

**WEB OF LIES: HATE SPEECH, PSEUDONYMS, THE
INTERNET, IMPERSONATOR TROLLS, AND FAKE
JEWS IN THE ERA OF FAKE NEWS**

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This Article discusses the problem of “hate-speech impersonator trolls,” that is, those who impersonate minorities through the use of false identities online, and then use those false identities to harm those minorities through disinformation campaigns and false-flag operations. Solving this problem requires a change to the status quo, either through the passage of a new statute targeting hate-speech impersonator trolls or through the modification of Section 230 of the Communications Decency Act. In this Article, I discuss the scope and severity of hate-speech impersonator-trolling, as well as relevant jurisprudence on the First Amendment, hate speech, anonymity, and online communications. I then present proposals and recommendations to counter and combat hate-speech impersonator trolls.

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I. Introduction

In August 2019, veteran journalist Yair Rosenberg uncovered a network of fake social media accounts that claimed to be the digital profiles of Jewish people.² The people behind these fake accounts used stereotypical Jewish names like “David Goldberg” and “Chaim Adelberg,” alongside stolen photos of real Jewish people.³ The fake accounts were created shortly after a thread on a 4chan message board—described by *Slate* as a “white supremacist breeding ground”⁴—called for “a massive movement of fake Jewish profiles” on Facebook and Twitter.⁵ Posts on the board transparently discussed the aim behind the use of these “fake Jews”: promoting anti-Semitism, provoking infighting, and fomenting a hatred of leftist ideologies.⁶ This was not the first time that Rosenberg had to deal with online anti-Semites; he fought against them in 2017 shortly after the election of former President Donald J. Trump.⁷ He dubbed these white supremacists “impersonator trolls” and “digital Nazis.”⁸

On New Year’s Day 2020, the trolls were at it again.⁹ This time, they used a fake Jewish profile on Twitter to create hatred and spark racial

² Rachele Hampton, *4chan Trolls Impersonated Jewish Twitter Users. Again.*, SLATE (Aug. 21, 2019, 11:04 AM), <https://slate.com/technology/2019/08/4chan-trolls-impersonated-jewish-twitter-users-again.html> [<https://perma.cc/LC2R-3LQH>].

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Yair Rosenberg, *Confessions of a Digital Nazi Hunter*, N.Y. TIMES (Dec. 27, 2017), <https://www.nytimes.com/2017/12/27/opinion/digital-nazi-hunter-trump.html> [<https://perma.cc/S5J4-BQ39>].

⁸ *Id.*

⁹ Donie O’Sullivan, *A Fake Twitter Account Stirred Tensions Between Jews and African Americans. Trolls Celebrated.*, CNN (Jan. 2, 2020, 3:04 PM), <https://www.cnn.com/2020/01/02/tech/twitter-fake-account-anti-semitic-new-york-attacks/index.html> [<https://perma.cc/V9TZ-GKSU>].

enmity between Jewish and Black Americans in the wake of widely reported, violent anti-Semitic attacks against Jews in New York.¹⁰ In response to this trolling operation, Rosenberg wrote: “The white supremacists on Twitter are doing what they regularly do, especially in the wake of tragedy: impersonating minorities to sow hatred and pit them against each other. Right now, we’re seeing fake Jews saying anti-black things. As ever, this is on @Twitter to deal with.”¹¹

These digital false-flag operations involved the impersonation of a member of a protected class¹² in order to disparage, malign, spread misinformation about, and/or incite hatred against that protected class.¹³ Setting aside subjects like identity theft and fraud, these acts of online hate speech present complicated issues related to cyberspace law and the limits of First Amendment protections.

This Article will examine those issues in detail. Specifically, it will investigate the following question: Presuming that it is legal to both (1) impersonate on the internet a member of a protected class and (2) express hate speech on the internet, should it be illegal to do both at the same time? Framed another way, is it legal to (1) assume a false identity masquerading as a member of a protected class so as to co-opt the credibility and legitimacy implicitly granted to genuine members of that protected class, and then (2) engage in a campaign of disinformation and racist rhetoric?

¹⁰ *Id.*

¹¹ *Id.*

¹² The term “protected class” is defined as a group[] protected from the employment discrimination by law. These groups include men and women on the basis of sex; any group which shares a common race, religion, color, or national origin; people over 40; and people with physical or mental handicaps. Every U.S. citizen is a member of some protected class and is entitled to the benefits of [Equal Employment Opportunity (EEO)] law. However, the EEO laws were passed to correct a history of unfavorable treatment of women and minority group members.

EEO Terminology, NAT’L. ARCHIVES (Aug. 15, 2016), <https://www.archives.gov/eo/terminology.html#p> [<https://perma.cc/S823-XGQF>].

¹³ Rosenberg, *supra* note 7.

Part I of this Article details the *modus operandi* of an impersonator troll and discusses several examples of impersonator trolls attacking minorities.¹⁴ It also considers the impact that impersonator trolls can have on extremists in the physical world.¹⁵ Part I also discusses how the Russian government uses impersonator trolls to foster social discord and internal divisions in the United States.¹⁶ Part II reviews the legal principles and case law related to hate speech and the First Amendment.¹⁷ It also covers jurisprudence surrounding anonymity and the ability to create a fictional identity on the internet.¹⁸ Part III analyzes the laws and policies governing social media platforms, and their obligations and efforts to combat online hate speech (or the lack thereof).¹⁹

Having established the body of relevant law, this Article concludes with Part IV, which returns to the question articulated at the outset: Is it illegal to masquerade online as a member of a protected class, and then foment hatred, spread disinformation, and inflame racial tensions?²⁰ Part IV also proposes ways to counter and combat impersonator trolls that promulgate hate speech, spread disinformation, and attack minorities.²¹

II. Impersonation as a Form of Hate Speech

Impersonator-trolling is one form of a broader phenomenon of digital deception called “sockpuppeting.”²² Broadly defined, a “sockpuppet” is just “a user account that is controlled by an individual (or puppetmaster) who controls at least one other user account,” but the term is typically used to refer to “a false online identity that is used for the purposes of

¹⁴ See *infra* Parts I.A, I.C.

¹⁵ See *infra* Part I.B.

¹⁶ See *infra* Part I.D.

¹⁷ See *infra* Part II.A.

¹⁸ See *infra* Part II.B.

¹⁹ See *infra* Part III.

²⁰ See *infra* Part IV.

²¹ See *infra* Part IV.

²² Srijan Kuman et al., *An Army of Me: Sockpuppets in Online Discussion Communities*, in PROCEEDINGS OF THE 26TH INTERNATIONAL CONFERENCE ON WORLD WIDE WEB 857, 857 (2017), available at <https://thewebconf.org/proceedings/www2017/proceedings/p857.pdf>.

deceiving others.”²³ Sockpuppets are often used for underhanded commercial dealings, like sabotaging competitors on social media platforms or posting fake product reviews in online marketplaces like Amazon.²⁴ In January 2019, the New York Attorney General’s Office became the first law enforcement agency to find that selling fake social media engagement is illegal, with Attorney General Letitia James warning those seeking to “make a quick buck by lying to honest Americans” that her office was “sending a clear message that anyone profiting off of deception and impersonation is breaking the law and will be held accountable.”²⁵ Sockpuppeting can also serve political or social purposes, either through the creation of fake grassroots supporters—a practice known as “astroturfing”²⁶—or through impersonator trolls’ efforts to attack minorities, spread hate speech, and foment civil unrest.

A. Defining a Hate-Speech Impersonator Troll

Hate-speech impersonator trolls “are not content to harass Jews and other minorities on Twitter; they seek to assume their identities and then defame them.”²⁷ To do so, an impersonator troll will first create or steal “an online photo of a Jew, Muslim, African-American or other minority—typically one with clear identifying markers, like a yarmulke-clad Hasid or a woman in hijab.”²⁸ The troll will then use this photo as their avatar on a social media platform like Twitter, and fill out

²³ *Id.* at 858.

²⁴ David Wagner, *Sockpuppet Reviews Aren’t Just Unethical, They’re also Unconvincing*, ATLANTIC (Sept. 4, 2012), <https://www.theatlantic.com/culture/archive/2012/09/sockpuppet-reviews-arent-just-unethicaltheyre-also-unconvincing/323992/> [https://perma.cc/BGS5-J3TB].

²⁵ Press Release, New York State Off. Att’y Gen., Attorney General James Announces Groundbreaking Settlements with Sellers of Fake Followers and “Likes” on Social Media (Jan. 30, 2019), <https://ag.ny.gov/press-release/2019/attorney-general-james-announces-groundbreaking-settlement-sellers-fake-followers> [https://perma.cc/H4G6-EHZW].

²⁶ Franziska Keller et al., *It’s Not Easy to Spot Disinformation on Twitter. Here’s What We Learned from 8 Political ‘Astroturfing’ Campaigns*, WASH. POST (Oct. 28, 2019 6:00 AM), <https://www.washingtonpost.com/politics/2019/10/28/its-not-easy-spot-disinformation-twitter-heres-what-we-learned-political-astroturfing-campaigns/> [https://perma.cc/J29U-EMAR]. For an example of astroturfing within the context of alt-right propaganda, see Charlie Warzel, *How the Alt-Right Manipulates the Internet’s Biggest Commenting Platform*, BUZZFEED NEWS (June 5, 2018, 9:58 AM), <https://www.buzzfeednews.com/article/charliwarzel/how-the-alt-right-manipulates-disqus-comment-threads> [https://perma.cc/M5SQ-T26P].

²⁷ Rosenberg, *supra* note 7.

²⁸ *Id.*

their social media profile with ethnic and progressive terms like “Jewish,” “Zionist,” “Muslim,” or “enemy of the alt-right.”²⁹

Having created their false identity online, the impersonator troll will then “insert themselves into conversations with high-profile Twitter users—conversations that are often seen by tens of thousands of followers—and proceed to say horrifically racist things.”³⁰ Thus, the troll defames an entire community, because “unsuspecting readers glancing through their feed are given the impression that someone who looks like, say, a religious Jew or Muslim is outlandishly bigoted.”³¹ This deception is effective because casual users rarely realize that the images are stolen or fake, nor do they read through that account’s history to determine that it only shares racist posts and is therefore unlikely to be a legitimate account.³²

B. Anti-Semitic Impersonator Trolls and Their Influence on Racist Murderers

A post on a white supremacist thread on 4chan pulled back the curtain on the anti-Semitic agenda of some impersonator trolls.³³ The post called for impersonating Jews online; its reasoning was that “[s]ince Jews shapeshift into whites anytime they want, we [impersonator trolls] can do the same to them.”³⁴ The post noted that “LARPing [live-action role-playing] as a Jew has the benefit of being uncensored by big tech” and that impersonator trolls posing as Jews “also have the benefit of labeling anyone an anti semite [sic] who disagrees with you.”³⁵ “Use this to your advantage,” the post counseled.³⁶

“Being a Jew, you are able to subvert Jews themselves,” the post explained.³⁷ “As a Jew, normies will listen to you. Especially boomers.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Hampton, *supra* note 2.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

You can take the blame for world events. Post redpill facts about your fellow Jews. Slave trade, monetary facts, mass media, porn industry etc...etc... [sic].”³⁸

The post then took another anti-Semitic turn, writing that

[s]ince Jewishness is 100% based on supremacism, you can use the same tactics they have used to dismantle our own society. You can push for more diversity in Israel, for example. More race mixing...etc...etc...If your fellow Jews disagree, call them Nazi’s [sic], racists, bigots, xenophobes. LOVE WILL WIN. Bring ICE detainees to Israel.³⁹

It is easy to see how this online anti-Semitism can lead to real-world attacks. As one example, domestic terrorist Robert Bowers killed eleven people and injured six more during a shooting attack on the Tree of Life - Or L’Simcha synagogue in Pittsburgh, Pennsylvania, on October 27, 2018.⁴⁰ This was the deadliest attack on American Jews in the history of the country.⁴¹

Bowers posted a large number of anti-Semitic slurs, stereotypes, and conspiracy theories on Gab, a social media platform.⁴² Neo-Nazis, white nationalists, and other alt-right groups favor Gab, and the platform has

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Justin Carissimo, *Pittsburgh Shooting Suspect Makes Court Appearance; Feds Seek Death Penalty*, CBS NEWS (Oct. 29, 2018, 7:24 PM), <https://www.cbsnews.com/live-news/pittsburgh-shooting-synagogue-today-suspect-robert-bowers-squirrel-hill-live-updates-2018-10-29/> [<https://perma.cc/QV7X-XAFV>].

⁴¹ Emma Green, *The Fight to Make Meaning out of a Massacre*, ATLANTIC (Sept. 29, 2019), <https://www.theatlantic.com/politics/archive/2019/09/pittsburgh-politics-violence-gun-reform/598885/> [<https://perma.cc/UC6E-YTFS>].

⁴² Jason Silverstein, *Robert Bowers, Pittsburgh Shooting Suspect, Was Avid Poster of Anti-Semitic Content on Gab*, CBS NEWS (Oct. 28, 2018, 12:03 AM), <https://www.cbsnews.com/news/robert-bowers-gab-pittsburgh-shooting-suspect-today-live-updates-2018-10-27/> [<https://perma.cc/TV6L-TXV3>]; see also Rita Katz, *Inside the Online Cesspool of Anti-Semitism that Housed Robert Bowers*, POLITICO (Oct. 29, 2018), <https://www.politico.com/magazine/story/2018/10/29/inside-the-online-cesspool-of-anti-semitism-that-housed-robert-bowers-221949> [<https://perma.cc/J39R-XRSN>].

even been dubbed “Twitter for racists.”⁴³ While extremists may favor sites like Gab and 4chan for communicating amongst themselves, “the popularity of mainstream mega-platforms like Twitter, Facebook and YouTube has created environments in which misinformation and hate can multiply, and where extremists can attempt to convert—or ‘red pill,’ in the parlance of right-wing Internet activists—a new generation to their cause.”⁴⁴ For reference, Gab has approximately 480,000 users, while Twitter has over 300 million people using the site every month.⁴⁵

Bowers wrote that Jews were the enemy of Christian people of European descent, whom he viewed as the “chosen people.”⁴⁶ He also claimed that Jews would engage in a false-flag attack as “one of the final desperate attempts by the jewish [sic] international oligarchy to maintain power in the face of collapsing public trust” in the mainstream media.⁴⁷ He focused on HIAS, a Jewish group that helps refugees of all faiths settle in the U.S., and claimed that the group was bringing illegal immigrants and “hostile invaders” into the country.⁴⁸ Just before his murderous attack on the synagogue, Bowers posted, “HIAS likes to bring invaders in that kill our people. I can’t sit by and watch my people get slaughtered. Screw your optics. I’m going in.”⁴⁹

Bowers was influenced by a sockpuppet account that went by the names “Jack Corbin” and “Pale Horse,”⁵⁰ and Bowers himself influenced another murderous anti-Semite, John T. Earnest, who killed one person

⁴³ Lois Beckett, *Pittsburgh Shooting: Suspect Railed Against Jews and Muslims on Site Used by ‘Alt-Right’*, GUARDIAN (Oct. 27, 2018, 6:49 PM), <https://www.theguardian.com/us-news/2018/oct/27/pittsburgh-shooting-suspect-antisemitism> [<https://perma.cc/FA8J-MVTC>].

⁴⁴ Kevin Roose, *On Gab, an Extremist-Friendly Site, Pittsburg Shooting Suspect Aired His Hatred in Full*, N.Y. TIMES (Oct. 28, 2018), <https://www.nytimes.com/2018/10/28/us/gab-robert-bowers-pittsburgh-synagogue-shootings.html> [<https://perma.cc/3AHL-3FQE>].

⁴⁵ Abby Vesoulis, *How Gab Became the Social Media Site Where the Pittsburgh Suspect’s Alleged Anti-Semitism Thrived*, TIME (Oct. 27, 2018, 7:41 PM), <https://time.com/5437006/gab-social-media-robert-bowers/> [<https://perma.cc/WMF8-7KB5>].

⁴⁶ Rich Lord, *How Robert Bowers Went from Conservative to White Nationalist*, PITT. POST-GAZETTE (Nov. 10, 2018, 11:33 PM), <https://www.post-gazette.com/news/crime-courts/2018/11/10/Robert-Bowers-extremism-Tree-of-Life-massacre-shooting-pittsburgh-Gab-Warroom/stories/201811080165> [<https://perma.cc/8YN9-W2W8>].

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

and wounded three others in a shooting attack on a Chabad synagogue near San Diego, California, on April 27, 2019.⁵¹ In his manifesto published online prior to the attack, Earnest celebrated the anonymous activists on 8chan who helped to spread his anti-Semitic beliefs.⁵²

According to the FBI, the number of hate crimes targeting Jews spiked in 2017, which saw a seven-year high in the number of these crimes.⁵³ While 2018's number of anti-Semitic hate crimes was lower than that of 2017, the number of violent crimes like arson, felony assault, and murder increased.⁵⁴

Given the size, scale, and scope of online anti-Semitism—and its influence on real-world attackers like Bowers and Earnest—it is not hard to imagine how an impersonator troll could push some other digital bigot into acting on their hatred in the real world. While masquerading as Jews, impersonator trolls could create online content that feeds into extremists' anti-Semitic beliefs. Those extremists would then spread these allegedly Jewish pieces of content online to support their calls for attacks on Jews.

C. “Digital Blackface”: Impersonator Trolls Targeting Women of Color

Impersonator trolls are not limited to anti-Semitism. In 2013-14, impersonator trolls engaged in “Operation: Lollipop,” “a propaganda campaign run largely by members of the Men's Rights and Pick-Up Artist communities” posing as women of color on Twitter “as a way to

⁵¹ Ben Collins & Andrew Blankstein, *Anti-Semitic Open Letter Posted Online Under Name of Chabad Synagogue Shooting Suspect*, NBC NEWS (Apr. 28, 2019, 12:37 PM), <https://www.nbcnews.com/us-news/anti-semitic=posted-online-under-chabad-synagogue-n999211> [https://perma.cc/T8AQ-LUG3].

⁵² Open Letter by John Earnest, accused Poway synagogue shooter (April 2019), available at <https://bcsh.bard.edu/files/2020/05/Earnest-Manifesto-042719.pdf>.

⁵³ Nigel Chiwaya, *It's Not Just New York: Anti-Jewish Attacks Are Part of a Wave of 'More Violent' Hate Crimes*, NBC NEWS (Jan. 3, 2020, 7:33 PM), <https://www.nbcnews.com/news/us-news/anti-semitic-attacks-more-violent-hate-crimes-new-york-n1110036> [https://perma.cc/A4JK-WHU3].

⁵⁴ *Id.*

embarrass the online social justice community.”⁵⁵ A since-deleted Tumblr blog associated with Operation: Lollipop described the “Privilege Wars of 2013” as an effort to “infiltrate feminist movements with [T]witter accounts” and thereby use fake accounts to turn activists against one another.⁵⁶

Impersonator trolls waged a similar campaign in 2014 with the #EndFathersDay hashtag on Twitter.⁵⁷ “To casual observers online, #EndFathersDay appeared to be the work of militant feminists, most of whom were seemingly women of color,” to the point that people were easily “lured into believing a stereotype of black women.”⁵⁸ In reality, this Twitter disinformation campaign was the work of impersonator trolls seeking “to engender exactly the vitriol that pundits so readily stepped up to spew.”⁵⁹ Commentators and talking heads like Tucker Carlson, Ashe Schow, Dan McLaughlin, and Ben Shapiro all cited the #EndFathersDay hashtag in their criticisms of “progressivism” or the “feminist outrage machine.”⁶⁰

It took the efforts of activists like L’Nasah Crockett and Shafiqah Hudson to expose this impersonator troll scheme.⁶¹ Hudson created a new Twitter hashtag, #YourSlipIsShowing, designed to help women flag so-called “black feminist” accounts that they suspected of being trolls.⁶² Crockett found the original 4chan post outlining the #EndFathersDay campaign as “part of a crusade by men’s rights activists, pickup artists, and miscellaneous misogynists hoping to capitalize on previously existing rifts in the online feminist movement

⁵⁵ Ryan Broderick, *Activists Are Outing Hundreds of Twitter Users Believed To Be 4chan Trolls Posing as Feminists*, BUZZFEED NEWS (June 17, 2014, 9:25 AM), <https://www.buzzfeednews.com/article/ryanhatethis/your-slip-is-showing-4chan-trolls-operation-lollipop#.leR34ayWd> [<https://perma.cc/HYG4-W6GZ>].

⁵⁶ *Id.*

⁵⁷ *Id.*; Rachele Hampton, *The Black Feminists Who Saw the Alt-Right Threat Coming*, SLATE (Apr. 23, 2019, 5:45 AM), <https://slate.com/technology/2019/04/black-feminists-alt-right-twitter-gamergate.html> [<https://perma.cc/3ECL-ZQPH>].

⁵⁸ Hampton, *supra* note 57.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

related to race and class.”⁶³ Using the #YourSlipIsShowing tag, Crockett posted screenshots of this 4chan post on Twitter, presenting to the world her evidence of the premeditation behind the impersonator-trolling campaign.⁶⁴

Shireen Mitchell, founder of Stop Online Violence Against Women, described impersonator-troll attacks against Black women as “digital blackface.”⁶⁵ “You use the stereotype to project that all black women are angry, so that anything we say or do becomes part of a disinformation and dismissal campaign,” she told *The Daily Beast* in May 2019 after an impersonator troll used the stolen identity of a dead transgender activist to support former President Trump.⁶⁶

D. Russian Impersonator Trolls Attacking America Along Racial Lines

Governments have also begun using impersonator trolls to foment discord and disinformation, with one writer noting that “what does seem clear is that the misinformation, bot networks, and weaponized trolls that Twitter did little to curb back in 2014 were a ‘dry run’ for the presidential campaign two years later.”⁶⁷ In 2017, CNN linked a social media campaign called “Blacktivist” with the Russian government, alleging that Moscow was using Blacktivist accounts on Facebook and Twitter to “amplify racial tensions during the U.S. presidential election.”⁶⁸ The people behind these accounts claimed to be Black Americans, but were actually Russian impersonator trolls seeking to stoke outrage and divide Americans along racial lines.⁶⁹

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Kelly Weill, ‘Digital Blackface’: Pro-Trump Trolls Are Impersonating Black People on Twitter, *DAILY BEAST* (May 8, 2019, 6:41 PM), <https://www.thedailybeast.com/digital-blackface-pro-trump-trolls-are-impersonating-black-people-on-twitter-9> [<https://perma.cc/Y2BK-H4NK>].

⁶⁶ *Id.*

⁶⁷ See Hampton, *supra* note 57.

⁶⁸ Donie O’Sullivan & Dylan Byers, *Exclusive: Fake Black Activist Accounts Linked to Russian Government*, *CNN* (Sept. 28, 2017, 11:40 PM), <https://money.cnn.com/2017/09/28/media/blacktivist-russia-facebook-twitter/index.html> [<https://perma.cc/4YR3-49ZV>].

⁶⁹ *Id.*

The Russian government also created false online identities that were designed to hold diametrically opposed opinions on political and social issues, so as to rile up hatred among the passionate supporters of those opinions.⁷⁰ “Some Internet Research Agency-created accounts pretended to be Muslim groups, others anti-Muslim activists. They were advocates of Black liberation on one hand and its most fervent American critics on the other—whatever was necessary to aggravate long-standing and very real American divisions.”⁷¹ The Internet Research Agency (“IRA”) is the “notorious Russian ‘troll’ farm” that U.S. Special Counsel Robert S. Mueller III investigated following Trump’s narrow electoral win in 2016.⁷² On February 16, 2018, Mueller indicted thirteen Russian individuals and three Russian organizations, including the IRA, for “engaging in operations to interfere with U.S. political and electoral processes, including the 2016 presidential election” through the use of false personas and the “exploitation of social media networks.”⁷³

III. First Amendment Jurisprudence

Modern technology allows for massive disinformation and propaganda campaigns that “pepper vulnerable targets relentlessly with their messages in the hope of wearing them down and converting them.”⁷⁴ Simply put, the speed, scope, and “information overload” of the internet can overwhelm users, leaving them vulnerable to bad actors seeking to spread fake news online through the use of sockpuppets and false identities.⁷⁵ Yet writing under a pseudonym predates the World Wide

⁷⁰ Spencer Ackerman, Gideon Resnick & Ben Collins, *Leaked: Secret Documents from Russia’s Election Trolls*, DAILY BEAST (Oct. 26, 2018, 7:53 AM), <https://www.thedailybeast.com/exclusive-secret-documents-from-russias-election-trolls-leak> [https://perma.cc/9K6H-5CSL].

⁷¹ *Id.*

⁷² *Exposing Russia’s Effort to Sow Discord Online: The Internet Research Agency and Advertisements*, U.S. H. REP. PERMANENT SELECT COMM. ON INTEL., <https://intelligence.house.gov/social-media-content/> [https://perma.cc/67FL-TYBV].

⁷³ *Id.*

⁷⁴ See Warzel, *supra* note 26.

⁷⁵ Filippo Menczer & Thomas Hills, *Information Overload Helps Fake News Spread, and Social Media Knows It*, SCI. AM. (Dec. 1, 2020), <https://www.scientificamerican.com/article/information-overload-helps-fake-news-spread-and-social-media-knows-it/>

Web by centuries.⁷⁶ Thus, to understand the legal framework surrounding online anonymity and hate speech, one must first understand traditional First Amendment protections and the evolution of free speech jurisprudence.

A. A Foundation in First Amendment Law

One of the most influential cases in First Amendment jurisprudence is *Brandenburg v. Ohio*.⁷⁷ In 1969, Ohio convicted Clarence Brandenburg, the leader of a local Ku Klux Klan (“KKK”) group, under the Ohio Criminal Syndicalism statute for “advocat[ing] ... the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and for “voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.”⁷⁸

Brandenburg invited a Cincinnati journalist to a KKK rally, which was filmed by the journalist and his crew.⁷⁹ At the rally, KKK members made derogatory statements about Black Americans and Jews.⁸⁰ Additionally, Brandenburg himself made a speech in which he said, “We’re not a revengent [sic] 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 [sic] taken.”⁸¹ Brandenburg also declared that 400,000 KKK members planned on marching on Congress.⁸² In a second speech, Brandenburg added: “Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel.”⁸³

[<https://web.archive.org/web/20210320002224/https://www.scientificamerican.com/article/information-overload-helps-fake-news-spread-and-social-media-knows-it/>].

⁷⁶ As one example, American Founding Father Benjamin Franklin is famed for writing *Poor Richard’s Almanack* under a pseudonym, as well as his “Silence Dogood” letters. *Id.*

⁷⁷ See generally *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁷⁸ *Id.* at 444-45 (quoting Ohio Rev. Code Ann. § 2923.13).

⁷⁹ *Id.* at 445.

⁸⁰ *Id.* at 446.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 447.

Brandenburg challenged the constitutionality of the Ohio Criminal Syndicalism statute under the First and Fourteenth Amendments.⁸⁴ The Supreme Court upheld that challenge.⁸⁵ In a per curiam decision, the Court emphasized the distinction between “mere advocacy” for “violence ‘as a means of accomplishing industrial or political reform’” and “incitement to imminent lawless action.”⁸⁶ The former is acceptable under the First Amendment, while the latter cannot be defended by the shield of free speech.⁸⁷ Through this dichotomy, the Court established a principle:

[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.⁸⁸

Thus, the statute was deemed unconstitutional, because it punished “mere advocacy” rather than “incitement to imminent lawless action.”⁸⁹ This “likely to incite or produce imminent lawless action” threshold has since become the standard for First Amendment cases of this kind.

A pivotal forerunner to *Brandenburg* also related to the prohibition against speech inciting imminent lawless action, but framed this concept around the term “‘fighting’ words.”⁹⁰ In that case, *Chaplinsky v. State of New Hampshire*, the appellant was a member of the Jehovah’s Witness faith who incited a riot by preaching his religion in a busy public square, allegedly insulting other religions, and calling his city’s police marshal a racketeer and “a damned Fascist and the whole

⁸⁴ *Id.* at 445.

⁸⁵ *Id.*

⁸⁶ *Id.* at 448-49.

⁸⁷ *Id.*

⁸⁸ *Id.* at 447.

⁸⁹ *Id.* at 449.

⁹⁰ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942).

government of Rochester [] Fascists or agents of Fascists.”⁹¹ Chaplinsky was convicted of violating a state statute mandating:

No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.⁹²

Chaplinsky challenged his conviction, alleging that it violated his right to free speech, and the Supreme Court took up the case.⁹³ It upheld Chaplinsky’s conviction, and concluded that the New Hampshire statute was a valid restriction of the First Amendment.⁹⁴

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.⁹⁵

⁹¹ *Id.* at 569. The “fascism” insult likely carried significantly more weight in the midst of World War II than it would today.

⁹² *Id.* at 569.

⁹³ *Id.*

⁹⁴ *Id.* at 573-74.

⁹⁵ *Id.* at 571-72.

The Court's inclusion of the phrase "those which by their very utterance inflict injury" indicates that a statement does not have to incite imminent lawless action to fall out from underneath the aegis of the First Amendment.⁹⁶ A "statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace" does not "contravene the constitutional right of free expression," the Court concluded. This determination suggests the validity of any narrowly tailored statute criminalizing hate-speech impersonator-trolling.⁹⁷

Another hate-speech case occurred in 1977, when the Illinois Circuit Court of Cook County entered an injunction against the National Socialist Party of America, also known as the American Nazi Party.⁹⁸ The injunction barred the Nazis from:

[m]arching, walking or parading in the uniform of the National Socialist Party of America; [m]arching, walking or parading or otherwise displaying the swastika on or off their person; [d]istributing pamphlets or displaying any materials which incite or promote hatred against persons of Jewish faith or ancestry or hatred against persons of any faith or ancestry, race or religion.⁹⁹

The American Nazi Party sought a stay pending appeal, and the case made its way up through the judicial system until it reached the Supreme Court.¹⁰⁰ The Supreme Court mandated that the state court system review the Nazis' stay application, and the case was remanded to the state court.¹⁰¹

The Supreme Court of Illinois, in its subsequent decision on the issue, wrote that the "use of the swastika is a symbolic form of free speech

⁹⁶ *Id.*

⁹⁷ *See infra* Part IV.A.

⁹⁸ *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43 (1977).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 44.

¹⁰¹ *Id.*

entitled to First Amendment protections,” and “[i]ts display on uniforms or banners by those engaged in peaceful demonstrations cannot be totally precluded solely because that display may provoke a violent reaction by those who view it.”¹⁰²

The “unpopularity of views, their shocking quality, their obnoxiousness, and even their alarming impact is not enough” to allow for prior restraint by the government, the Supreme Court of Illinois wrote.¹⁰³ However, “if the speaker incites others to immediate unlawful action he may be punished in a proper case, stopped when disorder actually impends,” a legal formulation taken from *Brandenburg*.¹⁰⁴

Citing a U.S. Supreme Court case, the Supreme Court of Illinois noted that citizens “are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech.”¹⁰⁵ The Illinois Supreme Court—quoting verbatim from a U.S. Supreme Court case related to a person’s ability to wear a jacket upon which was written “Fuck the Draft”—concluded:

The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.¹⁰⁶

The KKK returned to the Supreme Court in 2003 after a Virginia court convicted local Klan leader Barry Black of cross burning, under a state statute that made it “unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public

¹⁰² Vill. of Skokie v. Nat’l Socialist Party of Am., 373 N.E.2d 21, 25 (1978).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (quoting Rowan v. U.S. Post Office Dep’t, 397 U.S. 728, 738 (1970)).

¹⁰⁶ *Id.* (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).

place.”¹⁰⁷ Additionally, “[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons,” the statute continued.¹⁰⁸ Black challenged the constitutionality of the statute on First Amendment grounds, and the Supreme Court took the case.¹⁰⁹

After concluding that “when a cross burning is used to intimidate, few if any messages are more powerful,”¹¹⁰ the Court analyzed this speech-as-conduct within the context of First Amendment jurisprudence.¹¹¹ It noted that “the First Amendment . . . permits a State to ban a ‘true threat,’” i.e., “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹¹² Even a speaker that does not actually intend to carry out their threat would still be guilty of violating a state’s ban on true threats.¹¹³ The proscription is against speech designed to engender fear, rather than any physical act of violence that would follow said speech.¹¹⁴ Thus, a “true threat” crime is one of the mind, rather than the body, and does not require any relationship to “imminent lawless action,” as is the case with the free speech exception ordained in *Brandenburg*.¹¹⁵ While the Court ultimately concluded that Black’s conviction could not stand due to the “prima facie” language in the statute and the lack of clarity regarding his intentions,¹¹⁶ it nevertheless held that the “First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate.”¹¹⁷ This holding, and its emphasis on intent, indicates that some statements made with a nefarious mens rea are devoid of First Amendment protection, even in the absence of any other factor.

¹⁰⁷ *Virginia v. Black*, 538 U.S. 343, 348 (2003).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 351-52.

¹¹⁰ *Id.* at 357.

¹¹¹ *Id.* at 358-63.

¹¹² *Id.* at 359.

¹¹³ *Id.* at 360.

¹¹⁴ *Id.*

¹¹⁵ See *supra* notes 77-87 and accompanying text.

¹¹⁶ *Black*, 538 U.S. at 367.

¹¹⁷ *Id.* at 363.

Statements made by hate-speech impersonator trolls should fall into this category. While the First Amendment protects offensive statements,¹¹⁸ hate-speech impersonator trolls go beyond this line in the sand. They are not merely “disagreeable,” “distasteful,” and “discomforting”¹¹⁹; they are deceptive and dangerous.

B. Anonymity and False Speech in the Eyes of the Law

The emphasis on the invasion of substantial privacy interests in an “essentially intolerable manner”¹²⁰ opens the door to the following question: Do impersonator trolls fit under this rubric? Before answering that question, one must examine the seminal Supreme Court case on false speech, *U.S. v. Alvarez*.¹²¹

In *Alvarez*, the defendant lied about winning the Congressional Medal of Honor, and thereby violated the Stolen Valor Act of 2005.¹²² He challenged the validity of the Act, arguing that it was invalid under the First Amendment.¹²³

In evaluating the strength of Alvarez’s argument, the Court began by noting that content-based restrictions on free speech “have been permitted, as a general matter, only when confined to the few ‘historic and traditional categories [of expression] long familiar to the bar.’”¹²⁴ These categories of acceptable content-based restrictions on free speech include: “advocacy intended and likely to incite imminent lawless action”; obscenity; defamation; speech integral to criminal conduct; “fighting words”; child pornography; fraud; true threats; and speech presenting some grave and imminent threat that the government has the power to prevent.¹²⁵

¹¹⁸ *Id.* at 358.

¹¹⁹ *Id.*

¹²⁰ *Vill. of Skokie v. Nat’l Socialist Party of Am.*, 373 N.E.2d 21, 25 (Ill. 1978).

¹²¹ 567 U.S. 709 (2012).

¹²² *Id.* at 713.

¹²³ *Id.* at 714.

¹²⁴ *Id.* at 717 (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)).

¹²⁵ *Id.*

The Court then noted that “[a]bsent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements,” a principle which “comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.”¹²⁶ It is worth noting that the Court includes in this category of “false statement” both unintentionally erroneous comments and deliberately deceitful claims like Alvarez’s Congressional Medal of Honor lie.¹²⁷

The Court accepted the government’s point that false statements made in connection to “defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation,” can still be devoid of First Amendment protections.¹²⁸ Other examples of “regulations on false speech that courts have generally found permissible” include “the criminal prohibition of a false statement made to a Government official”; statutes punishing perjury; and prohibitions against impersonating a government official or falsely claiming that one speaks on behalf of the government.¹²⁹ Furthermore, the Court noted that “there are instances in which the falsity of speech bears upon whether it is protected. Some false speech may be prohibited even if analogous true speech could not be.”¹³⁰

In evaluating the validity of the Stolen Valor Act, the Court took umbrage at the fact that the Act “applies to a false statement made at any time, in any place, to any person” and “seeks to control and suppress all false statements on this one subject in almost limitless times and settings.”¹³¹ The Court noted that were it “to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it

¹²⁶ *Id.* at 718.

¹²⁷ *See id.* at 718-19.

¹²⁸ *Id.* at 719.

¹²⁹ *Id.* at 720.

¹³⁰ *Id.* at 721.

¹³¹ *Id.* at 722-23.

would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition,” a power that the First Amendment cannot allow to stand.¹³²

The Court then went through the elements needed for an appropriate content-based restriction on free speech: (1) that there is a compelling government interest behind the restriction; (2) that the restriction is narrowly tailored so as to be “actually necessary” to achieve the compelling government interest and be the “least restrictive means among available, effective alternatives”; and (3) “a direct causal link between the restriction imposed and the injury to be prevented.”¹³³ The Court stated that the government failed to present a causal link between the Stolen Valor Act and any supposed injury related to liars like Alvarez.¹³⁴ Additionally, the government failed to show why the restriction was narrowly tailored so as to prevent the harm, when counterspeech—i.e., openly refuting the claims of liars like Alvarez—would accomplish the same goal without harming free speech.¹³⁵

The “remedy for speech that is false is speech that is true,” the Court declared.¹³⁶

This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth The theory of our Constitution is ‘that the best test of truth is the power of the thought to get itself accepted in the competition of the market.’¹³⁷

It remains unclear how well this logic holds up under the rigors, size, scope, and speed of the internet, particularly in circumstances in which there are concerted efforts to spread disinformation and establish lies as truths.

¹³² *Id.* at 723.

¹³³ *Id.* at 725.

¹³⁴ *Id.* at 726, 729.

¹³⁵ *Id.* at 726-27.

¹³⁶ *Id.* at 727.

¹³⁷ *Id.* at 727-28.

However, a 2018 case called *Sandvig v. Sessions* shined a spotlight on the intersection between false speech and the internet.¹³⁸ The plaintiffs were four professors and the publisher of *The Intercept* online news platform.¹³⁹ They were “conducting studies to respond to new trends in real estate, finance, and employment transactions” to determine whether algorithms and online automated decision-makers were unintentionally engaging in discriminatory behavior.¹⁴⁰ As part of their studies, the plaintiffs engaged in “outcomes-based audit testing,” which “involves accessing a website or other network service repeatedly, generally by creating false or artificial user profiles, to see how websites respond to users who display characteristics attributed to certain races, genders, or other classes.”¹⁴¹ The plaintiffs used bots to create and manage fake user profiles, i.e., sockpuppets, to visit real estate and employment websites, and then collected data about these site visits and web usage.¹⁴² Using this data, the plaintiffs intended to “determine whether race-associated behaviors caused the [sockpuppets] to see different sets of properties” and “whether hiring websites’ algorithms end up discriminating against job seekers based on protected statuses like race or gender.”¹⁴³

The plaintiffs were aware of the fact that these activities violated the Terms of Service (“ToS”) for certain websites, and thus exceeded their “authorized access.”¹⁴⁴ They brought their lawsuit to challenge the Access Provision of the Computer Fraud and Abuse Act (“CFAA”), which states that “[w]hoever . . . intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer . . . shall be punished.”¹⁴⁵

The plaintiffs argued that the ToS, and by extension the Access Provision of the CFAA, were unconstitutional because they prohibited the plaintiffs’ research and auditing efforts, which they claimed were

¹³⁸ 315 F. Supp. 3d 1, 8 (D.D.C. 2018).

¹³⁹ *Id.* at 8-9.

¹⁴⁰ *Id.* at 9.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 10.

¹⁴⁵ *Id.* at 8 (citing 18 U.S.C. § 1030(a)(2)(C)).

protected under the First Amendment.¹⁴⁶ In other words, plaintiffs contended that they either needed to refrain from legal activity or “expose themselves to the risk of prosecution under the Access Provision of the CFAA.”¹⁴⁷ Consequently, they sued Jefferson B. Sessions, the then-U.S. Attorney General, to challenge the law.¹⁴⁸

The U.S. District Court for the District of Columbia upheld the plaintiffs’ as-applied challenge to the Access Provision of the CFAA but dismissed the broader claims of First Amendment overbreadth.¹⁴⁹ On the subject of false speech and sockpuppets, the court noted that “plaintiffs have a First Amendment interest in harmlessly misrepresenting their identities to target websites.”¹⁵⁰ Citing *Alvarez*, the court stated that false speech is protected by the First Amendment so long as it is harmless.¹⁵¹

However, this principle does not answer the questions of whether any type of harmful falsehood would receive First Amendment protection and, if so, how much harm is required to remove a false statement from First Amendment protection. Nevertheless, the court’s conclusions on harmless falsehoods are inapplicable in cases of racist or misogynistic impersonator trolls targeting protected classes because their actions are designed to cause harm.

This emphasis on harm and injury also came up in one of the most famous impersonator-troll cases: *Golb v. Attorney General of the State of New York*.¹⁵² Petitioner-appellant Raphael Golb impersonated three

¹⁴⁶ *Id.* at 10.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 8. Interestingly, in a summary judgment ruling in this case, the court held that ToS violations did not violate the Access Provision of the CFAA and were therefore not criminal actions. *See Sandvig v. Barr*, 451 F. Supp. 3d 73 (D.D.C. 2020). Consequently, plaintiffs’ conduct was not in fact criminal, their as-applied challenge to the CFAA was mooted, and the Court “need not wade into the question whether plaintiffs’ proposed conduct should receive First Amendment protection.” *Id.* Following Sessions’s departure from the Department of Justice and William Barr’s appointment as attorney-general, the case was recaptioned “*Sandvig v. Barr*” for the summary judgment portion of the case.

¹⁴⁹ *See Sandvig v. Sessions*, 315 F. Supp. 3d 1, 28, 30 (D.D.C. 2018).

¹⁵⁰ *Id.* at 14.

¹⁵¹ *See id.*

¹⁵² 870 F.3d 89, 93 (2d Cir. 2017).

scholars in an attempt to support his father's academic position about the authorship of the Dead Sea Scrolls.¹⁵³ Golb's father Norman claimed that the Scrolls were written by various authors (the "Golb Theory"), while other academics believe that an ancient Jewish sect known as the Essenes wrote the Scrolls (the "Essenes Theory").¹⁵⁴

In mid-2008, Golb created a fake email address to impersonate Frank Cross, a reputable Scrolls scholar who had taught at Wellesley and Harvard.¹⁵⁵ Using this false identity, Golb as Cross sent an email disparaging Bart Ehrman, a proponent of the Essene Theory.¹⁵⁶ In the fall of 2008, Golb published an article under the pseudonym "Peter Kaufman" in which he accused another Essene Theory proponent, Lawrence Schiffman, of plagiarizing some of Norman Golb's work.¹⁵⁷ Golb also created the email address "larry.schiffman@gmail.com" and used this account to send one message to four of Schiffman's graduate students and a second message to every member of Schiffman's academic department at New York University.¹⁵⁸ Both emails referenced Golb's "Peter Kaufman" article accusing Schiffman of plagiarism.¹⁵⁹ Golb then sent more emails from his Schiffman account to the Dean and Provost of NYU.¹⁶⁰ Golb as Schiffman also forwarded his email to the Dean over to NYU's student newspaper, with the added line, "I must ask you not to publish a word about this."¹⁶¹

Shortly thereafter, Golb created the email address "seidel.jonathan@gmail.com" to impersonate Jonathan Seidel, a professor of Judaic Studies at the University of Oregon.¹⁶² As Seidel, Golb asked the Royal Ontario Museum, which had recently opened a Scrolls exhibit, whether Norman Golb was going to be invited to lecture

¹⁵³ *Id.* at 93-94.

¹⁵⁴ *Id.* at 94.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 94-95.

¹⁶⁰ *Id.* at 95.

¹⁶¹ *Id.*

¹⁶² *Id.*

at the museum.¹⁶³ Golb also used his Seidel persona to ask the exhibit's curator whether she would respond to Norman Golb's critique of the exhibit.¹⁶⁴ The Seidel email address was also used to send emails to dozens of Scrolls scholars, but these emails also included an unfavorable critique of Norman Golb's work.¹⁶⁵

Golb was convicted in a New York state court, but his case was later taken up at the federal level in a habeas proceeding.¹⁶⁶ The federal court only dealt with nine state convictions for criminal impersonation and ten convictions for forgery in the third degree.¹⁶⁷ Golb challenged the constitutionality of the statutes behind both sets of convictions.¹⁶⁸

The New York criminal impersonation statute states: "A person is guilty of criminal impersonation in the second degree when he ... [i]mpersonates another and does an act in such assumed character with intent to obtain a benefit or to injure or defraud another[.]"¹⁶⁹ To maintain the constitutionality of the statute, the New York state court construed the "injure" and "benefit" language narrowly such that they cannot mean "any injury or benefit, no matter how slight."¹⁷⁰ Instead, the term "injury" "is limited to intent to cause 1) 'a tangible, pecuniary injury,' 2) 'interfere[nce] with governmental operations,' or 3) harm to 'reputation.'"¹⁷¹ However, "a prank intended to cause temporary embarrassment or discomfiture" would not satisfy the injury element required by the statute.¹⁷²

Ultimately, the Second Circuit Court of Appeals upheld the constitutionality of the criminal impersonation statute.¹⁷³ While the high-profile case resulted in the punishment of an online impersonator

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 93.

¹⁶⁷ *Id.* at 95.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 95-96 (citing N.Y. PENAL LAW § 190.25(1)).

¹⁷⁰ *Id.* at 96 (citing *People v. Golb*, 15 N.E.3d 805 (N.Y. 2014) (*Golb III*)).

¹⁷¹ *Id.* at 100 (citing *Golb III*).

¹⁷² *Id.* at 98.

¹⁷³ *Id.* at 102.

for their sockpuppeting, Golb's actions targeted specific individuals, and so comparing his actions to those of hate-speech impersonator trolls is inapt. That being said, the statute itself does not require impersonating a *specific* person, but rather "impersonat[ing] another," and so impersonating a stereotypical Jewish person, for example, rather than a named Jewish person, may still satisfy the language of the statute.¹⁷⁴

The Court concluded in *Alvarez* that the First Amendment "protects the speech we detest as well as the speech we embrace."¹⁷⁵ But while the First Amendment protects detestable speech, it does not protect detrimental or damaging speech, as the Court noted when discussing restrictions against defamation, perjury, fraud, and the like.¹⁷⁶ Impersonator trolls targeting people online because of the targets' race, religion, sex, or gender cross the line from merely detestable to clearly detrimental.¹⁷⁷

The Court wrote that "[o]nly a weak society needs government protection or intervention before it pursues its resolve to preserve the truth."¹⁷⁸ Yet the United States may be facing signs of a society weakened by digital deceptions, particularly when it comes to large-scale efforts to spread disinformation. The Court continued that "[t]ruth needs neither handcuffs nor badge for its vindication,"¹⁷⁹ but targeted minorities may need these protections from falsehoods designed to harm them as a group.

IV. The Internet, as Dictated by Section 230 and Interactive Computer Service Providers

Even if there was currently a way to use the law to punish impersonator trolls, internet entities like Google, Facebook, and Twitter, which largely allow impersonator trolls to go unchecked, would still be

¹⁷⁴ See *infra* Part IV.

¹⁷⁵ *United States v. Alvarez*, 567 U.S. 709, 728 (2012).

¹⁷⁶ See *supra* notes 125-30 and accompanying text.

¹⁷⁷ See *supra* Part I.

¹⁷⁸ *Alvarez*, 567 U.S. at 729.

¹⁷⁹ *Id.*

protected by Section 230 of the Communications Decency Act.¹⁸⁰ This piece of legislation is ostensibly designed “to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the internet and other interactive computer services” and “to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.”¹⁸¹

The term “interactive computer service” encapsulates social media platforms, and includes “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.”¹⁸²

To encourage the development and use of interactive computer services, Section 230 provides them with immunity for actions and posts created by individual users.¹⁸³ The statute states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁸⁴

Cornell Law School Professor James Grimmelmann referred to Section 230 as the “single most important piece of law” discussed in his textbook on internet law.¹⁸⁵

The basic idea of Section 230 is simple: if I post a defamatory video to YouTube, I’m the one who should be held liable for it, not YouTube. But . . . the exact scope of this immunity was up for grabs in the late 1990s. The

¹⁸⁰ See 47 U.S.C. § 230.

¹⁸¹ See 47 U.S.C. § 230(b)(3), (5).

¹⁸² 47 U.S.C. § 230(f)(2).

¹⁸³ See 47 U.S.C. § 230(c)(1).

¹⁸⁴ *Id.*

¹⁸⁵ JAMES GRIMMELMANN, *INTERNET LAW: CASES AND PROBLEMS* 196 (10th ed. 2020).

courts have chosen to interpret Section 230 broadly—creating a kind of immunity with no offline parallel.¹⁸⁶

A. *Zeran*: The Case That Shook the Web

Zeran v. America Online, Inc., the foundational case in this area of the law, “illustrates the crucial early decisions by the courts to read Section 230’s immunities broadly.”¹⁸⁷ The plaintiff, Kenneth Zeran, sued America Online (“AOL”) for “unreasonably delay[ing] in removing defamatory messages posted by an unidentified third party, refus[ing] to post retractions of those messages, and fail[ing] to screen for similar postings thereafter.”¹⁸⁸ The third party in question posted a message on an AOL bulletin board on April 25, 1995, describing the sale of “shirts featuring offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City.”¹⁸⁹ Timothy McVeigh, the perpetrator of the attack, killed 168 people—including 19 children—and injured several hundred more.¹⁹⁰ The bombing was the deadliest act of domestic terrorism in the nation’s history.¹⁹¹

The third-party AOL message instructed people interested in buying the offensive shirts to call “Ken,” and provided Zeran’s home phone number.¹⁹² Zeran received death threats and a large number of outraged calls about the shirts from people who believed that he was the one behind the message.¹⁹³ Unfortunately, he was unable to change his phone number because he relied on it for his business.¹⁹⁴ Later that day, Zeran informed an AOL representative about the problem, who

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997).

¹⁸⁹ *Id.* at 329.

¹⁹⁰ *Oklahoma City Bombing*, FBI, <https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing> [<https://perma.cc/G86Y-LW7D>].

¹⁹¹ *Id.*

¹⁹² *Zeran*, 129 F.3d at 329.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

reassured him that the post would be removed but added that AOL would not post a retraction as a matter of policy.¹⁹⁵

The next day, another similar message was posted, and once again, interested buyers were directed to call Zeran's number and ask for "Ken."¹⁹⁶ Over the next four days, similar messages continued to show up on AOL's bulletin board.¹⁹⁷ Zeran faced another wave of angry, threatening phone calls.¹⁹⁸ He repeatedly called AOL about the problem, and company representatives told him that AOL would soon close the individual account from which the messages were posted.¹⁹⁹ To put the problem into perspective, "[b]y April 30, Zeran was receiving an abusive phone call approximately every two minutes."²⁰⁰

The problem worsened when an announcer for an Oklahoma City radio station received a copy of the first AOL posting.²⁰¹ The announcer relayed the contents of the posting on air, and urged the audience to call Zeran's number.²⁰² Due to this radio broadcast, Zeran became "inundated with death threats and other violent calls from Oklahoma City residents."²⁰³ He called the police, who began to surveil his home for his own safety.²⁰⁴ Zeran also called the radio station to explain the situation, and once again turned to AOL for help.²⁰⁵ The number of calls to Zeran's home fell to only fifteen calls a day by May 14, after an Oklahoma City newspaper ran a story exposing the AOL posting as a hoax and after the radio station made an on-air apology.²⁰⁶

Zeran filed his lawsuit against AOL on April 23, 1996, alleging that AOL was liable for defamatory speech initiated by a third party because AOL, after being notified by Zeran about the defamatory post, had a

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

duty to remove the post promptly, notify its subscribers of the post's false nature, and screen for similar defamatory material in the future.²⁰⁷ AOL argued that Section 230 was an affirmative defense, in that it allegedly "immunized interactive computer service providers from claims based on information posted by a third party."²⁰⁸

The court rejected Zeran's argument and held in favor of AOL, emphasizing that Section 230 clearly gave protection against lawsuits like Zeran's to online service providers and platforms like AOL:

By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.²⁰⁹

In the eyes of the court, the language of Section 230 made it "plain that Congress' desire to promote unfettered speech on the Internet must supersede conflicting common law causes of action."²¹⁰ The court noted that this immunity stemmed directly from Congress' chosen policy "not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages."²¹¹

²⁰⁷ *Id.* at 329-30.

²⁰⁸ *Id.* at 330.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 334.

²¹¹ *Id.* at 330-31.

B. Contemporary Criticism of Section 230

In addition to “promot[ing] unfettered speech on the Internet,”²¹² Congress enacted Section 230 “to encourage service providers to self-regulate the dissemination of offensive material over their services.”²¹³ However, many people now feel that online service providers are not doing enough to self-regulate.²¹⁴ They argue that online service providers are using their Section 230 immunity to avoid taking any responsibility for both their own actions as pseudo-publishers of online content as well as the actions of their users.²¹⁵ Moreover, these online service providers are commercializing their immunity at the expense of the public.²¹⁶ Federal Trade Commissioner Rohit Chopra condemned social media companies for their destructive business models in 2019, writing that these models “generate[] profits by turning users into products, their activity into assets, their communities into targets, and social media platforms into weapons of mass manipulation.”²¹⁷

Social media platforms’ refusal to take action is “as unsurprising as it is depressing,” Boston University School of Law Professor Danielle Keats Citron noted, in that “[a]llowing attention-grabbing abuse to remain online accords with platforms’ rational self-interest.”²¹⁸ Since “[s]ocial media companies earn advertising revenue when users like, click, and share,” those companies will promote and preserve whatever content causes people to pay more attention, even if that content misinforms or incenses readers.²¹⁹ In other words, divisive rhetoric brings in the dollars, a culture clash just means more cash, and strife is success. This is not to say that social media platforms cannot regulate content if they

²¹² *Id.* at 334.

²¹³ *Id.* at 331.

²¹⁴ Mark Sullivan, *The 1996 Law that Made the Web Is in the Crosshairs*, FAST CO. (Nov. 29, 2018), <https://www.fastcompany.com/90273352/maybe-its-time-to-take-away-the-outdated-loophole-that-big-tech-exploits> [<https://perma.cc/3HUK-ZMNA>].

²¹⁵ *Id.*

²¹⁶ See OFFICE OF COMM’R ROHIT CHOPRA, DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA IN RE FACEBOOK INC. COMMISSION FILE NO. 1823109, 1-2 (2019).

²¹⁷ *Id.* at 2.

²¹⁸ Danielle Keats Citron, *Cyber Mobs, Disinformation, and Death Videos: The Internet as It Is (and as It Should Be)*, 118 MICH. L. REV. 1073, 1085 (2020).

²¹⁹ *Id.* at 1085-86.

are so inclined.²²⁰ As Citron aptly elucidated, “[w]hen it is bad for business, platforms have expended resources to stem abuse.”²²¹

Even Senator Ron Wyden, co-author of Section 230, has been critical of today’s tech giants for their failure to regulate online speech.²²² In an address on the floor of the Senate on March 21, 2018, Wyden hammered home on the flawed outcome of Section 230 protecting online service providers that commercialize their immunity while abstaining from meaningful self-regulation.²²³

The tech giants state that no one could track the millions of posts or videos or tweets that cross their services every hour. Nobody is asking them to do that--nobody. Section 230 means they are not required to fact-check or scrub every single post or tweet or video, but there have been far too many alarming examples of algorithms that drive vile, hateful, or conspiratorial content to the top of the sites that millions of people click on every day. Companies seem to aid in the spread of this content as a direct function of their business models.

It is perfectly reasonable to expect some greater responsibility from these giant, multibillion-dollar corporations that were able to thrive as a result of protection that they were guaranteed by law. That was the idea behind Section 230. That doesn't carry any obligation to suppress free speech, but it is definitely about being a responsible citizen, a responsible member of the community.

Sites like Facebook, YouTube, and Tumblr constitute the entire Internet for millions of users who click through the same group of sites every single day. They have an undeniable role to play in fostering a civil environment. Their failure to do so could very well mean that the Internet looks very different 10 years from now, not just for those who spread hateful and conspiracy-

²²⁰ *Id.* at 1086.

²²¹ *Id.*

²²² 164 CONG. REC. S1868 (daily ed. Mar. 21, 2018) (statement of Sen. Wyden).

²²³ *Id.*

driven filth, but for the millions of decent people who use the Internet to learn, to find entertainment, and to keep in touch with loved ones.

There was a time when the biggest Internet companies had mottos like “Don't be evil.” Perhaps it is time for them to aspire to a more modest motto: “Don't spread evil.”²²⁴

V. Proposals and Conclusions

The problem of impersonator trolls targeting members of a protected class can be framed in terms of hate speech and anonymity. As *Brandenburg* demonstrated, a person has the right to espouse hate speech so long as they do not incite others to engage in imminent lawless action.²²⁵ Similarly, the *Alvarez* case enshrined a person's right to speak falsely, anonymously, and/or pseudonymously.²²⁶

But what happens when these two rights intersect? Such a scenario occurs when an impersonator troll pretends to be a member of a protected class—and in so doing takes on a pseudonym—and espouses hate speech or spreads misinformation in an effort to harm members of the impersonated class by co-opting the credibility afforded to a member of that protected class. Do the overlapping rights to espouse hate speech and to speak through a pseudonym protect impersonator trolls, or should their efforts be curtailed as a matter of law?

I argue that impersonator trolls that target minorities or other protected classes are inherently harmful to society and should be outlawed. This would entail either classifying hate-speech impersonator trolls under one of the traditional exceptions to free speech protection or carving out a similar exception in line with First Amendment jurisprudence.

²²⁴ *Id.*

²²⁵ See *supra* notes 77-89 and accompanying text.

²²⁶ See *supra* notes 121-26 and accompanying text.

Like the crime in *Black*,²²⁷ hate-speech impersonator-trolling demonstrates a malicious intent. Like the crime in *Chaplinsky*,²²⁸ hate-speech impersonator-trolling “by [its] very utterance inflict[s] injury” on the safety and wellbeing of minorities, and damages society as a whole by manipulating segments of the population into attacking one another. As for *Brandenburg*, it is clear that impersonator trolls espousing hate speech online can incite people to engage in imminent lawless action.²²⁹ Moreover, hate-speech impersonator trolls engage in deception and disinformation, rather than the “mere advocacy” protected by *Brandenburg*.²³⁰ Lastly, a statute criminalizing hate-speech impersonator-trolling would also be in line with *Skokie*—even though that case is not binding on a national level—because of the “essentially intolerable manner” in which minorities are being targeted.²³¹

A. A Proposed Statute Against Hate-Speech Impersonator Trolls

To combat hate-speech impersonator trolls, I advocate a statute making it illegal to use a false identity that possesses a specific trait or characteristic—such as race, religion, or gender—to harm people that genuinely possess that specific trait or characteristic. Examples of that harm include spreading disinformation about a protected class or engaging in a false-flag operation in which an impersonator troll uses their false identity to suggest that members of a protected group maintain hateful positions so that average citizens will develop antipathy toward that protected group.²³² The Supreme Court has already established the validity of a similar statute, holding in *Chaplinsky* that a “statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law.”²³³

²²⁷ See *supra* notes 108-18 and accompanying text.

²²⁸ See *supra* notes 91-98 and accompanying text.

²²⁹ See *supra* notes 30-43 and accompanying text.

²³⁰ See *supra* notes 85-90 and accompanying text.

²³¹ *Vill. of Skokie v. Nat'l Socialist Party of Am.*, 373 N.E.2d 21, 25 (Ill. 1978).

²³² See *supra* Part I.

²³³ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942).

A statute against hate-speech impersonator-trolling would curtail free speech, but the question arises: Would a court consider it a content-neutral restriction or a content-based one?

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral.²³⁴

Content-neutral restrictions on free speech are subject to the intermediate level of scrutiny,²³⁵ and can be characterized as “reasonable time, place, or manner restrictions.”²³⁶ This kind of restriction is valid so long as it is “justified without reference to the content of the regulated speech,” “narrowly tailored to serve a significant government interest,” and “leave[s] open ample alternative channels for communications of the information.”²³⁷

The proposed statute against hate-speech impersonator-trolling targets the manner in which these trolls convey their opinions, in that it prevents them from using a specific false identity and does not prevent them from publishing the content of their statements. The significant government interest would be preventing the harm caused by hate-speech impersonator trolls. Lastly, the statute leaves open the possibility of publishing the content of their opinions under their own name or under a more generic pseudonym like “Web-Of-Lies1,” “SalazarSlytherinSpeaks,” or “I.Am.An.Extremist.” Thus, the statute provides for ample alternative channels of communication, and would likely be upheld if faced with a constitutional challenge.

Even if a court considered the proposed statute to be a content-based restriction, it would likely still be constitutional. Content-based restrictions are subject to strict scrutiny, which requires proof (1) that

²³⁴ Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994) (citations omitted).

²³⁵ *Id.* at 642.

²³⁶ Clark v. Cmty for Creative Non-Violence, 468 U.S. 288, 293 (1984).

²³⁷ *Id.*

there is a compelling government interest behind the restriction; (2) that the restriction is narrowly tailored so as to be “actually necessary” to achieve the compelling government interest and be the “least restrictive means among available, effective alternatives”; and (3) that there is “a direct causal link between the restriction imposed and the injury to be prevented.”²³⁸

It is clear that hate-speech impersonator trolls present a serious threat.²³⁹ Their disinformation and false-flag operations threaten the health and safety of minority communities.²⁴⁰ They also threaten to tear apart this country along political and racial lines.²⁴¹ Thus, the compelling-interest element behind the proposed statute would be preventing the harm to society and minorities caused by hate-speech impersonator trolls.

Likewise, the proposed statute is narrowly tailored, in that it only targets impersonator trolls, and leaves open options for people to express themselves through an inoffensive pseudonym or under their own name. Consequently, a person could still engage in free speech, and introduce their thoughts into the marketplace of ideas; they would only be banned from using a false identity to co-opt credibility as part of their illicit online machinations. As a result, the proposed statute would likely satisfy the “least restrictive means” element of the strict-scrutiny test for content-based restrictions, if it were considered to be such a restriction at all. Lastly, there would be a direct link between the proposed statute and the harm it aims to prevent, in that the proposed statute would allow law enforcement personnel to take down hate-speech impersonator trolls that attack minorities.

I argue that this proposed statute is in line with other statutes and cases regulating free speech, such as those related to fraud or true threats. In fact, courts have restricted speech for comparatively minor reasons. As one example, consider *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, a case in which the Court prohibited the co-opting

²³⁸ See *supra* note 133 and accompanying text.

²³⁹ See *supra* Part I.

²⁴⁰ See *supra* Part I.

²⁴¹ See *supra* Part I.

of the “commercial value” of the term “Olympic.”²⁴² If the Court is comfortable restricting free speech so as to prevent the co-opting of commercial value, it should be amenable to restricting free speech for the purposes of preventing the co-opting of the credibility inherently afforded to a person speaking about their own experiences as a member of a protected class.

B. Public Pressure Against Tech Giants and a Push to Change Section 230

Those seeking to fight impersonator trolls can do so by pressing online service providers to take steps against these bad actors. Entities like Google, Facebook, Twitter, Spotify, and Reddit can easily choose to enforce their Terms of Service against impersonator trolls, if they want to do so. Frequently, these companies will only take action against racists and other bad actors after facing public outcry.²⁴³ Unfortunately, in some cases, online service providers will only act after extremists have killed someone.²⁴⁴ It should not take an act of murder, the threat of a lawsuit, or the widespread media coverage of a racist, torch-bearing

²⁴² 483 U.S. 522, 539 (1987).

²⁴³ For examples of outspoken criticism against online entities and these entities’ responses to criticism, see, e.g., Rosenberg, *supra* note 7; Sacha Baron Cohen, *Read Sacha Baron Cohen’s Scathing Attack on Facebook in Full: ‘Greatest Propaganda Machine in History’*, GUARDIAN (Nov. 22, 2019, 1:10 PM), <https://www.theguardian.com/technology/2019/nov/22/sacha-baron-cohen-facebook-propaganda> [<https://perma.cc/93P5-74XM>]; Mary Meisenzahl, *Facebook’s Statement on Sacha Baron Cohen’s Viral Speech Totally Misses the Point*, BUS. INSIDER (Nov. 25, 2019, 12:45 PM), <https://www.businessinsider.com/sacha-baron-cohen-speech-facebook-response-misses-point-2019-11> [<https://perma.cc/S4LF-EFG7>]; Yair Rosenberg, *Mark Zuckerberg Is Doubly Wrong About Holocaust Denial*, ATLANTIC (July 19, 2018), <https://www.theatlantic.com/ideas/archive/2018/07/the-solution-to-holocaust-deniers-on-facebook/565562/> [<https://perma.cc/UWE9-4XZN>]; Eleanor Beardsley, *French Tweet Sweep Shows Twitter’s Local Struggles*, NPR (Oct. 20, 2012, 3:00 PM), <https://www.npr.org/2012/10/20/163315105/french-tweet-sweep-shows-twitters-local-struggles> [<https://perma.cc/4UKL-DTZG>]; Marissa Newman, *Spotify Says It’s Removing Playlists that Glorify Hitler, Urge Gassing of Jews*, TIMES ISRAEL (Jan. 9, 2020, 9:50 PM), <https://www.timesofisrael.com/spotify-says-removing-playlists-that-glorify-hitler-urge-gassing-of-jews/> [<https://perma.cc/F4H3-SRP4>].

²⁴⁴ See, e.g., Adam Smith, *GoDaddy and PayPal Ban Gab After Pittsburgh Shooting*, PC MAG. (Oct. 29, 2018), <https://www.pcmag.com/news/godaddy-and-paypal-ban-gab-after-pittsburgh-shooting> [<https://perma.cc/CM8U-5EWA>]; David Meyer, *Cloudflare and Apple Deal Fresh Blows to Neo-Nazi Sites*, FORTUNE (Aug. 17, 2017, 4:57 AM), <https://fortune.com/2017/08/17/cloudflare-apple-neo-nazi-charlottesville/> [<https://perma.cc/V8L2-TE6H>].

mob to shame online service providers into action, but sadly this is often the case. Generating a wave of bad press can prompt both tech giants and elected officials into action.

Failing the creation of a new statute targeting hate-speech impersonator trolls, lawmakers can still combat these bad actors by altering Section 230 so as to allow people to sue online service providers that do not engage in significant efforts to crack down on hate-speech impersonator trolls. Such a modification to Section 230 would compel online service providers to regulate their platforms, and thereby cut down on impersonator trolls' ability to operate.

There have already been calls from politicians to alter or eliminate Section 230.²⁴⁵ Former President Trump has called to repeal Section 230, and has waged a months-long war on social media platforms.²⁴⁶ On May 28, 2020, Trump issued an executive order that targeted both Section 230 and social media platforms for their alleged political bias against the then-president.²⁴⁷ The executive order came in response to Twitter's decision to label two of Trump's tweets as "potentially misleading."²⁴⁸ The tweets decried mail-in ballots, claiming that they would be "substantially fraudulent" and would result in a "rigged election."²⁴⁹ There is little evidence to support Trump's claims about the online silencing of conservatives, and in fact, the opposite is true.²⁵⁰

²⁴⁵ Daphne Keller, *Trump-Backed Rules for Online Speech: No to Porn, Yes to Election Disinformation and Hate Speech*, SLATE (Oct. 1, 2020, 4:53 PM), <https://slate.com/technology/2020/10/cda-section-230-graham-doj-reform-content-moderation.html> [<https://perma.cc/F874-ZA2M>].

²⁴⁶ Derek E. Bambauer, *Trump's Section 230 Reform is Repudiation in Disguise*, BROOKINGS (Oct. 8, 2020), <https://www.brookings.edu/techstream/trumps-section-230-reform-is-repudiation-in-disguise/> [<https://perma.cc/47MA-QS6T>].

²⁴⁷ Exec. Order No. 13925, Preventing Online Censorship, 85 Fed. Reg. 34079 (May 28, 2020).

²⁴⁸ Christian T. Fjeld & Christopher Harvie, *The Implications of Trump's Executive Order and Section 230 of the Communications Decency Act*, NAT'L L. REV. (June 3, 2020), <https://www.natlawreview.com/article/implications-trump-s-executive-order-and-section-230-communications-decency-act> [<https://perma.cc/L8FF-4VL8>].

²⁴⁹ *Id.*

²⁵⁰ Oliver Darcy, *Trump Says Right-Wing Voices Are Being Censored. The Data Says Something Else*, CNN (May 28, 2020, 7:54 PM), https://amp.cnn.com/cnn/2020/05/28/media/trump-social-media-conservative-censorship/index.html?__twitter_impression=true [<https://perma.cc/F25D-UUMK>].

Data from Facebook actually shows that right-wing content dominates the social media platform and frequently outperforms content from other news organizations.²⁵¹ In the months ahead of the 2020 election, Trump pressured Senate Republicans to amplify their efforts against social media platforms.²⁵² Former Senate Judiciary Committee chairman Lindsey Graham, an ardent and frequent Trump supporter, introduced a bill on September 21, 2020, designed to “modify the scope” of Section 230’s liability shield.²⁵³ Several prominent organizations strongly oppose the bill, arguing that it weakens efforts to combat digital disinformation.²⁵⁴ Similarly, in June 2019, Republican Senator Josh Hawley introduced a bill that would cause online service providers to lose their Section 230 immunity if they fail to prove that their moderation efforts are politically unbiased.²⁵⁵ Representative Paul Gosar, a Republican congressman from Arizona, introduced a similar bill in the House a few weeks later.²⁵⁶

Tech companies have faced scrutiny on the other side of the aisle as well. In April 2019, Democratic Speaker of the House Nancy Pelosi openly expressed her dissatisfaction with the status quo surrounding Section 230.²⁵⁷ In her view, society had entered a “new era” in which online service providers should face more regulation than they had in

²⁵¹ *Id.*

²⁵² Cristiano Lima & John Hendel, *At White House’s Urging, Republicans Launch Anti-Tech Blitz Ahead of Election*, POLITICO (Oct. 21, 2020, 3:25 PM), <https://www.politico.com/news/2020/10/01/republicans-launch-anti-tech-blitz-424254> [<https://perma.cc/R3JR-AJS4>].

²⁵³ S. 4632, 116th Cong. (2020).

²⁵⁴ Justin Sherman, *The GOP’s Cries of ‘Censorship’ Are Hurting Democracy*, WIRED (Oct. 7, 2020, 9:08 AM), <https://www.wired.com/story/opinion-the-gops-cries-of-censorship-are-hurting-democracy/> [<https://perma.cc/CA4V-H9FU>].

²⁵⁵ Matt Laslo, *The Fight over Section 230—and the Internet as We Know It*, WIRED (Aug. 13, 2019, 3:18 PM), <https://www.wired.com/story/fight-over-section-230-internet-as-we-know-it/> [<https://perma.cc/ZJ3F-UX87>].

²⁵⁶ Makena Kelly, *Big Tech’s Liability Shield Under Fire Yet Again from Republicans*, VERGE (Jul. 28, 2019, 1:00 PM), <https://www.theverge.com/2019/7/28/8933871/big-techs-liability-shield-under-fire-yet-again-from-republicans> [<https://web.archive.org/web/20210208025531/https://www.theverge.com/2019/7/28/8933871/big-techs-liability-shield-under-fire-yet-again-from-republicans>].

²⁵⁷ Ashley Killough, *Pelosi Suggests Tech Companies Need More Regulation: ‘It’s a New Era’*, CNN (Apr. 12, 2019, 4:01 PM), <https://www.cnn.com/2019/04/12/politics/nancy-pelosi-tech-regulation-recode-interview/index.html> [<https://perma.cc/K3Y7-SPUE>].

the past.²⁵⁸ “[Section] 230 is a gift to them, and I don’t think they are treating it with the respect that they should,” Pelosi told Kara Swisher on the *Recode Decode* podcast.²⁵⁹ “And so I think that that could be a question mark and in jeopardy For the privilege of 230, there has to be a bigger sense of responsibility on it, and it is not out of the question that that could be removed.”²⁶⁰

President Joe Biden has also been harshly critical of social media platforms and Section 230.²⁶¹ During an interview with *The New York Times* editorial board that was published January 17, 2020, Biden said that Section 230 should be revoked because companies like Facebook, through their use of Section 230’s liability shield, are “propagating falsehoods they know to be false” and are “totally irresponsible.”²⁶²

There have also been bipartisan attempts to reform Section 230.²⁶³ On September 28, 2020, Democratic Senator Joe Manchin and Republican Senator John Cornyn co-sponsored a bill that would hold online interactive platforms liable if they fail to report criminal activity.²⁶⁴ Similarly, in March 2020, Graham and Democratic Senator Richard Blumenthal introduced the EARN IT Act, which would remove the liability shield from online service providers that do not follow government-created best practices to combat child abuse online.²⁶⁵ The

²⁵⁸ Eric Johnson, *Silicon Valley’s Self-Regulating Days “Probably Should Be” Over, Nancy Pelosi Says*, VOX (Apr. 11, 2019, 6:20 PM), <https://www.vox.com/podcasts/2019/4/11/18306834/nancy-pelosi-speaker-house-tech-regulation-antitrust-230-immunity-kara-swisher-decode-podcast> [https://web.archive.org/web/20190521062315/https://www.vox.com/podcasts/2019/4/11/18306834/nancy-pelosi-speaker-house-tech-regulation-antitrust-230-immunity-kara-swisher-decode-podcast].

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ The Editorial Board, *Joe Biden*, N.Y. TIMES (Jan. 17, 2020), <https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html?smid=nytcore-ios-share> [https://perma.cc/DH5L-G3ET].

²⁶² *Id.*

²⁶³ See S. 4758, 116th Cong. (2020).

²⁶⁴ *Manchin, Cornyn Bill to Require Companies Report Illicit Online Drug Sales*, JOE MANCHIN (Sept. 29, 2020), <https://www.manchin.senate.gov/newsroom/press-releases/manchin-cornyn-bill-to-require-companies-report-illicit-online-drug-sales> [https://perma.cc/PQP3-X26S].

²⁶⁵ Cristiano Lima & Eric Geller, *Washington Prepares to Battle Silicon Valley over Child Exploitation, Encryption*, POLITICO (Mar. 5, 2020, 5:35 PM),

bill would create a 19-member commission charged with drafting up those best practices.²⁶⁶ The bill received broad bipartisan support.²⁶⁷

While some of these pieces of proposed legislation have faced harsh criticism,²⁶⁸ they nevertheless represent a willingness in Washington to modify Section 230. Lawmakers could take a similar approach to fight back against hate-speech impersonator trolls, though this proposed effort would strive to avoid any controversies like the fight over encryption sparked by the EARN IT Act.²⁶⁹

C. Prosecuting Impersonator Trolls for Intentional Infliction of Emotional Distress and Criminal Impersonation

Another way to fight impersonator trolls may be through other laws like those prohibiting intentional infliction of emotional distress and criminal impersonation. However, bringing a lawsuit for intentional infliction of emotional distress can be challenging in this regard, given the Supreme Court's holding in *Snyder v. Phelps*.²⁷⁰

<https://www.politico.com/news/2020/03/05/doj-silicon-valley-child-exploitation-fight-122213> [<https://perma.cc/ZAX6-AEZ7>].

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ See Mark Joseph Stern, *Josh Hawley Wants to Stop Internet Censorship by Censoring the Internet*, SLATE (June 19, 2019, 5:42 PM), <https://slate.com/technology/2019/06/josh-hawley-section-230-cda-internet-speech-conservatives.html> [<https://perma.cc/HYF7-TBTX>]; Mike Masnick, *Congressman Who Was Sued for Blocking Constituents on Social Media Now Also Wants to Undermine Section 230*, TECHDIRT (July 31, 2019, 9:31 AM), techdirt.com/articles/20190726/15454442662/congressman-who-was-sued-blocking-constituents-social-media-now-also-wants-to-undermine-section-230.shtml [<https://perma.cc/B462-AVGJ>].

²⁶⁹ See Lily Hay Newman, *The EARN IT Act Is a Sneak Attack on Encryption*, WIRED (Mar. 5, 2020, 8:22 PM), <https://www.wired.com/story/earn-it-act-sneak-attack-on-encryption/> [<https://perma.cc/GS4Z-AYG7>].

²⁷⁰ 562 U.S. 443, 460-61 (2011) (“Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.”).

In that case, the Westboro Baptist Church picketed outside the funeral of Marine Lance Corporal Matthew Snyder, a soldier killed in the line of duty.²⁷¹ Albert Snyder—the father of the fallen soldier—alleged that Westboro intentionally inflicted emotional distress on him²⁷² because of the hurtful nature of Westboro’s signs.²⁷³ The Court held that “[w]hat Westboro said, in the whole context of how and where it chose to say it, is entitled to ‘special protection’ under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous.”²⁷⁴

That being said,

[w]hile *Snyder* clearly expressed a broad view of “special protection” for speech on matters of public concern, even where it is false and “insulting” or “outrageous,” it can be asserted fairly that the First Amendment protection described in *Snyder* does not extend to speech that is not “honestly” believed, or that is used as a weapon simply to mount a personal attack against someone over a private matter.²⁷⁵

Cases involving hate-speech impersonator trolls could satisfy this limitation, and thereby see impersonator trolls’ harmful hate speech lose its First Amendment protection.

As for criminal impersonation, the argument would be that since an impersonator troll has impersonated a person—for example, a Jewish person or a Black, female person—they would be guilty of violating a state’s criminal impersonation statute, presuming the statute does not

²⁷¹ *Id.* at 448.

²⁷² *Id.* at 449-50.

²⁷³ *Id.* at 454 (“The [Westboro] placards read ‘God Hates the USA/Thank God for 9/11,’ ‘America is Doomed,’ ‘Don’t Pray for the USA,’ ‘Thank God for IEDs,’ ‘Fag Troops,’ ‘Semper Fi Fags,’ ‘God Hates Fags,’ ‘Maryland Taliban,’ ‘Fags Doom Nations,’ ‘Not Blessed Just Cursed,’ ‘Thank God for Dead Soldiers,’ ‘Pope in Hell,’ ‘Priests Rape Boys,’ ‘You’re Going to Hell,’ and ‘God Hates You.’”).

²⁷⁴ *Id.* at 458.

²⁷⁵ *Holloway v. Am. Media, Inc.*, 947 F. Supp. 2d 1252, 1262 (N.D. Ala. 2013).

specify that it only applies to impersonation of a specific, named individual.²⁷⁶

D. Conclusion

The law is currently unfit to fight against impersonator trolls in a meaningful, conclusive manner, and as such, it should be modified—either through the passage of a new statute, through modification to Section 230, or both. Public pressure can create opportunities to change the status quo. Regardless of the methodology used to combat hate-speech impersonator trolls, it is clear that their disinformation campaigns and false-flag operations represent harmful actions against both minorities and the U.S. as a whole. For the good of the nation, they must be stopped.

²⁷⁶ For an example of a broad criminal impersonation statute that does not specify the personation of a specific, named individual, see New York's criminal impersonation statute, *supra* note 169 and accompanying text.