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NOTE

ENDING THE RIGHT'S REIGN OF STOCHASTIC TERROR: REPLACING BRANDENBURG TO MODERNIZE THE FIRST AMENDMENT

Liam Pagán *

ABSTRACT

Political debate in the United States has entered a dangerous era beyond mere hyper-partisanship. Often, “political commentary” presented by some of the most watched conservative news networks is not political commentary at all, but vilification of political targets. This vilification often results in stochastic terrorism—a phenomenon that occurs when speakers with large audiences engage in frequent rhetorical attacks against political opposition, eventually inciting an ideologically aligned individual to take unpredictable, often violent action. Stochastic terrorism is an expedient form of dealing with political opponents because, due to First Amendment incitement jurisprudence, speakers who say inciteful things remain legally insulated from accountability for the result.

To discourage and stifle the use of stochastic terrorism in political discourse, there must be accountability for demagogues who incite violence against political targets. Impeding the road to accountability is

* J.D. Candidate, 2024, Drexel University Thomas R. Kline School of Law. I want to express my sincerest gratitude to Saba Abbasi and David S. Cohen for their guidance and feedback throughout my writing process. I want to extend a special thanks to Emily Palladinetti for her mentorship throughout my time on *Drexel Law Review*. Lastly, I thank my family and friends for their endless support.

the 1969 Supreme Court case, Brandenburg v. Ohio. This case creates a near absolute barrier to legislation that can limit speech which incites stochastic terrorism. The Supreme Court should strike down the Brandenburg incitement test, allowing it to be replaced with a standard that is less tolerant of inciteful rhetoric. Articles 19 and 20 of the International Covenant on Civil and Political Rights serve as excellent guides for proper treatment and discouragement of inciteful language that the federal government should allow states to implement as they see fit to protect targeted populations. Although it is unlikely that stochastic terrorism will ever be effectively ended, this multi-part solution would significantly decrease its potency and lead to accountability for the reckless use of violent rhetoric.

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INTRODUCTION

The propensity for politically motivated violence and partisan rhetoric, while not uncommon throughout the history of the United States, has recently hit a fever pitch.¹ During the 2016

1. See NAT’L SEC. COUNCIL, NATIONAL STRATEGY FOR COUNTERING DOMESTIC TERRORISM 10–11 (2021) (finding that Militia Violent Extremists “typically target[] law enforcement and government personnel and facilities . . . because of contentious sociopolitical factors.”); Sarah D. Wire, *Threats Against Members of Congress Are Skyrocketing. It’s Changing the Job*, L.A. TIMES (Sept. 20, 2021, 2:00 AM), <https://www.latimes.com/politics/story/2021-09-20/threats-members-of-congress>, [<https://perma.cc/JH37-46XT>] (explaining that reports of threats against members of

presidential election, then-Republican nominee Donald Trump gave a speech to a congregation of supporters at a rally in Wilmington, North Carolina, in which he made a thinly veiled call to violence against then-Democratic nominee, Hillary Clinton.² He said, “[i]f [Clinton] gets to pick her judges, nothing you can do, folks. Although, the Second Amendment people, maybe there is. I don’t know.”³ Many characterized this quote as an indirect, albeit not far from direct, call for gun violence to befall his political opponent.⁴ This was inferred based on the consideration that the Second Amendment protects the right to possess and bear arms.⁵ Six years later in 2023, we know Donald Trump’s disguised call to action did not lead to violent attacks against Hillary Clinton.⁶ However, if it had, would Donald Trump have faced any consequences for making his thinly veiled incitement to violence? Would he be considered an

Congress rose from 902 in 2016 to 8,613 in 2020). A survey of over 1,000 American adults across the political spectrum found that 67% of them believe the use of force is justified to “save” the “American way of life.” NAT’L OPINION RSCH. CTR. AT THE UNIV. OF CHI. & CHI. PROJECT ON SEC. & THREATS, UNDERSTANDING THE AMERICAN INSURRECTIONIST MOVEMENT: A NATIONALLY REPRESENTATIVE SURVEY 4 (2021).

2. David S. Cohen, *Trump’s Assassination Dog Whistle Was Even Scarier than You Think*, ROLLING STONE (Aug. 9, 2016), <https://www.rollingstone.com/politics/politics-features/trumps-assassination-dog-whistle-was-even-scarier-than-you-think-112138> [https://perma.cc/SAY9-9S3L] [hereinafter Cohen, *Trump’s Assassination Dog Whistle*].

3. *Id.*

4. See, e.g., Nick Corasaniti & Maggie Haberman, *Donald Trump Suggests ‘Second Amendment People’ Could Act Against Hillary Clinton*, N.Y. TIMES (Aug. 9, 2016), <https://www.nytimes.com/2016/08/10/us/politics/donald-trump-hillary-clinton.html> [https://perma.cc/94LD-FPAP] (noting that “Mr. Trump’s remark quickly elicited a wave of condemnation from Democrats, gun control advocates and others, who accused him of suggesting violence against Mrs. Clinton or liberal jurists.”); David Smith, *Donald Trump Hints at Assassination of Hillary Clinton by Gun Rights Supporters*, THE GUARDIAN (Aug. 10, 2016, 2:55 PM), <https://www.theguardian.com/us-news/2016/aug/09/trump-gun-owners-clinton-judges-second-amendment> [https://perma.cc/75EB-F3F5] (describing how this statement promotes violence, quoting Clinton’s Campaign Manager, Robby Mook as stating, “[t]his is simple – what Trump is saying is dangerous. A person seeking to be the president of the United States should not suggest violence in any way.”); Andrew Rafferty, *Trump ‘Second Amendment’ Comment Seen as Veiled Threat Against Clinton*, NBC NEWS, (Aug. 9, 2016, 10:24 PM), <https://www.nbcnews.com/politics/2016-election/trump-campaign-defends-2nd-amendment-comment-n626601> [https://perma.cc/9VPL-4Z7J] (noting that some “blamed the GOP nominee for suggesting violence as a possible means of preventing Clinton from appointing judges if she is elected president”).

5. U.S. CONST. amend. II; see *supra* note 4 and accompanying text.

6. See Cohen, *Trump’s Assassination Dog Whistle*, *supra* note 2.

accomplice to any violent act conducted against her? Under current First Amendment principles—which have remained stagnant for over fifty years—the bar for holding someone accountable in cases like these is incredibly high, and speech of this nature would most likely be protected.⁷ This protection has been enshrined in First Amendment law by the Supreme Court case, *Brandenburg v. Ohio*, in which the Supreme Court held that state legislatures may not create laws prohibiting speech that incites violence unless the violence is imminent and likely to occur.⁸ This standard—referred to as the “imminent and likely” standard—is a lofty and ambiguous⁹ standard that has allowed inciteful rhetoric to be weaponized in a dangerous fashion.¹⁰ The inciteful rhetoric that *Brandenburg* permits often leads to the political violence that we see today.¹¹

The January 6th Insurrection provides an example of inciteful political rhetoric that actualized as violence.¹² Once news outlets projected then-Democratic nominee Joe Biden to win the 2020 Presidential election, then-President Trump publicly stated he “did win [the] election,” not Biden.¹³ This posturing continued for months, magnifying the seemingly constant spinning of conspiratorial webs on the internet that, even prior to the election, implicated Democratic Party leadership in a plot to

7. See *infra* Section II.B.

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

9. See *infra* Section II.C.

10. Alton Frye, *Incitement: Modernizing the Standard*, THE HILL (Apr. 7, 2021, 7:30 PM), <https://thehill.com/opinion/judiciary/547053-incitement-modernizing-the-standard/> [<https://perma.cc/X6RJ-2YWQ>] [hereinafter Frye, *Incitement*].

11. See *infra* Sections I.A, II.C.

12. Sheera Frenkel, *The Storming of Capitol Hill Was Organized on Social Media*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/protesters-storm-capitol-hill-building.html> [<https://perma.cc/256F-S598>].

13. See Steve Inskeep, *Timeline: What Trump Told Supporters for Months Before They Attacked*, NPR (Feb. 8, 2021, 2:32 PM), <https://www.npr.org/2021/02/08/965342252/timeline-what-trump-told-supporters-for-months-before-they-attacked> [<https://perma.cc/C3Y7-MT2D>].

steal the election from Trump and the Americans who voted for him.¹⁴

Gab, Parler, Telegram, Discord, and X, formerly known as Twitter, were all social media platforms used as echo chambers for believers in Trump's assertion that the election was stolen.¹⁵ Shortly after the election was officially called for Biden, chat rooms on these platforms were used as war rooms, where plans and logistics for the attack on the Capitol would be debated and shared with all who wanted to participate.¹⁶ Websites advertising the January 6th "protest" were created to both drive and gauge interest and attendance in the event.¹⁷ Further, while the attack was underway, organizers used some of these same platforms to issue orders to rioters.¹⁸ Social media proved significant both for the planning and carrying out of the insurrection.¹⁹ Trump used social media to amplify his election fraud conspiracies to his followers, and the extremists among them obliged and shared his message.²⁰

It remains to be seen if Trump will be held accountable for his hand in inciting the violence that occurred on January 6th.²¹ In

14. *See id.*

15. *See* Tonya Mosley & Allison Hagan, *How Social Media Fueled the Insurrection at the U.S. Capitol*, WBUR (Jan. 7, 2021), <https://www.wbur.org/hereandnow/2021/01/07/social-media-capitol-mob> [<https://perma.cc/7WRC-TPCK>]; Rebecca Heilweil & Shirin Ghaffary, *How Trump's Internet Built and Broadcast the Capitol Insurrection*, VOX (Jan. 8, 2021, 5:00 PM), <https://www.vox.com/recode/22221285/trump-online-capitol-riot-far-right-parler-twitter-facebook> [<https://perma.cc/DWR2-7EV8>].

16. *See* Mosley & Hagan, *supra* note 15; Heilweil & Ghaffary, *supra* note 15.

17. Heilweil & Ghaffary, *supra* note 15.

18. *Id.*

19. *See* Meagan Schantz, *Technology's War on Terror: The Need for Platform Accountability in the Wake of a National Security Crisis*, 36 J. CIV. RTS. & ECON. DEV. 151, 152–53 (2022).

20. Heilweil & Ghaffary, *supra* note 15. Social media was also used in the weeks leading up to the event to share death threats against former-Vice President Pence and former-Speaker of the House Nancy Pelosi to galvanize prospective attendees. Kayla Gallagher, *Secret Service Knew of Threats Against Nancy Pelosi, Joe Biden, and Mike Pence for Days Before the Capitol Riot: CREW, INSIDER* (Aug. 17, 2022, 4:47 PM), <https://www.businessinsider.com/secret-service-knew-threats-nancy-pelosi-before-jan-6-riot-2022-8> [<https://perma.cc/NE5J-GSPP>]. During the attack, social media was used to communicate the locations of fellow rioters, politicians, and plans for the violence the insurrectionists intended to carry out. Heilweil & Ghaffary, *supra* note 15.

21. Brent Kendall, *Incitement Case Against Trump for Capitol Riot Would Present Challenges*, WALL ST. J. (Feb. 21, 2021, 9:00 AM), <https://www.wsj.com/articles/incitement-case-against-trump-for-capitol-riot-would-present-challenges-11613916000> [<https://perma.cc/VH2J-KRUK>]; *see* Alan Feuer, *The Charges That*

the two years since the insurrection, there have been many charges filed against the rioters and organizers of the attack,²² including four against Trump himself, but none of those charges assert that he incited the violence that occurred that day.²³ Leaving aside the question of whether a President, former or otherwise, could be criminally charged for actions he took while in office, legal scholars and analysts hold conflicting views on whether the rhetoric that led to the Capitol attack should receive First Amendment protection.²⁴ Regardless of where one falls in that debate, there appears to be a broad public consensus that Trump's speech instructing his followers to march to the Capitol and "fight like hell" played some part in the events that occurred that day, and should lead to accountability.²⁵ This attack, and the seeming lack of consequences for its

Were Notably Absent from the Trump Indictment, N.Y. TIMES (Aug. 3, 2023), <https://www.nytimes.com/2023/08/03/us/politics/indictment-trump-jan-6-violence.html>, [<https://perma.cc/FKR9-SRSZ>] (noting that while Trump has faced charges related to the events of January 6th, there has been no criminal indictment against him asserting that he personally incited the violence that occurred).

22. At the time of writing, over 1,100 charges have been filed against rioters. Lauren Sforza, *Number of People Charged in Jan. 6 Rioting Surpasses 1,100*, HILL (Aug. 10, 2023, 10:02 AM), <https://thehill.com/policy/national-security/4147038-number-of-people-charged-in-jan-6-rioting-surpasses-1100/> [<https://perma.cc/D4HK-YGU9>].

23. Congress impeached and subsequently acquitted Donald Trump for inciting a riot. See Kendall, *supra* note 21. Trump was also criminally indicted in New York on April 4, 2023 for "falsifying business records." Jonah E. Bromwich, Ben Protess, William K. Rashbaum & Michael Gold, *The Case Against Donald Trump: What Comes Next?*, N.Y. TIMES (Apr. 5, 2023), <https://www.nytimes.com/article/trump-indictment-criminal-charges.html> [<https://perma.cc/BQM9-DVUA>].

24. See, e.g., Jen Patja Howell, Natalie K. Orpett, Alan Z. Rozenshtein, Jed Handelsman Shugerman, *The Lawfare Podcast: Why the First Amendment Doesn't Protect Trump's Jan. 6 Speech*, LAWFARE (Oct. 28, 2022, 12:00 PM), <https://www.lawfaremedia.org/article/lawfare-podcast-why-first-amendment-doesnt-protect-trumps-jan-6-speech> [<https://perma.cc/6JAT-E4XW>] (describing why Trump may be held criminally liable for his speech on January 6); Jonathan Turley, *Even Lies Are Protected Speech: New Trump Indictment Bulldozes the First Amendment*, HILL (Aug. 5, 2023, 10:30 AM), <https://thehill.com/opinion/criminal-justice/4137650-even-lies-are-protected-speech-new-trump-indictment-bulldozes-the-first-amendment>.

25. Brian Naylor, *Read Trump's Jan. 6 Speech, a Key Part of Impeachment Trial*, NPR (Feb. 10, 2021, 2:43 PM), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial> [<https://perma.cc/2NB7-26HD>]; see Carrie Johnson & Domenico Montanaro, *The Ongoing Quest for Accountability Two Years After the Jan. 6 Riot*, NPR (Jan. 6, 2023, 5:18 PM), <https://www.npr.org/2023/01/06/1147545767/the-ongoing-quest-for-accountability-two-years-after-the-jan-6-riot> [<https://perma.cc/7UA4-29ST>]; Tierney Sneed, Sara Murray, Zachary Cohen, Annie Grayer & Marshall Cohen, *What's in the House January 6 Committee Report Summary*, CNN, <https://www.cnn.com/2022/12/19/politics/what-is-in-jan-6-committee-report-summary/index.html> [<https://perma.cc/4L59-KFCR>] (Dec. 19, 2022, 9:26 PM) (reporting that the

lead architect despite a widely-shared desire for accountability, should make it clear the First Amendment's body of incitement case law allows for dangerous exploitation.²⁶ A solution that bridges the gap between public safety and censorship concerns is necessary to preserve democracy and discourage the use of inciteful language — which often leads to violence — from being shared without consequence.²⁷

Accordingly, this Note proposes overturning the Supreme Court case *Brandenburg v. Ohio*. This will allow states to impose standards and statutes modeled after international law that will both acknowledge and address the epidemic of stochastic violence that is often carried out under the guise of political speech by politicians and the press. Part I demonstrates how dehumanization and aggressive rhetorical attacks masked as “political commentary” lead to a violent phenomenon known as stochastic terrorism, and the importance of providing a legal remedy in such cases. Part II parses through the history of the First Amendment, specifically *Brandenburg* and highlights why its holding is incapable of adequately addressing stochastic terror. Part III explores Articles 19 and 20 of the International Covenant on Civil and Political Rights as adequate legal standards to counter stochastic terrorism while still maintaining the benefits of First Amendment protections. Part IV recommends striking down and replacing the *Brandenburg* standard with the requirements of Articles 19 and 20. It also offers an example of what a

House select committee that investigated the January 6 attack on the Capitol believes Trump violated several statutes and will make criminal referrals to the Department of Justice).

26. See generally Alan Z. Rozenshtein & Jed Handelsman Shugerman, *January 6, Ambiguously Inciting Speech, and the Overt-Acts Rule*, 37 CONST. COMMENT. (forthcoming 2023). “In an age of increasing political polarization and violence, drawing a line between permitted and prohibited by our political officials is of the utmost importance.” *Id.* at 5.

27. *Id.* at 1–3, 19; see Colby Itkowitz, *An Expert on ‘Dangerous Speech’ Explains How Trump’s Rhetoric and the Recent Spate of Violence Are and Aren’t Linked*, WASH. POST (Oct. 29, 2018, 2:40 PM), <https://www.washingtonpost.com/politics/2018/10/29/professor-who-defined-dangerous-speech-how-trumps-rhetoric-pittsburgh-are-linked/> [<https://perma.cc/JV4U-34MQ>]; see also Nathan Kalmoe, *Yes, Political Rhetoric Can Incite Violence*, POLITICO (Oct. 30, 2018), <https://www.politico.com/magazine/story/2018/10/30/yes-political-rhetoric-can-incite-violence-222019/> [<https://perma.cc/2ZPH-QSHW>] (“[E]xposure to mildly violent political metaphors such as ‘fighting for our future’ increased general support for political violence among people with aggressive personalities.”) (citing Nathan P. Kalmoe, *Fueling the Fire: Violent Metaphors, Trait Aggression, and Support for Political Violence*, 31 POL. COMM’N 545 (2014)).

statute could look like under Articles 19 and 20, and how such statutes could operate effectively while still preserving the important aspects of speech and a press free from absolute government control.

I. BACKGROUND

Violent attacks against political enemies have increased in the United States in recent years.²⁸ Modern communication technology, particularly social media, plays a significant role in demagogues' ability to use political power and influence to incite violence against opposition.²⁹ The constant connectedness of modern society allows false narratives and inciteful language to spread like wildfire.³⁰ This spread often leads to radicalization of individuals who carry out the violence that has been directly or indirectly advocated.³¹

This Part will demonstrate how incendiary political speech, when disseminated at scale, has the potential to make people act aggressively towards targets of the speech. It will then explain the phenomenon of stochastic terrorism and the damage it has had and will continue to have on the country if it is allowed to proliferate unchecked. It will use the "great replacement" theory, a conspiracy theory often cited by the right-

28. Wire, *supra* note 1.

29. See MICHAEL JENSEN, PATRICK JAMES, GARY LAFREE, AARON SAFER-LICHTENSTEIN & ELIZABETH YATES, NAT'L CONSORTIUM FOR THE STUDY OF TERRORISM & RESPONSES TO TERRORISM, THE USE OF SOCIAL MEDIA BY UNITED STATES EXTREMISTS (2018), www.start.umd.edu/pubs/START_PIRUS_UseOfSocialMediaByUSExtremists_ResearchBrief_July2018.pdf [<https://perma.cc/2T8L-CUFG>] ("[S]ocial media platforms are playing an increasingly important role in the radicalization processes of U.S. extremists.").

30. See *id.* ("From 2011 to 2016, 216 out of 295 (73.2%) of the extremists in PIRUS used social media platforms to passively consume content, participate in extremist dialogues, spread extant extremist propaganda, or communicate with other extremists . . .").

31. *Confronting the Rise of Domestic Terrorism in the Homeland: Hearing Before the Comm. on Homeland Sec. H.R.*, 116th Cong. 18–19 (2021) (statement of Michael C. McGarrity, Assistant Director, Counterterrorism Division, Federal Bureau of Investigations) ("Radicalization to violence of domestic terrorists is increasingly taking place on-line, where violent extremists can use social media for the distribution of propaganda, recruitment, target selection, and incitement to violence.").

wing³² media to radicalize individuals, as a case study to demonstrate how open incitement against political targets has become more common and accepted in political commentary, particularly on the right.

A. When “Political Speech” Manifests as Violence

Bill O’Reilly, former host of the canceled Fox News show *The O’Reilly Factor*, engaged in behavior similar to that of Trump, both on his show and the Fox News website.³³ From 2005–2009, O’Reilly engaged in a personal crusade against renowned reproductive health care provider and advocate, Dr. George Tiller.³⁴ At the time, Dr. Tiller was one of only three health care providers in the nation providing abortion procedures beyond the threshold of fetal viability.³⁵ These late-term abortions often involved fetuses with low likelihood of survival because of developmental abnormalities or even potentially life-threatening complications for the mother upon delivery.³⁶ Anti-abortion extremists targeted Dr. Tiller several times in the 1980s and 1990s, including a bomb attack on his clinic in 1986 and a gun attack which resulted in Tiller being shot in both arms in 1993.³⁷ Despite the fact Dr. Tiller was previously targeted by anti-abortion

32. *Right-wing*, OXFORD LEARNER’S DICTIONARIES, <https://www.oxfordlearnersdictionaries.com/us/definition/english/right-wing> [<https://perma.cc/4ARN-BBRW>] (“supporting capitalism and the private ownership of businesses and services and generally opposed to social change”).

33. See *supra* INTRODUCTION; Brian Stelter, *Doctor’s Killer Is Not Alone in the Blame, Some Say*, N.Y. TIMES (June 1, 2009), <https://www.nytimes.com/2009/06/02/us/02blame.html> [<https://perma.cc/H2FQ-9GHQ>]; Bill O’Reilly, *Killing Babies in America*, FOX NEWS (NOV. 6, 2006, 7:46 AM), <https://www.foxnews.com/story/killing-babies-in-america> [<https://perma.cc/4KU6-U5FV>].

34. See Stelter, *supra* note 33.

35. David Barstow, *An Abortion Battle, Fought to the Death*, N.Y. TIMES (July 25, 2009), <https://www.nytimes.com/2009/07/26/us/26tiller.html> [<https://perma.cc/SK4J-QUGS>]. Fetal viability is the medical and legal concept that establishes the point in fetal development at which a fetus can “survive outside the womb.” See Elizabeth Chloe Romanis, *Is ‘Viability’ Viable? Abortion, Conceptual Confusion and the Law in England and Wales and the United States*, 7 J.L. & BIOSCIENCES 1, 2 (2020) (“Viability is ‘the ability [of a developing fetus] to survive independent of a pregnant woman’s womb.’”).

36. See Barstow, *supra* note 35; Judy L. Thomas & David Klepper, *From the Archives: The Complex Life of George Tiller*, KAN. CITY STAR, <https://www.kansascity.com/news/state/kansas/article230986418.html> (May 30, 2019, 4:54 PM).

37. Thomas & Klepper, *supra* note 36.

extremists, O'Reilly almost exclusively referred to him as "Tiller the Baby Killer" on his show, a gross mischaracterization of the services he provided.³⁸ Indeed, O'Reilly routinely mischaracterized and demonized Dr. Tiller and his work, making incendiary and false claims like "Tiller the Baby Killer out in Kansas, acquitted. Acquitted today of murdering babies."³⁹ O'Reilly also said "[Dr. Tiller] aborts babies at any time for just about any reason if you pay him \$5,000,"⁴⁰ and more egregiously: "if I could get my hands on Tiller—well you know,"⁴¹ "[t]his is the kind of stuff [that] happened in Mao's China, Hitler's Germany, Stalin's Soviet Union,"⁴² "this guy operat[es] a death mill,"⁴³ and "Dr. Tiller has blood on his hands."⁴⁴ O'Reilly even accused Dr. Tiller, then-Kansas Governor Kathleen Sebelius, and the judge who oversaw Dr. Tiller's criminal trial of being co-conspirators in a nefarious plot to allow illegal abortions to foment in Kansas.⁴⁵ On May 31, 2009, an anti-abortion extremist shot and killed Dr. Tiller as he handed out bulletins to the Reformation Lutheran Church congregation in Wichita, Kansas.⁴⁶

38. Angie Drobnic Holan, *Bill O' Reilly Called George Tiller "a Baby Killer" Without Attribution*, POLITIFACT (June 5, 2009), <https://www.politifact.com/factchecks/2009/jun/05/bill-oreilly/bill-oreilly-called-george-tiller-baby-killer/> [<https://perma.cc/865G-QMHX>].

39. *Id.* The acquittal in question was referring to a trial wherein Tiller was charged with nineteen counts of violating Kansas statute § 65-6724 which requires two doctors with no prior affiliation to agree that a pregnant women would be irreparably harmed while giving birth before proceeding with a late term abortion. *See* KAN. STAT. ANN. § 65-6724 (2023). Tiller was only charged with violating that provision of Kansas law and acquitted of all nineteen charges. Thomas & Klepper, *supra* note 36. No charges of infanticide were brought against him. *Id.*

40. Holan, *supra* note 38.

41. David S. Cohen, *Bill O'Reilly's Dangerous War Against Dr. Tiller*, ROLLING STONE (Apr. 19, 2017), <https://www.rollingstone.com/politics/politics-features/bill-oreillys-dangerous-war-against-dr-tiller-107722/> [<https://perma.cc/QTXX-8WSH>].

42. Gabriel Winant, *O'Reilly's Campaign Against Murdered Doctor*, SALON (May 31, 2009, 11:32 PM), https://www.salon.com/2009/05/31/tiller_2/ [<https://perma.cc/CS8G-9F76>].

43. *Id.*

44. *Id.*

45. *Id.*

46. Barstow, *supra* note 35. It is also worth noting that this result is by no means uncommon in the realm of anti-abortion extremism. *See* NAT'L ABORTION FED., 2016 VIOLENCE AND DISRUPTION STATISTICS, <https://prochoice.org/wp-content/uploads/2016-NAF-Violence-and-Disruption-Statistics.pdf> [<https://perma.cc/2P83-SA7c>] (providing information regarding the high rate of harassment that abortion providers and clinics regularly receive). The case of Dr. Tiller is a microcosm of the wider epidemic of anti-abortion violence that can often be characterized as stochastic terrorism, given the proliferation of extreme anti-abortion rhetoric. *See*

Despite societal condemnation of such violent acts, the unfortunate truth is political demagogues like Trump and O'Reilly recklessly use inciteful rhetoric with impunity because of outdated First Amendment principles.⁴⁷ This remains true despite fundamental changes in the ways that speech is disseminated and messages are shared from speaker to audience.⁴⁸ O'Reilly continued to mischaracterize, demonize, and lie about Dr. Tiller, despite the reasonable likelihood it would lead to violence against him, evidenced by the fact that there had been numerous attempts made on his life in the past.⁴⁹ In a world of ever-advancing technology that breeds interconnectedness across the globe, information and messages are shared instantly—not only vertically from pundit to audience, but horizontally across consumers—allowing false narratives and conspiracies to spread like wildfire.⁵⁰ Against a backdrop of violence resulting from demagogues exploiting the First

Amanda Robb, *The Making of an American Terrorist*, NEW REPUBLIC (Dec. 19, 2016), <https://newrepublic.com/article/138950/making-american-terrorist-robert-dear-planned-parenthood> [<https://perma.cc/MRT4-MGTU>] (providing an example of an anti-abortion extremist who cited anti-abortion rhetoric created by right-wing media as part of his inspiration to attack a Colorado Springs Planned Parenthood clinic).

47. Richard Ashby Wilson, *No Court Would Convict Trump of Incitement. His Liability Is Moral, Not Legal*, WASH. POST (Oct. 29, 2018, 6:00 AM), <https://www.washingtonpost.com/outlook/2018/10/29/no-court-would-convict-trump-incitement-his-liability-is-moral-not-legal/> [<https://perma.cc/M2P2-TBDP>]; see, e.g., *Nwanguma v. Trump*, 903 F.3d 604, 606 (6th Cir. 2018) (holding that Trump's repeated use of combative comments such as "Get 'em out of here" regarding protestors who were subsequently shoved and assaulted by audience members received First Amendment protection because "he did not specifically advocate imminent lawless action").

48. See John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 428 (2002).

49. See Daniel L. Byman, *How Hateful Rhetoric Connects to Real-World Violence*, BROOKINGS (Apr. 9, 2021), <https://www.brookings.edu/blog/order-from-chaos/2021/04/09/how-hateful-rhetoric-connects-to-real-world-violence/> [<https://perma.cc/G44V-X38M>] (noting that "[a]s extremism magnifies, the likelihood of violence increases"). A 2017 study on aggressive behavior showed that when individuals are treated with anger, contempt, and disgust, it is easier for them to be dehumanized and therefore treated more aggressively by other groups. See David Matsumoto, Hyisung C. Hwang & Mark G. Frank, *Emotion and Aggressive Intergroup Cognitions: The ANCODI Hypothesis*, 43 AGGRESSIVE BEHAV. 93, 103–05 (2017).

50. See generally Cronan, *supra* note 48 (noting "[t]he explosion of Internet messages that may incite individuals to lawless activity demands the articulation of an Internet incitement standard").

Amendment to spew dangerous rhetoric with impunity, the boundaries of the First Amendment must be revised.⁵¹

Stochastic terrorism is the phenomenon that best characterizes the plausibly deniable acts of incitement undertaken by Trump, O'Reilly, and others.⁵² This rhetorical, political weapon is nothing new, but its frequency and effectiveness in the modern American political debate, demonstrated by an uptick in deadly political violence from the far-right, should be a cause for concern for all Americans.⁵³

B. *Stochastic Terrorism*

Stochastic terrorism, also called stochastic terror, is a rhetorical tool used to leverage violent rhetoric against a target or group of targets, with the belief that it is likely to cause someone in their audience to act with violence against the targeted group despite the lack of specific instruction, creating plausible

51. *See id.* at 427–28.

52. “The use of mass media to provoke random acts of ideologically motivated violence that are statistically predictable but individually unpredictable.” *Philosophical and Public Security Law Implications of ‘Stochastic Terrorism’*, MAX PLANCK INST., <https://csl.mpg.de/en/projects/philosophical-and-public-security-law-implications-of-stochastic-terrorism> [<https://perma.cc/385R-STAZ>].

53. Gordon Woo is often credited with the first publicized use of the term “stochastic terror.” *See generally* Gordon Woo, *Quantitative Terrorism Risk Assessment*, 4 J. RISK FIN. 7 (2002) (describing stochastic terrorism as a method of terrorism which is difficult for law enforcement to predict and thwart). Of seventy-seven domestic terrorist attacks carried out in 2021, 49% were perpetrated by the far-right. CATRINA DOXSEE, SETH G. JONES, JARED THOMPSON, GRACE HWANG & KATERYNA HALSTEAD, *PUSHED TO EXTREMES: DOMESTIC TERRORISM AMID POLARIZATION AND PROTEST 6* (2022), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/220517_Doxsee_PushedtoExtremes_DomesticTerrorism_0.pdf [<https://perma.cc/MZ68-EA5F>]. Of the thirty-one fatalities related to *all* domestic terrorist attacks, twenty-eight stemmed from far-right terrorist attacks. *Id.* This Note does not assert that only individuals who identify with the political right engage in incitement or stochastic terrorism. The far-left similarly engages in inciteful rhetoric bordering on stochastic terrorism against political enemies such as police officers. *See* JOEL FINKELSTEIN, ALEX GOLDENBERG, SEAN STEVENS, LEE JUSSIM, JOHN FARMER, JOHN K. DONOHUE & PAMELA PARESKY, *NETWORK CONTAGION RSCH. INST., NETWORK-ENABLED ANARCHY: HOW MILITANT ANARCHO-SOCIALIST NETWORKS USE SOCIAL MEDIA TO INSTIGATE WIDESPREAD VIOLENCE AGAINST POLITICAL OPPONENTS AND LAW ENFORCEMENT 3* (2020), <https://networkcontagion.us/wp-content/uploads/NCRI-White-Paper-Network-Enabled-Anarchy-25-Sept-259pm.pdf> [<https://perma.cc/FS4V-X4NS>]. However, in its current state, the far-left is more focused on activism through protest or damaging property to make political headway through stochastic terrorism against individuals. *See id.* There is certainly worry, however, that if left unchecked, the left could also resort to frequent incitements of violence against political enemies in mainstream political discourse. *See id.* at 6.

deniability.⁵⁴ During the fallout of Trump's 2016 comment about the Second Amendment, his campaign team spun the plausible narrative that his comments were intended to politically unify Second Amendment fanatics, who tend to lean Republican,⁵⁵ under the cause of preventing Hillary Clinton from entering office.⁵⁶ Considering that Trump ran his campaign on a promise to put Clinton in jail for alleged crimes against the United States and other attacks against her, one can see how the message he sent was at least open to violent interpretation from extremists.⁵⁷ Similarly, in light of calls from the public for him to be held responsible for the assassination of Dr. Tiller in some fashion, O'Reilly responded with a half-hearted condemnation of the murder and avoidance of admission to any wrongdoing.⁵⁸ O'Reilly said, "pro-abortion zealots and Fox News haters [are attempting] to blame us for the crime," while asserting that he did not direct anyone to take any action against Tiller.⁵⁹

Stochastic terror has certainly received more mainstream attention because of the uptick of politically inspired violence and mass shootings. These attacks are often carried out by individuals radicalized by false narratives and conspiracy theories that have become more commonplace in Conservative media and

54. Mark Follman, *National Security Experts Warn Trump "Is Promoting Terrorism"*, MOTHER JONES (Dec. 17, 2020), <https://www.motherjones.com/politics/2020/12/trump-stochastic-terrorism-violence-rhetoric/> [<https://perma.cc/R7QC-7DQY>].

55. See *supra* INTRODUCTION; Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (Sept. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/09/13/key-facts-about-americans-and-guns/> [<https://perma.cc/R9SE-A9VP>] (noting that Republican voters are more in favor of broad access to firearms in most cases than Democratic voters).

56. Cohen, *Trump's Assassination Dog Whistle*, *supra* note 2.

57. See Peter W. Stevenson, *A Brief History of the 'Lock Her Up!' Chant by Trump Supporters Against Clinton*, WASH. POST (Nov. 22, 2016, 4:56 PM), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/22/a-brief-history-of-the-lock-her-up-chant-as-it-looks-like-trump-might-not-even-try/> [<https://perma.cc/RMZ8-L92G>]; *US Election 2020: Has Trump Delivered on His Promises?*, BRIT. BROAD. CORP. (Oct. 15, 2020), <https://www.bbc.com/news/world-us-canada-37982000> [<https://perma.cc/T53H-2963>].

58. *Bill O'Reilly in Hot Seat After Kan. Murder*, HOLLYWOOD REP. (June 2, 2009, 5:02 PM), <https://www.hollywoodreporter.com/business/business-news/bill-oreilly-hot-seat-kan-84866/> [<https://perma.cc/5UKZ-LNUT>]. O'Reilly said, "quick thinking Americans" should condemn the murder because "[a]narchy and vigilantism will assure the collapse of any society." *Id.*

59. *Id.*

politics.⁶⁰ During the 2018 midterm elections, Cesar Sayoc, a self-admitted “Donald Trump superfan,” and devout watcher of Fox News, mailed sixteen improvised explosive devices to Barack Obama, Hillary Clinton, Joe Biden, Kamala Harris, George Soros, and other left-leaning figures, who he believed were mortal enemies of President Trump, because of constant exposure to inciteful and denigrating rhetoric.⁶¹ The authorities caught him before he injured anyone and sentenced him to twenty years in prison.⁶² Despite admitting to religiously consuming Fox News and Donald Trump related content to the point of radicalization leading to attempted violence, the influential media figures who radicalized him were assigned no liability whatsoever in the attempted attacks.⁶³

Stochastic terror has far reaching and devastating consequences, amplified by the way in which hateful messages spread indiscriminately via the internet and television, resulting in radicalization and violent attacks against vulnerable communities.⁶⁴ On May 14, 2022, ten people were murdered by eighteen-year-old Payton Gendron when he drove to a

60. See Odette Yousef, *The ‘Great Replacement’ Conspiracy Theory Isn’t Fringe Anymore, It’s Mainstream*, NPR (May 17, 2022, 5:57 AM), <https://www.npr.org/2022/05/17/1099233034/the-great-replacement-conspiracy-theory-isnt-fringe-anymore-its-mainstream> [https://perma.cc/U78P-CA27]. Alt-right is a term used to describe “a set of far-right ideologies, groups, and individuals whose core belief is that ‘white identity’ is under attack by multicultural forces using ‘political correctness’ and ‘social justice’ to undermine white people and ‘their’ civilization.” *Alt-Right*, SOUTH. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/alt-right> [https://perma.cc/FC98-A7R8].

61. Benjamin Weiser & Ali Watkins, *Cesar Sayoc, Who Mailed Pipe Bombs to Trump Critics, Is Sentenced to 20 Years*, N.Y. TIMES (Aug. 5, 2019), <https://www.nytimes.com/2019/08/05/nyregion/cesar-sayoc-sentencing-pipe-bombing.html> [https://perma.cc/XJ7F-QC9A]. Sayoc suffered from mental health maladies as well. *Id.* This likely made him more impressionable and prone to carry out violence. See ALLISON G. SMITH, NAT’L INST. OF JUST., RISK FACTORS AND INDICATORS ASSOCIATED WITH RADICALIZATION TO TERRORISM IN THE UNITED STATES: WHAT RESEARCH SPONSORED BY THE NATIONAL INSTITUTE OF JUSTICE TELLS US 8 (2018).

62. Weiser & Watkins, *supra* note 61.

63. See *id.*

64. See Anna Gronewold, *Buffalo Shooter ‘Radicalized’ Through Fringe Online Platforms, Report Finds*, POLITICO (Oct. 18, 2022, 2:55 PM), <https://www.politico.com/news/2022/10/18/hochul-james-release-report-on-buffalo-shooter-online-radicalization-00062344> [https://perma.cc/AFW9-3SNM]; see also Karsten Müller & Carlo Schwarz, *From Hashtag to Hate Crime: Twitter and Anti-Minority Sentiment* 15 AM. ECON. J. 270, 308 (2023) (concluding that “social media can affect offline actions that might endanger minority communities”).

supermarket in a predominantly Black neighborhood in Buffalo, New York, and shot thirteen people, eleven of whom were Black.⁶⁵ In the aftermath of the shooting, authorities discovered that Gendron, a white man, had written a racist manifesto before the attack.⁶⁶ In it, he stated that he was motivated to carry out the attack after being radicalized by a conspiracy theory known as the “great replacement theory,” which has gained more traction in mainstream right-wing political discourse.⁶⁷

C. Violence as a Result of Popularization of Marginal Beliefs

The “great replacement theory” originated in fringe right-wing political circles, but eventually gained traction with the mainstream right in the modern political scene, making it one of the most dangerous, unsupported, and false conspiracy theories today.⁶⁸ The potential danger that lies in the great replacement theory is much higher than previously discussed examples of stochastic terror⁶⁹ because the explosion in worldwide internet use allows greater connectivity and unfettered access

65. Emma Bowman, Bill Chappell, & Becky Sullivan, *What We Know So Far About the Buffalo Mass Shooting*, NPR, <https://www.npr.org/2022/05/15/1099028397/buffalo-shooting-what-we-know> [https://perma.cc/4BA6-TAFE] (May 16, 2022), 9:45 AM; Madeline Halpert, *Buffalo Shooting Suspect Payton Gendron Indicted on 27 Federal Charges—Including Hate Crimes and Weapons*, FORBES (July 14, 2022, 3:07 PM), <https://www.forbes.com/sites/madelinehalpert/2022/07/14/buffalo-shooting-suspect-payton-gendron-indicted-on-27-federal-charges-including-hate-crimes-and-weapons/> [https://perma.cc/6VC2-BTEQ]

66. Halpert, *supra* note 65.

67. Dustin Jones, *What Is the ‘Great Replacement’ and How Is It Tied to the Buffalo Shooting Suspect?*, NPR (May 16, 2022, 12:35 AM), <https://www.npr.org/2022/05/16/1099034094/what-is-the-great-replacement-theory> [https://perma.cc/SU34-D9LJ]. See Cassie Miller, *SPLC Poll Finds Substantial Support for ‘Great Replacement’ Theory and Other Hard-Right Ideas*, S. POVERTY L. CTR. (June 1, 2022), <https://www.splcenter.org/news/2022/06/01/poll-finds-support-great-replacement-hard-right-ideas> [https://perma.cc/8KTU-NN3F] (stating “[n]early 7 in 10 Republicans surveyed agree to at least some extent that demographic changes in the United States are deliberately driven by liberal and progressive politicians attempting to gain political power by ‘replacing more conservative white voters’”). The theory has even been discussed on Capitol Hill in an official committee hearing. See *Hate Crimes and the Rise of White Nationalism: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec.*, 116th Cong. (2019) (statement of Rep. Jerrold Nadler, Chairman, H. Comm. on the Judiciary).

68. See *Hate Crimes and the Rise of White Nationalism*, *supra* note 67; Miller, *supra* note 67; Yousef, *supra* note 60.

69. See Yousef, *supra* note 60.

to dubious information.⁷⁰ This increase in access and viewership brings with it an increased likelihood that a credulous individual will be radicalized and more likely to carry out an attack, increasing the frequency of stochastic terrorism.⁷¹ A 2023 research brief compiled by the National Consortium for the Study of Terrorism and Responses to Terrorism documented a 40% increase in lone offender attacks compared to the 1980s.⁷² The report also found that only about 20% of individuals who committed extremist crimes in 2007 were mobilized to commit violence within a year of radicalization.⁷³ In 2021, nearly 50% of all violent extremists carried out attacks within a year of exposure to extremist views.⁷⁴ The report acknowledged that “[t]he acceleration of radicalization processes largely coincides with the explosive growth of online extremist communities and the rapid spread of mis/disinformation on social media.”⁷⁵

With prominent right-wing celebrities such as Tucker Carlson, Elise Stefanik and Marjorie Taylor Greene, Greg Abbott,⁷⁶ and more championing the great replacement theory on the internet and in the press, the conspiracy theory now permeates throughout daily political discourse.⁷⁷ The great replacement theory attempts to evoke fear and feelings of victimization from

70. See Ani Petrosyan, *Number of Internet Users Worldwide from 2005-2022*, STATISTA (Sept. 21, 2023) <https://www.statista.com/statistics/273018/number-of-internet-users-worldwide/> [<https://perma.cc/5YGD-4QDU>].

71. Jens F. Binder & Johnathan Kenyon, *Terrorism and the Internet: How Dangerous Is Online Radicalization?*, FRONTIERS PSYCH., Oct. 13, 2022, at 1, 3 (“To the extent that the Internet permeates all aspects of our daily lives, it is also an integral part of the propagation of extremist ideologies and resulting actions and operations.”).

72. See MICHAEL JENSEN, SHEEHAN KANE, & ELENA AKERS, NAT’L CONSORTIUM FOR THE STUDY OF TERRORISM & RESPONSES TO TERRORISM, PROFILES OF INDIVIDUAL RADICALIZATION IN THE UNITED STATES (PIRUS) 8 (2023), https://www.start.umd.edu/sites/default/files/publications/local_attachments/PIRUS%20March%202023%20Update.pdf [<https://perma.cc/SX9J-RUY8>] [hereinafter JENSEN ET AL., PIRUS].

73. *Id.* at 9.

74. *Id.*

75. *Id.*

76. Former Fox News host, House Representatives, and Governor of Texas, respectfully.

77. Will Ragland, *A List of MAGA Republicans Who Took the ‘Great Replacement’ Theory Mainstream*, CTR. FOR AM. PROGRESS ACTION (May 18, 2022), <https://www.americanprogressaction.org/article/a-list-of-maga-republicans-who-took-the-great-replacement-theory-mainstream/> [<https://perma.cc/3AFR-WQ9D>].

white individuals by making them believe there is a conspiratorial plot to replace them with non-white immigrants at a high rate in an attempt to subvert their centuries of political and cultural dominance.⁷⁸ This is usually partnered with disingenuous and inciteful rhetoric, such as characterizing immigration as an “invasion,” or the threat of unlawful voters swaying election outcomes if immigrants are permitted to enter the country.⁷⁹ Often, anti-Semitic undertones are also present and characterize the great replacement theory, with the oft-made assertion that “Jewish elites” have concocted and oversee the plot involving the genocide and subsequent replacement of white people.⁸⁰

The American iteration of this racist, xenophobic theory has been attributed to Theodore G. Bilbo, a Democrat who served as the Governor—and later a Senator—of Mississippi throughout his political career over seventy years ago.⁸¹ Bilbo was a known bigot who was outwardly hateful towards marginalized groups of the time, including Jewish, Italian, and African American communities.⁸² In his book *Take Your Choice: Separation or Mongrelization*, Bilbo espoused the thesis that is considered the

78. NAT'L IMMIGR. F., THE 'GREAT REPLACEMENT' THEORY, EXPLAINED 1 (2021), <https://immigrationforum.org/wp-content/uploads/2021/12/Replacement-Theory-Explainer-1122.pdf> [<https://perma.cc/7XHM-EB66>].

79. *Id.*

80. *Id.* The anti-Semitic undertones of the great replacement theory have coincided with an increase in denigrating rhetoric and violence against Jewish Americans. See *New Surge in Support for Replacement Theory Rhetoric*, ANTI-DEFAMATION LEAGUE (Sept. 27, 2021), <https://www.adl.org/resources/blog/new-surge-support-replacement-theory-rhetoric> [<https://perma.cc/UCB5-CFU7>]; Lois Beckett, *Pittsburgh Shooter Was Fringe Figure in Online World of White Supremacist Rage*, GUARDIAN (Oct. 30, 2018, 4:00 PM), <https://www.theguardian.com/us-news/2018/oct/30/pittsburgh-synagogue-shooter-was-fringe-figure-in-online-world-of-white-supremacist-rage> [<https://perma.cc/3YH2-X4YS>]. See generally *Audit of Antisemitic Incidents 2022*, ANTI-DEFAMATION LEAGUE (Mar. 23, 2023), <https://www.adl.org/resources/report/audit-antisemitic-incidents-2022> [<https://perma.cc/DU36-7CWM>] (finding an overall increase in the number of anti-Semitic incidents throughout the United States over the past ten years, and a 36% increase from 2021 to 2022).

81. Martha M. Hamilton & Aaron Wiener, *The Roots of the 'Great Replacement Theory' Believed to Fuel Buffalo Suspect*, WASH. POST (May 15, 2022, 7:39 AM) <https://www.washingtonpost.com/history/2022/05/15/great-replacement-theory-buffalo-bilbo/> [<https://perma.cc/7HEC-KY94>].

82. *Id.*; *Bigot*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/bigot> [<https://perma.cc/QKX4-T4GC>] (defining a bigot as “[especially] one who regards or treats the members of a group (such as a racial or ethnic group) with hatred and intolerance”).

progenitor of today's American iteration of the great replacement theory; "[I] would rather see [my] race and [my] civilization blotted out with the atomic bomb than to see it slowly but surely destroyed in the maelstrom of miscegenation, interbreeding, intermarriage, and mongrelization."⁸³ One can see how this message and sentiment has been adopted by far-right politicians, pundits, and white supremacists across the nation.⁸⁴ Renaud Camus, a French author endorsed the great replacement theory in his book *Le Grand Remplacement*, by boosting Bilbo's original message as it applies to modern day western Europe.⁸⁵ Although originally written in French, Camus' native language, supporters of the theory translated the book to English.⁸⁶ It was then shared on far-right websites and forums, spreading the theory back into the populace, and priming it to enter the American mainstream during a time of political unrest, creating a much more receptive audience.⁸⁷

The vehement anti-immigration and xenophobic sentiments expressed by the great replacement theory were put on full

83. THEODORE G. BILBO, *Preface to TAKE YOUR CHOICE: SEPARATION OR MONGRELIZATION* (1947).

84. See NAT'L IMMIGR. F., *supra* note 78, at 3 (listing prominent right wing figures sharing the great replacement theory); David Bauder, *What Is 'Great Replacement Theory' and How Does It Fuel Racist Violence?*, PBS (May 16, 2022, 4:10 PM), <https://www.pbs.org/newshour/politics/what-is-great-replacement-theory-and-how-does-it-fuel-racist-violence> [https://perma.cc/5SJK-7ZKJ] (explaining that believers of the theory are concerned with the declining birth rates of the white race compared to birth rates of other races.); see, e.g., Matt Gaetz (@MattGaetz), X (Sept. 25, 2021, 12:52 PM), <https://twitter.com/mattgaetz/status/1441807874053885952> [https://perma.cc/KR7D-7J45] (supporting Tucker Carlson's assertions about the great replacement theory); Frances Robles, *Dylann Roof Photos and a Manifesto Are Posted on Website*, N.Y. TIMES (June 20, 2015), <https://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.html> [https://perma.cc/8N2Y-AJCE] (noting that a website owned by Dylann Roof, a white supremacist convicted of killing nine Black churchgoers in Charleston, South Carolina, cited "white flight," as a reason he carried out the attack).

85. See Fabiola Cineas, *Where "Replacement Theory" Comes from — and Why It Refuses to Go Away*, VOX (May 17, 2022, 3:15 PM), <https://www.vox.com/23076952/replacement-theory-white-supremacist-violence> [https://perma.cc/MP95-LH5G]; *How France's 'Great Replacement' Theory Conquered the Global Far Right*, FR. 24 (Aug. 11, 2021, 8:44 PM), <https://www.france24.com/en/europe/20211108-how-the-french-great-replacement-theory-conquered-the-far-right> [https://perma.cc/2UXR-ND58].

86. Gillian Brockell, *The Father of 'Great Replacement': An Ex-Socialist French Writer*, WASH. POST, (May 17, 2022, 7:44 AM), <https://www.washingtonpost.com/history/2022/05/17/renaud-camus-great-replacement-history/> [https://perma.cc/M6MC-QZUM].

87. *Id.*

display during the Charlottesville, Virginia demonstrations and “Unite the Right” rally in 2017.⁸⁸ During this event, white nationalists carrying torches marched through the University of Virginia’s campus chanting “Jews will not replace us,” “White lives matter,” and other white supremacist rallying cries.⁸⁹ These chants are demonstrative of the great replacement theory’s influence.⁹⁰ While many people remember the event for the vehicular attack on pedestrians that resulted in one death and dozens of injuries, the deep rooted reason for the rallies seem to have been forgotten.⁹¹ Allowing such hatred and vitriol to continue to spread in the name of preserving freedom of speech has led to, and will continue to lead to, more radicalization, setting the stage for what is now becoming a normalization of outrageous conspiracy theories by the mainstream right wing.⁹²

The right-wing political machine has had no small hand in launching the great replacement theory and other fringe misinformation into Americans’ living rooms.⁹³ In September 2022,

88. See Debbie Lord, *What Happened at Charlottesville: Looking Back on the Rally That Ended in Death*, ATL. J. CONST. (Aug. 10, 2018), <https://www.ajc.com/news/national/what-happened-charlottesville-looking-back-the-anniversary-the-deadly-rally/fPpnLrbAtbxSwNI9BEy93K/> [<https://perma.cc/ZJ4F-ZHJ2>].

89. Frontline PBS | Official, *How Charlottesville Led to the Capitol Attack | “Trump’s American Carnage”* | FRONTLINE, YOUTUBE (Jan. 26, 2021), <https://www.youtube.com/watch?v=Vy4F0VsbBkQ> [<https://perma.cc/5F4R-C56D>].

90. See *id.*; NAT’L IMMIGR. F. *supra* note 78, at 3 and accompanying text.

91. See Steve Almasy, Kwegyirba Croffie & Madison Park, *Teacher, Ex-Classmate Describe Charlottesville Suspect as Nazi Sympathizer*, CNN (Aug. 15, 2017, 4:51 AM), <https://www.cnn.com/2017/08/12/us/charlottesville-car-crash-suspect-idd/index.html> [<https://perma.cc/5EDH-JACX>]; Joe Ruiz, *Ohio Man Charged with Murder in Fatal Car Attack on Anti-White Nationalist March*, NPR (Aug. 13, 2017, 7:30 AM), <https://www.npr.org/sections/thetwo-way/2017/08/13/543176250/charlottesville-attack-james-alex-fields-jr> [<https://perma.cc/W35N-LPU2>].

92. See *What Is the ‘Great Replacement’ Theory and How Did It Go Mainstream?*, NBC (May 17, 2022, 12:58 PM), <https://www.nbcwashington.com/lxnews/what-is-the-great-replacement-theory-and-how-did-it-go-mainstream/3053861/> [<https://perma.cc/DAR9-JL9U>]; Cynthia Miller-Idriss, *How Extremism Went Mainstream*, FOREIGN AFFS. (Jan. 3, 2022), <https://www.foreignaffairs.com/articles/united-states/2022-01-03/how-extremism-went-mainstream> [<https://perma.cc/LQV9-H65J>].

93. See Nicholas Confessore & Karen Yourish, *A Fringe Conspiracy Theory, Fostered Online, Is Refashioned by the G.O.P.*, N.Y. TIMES (May 15, 2022), <https://www.nytimes.com/2022/05/15/us/replacement-theory-shooting-tucker-carlson.html> [<https://perma.cc/FU5Y-P66Z>]; Philip Bump, *The Unique Role of Fox News in the Misinformation Universe*, WASH. POST (Nov. 8, 2021, 4:29 PM),

Tucker Carlson, former host of the popular Fox News show *Tucker Carlson Tonight*, topped the Nielsen ratings for average viewers in the twenty-five- to fifty-four-year-old demographic at 438,000 average viewers.⁹⁴ This is especially frightening when one considers Carlson was one of, if not the highest profile proponent of the great replacement theory on the right at the time.⁹⁵ On his April 8, 2021 broadcast, Carlson said

I know that . . . if you use the term ‘replacement,’ if you suggest [that] the Democratic Party is trying to replace the current electorate . . . with new people, more obedient voters from the Third World, . . . they become hysterical because that’s what’s happening, actually. . . . [It’s] true.⁹⁶

Florida Representative Matt Gaetz tweeted “[@TuckerCarlson is CORRECT about Replacement Theory as he explains what is happening to America,” signaling to his large following his support for Carlson’s on-air comment and the great replacement theory as an elected United States representative.⁹⁷ The viral nature of these falsified, bombastic conspiracy theories leads to increased likelihood that a “lone wolf” will believe in such lies and carry out an attack in response, making stochastic violence a useful tool of political terror.⁹⁸

<https://www.washingtonpost.com/politics/2021/11/08/unique-role-fox-news-misinformation-universe/> [https://perma.cc/K3KF-GWXC].

94. A.J. Katz, *These Are the Top-Rated Cable News Shows for September 2022*, TVNEWSER (Sept. 28, 2022, 12:34 PM), <https://www.adweek.com/tvnewser/these-are-the-top-rated-cable-news-shows-for-september-2022/515527/> [https://perma.cc/QZ2P-TAUUY]. See generally *National TV Measurement*, NIELSEN, <https://www.nielsen.com/solutions/audience-measurement/national-tv/> [https://perma.cc/JH4Z-3PVD] (tracking audience size and viewership for TV media companies, allowing them to understand their demographics and maximize advertising revenue and programming).

95. Confessore & Yourish, *supra* note 93.

96. Philip Bump, *Tucker Carlson’s Espousal of ‘Replacement’ Theory Is Both Toxic and Ahistoric*, WASH. POST, (Apr. 9, 2021, 9:21 AM), <https://www.washingtonpost.com/politics/2021/04/09/tucker-carlsons-espousal-replacement-theory-is-both-toxic-ahistoric/> [https://perma.cc/3ZQG-7UDC].

97. Gaetz, *supra* note 84.

98. See SOROUGH VOSOUGHI, DEB ROY & SINAN ARAL, THE SPREAD OF TRUE AND FALSE NEWS ONLINE, 359 SCIENCE 1146, 1148 (2018) (explaining that falsified news spreads at a faster rate than true news); Aumyo Hassan & Sarah J. Barber, *The Effects of Repetition Frequency on the Illusory Truth Effect*, 6 COGNITIVE RSCH. PRINCIPLES & IMPLICATIONS 38, 38 (2021),

The normalization of the great replacement theory and other white supremacist talking points are clear dangers to the health and wellbeing of the nation.⁹⁹ How can it be stopped? Current First Amendment jurisprudence almost entirely restricts the ability to censor and remove vitriol with the potential to result in stochastic terrorism—like the great replacement theory—from mainstream political discourse.¹⁰⁰ The body of case law spawned from the First Amendment must be revised to be more consistent with modern day communication.¹⁰¹

II. THE OBSTACLES TO SILENCING STOCHASTIC TERRORISM

The First Amendment protects, among others, the rights to free speech and a free press.¹⁰² Over time, courts and scholars have broadly interpreted these rights as permitting the citizenry to disseminate and receive ideas and information freely without government interference or censorship.¹⁰³ These rights are most often characterized as being rooted in the uniquely American idea, present at the founding, that the people and the press would act as a check on the government and governing elite, both by being a watchdog, and permitting the sharing of information freely so democratic thought could foment to its fullest

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8116821/pdf/41235_2021_Article_301.pdf [<https://perma.cc/A748-DDA9>] (explaining that “[p]eople tend to perceive claims as truer if they have been exposed to them before.”); JENSEN ET AL., *PIRUS*, *supra* note 72, at 9.

99. See Nik Popli, *How the ‘Great Replacement Theory’ Has Fueled Racist Violence*, TIME (May 16, 2022, 6:44 PM) <https://time.com/6177282/great-replacement-theory-buffalo-racist-attacks/> [<https://perma.cc/U8CF-9348>].

100. See *infra* Section II.B.

101. See generally Cronan, *supra* note 48 (discussing the need to extend *Bradenburg* address internet incitement).

102. U.S. Const. amend. I.

103. See *First Amendment and Censorship*, AM. LIB. ASS’N, <https://www.ala.org/advocacy/intfreedom/censorship> [<https://perma.cc/P9L7-J95A>]; *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (“The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”); *Whitney v. California*, 274 U.S. 357, 377 (1927) (“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.”).

extent and allow truth to prevail in the “marketplace of ideas.”¹⁰⁴

This Part will first discuss the history of the First Amendment and how it is ill-equipped to handle the problem of stochastic terrorism in its current form. It will then focus more closely on *Brandenburg v. Ohio*, the Supreme Court case that marked criminal syndicalism statutes as unconstitutional on their face, effectively preempting any government-led attempts to combat stochastic terrorism. Finally, it will highlight the shortcomings of *Brandenburg* as applied to modern scenarios that could be characterized as instances of stochastic terrorism.

A. *The First Amendment—Formulated for a Different Time*

The First Amendment’s mythical legacy is inconsistent with the Framers’ early ideas about the necessity of a constitutional provision providing for a free press and free speech.¹⁰⁵ Shortly after the founding, it was unclear if the First Amendment provided an explicit extension of protections, or whether it simply codified the lax English common law as the ruling doctrine on the matter of speech and press.¹⁰⁶ If the latter understanding of the First Amendment prevailed, the liberal protections that the Supreme Court constructed over decades likely would not exist.¹⁰⁷ In any event, the prevailing First Amendment principles and the surrounding body of law have cemented strong

104. See Linda R. Monk, *The First and Second Amendments*, PBS, <https://www.pbs.org/tpt/constitution-usa-peter-sagal/rights/first-and-second-amendments/> [https://perma.cc/RA46-A7YE] (last visited Sept. 23, 2023); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

105. Monk, *supra* note 104; *Abrams*, 250 U.S. at 630; Eugene Volokh, *Myths About America’s Founders and Free Speech*, ENCYCLOPEDIA (Jan. 5, 2004), <https://www.encyclopedia.com/law/legal-and-political-magazines/myths-about-americas-founders-and-free-speech> [https://perma.cc/P2RN-YHEE] (“For most of American history, speech was less constitutionally protected than it is today Modern free-speech protections were largely the work of Justices Oliver Wendell Holmes and Louis D. Brandeis . . . of the notoriously liberal Warren Court.”).

106. See Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 788–90 (2008).

107. See generally Eric Barendt, *Freedom of Expression in the United Kingdom Under the Human Rights Act 1998*, 84 IND. L.J. 851 (2009) (“A right to free speech (or expression) was not generally recognized by the [English] common law . . .”).

protections for political speech, even when it arguably crosses the line into disinformation and harassment.¹⁰⁸ Of course, political speech often involves passionate appeals to an audience's ethos, pathos, and logos.¹⁰⁹ This Note does not advocate for criminalization of passionate political rhetoric.¹¹⁰ Nonetheless, there must be a delineation between mere "strong and effective extemporaneous rhetoric" and incitement to violence.¹¹¹

The First Amendment, ratified in 1791, served a much different purpose in the late 1700s than it does now.¹¹² At the turn of the nineteenth century, newspapers were the predominant source of information and were radically different from modern news in three key ways.¹¹³ First, the political press coverage was limited to its own realm of newspapers that was typically reserved for only the privileged and wealthy.¹¹⁴ Political news was reserved for those who could afford to purchase political newspapers and learn about it, keeping the less wealthy out of the political sphere and unable to engage with it in any meaningful way.¹¹⁵ Second, most newspapers from the time of the

108. See Steven G. Gey, *The Brandenburg Paradigm and Other First Amendments*, 12 U. PA. J. CONST. L. 971, 978 (2010).

109. See Gloria Gennaro & Elliott Ash, *Emotion and Reason in Political Language*, 132 ECON. J. 1037, 1040 (2021) ("[T]he secular trends in polarisation, [sic] simplification and confidence have been accompanied by a more intense expression of emotion. All of these trends can be understood as a coherent shift toward a rhetoric that addresses voters rather than fellow politicians and elites.").

110. See *infra* Part IV; see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) ("Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases.").

111. See *Claiborne Hardware Co.*, 458 U.S. at 928; Frye, *Incitement*, *supra* note 10; Agnes Callamard, *Expert Meeting on the Links Between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence*, ART. 19, <https://www.article19.org/data/files/pdfs/conferences/iccpr-links-between-articles-19-and-20.pdf> [<https://perma.cc/T85T-D53V>] ("A restriction must be formulated in a way that makes clear that its sole purpose is to protect individuals holding specific beliefs or opinions, whether of a religious nature or not, from hostility, discrimination or violence, rather than to protect belief systems, religions, or institutions as such from criticism.").

112. See *The Bill of Rights: A Transcription*, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/bill-of-rights-transcript> [<https://perma.cc/NUF7-KKJL>].

113. *American Newspapers, 1800-1860: An Introduction*, UNIV. ILL. LIBR., <https://www.library.illinois.edu/hpnl/tutorials/antebellum-newspapers-introduction/> [<https://perma.cc/47WZ-LLU5>].

114. *Id.*

115. See *id.*

Revolutionary War and during the antebellum period explicitly demonstrated their political affiliations and biases.¹¹⁶ This is starkly different from the modern practice of heavily biased media outlets attempting to present themselves as impartial and fair.¹¹⁷ Many newspapers would go so far as to include their political affiliation in the title of the paper or masthead.¹¹⁸ Some were even subsidized directly by political party leadership to publish messages aligned with the party platform.¹¹⁹ This was particularly prevalent during the Revolutionary War when pro-crown publications designated themselves with the “royalist” moniker such as the *Royal Georgia Gazette*, but continued afterward with papers like *La Porte County Whig*, a publication clearly aligned with the now-defunct Whig party.¹²⁰ Third, the newspaper as an information sharing medium was not widely available like it is today until the 1830s and was much more easily identified as an entity unto itself.¹²¹ Today, headlines from *The New York Times* and *The Blaze* could each be discretely slipped into a Facebook timeline without the user noticing the difference between the sources, leaving them unable to treat each with the requisite level of skepticism.¹²² Newspapers were also more expensive to purchase whereas today, news about any topic published by thousands of outlets identifying themselves as “the press,” some less reputable than others, can be found for free using a smartphone and the internet.¹²³ These three changes to the modern conception of “the press” illustrate the need for First Amendment principles that will preserve operation of the press in a more responsible and organized manner that is consistent with the renaissance that speech and

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*; FRANK LUTHER MOTT, *AMERICAN JOURNALISM: A HISTORY OF NEWSPAPERS IN THE UNITED STATES THROUGH 250 YEARS 1690 TO 1940*, at 94 (1941).

121. *American Newspapers, 1800-1860: An Introduction*, *supra* note 113.

122. *See id.*

123. *See id.*; *Journalism in the Digital Age: What Is Digital Journalism?*, ST. BONAVENTURE UNIV. ONLINE (Aug. 9, 2021), <https://online.sbu.edu/news/journalism-in-the-digital-age> [<https://perma.cc/CMU4-XXKW>]; VOSOUGHI ET AL., *supra* note 98, at 1146.

information sharing has undergone since the ratification of the Constitution.¹²⁴

Of course, there are enforceable limits to the First Amendment freedoms of speech and press, such as prohibitions on defamation.¹²⁵ The defamation torts of libel and slander seek to rectify the dissemination of false, misleading, or harmful information so long as certain elements can be met.¹²⁶ Perhaps the most famous illustration of these torts in the cultural zeitgeist can be found in the *Depp v. Heard* case.¹²⁷ Actor Johnny Depp sued his ex-wife, actress Amber Heard, for defamation of character relating to an op-ed she published in *The Washington Post*, asserting that she was a victim of domestic violence at the hands of Depp.¹²⁸ While Heard was found liable for defamation, the outcome exposed the problem with post-facto enforcement of speech regulation through the tort system.¹²⁹ Depp already suffered damage to his character and career, culminating in his removal from several film roles such as Captain Jack Sparrow from the *Pirates of the Caribbean* franchise and Gellert Grindelwald from the *Fantastic Beasts* franchise.¹³⁰

124. See David A. Graham, *The Age of Reverse Censorship*, ATLANTIC (June 26, 2018), <https://www.theatlantic.com/politics/archive/2018/06/is-the-first-amendment-obsolete/563762/> [<https://perma.cc/K3KC-X3YU>]; Alicia D. Sklan, @SocialMedia: Speech with a Click of a Button? #SocialSharingButtons, 32 CARDOZO ARTS & ENT. L.J. 377, 379 (2013).

125. See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270–92 (1964); DAVID ELDER, *The Prima Facie Case*, in DEFAMATION: A LAWYER’S GUIDE (2022).

126. While defamation is generally a tort governed by state law, the requirements for a showing of defamation are almost uniform: 1) a false statement purporting to be fact; 2) publication or communication of that statement to a third person; 3) fault amounting to at least negligence; and 4) damages, or some harm caused to the reputation of the person or entity who is the subject of the statement. *Defamation*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/defamation> [<https://perma.cc/AH4T-GTMK>]; see David L. Hudson Jr., *Libel and Slander*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/997/libel-and-slander> [<https://perma.cc/AFM4-YY7M>] (Aug. 12, 2023).

127. *Depp v. Heard*, No. CL-2019-0002911, 2022 Va. Cir. LEXIS 84 (Va. Cir. Ct. June 24, 2022); Julia Jacobs, *Jury Reaches Verdict in Johnny Depp-Amber Heard Trial: What to Know*, N.Y. TIMES, <https://www.nytimes.com/2022/04/21/arts/johnny-depp-amber-heard-trial.html> [<https://perma.cc/B5BQ-8SCJ>] (Aug. 9, 2022).

128. Jacobs, *supra* note 127.

129. *Id.*

130. Depp’s *Pirates of the Caribbean* role was worth \$22.5 million alone. See *id.*; Bryan Alexander, *Johnny Depp Talks ‘Hollywood’s Boycott of Me’ in First Interview Since Losing British Libel Suit*, USA TODAY, <https://www.usatoday.com/story/entertainment/celebrities/2021/08/15/johnny->

Because libel and slander torts provide only post-injury civil relief, it is important to consider what real deterrence, if any, there might be for political demagogues to refrain from making incendiary remarks about individually unidentifiable political targets like groups of immigrants.¹³¹ This line of questioning becomes even more important when one considers that targets of stochastic terrorism can be public figures themselves,¹³² who are therefore afforded less protection by the torts of libel and slander because of heightened burden of proof requirements to prevail on such claims.¹³³

B. *Brandenburg's Obstinace*

The First Amendment case that is of utmost importance when examining the legal intersection with stochastic terrorism is *Brandenburg v. Ohio*, which provides the exception for incitement to violence.¹³⁴ In *Brandenburg*, the Court unanimously struck down an Ohio law passed with the goal of quelling Ku Klux Klan activity in the state by outlawing the “advocat[ion of] the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing

depp-talks-hollywood-boycott-first-interview-british-libel-suit-amber-heard/8144783002/ [https://perma.cc/7WX4-FKD3] (Aug. 17, 2021, 2:35 PM).

131. See Ellyn M. Angelotti, *Twibel Law: What Defamation and Its Remedies Look Like in the Age of Twitter*, 13 J. HIGH TECH. L. 433, 438 (2013) (“It’s not practical for one Twitter user to endure a lengthy and likely expensive, lawsuit against another Twitter user who has defamed them even after severe damage has been done to the defamed’s reputation.”).

132. Speaker of the House Nancy Pelosi, a frequent target of right-wing ire, was targeted by a lone wolf who listed his hatred for her and the corruption of the Democrat party as his motivations. Heather Timmons, *Hate Speech, Online Extremism Fed Pelosi Attack, Terror Experts Believe*, REUTERS (Oct. 29, 2022, 1:46 PM), <https://www.reuters.com/world/us/hate-speech-online-extremism-fed-pelosi-attack-terror-experts-believe-2022-10-29/> [https://perma.cc/MPW3-E49F]. She was not home, but her husband was attacked instead. *Id.* The individuals who Cesar Sayoc attempted to mail pipe bombs to were all public figures. See *supra* Section I.B.

133. E.H. Schopler, Annotation, *Libel and Slander: What Constitutes Actual Malice, Within Federal Constitutional Rule Requiring Public Officials and Public Figures to Show Actual Malice*, 20 A.L.R. 3d 988 (1968) (explaining that to prevail on defamation claims, public figures are required to show that the defamatory publication was carried out with “actual malice,” meaning knowledge that a defamatory statement was false, or having reckless disregard for whether it was false); see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–280 (1964) (defining “actual malice” in the context of defamation suits involving public officials as “knowledge that [the defamatory statement] was false or with reckless disregard of whether it was false or not.”).

134. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

industrial or political reform.”¹³⁵ A leader of the Ku Klux Klan held a meeting with other local Klan members and gave the following speech which was recorded on video and presented as evidence at trial:

The Klan has more members in the State of Ohio than does any other organization. We’re not a re-vengeant organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken. We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.¹³⁶

One can understand how this speech, especially when accompanied with the video of attending Klan members holding weapons and dressed in Klan regalia, could be reasonably seen as a threat of violent attack against the United States government.¹³⁷

Ohio convicted the defendant under the statute and subjected him to a \$1,000 fine and ten years imprisonment.¹³⁸ On appeal, both the appellate court and Ohio Supreme Court refused to overturn the conviction on First Amendment grounds, largely reflecting the prevailing understanding at the time that advocacy for violence or illegal conduct, no matter how indirect, is not protected speech.¹³⁹ During the first half of the twentieth century, statutes like the one at issue in *Brandenburg*, known as criminal syndicalism statutes, were very common.¹⁴⁰ Nearly

135. *Id.* at 444–45, 449.

136. *Id.* at 446.

137. *See id.* at 447–49.

138. *Id.* at 445.

139. *See id.* at 445. *See generally* Schenck v. United States, 249 U.S. 47, 51–52 (1919) (per curiam) (finding that using words that create a “clear and present danger” are violative of the First Amendment).

140. *See* Dale Mineshima-Lowe, *Criminal Syndicalism Laws*, THE FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/942/criminal-syndicalism->

half of all states had already passed comparable laws at the time the Supreme Court decided *Brandenburg*.¹⁴¹

The Supreme Court however, was on a crusade to strike down these statutes as repugnant to the First Amendment,¹⁴² and did so in *Brandenburg*.¹⁴³ The Court held that state statutes limiting the right of free speech are impermissible if they do not distinguish between punishing “advocacy of the use of force or of law violation” from “advocacy [which] is directed to inciting or producing *imminent* lawless action and *is likely* to incite or produce such action.”¹⁴⁴ While it seems this might prevent advocacy of stochastic terrorism from being protected speech, the *Brandenburg* test is deferential to the speaker and provides a blurry line between the posited categories of speech.¹⁴⁵ Essentially, to pass the *Brandenburg* test and statutorily restrict speech in this manner, the government must demonstrate that the speaker intended to advocate for unlawful action that would lead to *imminent* and *likely* harm, if the speech is permitted.¹⁴⁶

With the understanding that stochastic terrorism is effective because of the near impossibility to pinpoint the likelihood or possibility that someone will act in response to extreme and bombastic rhetoric in political commentary, one can see how *Brandenburg* is a significant roadblock to holding pundits and firebrands legally accountable for the violence they incite.¹⁴⁷ Although originally heralded as a win for political speech, the shortcomings of the Court’s analysis and the overbreadth of its

laws [<https://perma.cc/G63J-9WHS>] (Jan. 1, 2009) (providing a contemporary summary of criminal syndicalism laws, their commonality, and constitutionality in the decades leading up to *Brandenburg*). The list also contains cases where the Court decided in favor of inciteful speech restrictions prior to *Brandenburg*. See *id.*

141. 395 U.S. at 447; see R. E. H., Annotation, *Validity of Legislation Directed Against Political, Social, or Industrial Propaganda Deemed to Be of a Dangerous Tendency*, 73 A.L.R. 1494 § 3 (1931) (discussing comparable state statutes).

142. See Gey, *supra* note 108, at 979.

143. *Brandenburg*, 395 U.S. at 448.

144. *Id.* at 447 (emphasis added).

145. See Gey, *supra* note 108, at 978.

146. See *id.*; Doug Linder, *Advocacy of Unlawful Action and the “Incitement Test”*, EXPLORING CONST. CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/incitement.htm> [<https://perma.cc/VST2-42KM>].

147. See Gey, *supra* note 108, at 978.

decision quickly came to the forefront.¹⁴⁸ Reading *Brandenburg* as it has been interpreted leads to the conclusion that a message advocating for violence hidden behind a simple “dog whistle”¹⁴⁹ or coded message could be enough to avoid liability.¹⁵⁰ Similarly, *any* lapse of time between the inciteful message and the actual attack also defeats the *Brandenburg* test by failing to meet the imminence requirement.¹⁵¹

For example, Cesar Sayoc’s case demonstrates the shortcomings of *Brandenburg*.¹⁵² Even if it can be definitively proven that Sayoc took his cue to send his explosive devices from his constant consumption of Fox News and their demonization of Democratic Party leaders, it would be unlikely that Fox News could be held accountable under *Brandenburg* for inciting violence, unless he constructed and mailed the bombs immediately after being told to do exactly that.¹⁵³ Similarly, seeking accountability in the case of Dr. George Tiller becomes impossible considering that his murderer never admitted to watching a Bill O’Reilly segment during which he accused Tiller of murdering babies.¹⁵⁴ In the case of Donald Trump’s threat against Hillary Clinton, it would have proven much more difficult, if not impossible, to establish that an attack carried out on Hillary Clinton’s life was a direct result of the remarks he made at the Wilmington rally.¹⁵⁵

By contrast, in cases like *Depp v. Heard*, defamation is a more straight-forward tort in that the four general requirements are

148. *See id.*

149. A “dog whistle” is a rhetorical tool used to covertly deliver a message that only a specific group of people, usually those with whom one shares an ideology, will understand. Ian Olosov, *Offensive Political Dog Whistles: You Know Them When You Hear Them. Or Do You?*, VOX (Nov. 7, 2016, 9:50 AM), <https://www.vox.com/the-big-idea/2016/11/7/13549154/dog-whistles-campaign-racism> [<https://perma.cc/L5WJ-E7JB>].

150. *See id.*

151. Gey, *supra* note 108, at 978.

152. *See supra* notes 61–63 and accompanying text.

153. *See supra* note 63 and accompanying text.

154. *See Stelter, supra* note 33; Ed Pilkington, *I Shot US Abortion Doctor to Protect Children, Scott Roeder Tells Court*, GUARDIAN (Jan. 28, 2010, 8:41 PM), <https://www.theguardian.com/world/2010/jan/28/scott-roeder-abortion-doctor-killer> [<https://perma.cc/2EKN-5LH6>]; *State v. Roeder*, 336 P.3d 831 (2014).

155. Cohen, *Trump’s Assassination Dog Whistle, supra* note 2.

more concrete and easily proven by evidence when compared to establishing proof in cases of incitement of violence.¹⁵⁶ Furthermore, where the consequence for dissemination of violent rhetoric is real world violence and possibly death, not just the loss of film roles or emotional distress, the tort system and the remedies it offers cannot be considered an adequate solution or deterrence.¹⁵⁷ Thus, stochastic terrorism and this vast spectrum of plausibly deniable, rhetorically veiled threats exist with no apt solution provided by current First Amendment principles or the tort system.¹⁵⁸ In response, a long overdue modernization of the First Amendment is required.¹⁵⁹

C. *The Brandenburg Standard, Insufficient in Modern Practice*

The problem of stochastic terrorism requires a solution consistent with the realities of modern communication that adequately accounts for the benefits and potential harms that could result from imposing restrictions on political speech.¹⁶⁰ The *Brandenburg* test should be replaced by a more realistic standard, capable of addressing the problem of stochastic terrorism in the twenty-first century world of communication.¹⁶¹ Handed down in 1969,¹⁶² decades before the inception of the internet,¹⁶³ the *Brandenburg* test has severe shortcomings that have only been more exposed as time has passed and modern modes of communication have evolved.¹⁶⁴ A new test should account for the scale and immediacy with which speech and information is shared today because those fundamental differences frustrate

156. See *Defamation*, *supra* note 126; Jacobs, *supra* note 127.

157. See *infra* notes 254–57 and accompanying text.

158. See *infra* Section II.C, Part III.

159. See *infra* Section II.C; Frye, *Incitement*, *supra* note 10.

160. See *supra* Sections I.B, I.C.

161. See Frye, *Incitement*, *supra* note 10.

162. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

163. *A Brief History of the Internet*, LIBR. LEARNING, https://www.usg.edu/galileo/skills/unit07/internet07_02.phtml [<https://perma.cc/VR9P-2Y5M>].

164. See generally Richard Ashby Wilson & Jordan Kiper, *Incitement in an Era of Populism: Updating Brandenburg After Charlottesville*, 5 UNIV. PA. J.L. & PUB. AFFS. 55 (2020) (discussing *Brandenburg*'s shortcomings in the modern era).

the purpose and workability of the current imminence and likely requirements.¹⁶⁵

The Ohio law in *Brandenburg* and similar criminal syndicalism statutes were designed to prevent certain types of gatherings by limiting attendance, which constrained the level of immediate influence the meetings could have on targeted communities.¹⁶⁶ In other words, because the Ku Klux Klan and similar political terrorist groups held local, smaller meetings during the 1960s compared to the massive communities that congregate online on social media websites,¹⁶⁷ the imminent and likely requirements made sense for the time.¹⁶⁸ It stands to reason that if the person who sought to incite imminent and likely violence was in attendance at the meeting, and the communities that were frequently the target of violence were geographically close or identical to the communities where the Klan faction was based, violence would likely and imminently follow.¹⁶⁹ Compare these meetings with the “meetings” that occur through public discourse on the internet today.¹⁷⁰ Tweets, videos, and other media are omnipresent in both time and location, and there is no way of knowing who, or how many people

165. See Angelotti, *supra* note 131, at 461.

166. See *Brandenburg*, 395 U.S. at 445; Mineshima-Lowe, *supra* note 140.

167. See, e.g., Jordan Minor, *What Is Discord and How Do You Use It?*, PC, <https://www.pcmag.com/how-to/what-is-discord-and-how-do-you-use-it> [<https://perma.cc/QC7W-9UP4>] (Mar. 29, 2023); Kaya Yurieff, Brian Fung & Donie O’Sullivan, *Parler: Everything You Need to Know About the Banned Conservative Social Media Platform*, CNN BUS. (Jan. 10, 2021, 12:07 PM), <https://www.cnn.com/2021/01/10/tech/what-is-parler/index.html> [<https://perma.cc/66D3-XJFC>]; Amanda Hetler, *Twitter*, TECHTARGET, <https://www.techtarget.com/whatis/definition/Twitter> [<https://perma.cc/PELA-W7F6>] (July 2023).

168. See *Brandenburg*, 395 U.S., at 445; *A Brief History of the Internet*, *supra* note 163.

169. See S. POVERTY L. CTR., *KU KLUX KLAN A HISTORY OF RACISM AND VIOLENCE* 25, 27 (Richard Bauldoun, ed., 6th ed. 2011) (noting that a “loosely organized Klan empire” with strongholds in Mississippi, Alabama, and Georgia almost exclusively engaged in violence in those states).

170. Compare Frenkel, *supra* note 12 (explaining how social media allowed members of the January 6th insurrection to formulate and carry out a plan online while also drawing in thousands of attendees from all across the country to assist in carrying out the attack), with *Top 5 Questions About the KKK*, PUB. BROAD. SERV., <https://www.pbs.org/wgbh/americanexperience/features/klansville-faq/> [<https://perma.cc/9YET-8ZGX>] (discussing how the Klan is a collection of groups and factions that generally met amongst themselves and carried out violence in their own separate communities rather than unify across long distances to carry out their political objectives).

are hearing a shared message.¹⁷¹ Therefore, without knowing exactly who is exposed to radicalizing content, it is difficult to discern how likely it is someone in the audience will act in accordance with a message that is shared.¹⁷²

Consider the *Brandenburg* test and its place in modern First Amendment law when analyzing the events following an FBI raid on Donald Trump's Mar-a-Lago home in Florida.¹⁷³ Arizona Representative Paul Gosar tweeted in response to the raid: "[f]ailure is not an option. We must *destroy* the FBI."¹⁷⁴ Three days later, Ricky Shiffer, an alt-right ideologue, attempted to break into the FBI Cincinnati field office armed with an AR-15 rifle and nail gun.¹⁷⁵ He was later killed in a standoff with police officers during an attempted arrest.¹⁷⁶ Applying the *Brandenburg* test to Gosar's tweet raises several questions that illustrate

171. See *Social Media Reach vs. Impressions: What's the Difference?*, INDEED, <https://www.indeed.com/career-advice/career-development/social-media-reach-vs-impressions> [<https://perma.cc/9WVGJ-LRJN>] (Feb. 3, 2023). Although many media sharing websites such as YouTube, Twitter, and Facebook provide analytic data tracking tools, these tools only account for how many users of the website watched a particular post, also known as "reach." See *What Is Social Media Reach?*, KEYHOLE (Apr. 18, 2020), <https://keyhole.co/blog/what-is-social-media-reach/> [<https://perma.cc/9LUK-ABFM>]. It would be impossible to account for the views accumulated by copied, slightly modified, or recycled media posted by different accounts and across platforms. See *id.* It would also be difficult to know if certain users have seen the same media more than once across platforms. See *id.* It is also impossible to know if someone shared a piece of media with a person who does not have an account by showing them the media in person. See *id.* This is known as "impressions" and is much more difficult to track accurately. *Id.*

172. See Joe Whittaker, *Rethinking Online Radicalization*, 16 UNIV. LEIDEN PERSP. TERRORISM 27, 28 (2022).

173. The FBI raided Donald Trump's home in Palm Beach, Florida, following concerns that he had retained classified documents after leaving the White House. Kevin Breuninger & Dan Mangan, *Trump Says the FBI Raided His Mar-a-Lago Home*, CNBC, <https://www.cnbc.com/2022/08/08/trump-says-fbi-raiding-his-mar-a-lago-home.html> [<https://perma.cc/3LFN-JC84>] (Aug. 9, 2022, 3:51 PM).

174. Paul Gosar (@RepGosar), X (Aug. 8, 2022, 9:57 PM), <https://twitter.com/RepGosar/status/1556821907726630915> [<https://perma.cc/265M-VNXR>] (emphasis added).

175. Elisha Fieldstadt, Ken Dilanian, Tim Stelloh & Ryan J. Reilly, *Armed Man Who Was at Capitol on Jan. 6 Is Fatally Shot After Firing into an FBI Field Office in Cincinnati*, NBC NEWS (Aug. 11, 2022, 12:17 PM), <https://www.nbcnews.com/news/us-news/armed-man-shoots-fbi-cincinnati-building-nail-gun-flees-leading-inters-rcna42669> [<https://perma.cc/4N4J-MVE5>]; Melissa Chan, Elliot Lewis, Ryan J. Reilly & Corky Siemaszko, *Loner Gunman Who Attacked FBI Office Was Navy Vet Who Drove Fast and Was Devoted to Donald Trump*, NBC NEWS (Aug. 12, 2022, 6:33 PM), <https://www.nbcnews.com/news/us-news/loner-gunman-attacked-fbi-office-was-navy-vet-drove-fast-was-devoted-d-rcna42937> [<https://perma.cc/4NP9-UNS4>].

176. Fieldstadt et al., *supra*, note 175.

its inability to address the fundamental differences between the way communication was conceptualized by the 1969 opinion and how it works now.¹⁷⁷ Despite the impossibility of proving direct incitement from Gosar to Shiffer because of the latter's death, the inquiry will proceed with the assumption that Shiffer acted directly in response to the tweet.¹⁷⁸ Did the metaphorical clock tied to the imminence requirement begin to run when Gosar sent the tweet or when Shiffer read it? Regardless of the answer, how much time is permitted to pass before the imminence requirement expires? Is the likely requirement satisfied by a showing of statistical likelihood that *someone* would have acted violently in response to the tweet, or must it be shown that Shiffer himself was likely to act in response to Gosar's tweet? More fundamentally, by what metric is likelihood being measured? Can it truly be measured at all?

Brandenburg was not constructed to contemplate these questions because it was decided in a time where messages were predominantly shared immediately from speaker to a present audience within a moment's time.¹⁷⁹ The internet has added a pivotal wrinkle to that reality by creating the possibility that a message conveyed to no one in particular can continue to be viewed as a novelty by millions of people who are not in the physical presence of the speaker days after it was originally shared.¹⁸⁰ The great replacement theory—amongst other inciteful rhetoric now commonplace on the internet and in mainstream politics—increases the likelihood that violence against immigrants and minority citizens will be carried out,¹⁸¹ while

177. See Sklan, *supra* note 124; *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

178. See Mark Follman, *How Trump Spread Incitement of Violence Throughout the GOP*, MOTHER JONES (2022), <https://www.motherjones.com/politics/2022/09/trump-republicans-incitement-violence-threats-stochastic-terrorism/> [<https://perma.cc/XZ2C-YC6U>].

179. See Sklan, *supra* note 124 at 379. See generally *Brandenburg*, 395 U.S. at 446–47; Gey, *supra* note 108, at 978.

180. See, e.g., Schantz, *supra* note 19 (explaining use of Livestream on Reddit, Facebook, Twitter, YouTube, and Gab in the months prior to the attack on the Capitol).

181. See, e.g., Omar Abdel-Baqui, *What Is the 'Great Replacement' Conspiracy Theory That Inspired the Buffalo Shooter?*, WALL ST. J., <https://www.wsj.com/articles/what-is-replacement-theory-what-we-know-about-the-conspiracy-theory-linked-to-the-buffalo-gunman-11652811621>

Brandenburg ensures that platformed demagogues will avoid all legal accountability.¹⁸² The *Brandenburg* standard is insufficient as a means of combatting stochastic terrorism, and therefore must be replaced.

III. IMPLEMENTING AN INTERNATIONAL INCITEMENT STANDARD

The United States has already ratified the most workable and desirable substitute for *Brandenburg* and its progeny: the International Covenant on Civil and Political Rights (“ICCPR”).¹⁸³ Enacted in 1976, the ICCPR is a binding treaty colloquially known as the International Bill of Human Rights.¹⁸⁴ The ICCPR aims to protect citizens of nations who have ratified the treaty from government infringement of certain rights.¹⁸⁵ These rights include the rights to life and human dignity, gender equality, freedom of speech, assembly, association, and others.¹⁸⁶

The most important right protected by the ICCPR for purposes of replacing *Brandenburg* is the right to freedom of expression implicated in Articles 19 and 20.¹⁸⁷ Article 19 provides:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

[<https://perma.cc/G3MA-QW2E>] (May 19, 2022, 2:53 PM) (discussing how mass shooters have referenced the “great replacement theory” online).

182. See Frye, *Incitement*, *supra* note 10.

183. International Covenant on Civil and Political Rights, art. 19–20, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

184. FAQ: *The Covenant on Civil & Political Rights (ICCPR)*, AM. CIV. LIBERTIES UNION (July 11, 2013), <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr> [<https://perma.cc/8PA7-GVSH>].

185. *Id.*

186. *Id.*; see ICCPR *supra* note 183.

187. See ICCPR, *supra* note 183.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.¹⁸⁸

There are clear reflections and parallels between the rights protected by Article 19 and the First Amendment of the Constitution.¹⁸⁹ However, Article 19 takes a less absolutist approach to freedom of expression by highlighting the importance of striking a balance between the right to express oneself freely and the reality that there are times when limits on expression may be desirable or even necessary.¹⁹⁰ For example, under Article 19, state legislatures could have reasonably found it necessary to outlaw the use of the term “Chinese Virus” during the height of the COVID-19 pandemic to protect the rights and reputation of citizens with Chinese heritage, as well as preserve the public order in response to the spike in Chinese and Asian hate crimes.¹⁹¹ Evidence shows this was a public concern that required addressing, but many politicians were left powerless to stop the use of incendiary and harmful rhetoric levied against Asian and Chinese Americans.¹⁹² This is likely because, under

188. *Id.* at art. 19.

189. Compare U.S. CONST. amend. I, with ICCPR, *supra* note 183, at art. 19.

190. See ICCPR *supra* note 183, at art. 19. Paragraph 3 specifically notes that the freedom of expression comes with “special duties and responsibilities,” making it amenable to reasonable regulation where necessary. *Id.* at art.19, ¶3; see also Callamard, *supra* note 111.

191. See *More than 9,000 Anti-Asian Incidents Have Been Reported Since the Pandemic Began*, NPR (Aug. 12, 2021, 6:02 PM), <https://www.npr.org/2021/08/12/1027236499/anti-asian-hate-crimes-assaults-pandemic-incidents-aapi> [<https://perma.cc/VX5V-64NB>].

192. See *id.* Although President Biden signed the COVID-19 Hate Crimes Act, this act did not make hate speech against Asian Americans itself a crime; rather, it allowed for expeditious review of hate crimes. *Id.* The hate speech itself remained protected under this act. See *id.*; COVID-19 Hate Crimes Act, 34 U.S.C. § 30501.

Brandenburg, proposed prohibitions may have been deemed unconstitutional, since they could be considered blanket prohibitions rather than a single wrongful instance of language that might have incited imminent and possible violence against citizens.¹⁹³

Article 20 is likewise a provision that could directly address stochastic terrorism.¹⁹⁴ It is much less permissive than Article 19; Article 20 *requires* nations to prohibit “propaganda for war” and “advocacy of national, racial, or religious hatred that constitutes incitement” by law.¹⁹⁵ In practice, legislatures that abide by Article 20 *must* statutorily restrict speech associated with incitement of stochastic terrorism, like misrepresentations of immigrants at the southern border as an “invasion,” because of the racial hatred and subsequent violence this rhetoric often causes.¹⁹⁶ This directly implicates the possibility of statutorily prohibiting the great replacement theory, similar conspiracies, and other inciteful political rhetoric from being shared.¹⁹⁷ However, while Article 20 mandates legal action, statutory prohibitions still must prove to be a necessity under Article 19, paragraph 3 to pass muster.¹⁹⁸

Because the compulsory nature of Article 20 is antithetical to the First Amendment and *Brandenburg*, the United States issued a reservation prior to adopting the ICCPR.¹⁹⁹ The United States’ reservation to Article 20 states: “Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.”²⁰⁰ In other words, this reservation permitted the United States to ratify the

193. *See supra* Section II.B.

194. *See* ICCPR, *supra* note 183, at art. 20.

195. *Id.*

196. *Id.*; *see* Joel Rose, *Talk of ‘Invasion’ Moves from the Fringe to the Mainstream of GOP Immigration Message*, NPR (Aug. 3, 2022, 5:10 AM), <https://www.npr.org/2022/08/03/1115175247/talk-of-invasion-moves-from-the-fringe-to-the-mainstream-of-gop-immigration-mess> [<https://perma.cc/3JK2-S7JJ>]; *supra* Section II.C.

197. *See supra* Section II.C.

198. Callamard, *supra* note 111; ICCPR, *supra* note 183.

199. *See* 138 CONG. REC. 8068–71 (1992).

200. *Id.* at 8070.

ICCPR in its entirety without being required to enforce Article 20 because of its direct conflict with the First Amendment.²⁰¹ Therefore, the United States has not made “propaganda for war” or “advocacy of national, racial, or religious hatred that constitutes incitement” statutorily illegal, nor does it permit the criminalization of such speech.²⁰² If the *Brandenburg* incitement standard is to be replaced by Articles 19 and 20, the United States government would first have to withdraw its reservation, restoring enforceability of Article 20 within the United States.²⁰³

Because Article 20 compels governments to outlaw inciteful language and rhetoric, it carries with it the potential for abuse.²⁰⁴ In recognition of this danger, national leaders and signatories to the ICCPR have formulated the Rabat Plan of Action, a test tribunals can use to determine when language should be considered incitement.²⁰⁵ The six elements for consideration are: (1) the context within the social and political climate when the speech was made; (2) the status and position of the speaker; (3) whether it was the speaker’s specific intent to incite their audience; (4) the content of the speech and its form; (5) the extent of

201. See *id.* Article 19 of The Vienna Convention on the Law of Treaties provides the clearest summary of what constitutes a permissible reservation in international law. Vienna Convention on the Law of Treaties, art. 19, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). Although the United States is not a signatory to the Vienna Convention, the executive branch of the United States government has treated the Convention as customary international law, and therefore voluntarily subscribes to many of its tenets, including reservations. See CONG. RSCH. SERV., RESERVATIONS, UNDERSTANDINGS, DECLARATIONS, AND OTHER CONDITIONS TO TREATIES 2 (2022); see also Rep. of the Int’l L. Comm’n on its Sixty-Third Session, § 1.1, U.N. Doc. A/66/10/Add.1 (2011) (defining a reservation as “a unilateral statement . . . made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization”).

202. See 138 CONG. REC. 8070 (1992); ICCPR, *supra* note 183 and accompanying text.

203. See Vienna Convention on the Law of Treaties, *supra* note 201, at art. 22–23 (“[A] reservation may be withdrawn at any time The withdrawal of a reservation . . . must be formulated in writing.”).

204. See U.N. High Comm’r for Hum. Rts., *Rep. of the U.N. High Commissioner for Human Rights on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred*, ¶ 11, U.N. Doc. A/HRC/22/17/Add.4, annex (Jan. 11, 2013) [hereinafter *Report on Expert Workshops*].

205. *Id.* ¶¶ 6–9.

the speech including the audience size, the amount of times it was spoken, whether it is generally accessible, etc.; and (6) whether there was a reasonable probability the speech would have resulted in harm coming to the targeted group.²⁰⁶ The implementation of these six elements decreases the likelihood of abuse by requiring the totality of the circumstances to inform a tribunal's decision about whether speech was inciteful, rather than creating a hardline standard with no room for interpretation or argument.²⁰⁷

Further, a standard modeled after the Rabat Plan would require a judge or jury to holistically examine the evidence and circumstances to reach a factual conclusion of whether the circumstances lend the speech to incitement, or if it can be categorized as protected speech like rhetorically powerful, hyperbolic, and dissident speech.²⁰⁸ Popular news agencies often publish opinion pieces critiquing such speech.²⁰⁹ These literary pieces and individuals who author them would face no possibility of criminalization if the Rabat Plan of Action is applied faithfully.²¹⁰ Articles 19 and 20 of the ICCPR, together with the Rabat Plan of Action, would have an immediate impact on the use of stochastic terrorism, while still retaining the most desirable and necessary benefits of the First Amendment like journalistic freedom.

IV. LIFE BEYOND BRANDENBURG

The concerns surrounding the proliferation of stochastic terrorism in modern political debate must be taken seriously and

206. See *id.* ¶ 29; see also *One-Pager on "Incitement to Hatred": The Rabat Threshold Test*, U.N. HUM. RTS. (Apr. 20, 2020), https://www.ohchr.org/sites/default/files/Rabat_threshold_test.pdf [<https://perma.cc/R9Y92-JGJ3>], for a clearer presentation of the Rabat Plan of Action. [hereinafter *Rabat Plan of Action*].

207. See *Report on Expert Workshops*, *supra* note 204, ¶¶ 27–29.

208. See *id.*

209. See, e.g., Ed. Bd., *End Our National Crisis*, N.Y. TIMES <https://www.nytimes.com/interactive/2020/10/16/opinion/donald-trump-worst-president.html> [<https://perma.cc/9X6A-ZXDT>] for a compilation of opinion pieces about Donald Trump containing what some might characterize as hyperbolic political speech.

210. See *Rabat Plan of Action*, *supra* note 206, ¶ 29.

addressed.²¹¹ To assist in the fight against it, the *Brandenburg* standard must be judicially stricken down.²¹² Additionally, the United States should revoke its reservation to Article 20, allowing states to criminalize the dissemination of propaganda for war and general inciteful rhetoric as permitted by Articles 19 and 20 of the ICCPR.²¹³ Implementing a “necessity” standard like that found in Article 19, in accordance with the Rabat Plan of Action, would allow states to draft criminal statutes which outlaw the kind of inciteful language that can lead to stochastic terrorism if certain elements could be proven.²¹⁴ Such statutes would be similar to the criminal syndicalism laws deemed unconstitutional by *Brandenburg*, but they would require more specificity to avoid abuse and the criminalization of mere political speech, critique, and dissent.²¹⁵ A legislature would also need to deem the statute necessary to protect the public order or reputation of the groups that are often the target of incendiary and untruthful rhetoric before enactment.²¹⁶ Such a statute should take inspiration from the Rabat Plan of Action and attempt to incorporate the totality of the circumstances test to prevent weaponization and abuse.²¹⁷

A framework for such a statute could be written as so:

The legislature so finds that because of increased instances of radicalized violence, it is of strict necessity and in the best interest of the public to preserve the safety of marginalized political, racial,

211. See *id.* ¶ 28; *supra* Section I.B.

212. See *supra* Section II.C.

213. See *Rabat Plan of Action*, *supra* note 206, ¶ 28.

214. See ICCPR, *supra* note 183, at art. 19; *Rabat Plan of Action*, *supra* note 206.

215. See *Thorgeirson v. Iceland*, App. No. 13778/88, ¶ 63 (June 25, 1992), <https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-57795&filename=CASE%20OF%20THORGEIR%20THORGEIRSON%20v.%20ICELAND.docx> (“Freedom of expression . . . is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.”).

216. See ICCPR, *supra* note 183, at art. 19, ¶ 3.

217. See *Report on Expert Workshops*, *supra* note 204, ¶ 2; see also Callamard, *supra* note 111 (“[A]ny hate speech restriction on freedom of expression should be carefully designed to promote equality and protect against discrimination and, as with all such restrictions, should meet the three-part test set out in Article 19 of the ICCPR . . .”).

ethnic, and national groups. Therefore, engaging in incitement of stochastic terrorism is expressly prohibited.

A speaker will be found guilty of engaging in incitement of stochastic terrorism if:

- (1) The speaker knowingly or purposefully shares a message or information presented as fact about a protected individual or group of protected individuals
- (2) that the speaker knows or, upon reasonable investigation, should have known to be demonstrably false, incendiary, hateful, or inciteful
- (3) with the specific intent to cause one or more persons in the speaker's audience to act violently or illegally against an individual or group of individuals, and
- (4) it is reasonable for the speaker to conclude, based on the totality of the circumstances, that sharing the message or false information would lead persons in their audience to act violently or illegally in accordance with the message or false information, and
- (5) violent or illegal action is taken in accordance with that message or false information.

Prosecutors might have difficulty proving violations of similar statutes because evidence will likely be predominantly circumstantial.²¹⁸ Factfinders, whether a judge or jury, will be required to make inferences where direct links do not exist, like

218. See generally Felix Frankfurter, *Sufficiency of Circumstantial Evidence in a Criminal Case*, 55 COLUM. L. REV. 549, 551 (1955) (discussing the use of circumstantial evidence in a criminal case and prosecutor's burden of proof).

in the case of Ricky Shiffer.²¹⁹ The workability of a statute like this one can be tested using the Dr. Tiller case.²²⁰

First, elements one and two of the sample statute can be addressed together. A speaker must share a message or information about a protected individual or group of protected individuals that they know or should have known is demonstrably false. This is best illustrated by Bill O'Reilly telling his audience that Dr. George Tiller was acquitted of murdering babies.²²¹ That information was demonstrably false because Tiller was never charged with murdering babies, and one cannot be acquitted of a crime of which they were not accused.²²² The second prong requires a showing that O'Reilly knew or should have known that the information was false.²²³ O'Reilly presents and holds himself out as a journalist, completing a Master's Degree in Broadcast Journalism from Boston University.²²⁴ At the very least, he and his team at Fox News should have sought access to the court records, or attended the trial in person to learn the charges of which Dr. Tiller was accused and subsequently acquitted, if they did not already know them.²²⁵ This willful ignorance could lead a reasonable factfinder to conclude O'Reilly

219. See FED. R. EVID. 1008; *supra* notes 173–79 and accompanying text.

220. See *supra* Section I.A.

221. See *supra* Section I.A.

222. See Holan, *supra* note 38; *Acquittal*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/acquittal> [<https://perma.cc/BPL5-3LW6>].

223. See discussion *supra* p. 288.

224. *Here's Bill*, BILLO'REILLY, <https://www.billoreilly.com/pg/jsp/general/billbio.jsp> [<https://perma.cc/9KX5-F3EK>] (last visited Sept. 23, 2023).

225. The Society of Professional Journalists Code of Ethics is a popularly adhered to creed in the field of journalism. Its four main tenets are: (1) seek truth and report it, (2) minimize harm, (3) act independently, and (4) be accountable and transparent. *SPJ Code of Ethics*, SOC'Y OF PRO. JOURNALISTS, <https://www.spj.org/ethicscode.asp> [<https://perma.cc/B587-BVJ2>] (last revised Sept. 6, 2014, 4:49 PM). Within each tenet are several responsibilities journalists should impose on themselves. *Id.* Particularly of note in the case of O'Reilly and Dr. Tiller are the journalistic responsibilities to verify information before releasing it, avoid misrepresentation, and accurately note whether reporting is advocacy or commentary. *Id.*; see also *supra* Section I.A.; Thomas J. Froehlich, *A Not-So-Brief Account of Current Information Ethics: The Ethics of Ignorance, Missing Information, Misinformation, Disinformation and other Forms of Deception or Incompetence*, 39 TEXTOS UNIVERSITARIS DE BIBLIOTECONOMIA I DOCUMENTACIÓ, Dec. 2017 (Spain) <https://bid.ub.edu/en/39/froehlich.htm> [<https://perma.cc/8KXS-PRH8>] (noting that “fake news” is often created and shared with the goal of creating false beliefs, often for political, ethical, or social reasons).

shared the false information with the goal of being incendiary and inciteful.²²⁶

Second, while the third and fourth elements are challenging for a prosecutor to prove, there is room for circumstantial evidence to convince a jury of a speaker's malicious intent.²²⁷ There were several different occasions where O'Reilly rallied against Dr. Tiller on his show, spanning the course of years.²²⁸ O'Reilly frequently called Dr. Tiller insulting names, mischaracterized the work he did, accused him of infanticide, and likened him to some of the worst totalitarian dictators of the past century.²²⁹ Most would agree that there is no legitimate reason to engage in exaggeration and mischaracterization which goes this far beyond political disagreement unless there is an ulterior goal, possibly inciting violence.²³⁰ If O'Reilly did not intend for violence to come to Dr. Tiller, but instead only wanted him to stop his abortion practice, he could have rationally encouraged his audience to be active in the political process by writing to Kansas representatives, encouraging his Kansan viewers to vote for anti-abortion candidates in future elections, or signing petitions.²³¹ Instead, at best, he acted with callous disregard to the accusations he levied against Dr. Tiller and the logical conclusion to which they would lead.²³² His rhetoric could be understood as an attempt to radicalize someone in his audience to do something violent to Dr. Tiller, as evidenced by his statement that he would engage in violence against him if the opportunity

226. See Froehlich, *supra* note 225.

227. See FED. R. EVID. 1008; discussion *supra* p. 287–88.

228. See *supra* Section I.A.

229. See *supra* Section I.A.

230. *But see* Thomas Zeitzoff, *What Violent Rhetoric Does and Does Not Do*, POL. VIOLENCE AT A GLANCE (Aug. 17, 2018), <https://politicalviolenceataglance.org/2018/08/17/what-violent-rhetoric-does-and-does-not-do/> [<https://perma.cc/B3UF-3VZG>] (acknowledging that while violence is a potential motivator for violent rhetoric, other reasons include acting as a barometer for what is and is not acceptable speech, being used as a distraction from other political issues, or to identify true believers in a cause).

231. See AJ Willingham, *25 Ways to Be Politically Active (Whether You Lean Left or Right)*, CNN, <https://www.cnn.com/2016/11/15/politics/ways-to-be-more-politically-active-trnd/index.html> [<https://perma.cc/2UJ6-8HQS>] (Jan. 23, 2017, 8:46 AM).

232. See Winant, *supra* note 42 (characterizing O'Reilly's rhetoric as "sensationally irresponsible"); Matsumoto et al., *supra* note 49, at 103–05.

presented itself.²³³ After enough repetition of the demonizing rhetoric, someone in his large audience was likely to take the words of an ostensibly credible figure seriously and conclude that they too should engage in such violence if they have the opportunity.²³⁴ Further, O'Reilly should have known, if he did not actually know, that Tiller had already been subjected to violence from anti-abortion extremists in the past.²³⁵ If actual knowledge could be proven, then a judge or jury could reasonably conclude that O'Reilly intended for his audience to engage in violence against Tiller in response to his verbal attacks on him.

Finally, the act of the killer murdering Tiller would have to be connected to O'Reilly in some concrete fashion.²³⁶ Whether by a confession or witness testimony, it would have to be shown that the attacker acted in direct accordance with the message shared by O'Reilly.²³⁷ While this might lead to unsatisfactory results and be difficult to prove in some instances, it should catch the more overt cases like the Shiffer case, provided the attacker survives the ordeal.²³⁸ This is the most essential element in seeking true accountability and preventing weaponization or abuse of these statutes; thus, requiring a substantial degree of proof here is desirable and even necessary towards that end.

There are many who would be rightfully concerned statutes like these could be insufficiently drafted to defend against the possibility of abuse by bad actors who wish to silence political dissidents and others who have thoughts divergent from the

233. See *supra* notes 40–44 and accompanying text.

234. See Hassan & Barber, *supra* note 98, at 8.

235. See *supra* Section I.A. Given Dr. Tiller was one of very few late-term abortion providers in the country at the time, the attacks on him and his clinic in the 1990s were highly publicized. Sirin Kale, *Anti-Abortion 'Terrorist' Who Shot George Tiller Is Out of Jail*, VICE (Nov. 8, 2018, 9:50 AM), <https://www.vice.com/en/article/59vznb/anti-abortion-terrorist-shelley-shannon-released-prison> [<https://perma.cc/2VRC-JZUA>].

236. See discussion *supra* p. 287–88.

237. See 18 U.S.C. § 3501; FED. R. EVID. 601.

238. See *supra* Section II.C.

status quo.²³⁹ However, it is worth understanding that stochastic terrorism is a tyrannical tool used to silence proponents of an opposing political ideology, regardless of what political ideology is in the majority. O'Reilly targeted Tiller because they shared differing opinions on abortion, Trump and Sayoc targeted Clinton and other Democratic leaders because they were of a different political party, and Carlson disseminated the great replacement theory solely because of his belief that Democratic leadership, specifically the Biden administration, allows immigrants to enter America because they are overwhelmingly more inclined to vote for Democrats rather than Republicans. The political minority is just as capable of wielding stochastic terrorism as a means to inflict harm and violence on politically marginalized groups like immigrants, LGBTQ+ individuals, and their supporters as the political majority.

This illustrates that stochastic terrorism must be addressed as quickly as possible and at any cost to prevent the possibility of stochastic warfare, despite undoubtedly valid fears of misuse by the majority.²⁴⁰ With the implementation of the Rabat Plan of Action, judges and juries will have ample opportunity to inspect evidence and reach a conclusion that they believe is just based on the totality of the circumstances. This narrow interpretation of inciteful language should limit the ability of authoritarians to prosecute political dissidents at will.²⁴¹

While a federal criminal statute would be preferred as a means of achieving uniformity and maximizing enforcement, it would be incredibly difficult to pass such a statute considering that members of one major political party are more closely associated with higher-profile stochastic terrorists. The possibility of a federal statute should not be written off, however.²⁴²

239. Callamard, *supra* note 111 (noting that “overbroad rules in this area are abused by the powerful to limit nontraditional, dissenting, critical, or minority voices, or discussion about challenging social issues”).

240. See Callamard, *supra* note 111 (“Hate speech laws . . . are often used by states against the very minorities they are designed to protect.”).

241. See Callamard, *supra* note 111; U.N. Secretary-General, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶¶ 4–6(a), U.N. Doc. A/74/486 (Oct. 9, 2019).

242. See Domestic Terrorism Prevention Act of 2022, H.R. 350, 117th Cong. § 4(a) (2022).

Perhaps in the future such a prohibition could be agreed upon and enforced by federal courts, the Department of Defense, Department of Homeland Security, and Department of Justice, but such a solution is not offered by this Note. Given the current political climate, it is far more likely state legislatures, if given the ability by the end of *Brandenburg*, will be able to come to agreements regarding the importance and necessity of curbing stochastic terror and violence.²⁴³

Further acting as a check on tyranny and over-restriction of speech, state court judges are free to interpret the necessity test required by Article 19 as strictly or loosely as they wish when deciding if a statute meets that standard.²⁴⁴ Perhaps judges in conservative states will decide that a sufficient showing of necessity requires the legislature to exhaust all less restrictive options and then demonstrate empirical evidence that only the existence and enforcement of a statutory prohibition would adequately protect targeted populations.²⁴⁵ In contrast, courts and judges in more liberal states, which generally have a higher population of vulnerable groups, may give more deference to the legislature in determining what suffices as a necessity for the existence of such a law.²⁴⁶ Regardless of what each state does individually with this improved and modernized standard, it is most important that these options are reintroduced to the state legislatures rather than remaining completely precluded under *Brandenburg*.

243. See *State Legislatures vs. Congress: Which Is More Productive?*, QUORUM, <https://www.quorum.us/data-driven-insights/state-legislatures-versus-congress-which-is-more-productive/> [<https://perma.cc/8JRV-AKG8>] (“Legislation at the state level is more likely to be enacted than federal legislation.”).

244. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

245. See ICCPR, *supra* note 183, at art. 19; see generally *Strict Scrutiny*, https://www.law.cornell.edu/wex/strict_scrutiny [<https://perma.cc/M5WD-76FD>].

246. See *U.S. Immigrant Population by State and County*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/programs/data-hub/charts/us-immigrant-population-state-and-county> [<https://perma.cc/FCS9-4RVJ>]; *Party Affiliation by State*, PEW RSCH. CTR., <https://www.pewresearch.org/religion/religious-landscape-study/compare/party-affiliation/by/state/> [<https://perma.cc/5QNT-94GP>].

Engagement in the political process would also act as a check on abuse by authoritarians seeking to abuse stochastic terror statutes.²⁴⁷ If citizens of a state are concerned with the possibility that they could be unfairly targeted by a law that censors inciteful rhetoric, they would do well to campaign and vote against the politicians who sponsor it.²⁴⁸ The right of political recourse against stochastic terrorists through statutory enactment is a right that those who are targets of stochastic terrorism do not currently have because *Brandenburg* completely preempts the existence of such laws. With its replacement, the parties who are proponents and detractors of such statutes will be able to let their voices be heard and compete in the marketplace of ideas, rather than relying on the Supreme Court to decide what is and is not speech that they feel should be protected or criminalized.

The biggest shortcoming of any state-based legal framework, like the one this Note proposes, compared to a federal standard is that enforcement will likely be inconsistent and based on a patchwork.²⁴⁹ If a speaker engaging in stochastic terrorism shares their inciteful message while located in one state while a related attack was carried out in another, which state's law will control? Suppose a state has no law about stochastic terror. Is prosecution of a potential inciter located in that state impossible even if it leads to violence in a state where stochastic terror is statutorily prohibited? We see questions like these arising in the aftermath of *Dobbs v. Jackson Whole Women's Health Organization* given the political divide that exists as to the morality of

247. See *What States Can Do to Fight Corruption and Empower Voters*, CTR. FOR AM. PROGRESS (Jan. 23, 2019), <https://www.americanprogress.org/article/states-can-fight-corruption-empower-voters/> [<https://perma.cc/3UN3-CHQU>]; Willingham, *supra* note 231.

248. See Willingham, *supra* note 231.

249. See, e.g., Martin Kaste, *Piecing Together America's Patchwork Quilt of Body Cam Laws*, NPR (Feb. 25, 2016, 3:01 AM), <https://www.npr.org/sections/alltechconsidered/2016/02/25/467990199/piecing-together-the-countrys-patchwork-quilt-of-body-cam-laws> [<https://perma.cc/FP93-2S34>]; Daniel Castro, Luke Dascoli & Gillian Diebold, *The Looming Cost of a Patchwork of State Privacy Laws*, INFO. TECH. & INNOVATION FOUND. (Jan. 24, 2022), <https://itif.org/publications/2022/01/24/looming-cost-patchwork-state-privacy-laws> [<https://perma.cc/C434-DD67>]; A "Patchwork of Systems" Means Little Uniformity in How Environmental Laws Are Enforced, GOOD JOBS FIRST (Mar. 29, 2021), <https://goodjobsfirst.org/patchwork-systems-means-little-uniformity-how-environmental-laws-are-enforced/> [<https://perma.cc/J9JK-GUKG>].

abortions.²⁵⁰ To remedy these shortcomings, the federal government should remain involved by implementing an incentive program to encourage states to enact laws prohibiting stochastic terror. This could be as simple as allocating and distributing funds to help states investigate and combat domestic terrorism within their borders.²⁵¹ Incentives like these are constitutional under the spending clause of Article I of the United States Constitution, and could remedy the most glaring concerns like stochastic terror being criminalized in only a very select few states.²⁵² If all fifty states enact some stochastic terror prohibition, then prosecution and enforcement will be much more likely to occur when appropriate.²⁵³

Another concern is whether the viral nature of inciteful rhetoric will be adequately stanching by silencing the speakers, or whether the internet will allow the message to disseminate freely anyway.²⁵⁴ The hope is that stochastic terror prohibitions would prevent inciteful messages from being spread regardless, but as evidenced by Holocaust denialism and glorification

250. *Dobbs v. Jackson Whole Women's Health Org.*, 142 S. Ct. 2228, 2234 (2022) (holding that there is no constitutional right to abortion and states are free to regulate abortion however they deem fit); see *Dobbs Decision Creates Uncertainty and Battlefield Across States, Say Constitutional Law Experts at UH Law Center*, UNIV. HOUSTON L. CTR. (Oct. 17, 2022), <https://www.law.uh.edu/news/fall2022/1017CLE.asp> [<https://perma.cc/B8G4-7V8R>] (noting that "[t]he [legal] patchwork situation in which we find ourselves raises several questions . . . fundamental rights, like bodily autonomy, are now dictated by geography."); *Social and Moral Considerations on Abortion*, PEW RSCH. CTR. (May 6, 2022), <https://www.pewresearch.org/religion/2022/05/06/social-and-moral-considerations-on-abortion/> [<https://perma.cc/8JJN-F4RS>].

251. For example, the Domestic Terrorism Prevention Act of 2022 was a bill which would have provided for federal resources and training to be given to state, local, and tribal law enforcement agencies. Domestic Terrorism Prevention Act of 2022, H.R. 350, 117th Cong. § 4(a) (2022). However, Senate Republicans filibustered the bill. *Senate Republicans Filibuster Durbin's Domestic Terrorism Prevention Act*, U.S. SENATE COMM. JUDICIARY (May 26, 2022), <https://www.judiciary.senate.gov/press/dem/releases/senate-republicans-filibuster-durbins-domestic-terrorism-prevention-act> [<https://perma.cc/EH5D-MHYE>].

252. U.S. CONST. art I., § 8, cl. 1.

253. *But cf. Dobbs Decision Creates Uncertainty and Battlefield Across States, Say Constitutional Law Experts at UH Law Center*, *supra* note 250 (explaining uncertainty in abortion law given differences between state law).

254. See RACHEL BRIGGS & SEBASTIEN FEVE, POLICY BRIEFING: COUNTERING THE APPEAL OF EXTREMISM ONLINE 8–12 (2014).

in Europe despite statutory bans, this is unlikely.²⁵⁵ Social media companies would likely play a part as well by adapting their terms of service to prevent the sharing of inciteful rhetoric on their platforms like they do with other illegal content, such as child exploitation.²⁵⁶ There is already some support for more involvement from social media corporations considering that in 2022, Meta's Oversight Board referenced Article 19 in six different content policy decisions, and the Rabat Plan of Action in one.²⁵⁷ In the likely event that an inciteful message is shared regardless, states should also have sentencing guidelines proportionate to the act.²⁵⁸ Someone who merely shares an inciteful message should receive less punishment compared to someone who originally formulates and shares such a message on the internet and in the press to prevent a slippery slope chilling effect on speech of normal citizens.

CONCLUSION

Politically motivated stochastic terror is becoming increasingly problematic and prevalent in the United States. From nightly pundits on major news networks promoting dangerous, unfounded conspiracy theories about vulnerable minority groups which have inspired mass shooters, to a lame-duck president calling for an insurrection on the Capitol based on

255. See generally Michael J. Bazylar, *Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism*, YAD VASHEM, <https://www.yadvashem.org/holocaust/holocaust-antisemitism/holocaust-denial-laws.html> [<https://perma.cc/CR6C-PQNNQ>].

256. See Paul Bischoff, *The Rising Tide of Child Abuse Content on Social Media*, COMPARITECH, <https://www.comparitech.com/blog/vpn-privacy/child-abuse-online-statistics/> [<https://perma.cc/8WUC-8DTQ>] (Jan. 25, 2023) (noting the rise in flagged instances of child abuse content on social media despite site's community guidelines); Teresa Huizar, *Child Sex Abuse Content Is Exploding Online. We're Losing the Fight Against It.*, USA TODAY, <https://www.usatoday.com/story/opinion/2023/03/10/how-social-media-emboldens-abusers/11413209002/> [<https://perma.cc/5SMQ-FQ9P>] (Mar. 11, 2023, 1:38 PM) (noting that federal laws require social media companies to report sexually abusive material of children on their platforms, but child sex content continues to rise). However, putting faith in social media companies to moderate evenhandedly comes with its own challenges as evidenced by reports of censorship of Palestinians during conflict between Palestine and Israel. See Barbara Ortutay, *Facebook Violated Rights of Palestinian Users, Report Finds*, ASSOCIATED PRESS NEWS (Sept. 22, 2022, 4:57 PM), <https://apnews.com/article/technology-middle-east-israel-8587529541424ca7882bf88ba96e2799> [<https://perma.cc/J37K-KKZG>].

257. OVERSIGHT BOARD, OVERSIGHT BOARD Q4 2022 TRANSPARENCY REPORT 7–10 (2022).

258. See *Five Things About Deterrence*, NAT'L INST. JUST. (June 5, 2016), <https://nij.ojp.gov/topics/articles/five-things-about-deterrence> [<https://perma.cc/P827-GKMX>].

false narratives, political debate in the United States has devolved from valid criticisms and policy disagreements into incitements of violence used to destroy opposition. The First Amendment's allowance of such dangerous rhetoric and disguised incitements to violence under *Brandenburg* is incompatible with a truly free and democratic society. Instead, the people would be better served and protected by a new standard based on Articles 19 and 20 of the ICCPR, supplemented by the Rabat Plan of Action.²⁵⁹ The standards therein would not only reduce the hyper-partisan violence we are currently experiencing in the United States, but it would also prevent the continuance of stochastic terrorism while adequately preserving the bedrock principles of freedom of expression that Americans hold so dear.

259. See *supra* Part III, Part IV.