currently freight it with.

A laissez faire approach to speech regulation that relies upon counterspeech to cure all ills neglects the shortcomings of the marketplace of ideas, as well as the ways in which counterspeech has mutated over time in American law. As a proponent of counterspeech, I argue that we must change our perception of its importance. Working in concert with other tools — including government regulation — rather than to the exclusion of alternatives, counterspeech can work to promote the goals of the First Amendment.

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21 *See, e.g.*, Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1959–60 (2018); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 135–38 (2016).

II. ORIGINS OF THE COUNTERSPEECH DOCTRINE

As discussed supra, counterspeech is a commonly invoked, slippery term. For purposes of this Article, I define counterspeech as "speech that responds to other speech, particularly unpopular, disfavored, offensive, or discriminatory speech." Individual speakers and entities — not the government — engage in counterspeech. For its proponents, counterspeech promotes public debate and discourse from the ground up, from speakers. This model is treated as de facto preferable to a model in which the state intervenes in public discourse, picking winners and losers amongst ideas. One obvious fear of a state-controlled system — in which the state chooses what messages to promote or suppress — is that the state will instinctually muzzle speech critical of the state and will amplify speech that supports it. Thus, counterspeech, expressed by individual citizens, better promotes democratic values through debate in a public square than a statist model where the government holds all the cards.

Allowing speech to be answered by counterspeech rather than the state also has appeal for those skeptical of the government's ability to effectively regulate traditional markets. Not for nothing does counterspeech operate within the "marketplace of ideas" framework. Under this model, the marketplace of ideas functions as a venue for public debate in which counterspeech operates to promote public discourse. The marketplace of ideas, like other markets under a late capitalistic economic system, should have minimal government regulation in order to allow the best ideas to win out. This is analogizable to the goal from some quarters of reducing government regulation in order to foster competition and lower consumer prices — effectively letting the market decide how the market functions. As discussed infra, there are many obvious critiques of both the "counterspeech" and "marketplace of ideas" concepts. Articulating both concepts as a preliminary matter is necessary, in order to both understand what the concepts actually encompass and to avoid the ambiguity that tends to accrue in debates regarding their conceptual efficacy.

Within American jurisprudence, counterspeech has its origins in the early twentieth century Supreme Court cases that created our modern conception of the First Amendment — namely Schenck v. United States,[22] Abrams v. United States,[23] and Whitney v. California.[24] Theoretically, counterspeech has earlier philosophical antecedents as a concept related to (but distinct from) the marketplace of ideas. The writings of John Milton, John Stuart Mill, and other theorists formed the intellectual basis for the theory of "the marketplace of ideas," which relies upon counterspeech as a necessary element in order to function. In the marketplace of ideas, viewpoints and perspectives face off, with some responding to or rebutting others in order to "win out." Counterspeech is a necessary part of this process.

This Part explores the theoretical origins of counterspeech and its incorporation into modern First Amendment doctrine. It then proceeds to discuss how counterspeech has subsequently become popularized in First Amendment and free speech discourse.

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22 Schenck v. United States, 249 U.S. 47 (1919).

23 Abrams v. United States, 250 U.S. 616 (1919).

24 Whitney v. California, 274 U.S. 357 (1927).

A. Marketplace Theory

Democratic political systems arguably require freedom of speech in order to effectively function.[25] Freedom of speech allows for social debate of ideas, issues, and public figures without the fear of governmental reprisal or censorship targeted against unpopular or fringe opinions. Within the Anglo-American tradition, John Milton's Areopagitica contains an early articulation of why governmental censorship of speech conflicts with the quest for truth in the public sphere:

> [T]hough all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?[26]

Milton here describes concepts that echo in the marketplace of ideas metaphor ("the field" where Truth's strength should not be doubted) and counterspeech as a remedy for disfavored ideas (Truth grappling with Falsehood, and indisputably winning). The direct confrontation of Truth and Falsehood — with an uncontested victor — prefigures both the contemporary conception of counterspeech as a Hegelian struggle and the shortcomings of that conception. Whether speech actually functions in this way in the public sphere is not at all self-evident. The relationship between what we would now call the marketplace of ideas and counterspeech is also not clear — the most obvious reading would be that counterspeech takes place within the setting of the marketplace, as a distinct dynamic. In other words, the marketplace of ideas provides the venue for counterspeech to play out.

Areopagitica was not written primarily to advocate against government intervention in the public sphere. Milton wrote his pamphlet in order to protest against the Licensing Order of 1643, which would have required authors to have a license from the government before publishing their works.[27] Milton's argument, therefore, should be primarily understood as a critique not of government regulation but rather of mandatory licensing and pre-publication review — what we would now consider prior restraint.[28]

Broad mandatory licensing regimes can be characterized as part of speech regulation. However, because they effectively require preclearance for a wide range of speech, they are more pernicious and thus more akin to prior restraints. The Licensing Order would not have limited Milton's speech on specific topics, but rather the distribution of all material before it could be disseminated to the public at large. Thus, it is more akin to a prior restraint than more traditional speech regulations.

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25 *See, e.g.*, GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 7 (2004).

26 JOHN MILTON, AREOPAGITICA 58 (Cambridge Univ. Press 1918) (1644).

27 *See* Vincent Blasi, *Milton's* Areopagitica *and the Modern First Amendment* (Yale L. Sch. Occasional Papers, Paper No. 6, 1995), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1007&context=ylsop_papers [https://perma.cc/2HSK-43MG].

28 *See, e.g.*, Neb. Press Ass'n v. Stuart, 427 U.S. 539, 558–60 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.").

This distinction has relevance in American law given how severely prior restraints are disfavored as compared to other types of speech regulation. Prior restraints are almost always invalidated, given their breadth and lack of tailoring.[29] By contrast, regulations that limit speech may have a better chance of viability, depending on a number of variables including the nature, structure, and purpose of the regulation; the type of speech regulated; the penalties (whether civil or criminal); and the methods by which the state seeks to enforce the regulation on a practical basis. Put another way, speech regulation as a category is less odious than the subcategory of prior restraint, which the Licensing Order more clearly resembled.

Thus, Milton's framing of the appeal of counterspeech must necessarily be seen as a contrast to the broad nature of the Licensing Order (and by nature, prior restraints), rather than the entire category of speech regulation itself. It is not by any means certain that Milton was objecting to all types of speech regulation and promoting counterspeech as the only solution. One can plausibly read Areopagitica as a critique of the more limited category of what we would now refer to as prior restraint.

John Stuart Mill's On Liberty also provides a philosophical justification for minimal governmental intervention into speech, focusing on the difficulty, if not impossibility, of consistently and accurately silencing disfavored or inaccurate speech:

> First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility. Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied. Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds.[30]

Mill conceives of opinions that are more complex than merely "true" or "false." Rather, opinions can fall along a spectrum of accuracy, and rarely are the last word on a topic. In public discourse, opinions should "collide" to help discern the actual truth on a topic. Without such contestation, truth will be less likely to be publicly agreed upon. In a Hegelian sense, truth is strengthened and perhaps even discovered only through its conflicts with falsity and with counterspeech.[31]

Again, while this may resemble the style of an in-person intellectual debate, it does not necessarily reflect how speech occurs in the public sphere in our contemporary moment. The dynamic described also does not conceive of a marketplace (or any other venue) as the location for the discussion or contestation of the "incorrect" opinion.

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29 *See, e.g.*, *id.* at 568 ("[T]his prohibition regarding 'implicative' information is too vague and too broad to survive the scrutiny we have given to restraints on First Amendment rights.").

30 JOHN STUART MILL, ON LIBERTY 115–16 (Pelican Books 1974) (1859).

31 WILL DURANT, THE STORY OF PHILOSOPHY 321–22 (Garden City Publ'g Co., new rev. ed. 1933) (1926).

Mill's analysis of how ideas interact in public discourse has more nuance than Milton's, though both conceive of a final articulation of "truth" as a desirable, achievable goal. Mill's concerns about government regulation of speech have as much to do with administrability as with the utility of such regulation. American courts have taken up several of these objections and concerns as the foundation for why, under the modern understanding of the First Amendment, counterspeech and a laissez faire regulatory approach to unpopular speech remain preferable to government regulation.

American courts and scholars generally refer to the marketplace concept as the metaphorical space in civil society in which ideas are espoused, debated, and refined. Speech and counterspeech tangle within the marketplace, which, like the economic model, theoretically allows for all to participate. In so doing, the public can determine what is best, true, or accepted in social discourse.

B. Initial Articulations of Counterspeech in American Jurisprudence

Beginning in the early twentieth century, the U.S. Supreme Court transformed its conception of the First Amendment in cases like Schenck v. United States[32] and Abrams v. United States.[33] Those cases revived the First Amendment from its earlier existence as a "dead letter" in American law.

Schenck, decided in 1919, began the Court's modern consideration of the protections granted by the First Amendment and how those protections interact with federal law — specifically, recently enacted laws that limited the publication of information, such as the Espionage Act[34] and the Sedition Act.[35] Schenck concerned two defendants, Elizabeth Baer and Charles Schenck, who were active in the American Socialist Party and had been convicted for distributing material criticizing the U.S. military's efforts in World War I, including the draft.[36] In a unanimous opinion, Justice Oliver Wendell Holmes, Jr. argued that the First Amendment did not bar conviction as the speech at issue constituted a "clear and present danger" that Congress had the right to prevent by enacting laws like the Espionage Act.[37]

Later in 1919, Abrams continued the Court's examination of the contours of the protections granted by the First Amendment. Abrams featured facts similar to Schenck — both cases addressed speech recently criminalized by Congress. In Abrams, the Court addressed the convictions of Jacob Abrams and other activists who had printed pamphlets critiquing the American government's involvement in the World War I. The Court applied the clear and present danger test from Schenck and upheld the convictions.[38]

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32 Schenck v. United States, 249 U.S. 47 (1919).

33 Abrams v. United States, 250 U.S. 616 (1919).

34 Espionage Act, ch. 30, 40 Stat. 217 (1917) (codified as amended at 18 U.S.C. §§ 792–99).

35 Sedition Act, ch. 75, 40 Stat. 553 (1918).

36 *Schenck*, 249 U.S. at 49–50.

37 *Id.* at 52.

38 *Abrams*, 250 U.S. at 619, 623–24.

In a sharp move away from his unanimous majority opinion in Schenck, Justice Holmes penned a dissenting opinion in Abrams, which Justice Louis Brandeis joined. Justice Holmes argued in his dissent that, though he still endorsed the clear and present danger test he had articulated in Schenck, the conduct in Abrams did not meet that test.[39] The distinctions Justice Holmes draws between his majority opinion in Schenck and the dissent in Abrams do not seem as clear as he argues, but his concluding arguments in favor of the discussion of ideas rather than government censorship continue to resound in First Amendment jurisprudence:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[40]

Here, Justice Holmes emphasizes marketplace theory in ways similar to Milton and Mill — as the preferable venue for testing ideas for truth and validity — and also emphasizes its connection to constitutional principles set forth in the First Amendment. Though Justice Holmes is writing in dissent, his invocation of the marketplace of ideas as necessary to validate constitutional rights has become one of the most famous in defining the philosophical justifications for the modern First Amendment.

Because the theory defining the marketplace of ideas requires counterspeech in order to function, it is not surprising that the concept of counterspeech would also soon enter into the Court's First Amendment jurisprudence. Eight years after Abrams, counterspeech was explicitly articulated in Justice Brandeis's concurring opinion in Whitney v. California.[41] Whitney concerned the conviction of a California woman, Charlotte Anita Whitney, for violating California's Criminal Syndicalism Act, which prohibited the promotion of certain social movements.[42] Whitney had worked to establish a branch of the Communist Labor Party in Oakland, which California claimed advocated for violent overthrow of the government.[43] Under the Court's "clear and present danger" test, articulated in Schenck, Whitney's conviction was upheld.[44]

Justice Brandeis, who agreed with the ruling, wrote separately to describe his views on laws prohibiting speech and the goals of the Constitution's drafters:

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39 *Id.* at 627–28.

40 *Id.* at 630.

41 Whitney v. California, 274 U.S. 357, 377 (1927).

42 *Id.* at 372–73.

43 *Id.* at 363–64.

44 *Id.* at 371.

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.[45]

This passage, through its stirring description of the value of "more speech" as the preferred remedy for disfavored, false, and dangerous speech, serves as the cornerstone of counterspeech doctrine in American law. In order to avoid implicating Schenck's clear and present danger test, Justice Brandeis exempts situations in which there may be an imminent threat of physical harm or violence resulting from the original speech, as there supposedly was in Schenck. In all other situations involving "evil" words, Justice Brandeis chooses to elevate counterspeech as the preferred path forward, rather than governmental repression that conflicts with the liberty interests, in his view, that the founders were working to protect.[46]

Justice Brandeis's framing of counterspeech has been adopted as the clarion call for civil libertarians and First Amendment proponents for decades.[47] By emphasizing the need for more speech in order to combat disfavored speech, Brandeis emphasizes the desirability of the exchange of ideas as opposed to alternate solutions, most obviously government regulation or censorship. There are multiple unacknowledged assumptions underneath Brandeis's framing that many scholars have identified.[48] These criticisms have not prevented counterspeech from becoming a cornerstone of First Amendment doctrine.

C. Counterspeech Since Whitney

In the decades since Whitney, courts have validated the views espoused by Justice Brandeis regarding counterspeech. Schenck's clear and present danger test (which was applied in Abrams and Whitney) was supplanted (and arguably overruled) in Brandenburg v. Ohio,[49] which articulated an "imminent lawless action" standard prohibiting the punishment of inflammatory speech unless that speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such

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45 *Id.* at 377.

46 Justice Brandeis concurred in the judgment of the majority, rather than dissenting, due to his perception that Whitney and other organizers may have been planning a conspiracy. *Id.* at 379 (Brandeis, J., concurring).

47 *See, e.g.*, STROSSEN, *supra* note 7, at 7.

48 *See infra* Part III.

49 Brandenburg v. Ohio, 395 U.S. 444 (1969).

action."[50] Brandenburg involved a leader in the Ku Klux Klan who delivered speeches calling for racial violence against African Americans, Jews, and those who supported those groups; he was subsequently charged with advocating violence and violating Ohio's Criminal Syndicalism statute (which was somewhat analogous to the statute in Whitney).[51] The Brandenburg Court overruled Whitney and articulated the new "imminent lawless action" test.[52] Now, Whitney is most often cited not for the majority but for Justice Brandeis's concurrence, for its articulation of counterspeech as the preferred remedy for disfavored speech.

The Supreme Court has used Justice Brandeis's formulation in cases involving such varied free speech issues as ordinances governing "For Sale" and "Sold" signs,[53] the constitutionality of flag burning,[54] and the criminalization of "false speech."[55] In each of these cases, the Court uses counterspeech as the foil for overbroad, unnecessary, or excessive government actions that seek to limit speech.[56] Counterspeech thus functions not merely as a goal but also as a powerful de-regulatory tool. Rather than permit government actors to put their thumb on the scale to achieve certain economic, social, or regulatory goals by directly limiting speech, courts are inclined to prefer non-governmental speech as the method of achieving those goals in a majority of circumstances.

The Court's recent articulation of counterspeech as the preferred solution to disfavored speech in United States v. Alvarez provides a potent example of this phenomenon. Alvarez concerned the Stolen Valor Act,[57] which created a federal criminal law prohibiting individuals from falsely claiming that they had received the Congressional Medal of Honor.[58] At issue in Alvarez was the ability of the government to criminalize false speech. Alvarez lacked a clear majority, but six Justices agreed that the Stolen Valor Act was not drafted with sufficient narrowness or specificity, and it levied too severe a penalty to stay within the bounds of the First Amendment.[59]

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50 *Id.* at 447.

51 *Id.* at 444–45, 447.

52 The "imminent lawless action" test effectively allows much more speech to proliferate than under prior cases. *Id.* at 447–48.

53 Linmark Assocs. v. Twp. of Willingboro, 431 U.S. 85, 97 (1977).

54 Texas v. Johnson, 491 U.S. 397, 419 (1989).

55 United States v. Alvarez, 567 U.S. 709, 727–28 (2012).

56 Lower courts also rely upon *Whitney* in their analyses of free speech issues. *See, e.g.*, Lind v. Grimmer, 30 F.3d 1115, 1119–20 (9th Cir. 1994) (concerning disclosure of information of campaign spending investigations); List v. Ohio Elections Comm'n, 45 F. Supp. 3d 765, 773 (S.D. Ohio 2014) (concerning statutes criminalizing false statements made regarding candidates during political campaigns).

57 18 U.S.C. § 704, *recognized as unconstitutional by* Animal Legal Def. Fund v. Kelly, 434 F. Supp. 3d 974 (D. Kan. 2020).

58 *See* 18 U.S.C. § 704(c).

59 *Alvarez*, 567 U.S. at 729.

Justice Kennedy, writing for a plurality, observed that counterspeech would serve as the preferred remedy for false speech: "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth."[60] While there is something appealingly elegant about the simplicity of Justice Kennedy's framing — similar to that of Justice Brandeis's — it elides many of the complexities of speech in a modern marketplace of thought.

One can read the lies at issue in Alvarez in multiple ways. Lying by claiming that one has received the Congressional Medal of Honor is perhaps the easiest type of disfavored speech to invalidate, given that factually correct and independently verifiable information can easily be brought to bear in response to a lie. On the other hand, such a lie is particularly pernicious and difficult to correct, given that it requires suspicion directed at the speaker, investigation to discern the truth, and a venue to publicize the accurate findings. One's views on the efficacy and ease of exposing such obvious lies — to say nothing of more insidious, less contestable ones — in the marketplace of ideas may be correlated to one's belief that the marketplace privileges truth, volume, or persuasiveness.

As a result of Alvarez, false speech retains constitutional protections (although likely less than "core speech"), reducing the categories of speech that fail to receive protection to a mere handful. Whether counterspeech can function in its Brandeisian ideal in a marketplace that allows nearly everything to be expressed, with few governmental restrictions, remains at the very least debatable.

D. The "Is Counterspeech Effective?" Debate

If the courts have endorsed counterspeech as the best remedy for speech that we dislike, a number of First Amendment advocates — both in academic and popular writing — have embraced it as the slogan that justifies an expansive view of free speech protection. Governmental proposals, laws, regulations, or actions that limit disfavored speech are often criticized by civil libertarians for using the heavy hand of the state to suppress speech or manipulate the marketplace. Instead, they argue, the government and society at large should allow counterspeech to do its job and let the unpopular speech be pushed down by counterspeech.[61]

For civil libertarians, the government is ill-suited for a number of reasons to manage speech.[62] Because democratic institutions function through the consent of the governed, the government has an interest in minimizing or eliminating opinions that criticize it in order to perpetuate its legitimacy. It may also choose to sanction or prohibit undesirable speech in order to promote stability and conformity. The government may also not be institutionally well situated to adjudicate whether speech

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60 *Id.*

61 *See, e.g.*, STROSSEN, *supra* note 7, at 157–82 (arguing that counterspeech is a more effective rebuttal to hate speech than governmental regulation). For a discussion of how speech can be managed or mismanaged, see Jeremy Waldron, *A Raucous First Amendment*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (Aug. 21, 2019), https://knightcolumbia.org/content/a-raucous-first-amendment-1 [https://perma.cc/L6WE-6ZXP].

62 Individual civil libertarians, of course, may agree with only some of these criticisms of government regulation of speech, depending on their perspective.

is accurate, valuable, or correct, as those determinations are arguably best left to individuals rather than the state.

Civil libertarians therefore frequently point to employing counterspeech in the marketplace of ideas as the preferred solution to speech that is disfavored.[63] There are many debates in which this argument is deployed in order to argue against regulation of speech targeting racial minorities, women, and other groups. One of the foundational intellectual debates concerning the relative efficacy of counterspeech versus hate speech regulation involved former ACLU president and New York Law School Professor Nadine Strossen and Professor Charles Lawrence III, then of Stanford Law School, in 1989 and 1990.[64]

The debate principally concerned the then-recent trend of colleges and universities enacting "hate speech codes" prohibiting speech that discriminated against racial minorities. Professors Strossen and Lawrence debated the efficacy and constitutionality of this trend first at the Biennial Conference of the ACLU, and later in the Duke Law Journal.[65] Professor Lawrence argued that carefully crafted rules regarding speech on campus would not violate the First Amendment, asserting that the civil libertarian devotion to counterspeech is "an empty ideal" that ignores real life experiences of marginalized communities.[66] The current interpretation of the First Amendment, in his view, allows hate speech to proliferate;[67] those who endorse it, he argues, turn a blind eye to racist rhetoric.[68]

Professor Strossen's response, on the other hand, serves as a classic example of the civil libertarian response to these criticisms — that the principle of counterspeech is "time-honored," that it is consistent with First Amendment principles, and that it actually is more effective than censorship would be.[69] In responding to Professor Lawrence's criticisms, Professor Strossen argues that strong free speech protections actually benefit, rather than hinder, racial justice. Counterspeech and the marketplace of ideas, in her view, are how racial progress actually happens — without it, advancements like those in the 1960s would have been unlikely, if not impossible.[70]

The debate between Professors Lawrence and Strossen reflects how adherence to counterspeech can seem, to some, as negating the ability to restrict almost any kind of speech that disfavors or discriminates, and as raising the First Amendment's protections to a level that potentially ignores the protections given by other

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63 *See, e.g.*, Danny O'Brien & Dia Kayyali, *Facing the Challenge of Online Harassment*, ELEC. FRONTIER FOUND. (Jan. 8, 2015), https://www.eff.org/deeplinks/2015/01/facing-challenge-online-harassment [https://perma.cc/ZLS6-X8ZY].

64 *See* Lawrence, *supra* note 11, at 432; Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484 (1990).

65 *See* Strossen, *supra* note 64, at 484 n.†.

66 Lawrence, *supra* note 11, at 438, 476–81.

67 *Id.* at 436.

68 *Id.* at 477.

69 Strossen, *supra* note 64, at 562.

70 *Id.* at 567–69.

constitutional doctrines like due process or equal protection. While the campus speech codes that Professors Lawrence and Strossen debate were invalidated or limited by judicial decisions,[71] similar debates involving different categories of troubling speech have proliferated in the subsequent decades. Speech that is anti-Semitic, Islamophobic, racist, sexist, misogynistic, transphobic, anti-LGBT, and ableist all can face calls for banning, censorship, or removal, even as civil libertarians respond by arguing for counterspeech, technical solutions, and strong protections for most speech — even speech that many, if not most Americans would find to be hurtful, discriminatory, or valueless.

Critiques of counterspeech are not new, but they are increasing both in volume and in sophistication.[72] Analyzing exactly how counterspeech and the marketplace of ideas concepts have been critiqued over time in American legal scholarship helps to understand both the current dynamics and how, theoretically, counterspeech and the marketplace of ideas have remained such vexing concepts.

III. COUNTERSPEECH AND CHANGE

As discussed in Part II, supra, counterspeech remains a cornerstone of free speech doctrine even as its critics have observed deficiencies in how counterspeech and the marketplace of ideas operates in practice, as well as shortcomings in its theoretical underpinnings. This Part discusses these critiques in greater context in order to illuminate the widening gap between judicial invocation of counterspeech and the larger social and political discourse regarding whether counterspeech can ever function as effectively as judges suggest. This gap may explain why counterspeech is the subject of broader social critique, beyond the realm of theorists and academics.

A. Changes in Judicial Conceptions of Counterspeech

Early philosophical conceptions of counterspeech by Milton and Mill, amongst others, describe the process of counterspeech as a search for truth in the larger marketplace of ideas.[73] In this framing, "the truth" is thus something discoverable (as opposed to a contested or ineffable concept). Indeed, the marketplace of ideas allows for the collision of ideas in order to produce something ever closer to the truth. Eventually, as this process repeats, the best, strongest ideas will prevail in this tournament of debate.

The early American judicial decisions advocating for counterspeech as the preferred method for regulating speech reinforce this perspective from political philosophy. In Abrams, Justice Holmes argues that "free trade in ideas" leads to the ultimate good;[74] in Whitney, Justice Brandeis argues that more speech is the method for combating bad ideas through deliberation and education.[75] These decisions describe a venue for social discussion, deliberation, and argument. Implicitly, the

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71 *See, e.g.*, Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

72 *See, e.g.*, Mary Anne Franks, *Fearless Speech*, 17 FIRST AMEND. L. REV. 294, 309–11 (2019).

73 *See supra* Section II.A.

74 Abrams v. United States, 250 U.S. 616, 630 (1919).

75 Whitney v. California, 274 U.S. 357, 377 (1927).

Justices endorse the concept of the marketplace of ideas as a public sphere where anyone can participate, and, through the diversity of perspectives and debates, the truth will prevail.

There are several obvious criticisms of this formulation, but what is notable to a contemporary reader is how different these justifications are as compared to current judicial descriptions of why counterspeech is preferable to government regulation. When judges argue for counterspeech in recent decisions, they do not merely describe social debate as a search for truth. Instead, counterspeech is also posited as the best option as compared to government regulation of speech. Put another way, judges do not merely assert that counterspeech is effective or that truth is discoverable — rather, that it is preferable to any alternatives.

Consider Justice Kennedy's plurality opinion in United States v. Alvarez, the case concerning whether the government could impose criminal liability upon a speaker who falsely claimed to have received the Congressional Medal of Honor. Justice Kennedy noted:

> The lack of a causal link between the Government's stated interest and the Act is not the only way in which the Act is not actually necessary to achieve the Government's stated interest. The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest. The facts of this case indicate that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie.[76]

Here, Justice Kennedy contrasts the effectiveness of counterspeech against the language of the Stolen Valor Act. Rather than regulate (or criminalize, in this instance) a certain type of speech, Justice Kennedy argues here that counterspeech would reach the same ends. Speech is preferred over action (criminalization or other state action, or more drastically violence). It is not that counterspeech is being employed in a process to "discover" the truth, but rather that it is more effective and preferable to any kind of government action.[77] If counterspeech is ever a viable option, it seems to automatically win out over government regulation or sanction. Speech will always trump the state.

Appellate courts have similarly employed counterspeech as a preferred alternative to government regulation. In 281 Care Committee v. Arneson, the Eighth Circuit evaluated a First Amendment challenge to a Minnesota state law that criminalized speech that knowingly or with reckless disregard for the truth made a false statement pertaining to a proposed ballot initiative.[78] In determining that the Minnesota law

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76 United States v. Alvarez, 567 U.S. 709, 726 (2012).

77 The "lie" mentioned here is the false statement that Alvarez made. *See id.* at 713, 727. The truth is not "unknown" in this instance, unlike in the classic conception of counterspeech. Justice Kennedy's reference to the lie is not made in the context of counterspeech as a search for an unknown truth through the competition of ideas, but rather to counterspeech minimizing the risk of a false statement proliferating as contrasted against the Stolen Valor Act's criminalization of the false statement itself.

78 281 Care Comm. v. Arneson, 766 F.3d 774, 777–78 (8th Cir. 2014).

violated the First Amendment, the court noted that counterspeech remained a potential tool to meet the state's stated goals in criminalizing this type of speech.[79]

This is a somewhat surprising move. Why did the court decide that the potential for counterspeech meant that the Minnesota law could not withstand First Amendment scrutiny? Counterspeech is not an element of the test that the court used to evaluate whether the statute was narrowly tailored.[80] Rather, the court used this articulation:

> A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative).[81]

Counterspeech does not appear at all in this formulation, yet the court referred to it in its analysis.[82] Specifically, the court decided that counterspeech was the least-restrictive alternative to the statute, and that it was difficult to imagine an alternative statute that would be permissible and meet the government's interest.[83]

But counterspeech is not a governmental program, statute, or regulation. Its existence as an alternate method to a challenged statute does not necessarily mean that that the statute is not the least restrictive means. Counterspeech is not a governmental regulation, and it theoretically always exists.[84] Moreover, the state does not have the

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[79] *Id.* at 793. The court's counterspeech analysis accompanied its narrow tailoring analysis:

> Notwithstanding its overbreadth, the lack of a causal link between the advanced interests and [the statute] is not the only way in which [the statute] is not actually necessary to achieve the stated interests. A second consideration in our analysis as to whether [the statute] is narrowly tailored to achieve Minnesota's asserted compelling interest in preserving fair and honest elections and preventing a fraud on the electorate, is that the county attorneys have not offered persuasive evidence to dispel the generally accepted proposition that counterspeech may be a logical solution to the interest advanced in this case.
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> *Id.*

[80] Counterspeech conceivably could be folded into the first prong of the test. The state's regulation of speech might be deemed unnecessary if counterspeech exists as a viable alternative. But if one interprets counterspeech thusly, almost any governmental action could be invalidated given the abstract possibility of counterspeech. Moreover, because courts invoke counterspeech as a concept, rather than as a factual element in a specific case, it could become far too easy or automatic to call upon the abstract power of counterspeech as a death knell for many governmental actions.

[81] *Id.* at 787 (quoting Republican Party of Minn. v. White, 416 F.3d 738, 751 (8th Cir. 2005)).

[82] *Id.* at 787–88.

[83] *Id.* at 793–94.

[84] One could imagine very few contexts in which counterspeech was not an option. "Fighting words" might be the rare situation in which there may not be time to allow counterspeech to push

ability to precisely promote or facilitate counterspeech beyond very generalized ways, and usually not on specific issues (like false speech in political campaigns). The state's use of counterspeech will almost be a blunt instrument, given that it will generally act ex ante through official channels. "State counterspeech" at best seems propagandistic, and at worst oxymoronical, as the state's engagement in the marketplace of ideas as "speaker" would be difficult to disentangle from its role as regulator.

Yet the Eighth Circuit in Arneson observed that "counterspeech confronts these asserted compelling interests and is a less restrictive means of countering the concern leads us again to deduce that the interests are less compelling than touted and the statute is not narrowly tailored to achieve the goal."[85] This suggests that counterspeech, if viable, de facto obviates the state's ability to regulate speech that raises content discrimination issues.[86]

Other federal appellate decisions make similar claims. For example, in North Carolina Right to Life v. Leake, a case involving North Carolina's campaign finance law, the Fourth Circuit argued that independent expenditure committees did not need to be regulated: "The appropriate legislative response to potentially effective speech from organizations like the Farmers for Fairness [an example of such a committee] is not to silence them through regulation, but rather to appeal to the electorate with effective counter-speech."[87]

The argument here seems to be that rather than enacting a state law, state legislatures could push back through counterspeech. Like the Arneson court, the Fourth Circuit here seems to assert that if counterspeech exists as a viable alternative, it should be employed. But the court elided the distinction between the North Carolina legislature and individual state legislators in discussing the possibility of effective counterspeech. While individual legislators could certainly use counterspeech, it is more difficult to imagine how the legislature as a whole could do so, other than by enacting a statute.

Courts have not completely abandoned the idea that counterspeech helps American society discover the truth.[88] Such references, though, are less common than those which refer to counterspeech as better than the alternative government regulation.[89] When judges wax rhapsodic on why the First Amendment validates counterspeech,

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back against the unwanted speech at issue. Beyond that type of exigent situation, almost any context allows for counterspeech to take hold. As such, the reasoning here implies that any type of government regulation targeting certain types of speech would violate the First Amendment.

85 *Arneson*, 766 F.3d at 793.

86 N.C. Right to Life, Inc., v. Leake, 525 F.3d 274, 305 (4th Cir. 2008).

87 *Id.* (citing Whitney v. California, 274 U.S. 357, 377 (1927)).

88 *See, e.g.*, Hustler Mag. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas . . . .").

89 *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Couns., 425 U.S. 748 (1976).

they raise concerns about the dangers of government regulation and liability more often than describing a quest for truth.[90]

What might be the reasons that judges consider counterspeech, when feasible, as per se preferable to government regulation? What seems to be underlying the appeal of counterspeech is not the idea that it helps us find the truth, but rather that it provides an alternative to government regulation. Even if that alternative is speculative or illusory, courts seem eager to point to counterspeech as a better method of combating speech than regulation.

Because courts do not explicitly indicate that they are invoking counterspeech in a new way — not as a truth-seeking force, but rather as a viable alternative to regulation — it is not obvious why they are doing so. It is possible that the preference for counterspeech stems from skittishness regarding government regulations that implicate speech rights. If the First Amendment is intended to protect against government intrusion into speech, any possible alternative might be preferred, even if it is merely suppositional. For those who hold as a default position philosophical opposition to government regulation of speech — or for those who are concerned about the government's ability to effectively, thoughtfully, or carefully regulate speech — counterspeech is certainly appealing. But this use of counterspeech is quite different than the truth-seeking function described in Whitney and earlier philosophical formulations.

This shift matters for two reasons. First, it moves counterspeech from a vital component of the public marketplace of ideas, where ideas are debated and truth necessarily wins out, to a hypothetical, perpetually superior alternative to government regulation. Counterspeech is no longer an element of what the public debates and decides. Now, it serves as a contrast for courts skeptical of government intervention into any area that might be considered speech. Yet, judges still describe counterspeech in the same way, often citing to Whitney, without noting that they use the concept in ways distinct from Justice Brandeis. If courts have moved away from the truth-seeking function of counterspeech to more instrumentalist concerns about the efficacy of government regulation of speech, it is important to note that for clarity and consistency.[91]

Second, as discussed in Section IV.B, infra, there are multiple critiques of the counterspeech doctrine and its efficacy in actually achieving a truth — most obviously, as to whether this is even a feasible exercise or if truth exists, and whether there actually is equal access to the marketplace of ideas in order to employ counterspeech. These critiques are generally responding to the classical conception of counterspeech and the mantra often deployed that "the only cure for bad speech is more speech."

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90 For example, in *Virginia State Board of Pharmacy*, which extended First Amendment protection to commercial speech, the majority opinion described Virginia's regulations of pharmacists as "highly paternalistic." *Id.* at 770.

91 The reasons for this shift are non-obvious, in part because the shift itself has gone unacknowledged. It is possible that the balkanization of public discourse — a move away from a unified, largely homogenous media landscape to one that does not inherently seek communal truth-seeking as a goal — meant that courts needed to adjust how they conceived of counterspeech.

Yet, courts are more likely to describe counterspeech as an alternative to regulation, and critics are more likely to engage with the Brandeisian formulation. Non-judicial defenders of counterspeech sometimes do both. Thus, among those who choose to debate whether counterspeech is effective or preferable, it is not always clear whether the same conception is being discussed. Ironically, this may demonstrate the limits of counterspeech itself — if different parties can't agree upon what a topic even is, how can the truth ever be discovered, or dangerous speech suppressed in the public square?

B. Criticisms of Counterspeech over Time

Critiques of counterspeech and its use in American law have proliferated as the doctrine has ascended post-Brandenburg. These critiques have focused on a variety of shortcomings in the assumptions underlying counterspeech and the marketplace of ideas, particularly with regard to the disconnect between how counterspeech and the marketplace of ideas are described theoretically, and how ideas are actually discussed in American society. Critiques touch upon the same issues described in Part II, supra, in the debates between Professors Lawrence and Strossen on the efficacy of hate speech regulation.

This Section discusses critiques of both counterspeech and the marketplace of ideas, rather than just counterspeech, as counterspeech is rarely discussed in isolation. These related concepts, though distinct, are often discussed hand-in-hand by academics, judges, and the public. Some, though not all, criticisms of the marketplace of ideas pertain to counterspeech, and are discussed below.

Stanley Ingber's influential article of the effectiveness and assumptions of counterspeech and the marketplace of ideas highlights some common themes in subsequent critiques.[92] Professor Ingber describes the following criticisms, which have continued to resound in scholarly and social debates:

> Scholarly critics of the marketplace model argue that the model itself suggests a vital need for government regulation of the market. The imagery of the marketplace of ideas is rooted in laissez-faire economics. Although laissez-faire economic theory asserts that desirable economic conditions are best promoted by a free market system, today's economists widely admit that government regulation is needed to correct failures in the economic market caused by real world conditions. Similarly, real world conditions also interfere with the effective operation of the marketplace of ideas: sophisticated and expensive communication technology, monopoly control of the media, access limitations suffered by disfavored or impoverished groups, techniques of behavior manipulation, irrational responses to propaganda, and the arguable nonexistence of objective truth, all conflict with marketplace ideals. Consequently, critics of the market model conclude, as have critics of laissez-faire economics, that state intervention is necessary to correct communicative market failures.[93]

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92 Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984).

93 *Id.* at 5.

Professor Ingber wrote this passage over thirty-five years ago, yet many of the ongoing criticisms of marketplace theory and counterspeech are described herein — demonstrating that the debate has not progressed very much in recent decades. Common points of contention regarding the marketplace of ideas tend to arise as follows:

- Unlike the traditional goods and services in a market which are bought and sold, speech in the marketplace of ideas is not actually traded and price signals do not exist, making it far from a traditional market.[94]
- Even with a laissez-faire approach, American law enacts multiple regulations on the market; why shouldn't the marketplace of ideas be similarly regulated?[95]
- Technology exacerbates existing inequities in the marketplace and in society, preventing equal access of ideas.[96]
- Speakers with less power or social influence will often have fewer or truly equal opportunities to participate in public discourse.[97]
- Financial power or influence will distort the ability of individuals to equally access the marketplace of ideas.[98]
- Individuals are not perfectly rational and thus may be swayed by untrue or misleading ideas, thus demonstrating the ineffectiveness of a purely truth-seeking marketplace.[99]

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94 *See, e.g.*, Gregory Brazeal, *How Much Does a Belief Cost?: Revisiting the Marketplace of Ideas*, 21 S. CAL. INTERDISCIPLINARY L.J. 1, 23 (2012) (describing the strengths and shortcomings of the marketplace of ideas metaphor as compared to traditional markets).

95 *See, e.g.*, Claudio Lombardi, *The Illusion of a "Marketplace of Ideas" and the Right to Truth*, 3 AM. AFF. 1 (2019), https://americanaffairsjournal.org/2019/02/the-illusion-of-a-marketplace-of-ideas-and-the-right-to-truth/ [https://perma.cc/R4VD-KMLB] (arguing for some type of regulation for the marketplace of ideas).

96 *See, e.g.*, David Shih, Opinion, *Hate Speech and the Misnomer of 'The Marketplace of Ideas*,*'* NPR: CODE SW!TCH (May 3, 2017, 3:22 PM), https://www.npr.org/sections/codeswitch/2017/05/03/483264173/hate-speech-and-the-misnomer-of-the-marketplace-of-ideas [https://perma.cc/U6XX-XKDP] (criticizing the marketplace of ideas metaphor and its tolerance for hate speech, particularly against racial minorities).

97 *See, e.g.*, Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117 (2018) (arguing for a First Amendment jurisprudence that promotes substantive rather than formal equality).

98 *See, e.g.*, Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986) (critiquing then-recent decisions for allowing an unbalanced, formalistic approach to the First Amendment to proliferate, invariably on the side of capital).

99 *See, e.g.*, Norbert Schwarz et al., *Making the Truth Stick & the Myths Fade: Lessons from Cognitive Psychology*, 2 BEHAV. SCI. & POL'Y 85, 86 (2016) ("The persistence of the necrotizing banana myth shows that correcting false beliefs is difficult and that correction attempts often fail because addressing misinformation actually gives it more airtime, increasing its familiarity and making it seem even more believable. For instance, one of the most frequently used correction strategies, the myth-versus-fact format, can backfire because of repetition of the myth, leaving people all the more convinced that their erroneous beliefs are correct. The simple repetition of a

• There is no evidence that counterspeech is actually effective in changing minds, discovering truth, or promoting democratic values.[100]

While the goals of this Article are not to rehash these critiques, it is notable that despite the variety of criticisms of the marketplace of ideas and the efficacy of counterspeech, courts have not only generally declined to incorporate any of these criticisms, they also rarely acknowledge them. Instead, they generally resort to the Whitney formulation that the only cure for bad speech is more speech.[101]

One prominent instance of a court acknowledging the shortfalls of counterspeech occurs in American Booksellers Association v. Hudnut, a Seventh Circuit case from 1985.[102] Hudnut concerned a First Amendment challenge to an anti-pornography ordinance enacted by Indianapolis. The ordinance had been drafted by two prominent feminist thinkers, Catharine MacKinnon and Andrea Dworkin, in order to promote women's equality.[103] The ordinance prevented individuals from trafficking in pornography, coercing others from performing in pornographic works, or forcing pornography on others; if an individual was injured by someone who had seen or read pornography, they could file a lawsuit against the maker or seller.[104]

Under current First Amendment jurisprudence, it would seem obvious that the Seventh Circuit would find such a statute unconstitutional, as it regulates speech protected by the First Amendment. At the time, though, the contours of protected speech were different, and the expansion of protected speech was arguably still in progress.[105] The court, however, resorted to the classic concepts of the marketplace of ideas and the benefits of counterspeech in order to invalidate the ordinance.[106]

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falsehood, even by a questionable source, can lead people to actually believe the lie. The psychological research showing how people determine whether something is likely to be true has important implications for health communication strategies and can help point to more efficient approaches to disseminating well-established truths in general.").

100 *See, e.g.*, Lynne Tirrell, *Toxic Misogyny and the Limits of Counterspeech*, 87 FORDHAM L. REV. 2433, 2445–50 (2019) (describing how counterspeech operates and the limits of language in combating misogyny).

101 *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 727–28 (2012) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence . . . ." (quoting Whitney v. California, 247 U.S. 357, 377 (1927) (Brandeis, J., concurring) (internal quotation marks omitted)).

102 Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

103 *See* Victoria Baranetsky, *The Economic-Liberty Approach of the First Amendment: A Story of* American Booksellers v. Hudnut, 47 HARV. C.R.-C.L. L. REV., 169, 172–73.

104 *Hudnut*, 771 F.2d at 325.

105 Victoria Baranetsky argues that the *Hudnut* court extended the "marketplace of ideas" metaphor beyond its classic origins in political speech to expressive speech. Baranetsky, *supra* note 103, at 172, 179. Under this view, *Hudnut* was more innovative than it might seem, as it limited the categories of speech that the government could permissively regulate.

106 *Hudnut*, 771 F.2d at 325, 330–31, 333–34.

In the majority opinion, Judge Easterbrook notes some of the consequences of that approach — namely, that the goals of equality are subordinate to the goals of the First Amendment.[107] At various points in the opinion, Judge Easterbrook observes that the marketplace of ideas and counterspeech have limitations that may impede their effectiveness, but argues that that system is preferable to the alternative of government as censor and thought police:

> Racial bigotry, anti-semitism, violence on television, reporters' biases— these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.
>
> . . . .
>
> At any time, some speech is ahead in the game; the more numerous speakers prevail. Supporters of minority candidates may be forever "excluded" from the political process because their candidates never win, because few people believe their positions. This does not mean that freedom of speech has failed.[108]

This opinion is a rarity for its acknowledgement that counterspeech and the marketplace of ideas have the potential to perpetuate other forms of inequity and social ills. Yet, Judge Easterbrook characterizes any alternatives from the government as a form of thought policing, casting regulation as a de facto extreme overreach. The subtext of this view is that we all must live with even an ineffective marketplace of ideas and inequitable counterspeech opportunities, because any other scenario is so catastrophic for individuals that it cannot even be contemplated. The choice between government censorship and individual violence is so abhorrent that we, as a society, have apparently decided that we prefer the specter of the latter over the former.[109]

Though the Hudnut opinion is rare for its acknowledgment that counterspeech and the marketplace of ideas have shortcomings, it echoes common judicial fears of dystopian speech regulation. Like many opinions, it also ignores critiques of the libertarian conception of the marketplace of ideas. As Victoria Baranetsky notes, the opinion acknowledges MacKinnon and Dworkin's critiques but fails to substantively

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107 *Id.* at 325, 328.

108 *Id.* at 330–31.

109 This framing owes its justifications in a world in which the government's ability to control media organizations (and thus much of the speech of individuals) was much higher than today. Arguably, the ability of the government to effectively censor is far lower today than it was in the past. Yet, the ability of the federal government to impede digital communication — a disturbing, though perhaps not far-fetched scenario — might mean that the dynamics haven't shifted as much as one might like to believe.

engage their arguments.[110] Instead, the opinion merely uses some of MacKinnon and Dworkin's arguments to bolster its own view of the First Amendment.[111]

There is no requirement that courts respond to popular critiques of counterspeech and the marketplace of ideas. Federal courts are not democratically elected institutions, for better or worse, and this purported insulation from politics arguably helps to protect individual rights of unpopular minority populations. Even if courts did more meaningfully engage with critiques, there is no evidence that this would change their approach. The canonization of counterspeech as the preferred method of managing unpopular speech and the veneration of the marketplace of ideas as an essential American value in constitutional law seems unshakeable.

Yet counterspeech, at least, has changed. As discussed in Section III.A, supra, counterspeech has grown beyond its original formulation as a method to discover the truth in political discourse. It is now the preferred method of regulating speech — regardless of its effectiveness — because the only alternative is a surveillance state in which the government controls our thoughts. In essence, counterspeech is the new regulation, controlled by private parties, because the concept of public regulation of speech is too bitter a pill to swallow.

These doctrines are not as cemented as we might think. They only appear so because courts don't always acknowledge doctrinal shifts, such as the shift in why counterspeech is a superior alternative to government regulation. Therefore, at least theoretically, some aspects of the counterspeech doctrine and the conception of the marketplace of ideas can and should be revisited by judges when they use these doctrines in analyzing First Amendment claims. The following reforms are listed in order of likelihood of adoption, from most to least likely.

First, courts should more explicitly acknowledge how counterspeech has shifted over time. The evolution from justifying counterspeech as a method of discovering truth to a superior alternative to government regulation is an important one, as it significantly shifts the judicial rationale for invalidating laws, ordinances, and regulations. Yet, it has not received significant attention or discussion from judges. This avoidance has led to an unfortunate ambiguity — when civil libertarians endorse counterspeech and critics argue for its narrowing or modification, they may not be discussing the same policies or theories. Without a common understanding on why the courts rely so heavily on counterspeech, these discussions may prove unfruitful.

Second, courts should more directly engage with the extensive literature — both legal and non-legal — that critiques the assumptions underlying the marketplace of ideas and the efficacy of counterspeech. These concepts have long histories, but they are not infallible or irrebuttable. As the courts have consistently solidified the status of counterspeech, they have ignored the growing body of research that analyzes and challenges its efficacy. While courts need not necessarily engage with public disfavor or critique, the existing research could help refine or inform judicial evaluation of how and whether counterspeech can be an effective alternative to government regulation.

At its core, counterspeech is a political theory, and its incorporation into free speech doctrine occurred prior to extensive empirical or qualitative engagement. When courts cite it as a truism, they do so relying upon its historical position rather than any evidence that counterspeech actually works. Counterspeech has become an

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110 Baranetsky, *supra* note 103, at 205–08.

111 *Id.*

aphorism without justification. That does not mean that its proponents (both inside and outside the judiciary) are wrong in arguing that counterspeech is preferable to the alternatives, but they should at least engage with those who have valid critiques, particularly given the multidisciplinary nature of those critiques. In a sense, counterspeech is no longer just a political theory, but something that can be analyzed through a range of methods and in multiple disciplines.

Third — and least likely — courts should incorporate some of these critiques in an active way to reshape the counterspeech doctrine. For the same reasons that courts should engage more fully with the criticisms of counterspeech, they should also consider modifying the doctrine. Counterspeech cannot, on its own, accomplish all the responsibilities that courts have placed upon it. It must work in tandem with other tools — most notably, regulation — to achieve the goals of the First Amendment, given the dynamics of public discourse. Given the unimpeded ascendancy of counterspeech over the last fifty years, this seems unlikely to happen — but it remains an option, even if an implausible one.

The third reform is the most critical to both preserving counterspeech's vitality and to promoting First Amendment values by moving away from a knee-jerk deregulatory response. Counterspeech is important in rebutting speech, but it cannot be the only tool in promoting the democratic values that the First Amendment is concerned with, particularly if counterspeech has a confusing mandate to begin with.

Though it seems unlikely that counterspeech will be fully reconsidered by federal courts in the coming years, given how strongly it has come to dominate other, non-legal settings, it deserves renewed attention. As counterspeech has been exported to new venues as a method of speech regulation, it is an appropriate moment to evaluate what different forms it takes in new applications.

IV. COUNTERSPEECH OUTSIDE LAW

This Part describes how counterspeech has been used to guide speech regulation outside of legal entities and encourages those entities that are adopting counterspeech to consider some of the criticisms described supra. Social media companies, the paradigmatic instance of a non-state public square, are the most obvious example of how counterspeech has leapt from courts to non-governmental entities.

The speech adjudication regimes that large social media platforms have developed have been extensively studied by legal and non-legal academics alike.[112] While an extensive discussion of the platforms' complex content moderation regimes is outside of the scope of this Article, many of the platforms have incorporated elements of American free speech law into their policies. Counterspeech is one of those elements.

In discussing how platforms conceive of counterspeech, this Part seeks to explore how counterspeech is conceived of and operates in non-judicial venues (that are still heavily influenced by First Amendment doctrine). The discussion draws attention to how social media platforms, which partially rely upon counterspeech to govern content policy, should more carefully examine the evolution of the legal doctrine when

112 *See, e.g.*, Klonick, *supra* note 12; SIVA VAIDYANATHAN, ANTI-SOCIAL MEDIA: HOW FACEBOOK DISCONNECTS US AND UNDERMINES DEMOCRACY (2018).

justifying their own content choices.[113] In doing so, they may also encourage courts to more explicitly engage with how counterspeech functions.

A. Counterspeech and Content Moderation Policy

Public engagement with platform content moderation policies has skyrocketed in recent years.[114] There are multiple potential reasons for this increase, including the proliferation of technology platforms in everyday life, heightened political polarization, and higher awareness of content moderation policy through press reports and social media sharing itself. In recent years, a number of scholars have studied content moderation from a range of scholarly disciplines and perspectives.[115] In general, such policies were developed by American attorneys with a background in First Amendment and U.S. media law.[116] As such, they reflect the baselines and preferences of American attitudes towards free speech.[117]

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113 I take as a given that social media platforms seek consistency and predictability in their application of content rules, in a similar way to courts. Whether they do is debatable. Unlike government actors, which have to conform with the First, Fifth, and Fourteenth Amendments, social media platforms have no formal requirements to be consistent, accountable, transparent, or fair. Pressure from individuals, civil society, governmental entities, and competitors may promote fairness, accountability, and transparency, but only to the degree that platforms actually respond to such pressure. *See The Santa Clara Principles on Transparency and Accountability in Content Moderation*, SANTA CLARA PRINCIPLES, https://santaclaraprinciples.org [https://perma.cc/SJJ6-TG3G] (setting out core principles for platforms to adhere to regarding content moderation principles and decisions).

114 *See, e.g.*, Julia Jacobs, *Will Instagram Ever "Free the Nipple"?*, N.Y. TIMES (Nov. 22, 2019), https://www.nytimes.com/2019/11/22/arts/design/instagram-free-the-nipple.html [https://perma.cc/26C8-REED] (discussing Instagram's ban on female nipples and the #freethenipple campaign supported by artists, activists, and celebrities); Liam Stack, *What Is a 'Shadow Ban,' and Is Twitter Doing It to Republican Accounts?*, N.Y. TIMES (July 26, 2018), https://www.nytimes.com/2018/07/26/us/politics/twitter-shadowbanning.html [https://perma.cc/Q2X9-BJJ7] (describing the concept of "shadow banning" — modifying algorithms to de-emphasize certain accounts in listings — and Twitter's denial that it did so for certain political views, despite allegations from conservatives).

115 *See, e.g.*, Klonick, *supra* note 12; Evelyn Douek, *The Rise of Content Cartels*, KNIGHT FIRST AMENDMENT INST. AT COLUM. UNIV. (Feb. 11, 2020), https://knightcolumbia.org/content/the-rise-of-content-cartels; SARAH T. ROBERTS, BEHIND THE SCREEN: CONTENT MODERATION IN THE SHADOWS OF SOCIAL MEDIA (2019).

116 *See* Eric Johnson, *Former Google Lawyer and Deputy U.S. CTO Nicole Wong on Recode Decode*, VOX: RECODE (Sept. 12, 2018, 12:46 PM), https://www.vox.com/2018/9/12/17848384/nicole-wong-cto-lawyer-google-twitter-kara-swisher-decode-podcast-full-transcript [https://perma.cc/3YCZ-YNDB] (discussing Wong's career from practicing media law to serving as a product counsel at Google).

117 American platform companies also enjoy a broad range of immunity from liability for the posts of their users, thanks to Section 230 of the Communications Decency Act. 47 U.S.C. § 230. While the protections of Section 230 do not explain all of the platforms' moderation choices, Section 230 was designed to encourage good faith moderation tactics on the part of platforms, whether or not they comported with constitutional protections. Because of Section 230, platforms can generally rely upon user speech and counterspeech to flourish without concerns regarding potentially unlawful content being posted and creating intermediary liability for the platforms.

Central to this approach, as discussed supra, is the notion that "the only cure for bad speech is more speech."[118] Rather than have extensive moderation of user-generated content or ex ante review, most of the major platforms like YouTube, Twitter, Facebook, and Instagram have adopted a model in which users are generally able to post content without prior review. This allows for both a decrease in oversight costs by the platforms and the possibility of widespread sharing or potential virality (depending on the platform's architecture), all without much regulation or intervention by the platform itself.[119] If they are marketplaces of ideas, they can often be boisterous or even cacophonous ones.

Part of the concern regarding social media platforms comes from questions regarding their honesty. Do they in fact want to promote speech for societal benefits, or because doing so helps their bottom line? Does a reluctance to moderate speech stem from First Amendment principles — or because provocative speech promotes user engagement and minimizes moderation costs? Given how Facebook CEO Mark Zuckerberg now whitewashes his company's history by claiming that the behemoth was born out of his desire to encourage debate and discussion regarding the Iraq War[120] — rather than a juvenile attempt to rate the attractiveness of his female classmates[121] — it is understandable that critics would be skeptical of platforms' claims regarding their content moderation goals and motivations. Yet, even taking platforms at their word, one can see the shortcomings of their approach.

While platforms have ever-mushrooming rules on what cannot be posted, they generally start from a place of allowance rather than restriction.[122] Content is

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For further discussion of the origins and history of Section 230, see JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019).

118 *See supra* Part I.

119 For a discussion of different taxonomies of moderation, see James Grimmelmann, *The Virtues of Moderation*, 17 YALE J.L. & TECH. 42, 55 (2015) (analyzing how different components of moderation play out in different online spaces). A Marxist critique of this model might observe that by outsourcing the labor to users to report unlawful or impermissible content, the platforms are abdicating part of their responsibility and requiring those with less power to disproportionately work to preserve the platforms' capacity for discourse.

120 Alex Horton, *Iraq War Protests Inspired Facebook, Zuckerberg Says. A Lawmaker Who Was There Says That's False.*, WASH. POST (Oct. 22, 2019, 5:30 PM), https://www.washingtonpost.com/business/2019/10/22/iraq-war-protests-inspired-facebook-zuckerburg-says-lawmaker-who-was-there-says-thats-false/ [https://perma.cc/V8UV-7ZFF].

121 Alex Horton, *Channeling 'The Social Network,' Lawmaker Grills Zuckerberg on His Notorious Beginnings*, WASH. POST (Apr. 11, 2018, 5:29 PM), https://www.washingtonpost.com/news/the-switch/wp/2018/04/11/channeling-the-social-network-lawmaker-grills-zuckerberg-on-his-notorious-beginnings/ [https://perma.cc/VN29-HB62].

122 Part of the puzzle of content moderation is the juxtaposition between what platforms *say* they do regarding speech and what they *actually* do. While there is a permissive aspect to what speech gets posted, the largest platforms have extensive guides on what content is allowable and what is not. These restrictions have become ever more complicated over time. For further discussion, see Klonick, *supra* note 12, at 1631–35. While there are complicated restrictions on what content is impermissible (based on a variety of factors) that somewhat undercuts the

presumptively permissible — except when it isn't allowed[123] — and while it may be reported to the platform by users as possibly violative of law or policy, much of it remains accessible. Thus, when it comes to objectionable content, platforms (like American courts) seem to prefer to let counterspeech in the form of criticism, replies, and comments manage the dynamics of speech on the forum.

This model, as many critics have noted, has its drawbacks. Speech online is quite different from speech in a physical, public space.[124] Amplification and virality mean that speech spreads much more rapidly via online platforms than it might through traditional media like newspapers, television, and radio.[125] The costs of creating coordinated misinformation campaigns are far lower.[126] Architectural choices on the platform have consequences for how speech is promulgated, prioritized, and critiqued.[127] Relying upon First Amendment doctrine to govern online spaces, therefore, cannot fill in all the gaps that divide the dynamics of speech online versus the dynamics of speech in person.[128]

Platforms differ from the archetypal public space in structural, technology, and political ways. They enable speech in different ways, allowing speech to proliferate on orders of magnitude greater than existing spaces. As private entities, they are subject to far different constraints and concerns than governmental bodies.

The harms that result — such as non-consensual sexual imagery, anti-Semitic tropes, and racist language — are similar to existing problems for free speech doctrine, but in a mutated manner. When the concerns involve private spaces rather than public

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perceived free-for-all nature of the platforms, there remains a baseline assumption from the perspective of the user that most content is permissible — as evidenced by the lack of prior review before a user can click "Post" or "Upload" or "Tweet" or "Share."

123 Image hashing is one method of preventing images from being posted or flagging them for review, if they fall into certain unwanted or illegal categories such as terrorist propaganda or child exploitative imagery. The content is analyzed against an existing corpus of content and compared, either as being identical content or falling into a similar category. Then, depending on the platform's design and policies, it can be blocked from posting or flagged. *See, e.g.*, Robert Gorwa et al., *Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance*, 7 BIG DATA & SOC. 1 (2020) (describing technical design and applications for algorithmic content moderation).

124 *See, e.g.*, KOSSEFF, *supra* note 117, at 36–56 (describing the differences between speech in an analog world and speech on the nascent Internet platforms of CompuServe and Prodigy in the 1990s, and resulting differences for intermediary liability).

125 *See, e.g.*, Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 64, 70 (2017).

126 *Id.* at 67.

127 *See, e.g.*, Soraya Chemaly, *Fake News and Online Harassment Are More Than Social Media Byproducts — They're Powerful Profit Drivers*, SALON (Dec. 17, 2016), https://www.salon.com/control/2016/12/17/fake-news-and-online-harassment-are-more-than-social-media-byproducts-theyre-powerful-profit-drivers/ [https://perma.cc/7B24-J8DL].

128 This brief summary necessarily elides many of the other distinctions between governmental restrictions on speech and private entities' restrictions on speech, especially the concerns relating to the power of the state to limit dissent.

squares, and the political and social ramifications of content management implicate different legal concerns than governmental censorship, classic approaches to free speech cannot be uncritically imported to platforms.

What does this mean for counterspeech? If courts and individual citizens have turned away from "the search for truth" justification, how and why should online platforms conceive of counterspeech?[129] And additionally, given that private companies have a different kind of power as compared to the state, why should we have a similar preference for counterspeech on a private platform as we do in a public space?[130]

Answers to these questions are the subject of books and require extensive interdisciplinary analysis to uncover. A narrow focus on how counterspeech functions on the platforms reveals two observations:

- The use of counterspeech as a guideline for content moderation is justified by reference to a framework informed by First Amendment doctrine, but it is unclear why counterspeech is preferable to other forms of speech regulation (particularly given the differences between governmental and corporate power).

- Many platforms employ counterspeech as an implicit content moderation scheme, in part because of its centrality in First Amendment doctrine, but often to avoid platform intervention in defining acceptable speech rather than because counterspeech helps orient public discourse towards truth.

Both these observations run parallel to the discussion in Part III, supra, regarding how courts conceive of counterspeech. Courts employ functionalist justifications for invalidating laws on free speech grounds where counterspeech might plausibly play a role instead.[131] While the platforms have developed a more sophisticated and complicated version of content regulation over time, counterspeech remains a core principle.[132] In general, there are not broad ex ante prohibitions (which, if they existed, would be akin to government regulation) on what users can post.

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129 Commissioner Ellen Weintraub, of the Federal Election Commission, observed that platforms that rely upon microtargeting may create an environment impervious to counterspeech, given that not all members of the marketplace may be even aware of certain ideas that they would want to counter. *See* Ellen L. Weintraub, Opinion, *Don't Abolish Political Ads on Social Media. Stop Microtargeting.*, WASH. POST (Nov. 1, 2019, 6:51 PM), https://www.washingtonpost.com/opinions/2019/11/01/dont-abolish-political-ads-social-media-stop-microtargeting/ [https://perma.cc/9FY8-3RUL].

130 One aspect of the dominance of American companies in the digital economy is the lack of alternate conceptions of speech (such as the quite different European framework) in developing content moderation strategies.

131 *See supra* Section IV.A.

132 One important distinction exists when comparing judicial invalidation of government regulation of speech when counterspeech exists as an alternative, and the platforms' implicit reliance on counterspeech as opposed to developing *ex ante* guidelines — the platform operates as both legislator and judge. This may demonstrate a more holistic, consistent view towards the relevance of counterspeech on platforms, given that those who draft the content moderation guidelines can anticipate how they will be adjudicated, as the same entity does both. The creation

There are many rational reasons for platforms to rely upon counterspeech rather than ex ante restrictions. If platforms are to fulfill their intended function of connecting individuals, too many prior restraints on speech would undercut that goal. Like governmental entities, platforms struggle with how to effectively draft restrictions on speech that are sufficiently well-tailored to keep unwanted speech out but don't block acceptable speech.[133] The scale of posting on the largest profiles is almost impossible to prescreen through human review. Automated screening of speech currently exists in very limited situations and would be difficult to realistically deploy on a broad scale.[134] The issue is not whether counterspeech works or is effective, but whether, how, and why companies are choosing to rely on it in regulating their speech venues — and whether their public rationales are consistent with their business motivations.

B. Changing Platform Counterspeech

In the early twentieth century, the Supreme Court made an intentional choice in shifting away from a system in which the First Amendment was a "dead letter" to one in which courts more robustly enforced civil liberties protections, using counterspeech as a partial justification for that move — even though the role of counterspeech shifted over time from a search for truth to an alternative to regulation. By contrast, social media platforms have seemingly relied upon counterspeech to support content moderation policies not through an intentional choice, but rather through a de facto analogization to existing American free speech law.

While this is understandable given that most of the major social media platforms are American companies staffed by American lawyers, that choice (or non-choice) has

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of Facebook's Oversight Board may complicate this dynamic. For further discussion of the history and intended function of the Oversight Board, see Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2232 (2020).

133 One of the most high-profile examples of this dilemma involved the posting of the famous "Napalm Girl" photograph, taken by an Associate Press photographer during the Vietnam War. The Pulitzer Prize-winning photograph depicts children fleeing a napalm attack; one, a nine-year-old girl, was naked. Facebook employees chose to remove the photo as violative of its policies, though critics noted that its newsworthiness and renown justified its posting. Eventually, the decision was reversed after global backlash. Facebook noted that "context" was crucial to determining what content was permissible, which demonstrates the limitations of automated content moderation and the classic legal dilemma of "rules vs. standards" which content moderation exemplifies. *See* Aarti Shahani, *With 'Napalm Girl,' Facebook Humans (Not Algorithms) Struggle To Be Editor*, NPR (Sept. 10, 2016, 11:12 PM), https://www.npr.org/sections/alltechconsidered/2016/09/10/493454256/with-napalm-girl-facebook-humans-not-algorithms-struggle-to-be-editor [https://perma.cc/MPF4-892N]; *see also* Klonick, *supra* note 12, at 1631–35 (describing the evolution of Facebook's content policies "from standards to rules").

134 *See, e.g.*, Natasha Duarte et al., *Mixed Messages: The Limits of Automated Social Media Content Analysis*, CTR. FOR DEMOCRACY & TECH. (Nov. 2017), https://cdt.org/wp-content/uploads/2017/11/Mixed-Messages-Paper.pdf [https://perma.cc/HGZ5-69Q7] (discussing how automated social media content analysis fall short of the desired applications of those tools. Depending on the context, some automated content notices — such as those targeting COVID-19 misinformation — may seem effective, but much depends on how these frameworks are designed.).

had massive repercussions given the global scale of the platforms.[135] Moreover, both of the main judicial justifications for counterspeech — that it helps to lead society to the truth or that it is preferable to regulation — might also be relevant for platforms, but those justifications are rarely discussed or acknowledged.[136] Instead, the platforms seem to justify the existence of harmful speech with instrumentalist or accountability theories — that they, in general, don't want to be in the position of making choices about user speech. Those theories, of course, also support their business models of having as large a user base as possible.

Counterspeech might be the best option for platforms given the alternatives. But given the importance of content moderation policy to shaping public discourse, there should be greater examination of why it is the best choice — either because of ambivalence about platform controls over speech or because it helps society discover the truth, or for some other reason. How counterspeech works on platforms remains another challenge, given that comments and critiques may not be placed on the same level as the original content. Defaulting to counterspeech absent any interrogation as to why it works best for the platforms benefits no one.

The public lacks an understanding of what theories undergird the platforms' approach to content management.[137] The platforms lack the ability to coherently

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135 The First Amendment has a capacious view of free speech almost unparalleled in other democratic nations; when contrasting the American free speech tradition against European norms, the differences are quite stark. However, there does seem to be a growing recognition that non-American perspectives on free speech are relevant given the global nature of many platforms. *See* Tiffany Li, *Intermediaries & Private Speech Regulation: A Transatlantic Dialogue*, INFO. SOC. PROJECT (Sept. 28, 2018), https://law.yale.edu/sites/default/files/area/center/isp/documents/private_speech_reg_workshop_report_3.12.19.pdf [https://perma.cc/2X3N-SSX3] (describing the changing nature of platform regulation and the importance of including non-American and non-Western perspectives).

136 Mark Zuckerberg has argued that Facebook shouldn't be in the position of deciding truth, though the platform (like all platforms) necessarily has to make difficult calls on content. *See, e.g.*, Salvador Rodriguez, *Mark Zuckerberg Says Social Networks Should Not Be Fact-Checking Political Speech*, CNBC (May 28, 2020, 7:05 AM), https://www.cnbc.com/2020/05/28/zuckerberg-facebook-twitter-should-not-fact-check-political-speech.html [https://perma.cc/8XVX-UGYA]. The disconnect between the public statements of company leaders and the actual practices of the platforms makes the problem even more difficult to address, and the role of counterspeech ever more contested.

In the United States, the rise of misinformation connected to both COVID-19 and the 2020 presidential election demonstrates how social media platforms must balance their own desires to host as much information as possible against public health or democratic legitimacy concerns. As companies are not courts, they did not need to explain those decisions, so we have less insight as to why those companies felt the counterspeech strategy was insufficient to address those issues.

137 At one point, Twitter was described as being "the free speech wing of the free speech party," a slogan that the site eventually moved away from. Whether or not it was ever an accurate description, it was at least cognizable as a policy framework that could be discussed and critiqued. *See* Josh Halliday, *Twitter's Tony Wang: 'We Are the Free Speech Wing of the Free Speech Party*,*'* GUARDIAN (Mar. 22, 2012), https://www.theguardian.com/media/2012/mar/22/twitter-tony-wang-free-speech [https://perma.cc/NG6L-Z43Z] (ascribing this view to Twitter's CEO and general counsel); *see also* Chloe Hadavas, *What Twitter Should Have Done Differently From the Very Beginning*, SLATE (May 29, 2020, 11:01 AM),

explain or justify their choices, instead relying upon pithy statements that sit in tension with ever-ballooning exceptions and limitations. Despite relying upon counterspeech to explain their content moderation policies, platforms also fail to engage with how counterspeech's justification has evolved over time. Just as courts should more explicitly describe how and why counterspeech functions as a guideline for understanding free speech, so too should platforms more directly describe how they conceive of counterspeech and why it is preferred above alternatives.

There are pragmatic reasons beyond intellectual consistency and transparency for platforms to better articulate why they rely upon counterspeech and what it is intended to do. Both users and government entities are increasingly focused on how platforms manage content.[138] Calls for changes to Section 230,[139] which are aimed at changing how platforms manage content, would likely change how counterspeech functions as part of those platforms' speech policies. Given that frustration with the platforms is the rare topic to achieve bipartisan consensus, it seems possible that regulatory changes could mandate unwilling changes for content moderation. The platforms will need to make their best case for why their approach works. If counterspeech is to remain part of their framework, platforms must do a better job of articulating why they rely upon it and to what ends. And if they cannot, they should more explicitly repudiate or modify their easy and expedient reliance on counterspeech.

V. CONCLUSION

Despite its muddled history, counterspeech is almost certainly here to stay. The courts show little appetite for revisiting the doctrine. Private U.S. entities have internalized First Amendment jurisprudence to such a degree that counterspeech seems similarly ensconced within their content policies. Changing the trajectory of counterspeech might be like reorienting an ocean liner.

In the judicial setting, the shifting and vague nature of counterspeech must change. Courts should better articulate what counterspeech is, why it matters, and what it is designed to accomplish. A lack of specificity in analyses of counterspeech has led to an unfortunate accretion of confusion regarding counterspeech. Courts would do well to clear up this confusion when they invoke counterspeech and not treat it as a silver bullet that is inherently preferable in addressing problems that governments have sought to regulate.

For private entities, relying on counterspeech without explanation — or as a shortcut for more expensive, more challenging, or more difficult choices — will only compound the confusion and frustration that abounds. With reform to Section 230

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https://slate.com/technology/2020/05/twitter-trump-blaine-cook.html [https://perma.cc/QQ5E-BX6V] (describing how Twitter's speech policies have changed over time and whether the "free speech wing of the free speech party" still applies to its content moderation approach).

138 *See, e.g.*, Casey Newton, *The Trauma Floor*, VERGE (Feb. 25, 2019), https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona [https://perma.cc/6NJ9-AZFZ] (describing the challenges of content moderation on Facebook and the psychological implications suffered by some moderators); Anna Wiener, *Trump, Twitter, Facebook, and the Future of Online Speech*, NEW YORKER (July 6, 2020) (discussing recent political critiques of Internet platforms and the case for modifying Section 230 in order to more effectively regulate speech).

139 Weiner, *supra* note 138.

more likely than ever,[140] social media platforms will have to better articulate why their counterspeech-reliant approach to content moderation works effectively, in order to preserve the status quo under federal law. A more forthcoming and robust response to why counterspeech is so central to content moderation policies will only improve the policy discussions surrounding platform regulation and the ways in which speech is expressed online.

Counterspeech will always be an incomplete answer to speech we dislike. It cannot work alone to solve social problems. It cannot accomplish all the goals we have freighted upon it over the past century. It cannot be the only solution we speak of when we are confronted with "speech we hate." Only by being transparent about what we hope for from counterspeech — its strengths, its limitations, and its purposes — can we actually seek to improve the state of public discourse and the lives of our fellow citizens.

140 *See* Matt Laslo, *The Fight over Section 230—And the Internet as We Know It*, WIRED (Aug. 13, 2019), https://www.wired.com/story/fight-over-section-230-internet-as-we-know-it/ [https://perma.cc/MM4Z-Z6QP]. For detailed discussion of common Section 230 reform issues, see, for example, Daphne Keller, *Six Constitutional Hurdles for Platform Speech Regulation*, STAN. L. SCH.: THE CTR. FOR INTERNET AND SOC'Y (Jan. 22, 2021, 6:49 AM), http://cyberlaw.stanford.edu/blog/2021/01/six-constitutional-hurdles-platform-speech-regulation [https://perma.cc/J2C6-MG4J].