



INCITEMENT, ENTHUSIASM, AND THE DANGERS OF NEGLIGENT PROTEST

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This Article explores the murky line between protected speech and assembly on the one hand, and harmful incitement on the other. On the occasion of the 100th anniversary of Oliver Wendell Holmes’s dissent in *Gitlow v. New York*, it uses Holmes’s famous dictum that “every idea is an incitement” as a conceptual starting point. By analyzing the relational and temporal dynamics between speaker and listener, the Article highlights how meaning and effect are often shaped by the listener’s agency and other circumstances beyond the control of the speaker. Two contemporary cases illustrate these dynamics. The first is the Fifth Circuit’s controversial decision in *Mckesson v. Doe*, which asserted that protest organizers might be civilly liable for the violent actions of others under a “negligent protest” theory. The second is President Donald Trump’s words on January 6, 2021, and their relationship to the ensuing violence at the Capitol. In both cases, the Article challenges the adequacy of foreseeability alone as a basis for liability, particularly given the First Amendment interests at stake. The Article proposes a potential middle ground: applying a recklessness standard to protest-related liability. Drawing from the Model Penal Code and recent Supreme Court decisions like *Counterman v. Colorado*, this framework would require subjective awareness of a substantial and unjustifiable risk, offering a more constitutionally sound alternative to negligence theory.

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INTRODUCTION

On a busy Saturday afternoon in 1940, Walter Chaplinsky took to the streets of Rochester, New Hampshire, to distribute literature promoting the faith of Jehovah's Witnesses and denouncing all other religions.¹ At one point, Chaplinsky encountered the City Marshall, whom he called a "damned racketeer" and a "damned Fascist." New Hampshire charged Chaplinsky under a criminal provision restricting "offensive" speech.² In upholding Chaplinsky's conviction a unanimous United States Supreme Court asserted that "[a]rgument is unnecessary to demonstrate that the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace."³

¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The year of the actual incident is reported in Chaplinsky's brief to the Supreme Court. See Appellant's Brief at 2, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (No. 255), 1941 WL 52756, at *2.

² The full criminal provision, included in the Supreme Court's opinion, is quite remarkable by today's standards: "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." N.H. PUB. L. ch. 378, § 2, *quoted in Chaplinsky*, 315 U.S. at 569.

³ *Id.* at 574.

When teaching *Chaplinsky* to law students, I walk over to a nearby student and, in an appropriately loud and threatening voice, call the student a “damned racketeer.” To date, not once have my words triggered a breach of the peace. The obvious point is that context matters. Chaplinsky and I may have spoken the same words, but the meaning of those words is determined at least in part by the context in which they are uttered.⁴ This latter observation has generated volumes of work in legal theory, linguistics, and philosophy.⁵ I won’t revisit those debates here except to lay my own cards on the table: Meaning is somewhat but not entirely determined by context.⁶ To ignore context would mean a rigid fundamentalism; to defer to it entirely would mean an open-ended pragmatism without foundations. Neither of these options accurately describes the social world in which we live. But understanding context gives us a clearer sense of how to understand changed meaning not only among words but also among relationships, politics, and societies.

I think this is what is ultimately at stake in Oliver Wendell Holmes’s famous dictum written a half-generation before the Supreme Court so confidently classified Chaplinsky’s utterance as fighting words likely to breach the peace. That dictum, from Holmes’s dissent in *Gitlow v. New York*, asserts with no less confidence that “every idea is an incitement” and that “the only difference between the expression of an opinion and an incitement in the narrow sense is the speaker’s enthusiasm for the result.”⁷ I want to suggest Holmes is right to assert that every idea is an incitement, but his subsequent focus on the speaker’s enthusiasm neglects other important contextual factors. *Chaplinsky*’s context included the generally understood meaning of the speaker’s insults at the time he uttered them and the physical environment in which he uttered them. Without this additional context—in other words, without moving beyond merely “the speaker’s enthusiasm for the result,”

⁴ See generally LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 43 (G.E.M. Anscombe trans. 1953) (“For a large class of cases—though not for all—in which we employ the word ‘meaning’ it can be defined thus: the meaning of a word is its use in the language.”)

⁵ See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994); Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109 (2008); GEOFFREY SAMPSON, *SCHOOLS OF LINGUISTICS* (1980); ROY HARRIS, *THE LANGUAGE MAKERS* (1980); SAUL KRIPKE, *WITTENSTEIN ON RULES AND PRIVATE LANGUAGE* (1982); STANLEY CAVELL, *MUST WE MEAN WHAT WE SAY?* (1969).

⁶ See, e.g., John D. Inazu, *The Limits of Integrity*, 75 L. & CONTEMP. PROBS. 181, 188–89 (2012) (discussing “an epistemology that hangs in the balance between a fixed textualism and an unbounded pragmatism.”).

⁷ *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

we cannot adequately assess the likely harm of a speaker's words or whether the state should be permitted to limit those words based on that harm.

Most incitement cases also include an additional contextual factor: the audience that hears the words uttered and then chooses whether to act on those words. For this reason, most incitement cases involve not only speech but also assembly.⁸ But a speaker's words do not directly correspond to a hearer's actions. Hearers have their own agency, which means that they help determine the ultimate meaning, consequences, and effects of the speaker's words. This is one reason that groups— assemblies—often pose a greater risk of uncertainty and instability than individuals. Having more people in the mix complicates both communication and action.

The relationship between speaker and hearer is further confounded by the variable of time. Chaplinsky's words were limited to the audience immediately in front of him. But many incitements unfold over time. Think, for example, of a sustained protest, a social movement, or a revolution. In these cases, we will not always know what words will come to mean or what their eventual effect will be—we will not know how listeners separated from the speaker over time might interpret and act on those words.

In the sections that follow, I explore the preceding claims and suggest why Holmes's aphorisms in his *Gitlow* dissent insufficiently account for the contingencies of listeners, and expose vulnerable speakers and organizers to liability for downstream and unintended consequences of their words. I illustrate with two contemporary applications. The first is a misguided doctrinal development out of the Fifth Circuit: the concept of "negligent protest." In *Mckesson v. Doe*, the Fifth Circuit suggested that a protest organizer could be personally civilly liable for the downstream actions of another protester.⁹ Following a remand and the Supreme Court's intervening decision in *Counterman v. Colorado*,¹⁰ the district court granted summary judgment to the protest organizer, noting that he "cannot be held liable in negligence for actions taken while exercising his First Amendment freedoms."¹¹ While *Counterman* and the district court's opinion limit the likely scope

⁸ See generally JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012).

⁹ 71 F.4th 278, 300 (5th Cir. 2023).

¹⁰ 600 U.S. 66 (2023).

¹¹ Ford v. Mckesson, 739 F. Supp. 3d 344 (M.D. La. 2024) (citing *Counterman*).

of negligent protest, the Fifth Circuit’s novel expansion of liability remains on the books.

The second application focuses on the words of Donald Trump and the ensuing actions of his supporters rioting at the United States Capitol on January 6, 2021.¹² The Capitol riot illustrates the magnitude of the danger of speech uttered in assembly—in this case, the violent assault on a core function of our democratic government. But even here, Trump’s “enthusiasm for the result” of his words is far from clear, and it may well be that the same civil liberties that ought to shield the protest organizer in *Mckesson* should also insulate Trump from the consequences of his words on January 6th.

I. THE CONTEXT OF INCITEMENT

Holmes is correct in his *Gitlow* assertion that “every idea is an incitement.” Every utterance we make that is heard and comprehended by at least one other person capable of acting upon what we say has the potential to move that person to action.¹³ Given the complexity of human interactions, even a banal-sounding statement lacking an imperative can incite someone to action: If I say “today is beautiful” to someone in a dour mood, my words have the potential to spur that person toward a different outlook.

We typically think of incitement as urging or persuading someone to act in a violent or unlawful manner.¹⁴ But at the time of *Gitlow*, the word “incitement” was

¹² *Capitol Riots Timeline: What Happened on 6 January 2021?*, BBC (Aug. 2, 2023), <https://www.bbc.com/news/world-us-canada-56004916>.

¹³ The mental and physical capacities of a hearer to act are important preconditions to the possibility of incitement.

¹⁴ See, e.g., *United States v. Miselis*, 972 F.3d 518, 532 (4th Cir. 2020) (“In general legal parlance, ‘incitement’ refers to ‘[t]he act of persuading’—that is, of inducing—‘another person to commit a crime.’”) (quoting *Incitement*, BLACK’S LAW DICTIONARY (11th ed. 2019)).

not limited to nefarious provocations, and common invocations referred to laudable as well as worrisome outcomes.¹⁵ So Holmes is correct—particularly in the context of his time—that every idea is an incitement.¹⁶ The harder question is which incitements are dangerous enough to be constrained by law. To answer that question, we need to turn to other factors.

A. *Enthusiasm and Intent*

Every idea is an incitement. But Holmes also contended that “the only difference between the expression of an opinion and an incitement in the narrow sense is the speaker’s enthusiasm for the result.” What then is an incitement “in the narrow sense”? Holmes means the way in which the majority believes Gitlow’s words should be criminalizable. He links it to the speaker’s enthusiasm. At first blush, this focus could be mistaken for the actor’s *mens rea*—whether the speaker *intends* the incitement to lead to a particular result. But conflating enthusiasm with intent misses an important difference. Enthusiasm sounds more like the degree of the in-

¹⁵ See, e.g., Theodore Roosevelt, *Address of President Roosevelt at the Laying of the Corner Stone of the Office Building of the House of Representatives Saturday, April 14, 1906* (“But the man who never does anything else, who never thinks or speaks or writes, save of his feats with the muck-rake, speedily becomes, not a help to society, not an incitement to good, but one of the most potent forces for evil.”); Virgil M. Harris, *The Clinch of the Dead Hand: Some Observations on Posthumous Control Over Property*, 6 ST. LOUIS L. REV. 134 (1921) (“[T]he presence of skeletons at Egyptian banquets furnished incitement to greater merriment. The bones were pelted and the revelers called for more wine.”); FREDERICK NIETZSCHE, *THE WILL TO POWER* (1901) (describing pain as “a greater incitement to life”); J.M. BALDWIN, *SOCIAL AND ETHICAL INTERPRETATIONS IN MENTAL DEVELOPMENT: A STUDY IN SOCIAL PSYCHOLOGY* 186 (1897) (referencing “an incitement to my humility”); Charles Downing Lay, *Nurseryman and Landscape Architect*, 7 LANDSCAPE ARCHITECTURE MAG. 157, 158 (1917) (“Every place well done is an incitement to better work next door.”).

¹⁶ Both contemporary and historical dictionaries include definitions of incitement that contemplate beneficial as well as harmful results. Compare BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “incite” as “[t]o provoke or stir up (someone to commit a criminal act, or the criminal act itself)” and “incitement” as “[t]he act or an instance of provoking, urging on, or stirring up” or, in criminal law, as “[t]he act of persuading another person to commit a crime”), with BLACK’S LAW DICTIONARY (3d ed. 1910) (defining “incite” as “to arouse; stir up; instigate; set in motion; as, to ‘incite’ a riot. Also, generally, in criminal law to instigate, persuade or move another to commit a crime; in this sense nearly synonymous with ‘abet.’”) (The 1910 edition did not have a separate definition for “incitement.”) Colloquially, however, the use of “incitement” today typically connotes a more negative meaning than in Holmes’s era. See *supra* note 15. For a rare contemporary usage to the contrary, see ROSS GAY, *INCITING JOY: ESSAYS* (2022).

tensity or commitment a person holds for a particular result; intent signifies purpose or desire.¹⁷ I can intend weakly or half-heartedly—think, for example, of a soldier conscripted for war who reluctantly engages in combat. Conversely, my enthusiasm for the result can sustain my commitment to see my intention come to fruition.

Another reason we know that Holmes did not consider intent the missing ingredient to culpability is that Gitlow himself intended the results of his actions. In publishing and distributing the 16,000 copies of “The Left Wing Manifesto,” he intended that the government be overthrown by force, violence, and unlawful means.¹⁸ Gitlow’s defense never argued he lacked intent; instead, they asserted that the government lacked “evidence of any concrete result flowing from the publication of the Manifesto or of circumstances showing the likelihood of such result.”¹⁹ In other words, the disputed issue was the likelihood of harm, not Gitlow’s intent to commit the harm. That means *Gitlow* leaves unclear how to address a different scenario: What happens when intent is not clear?

Holmes thinks the answer depends in part on the surrounding context of an incitement that makes a resulting harm dangerously possible. As he wrote in *Schenck* and reiterated in his *Gitlow* dissent, “the question in every case is whether the words used are used in such circumstances . . . as to create a clear and present danger that they will bring about the substantive evils that [the State] has a right to prevent.”²⁰ Holmes seems to be advocating for leniency when incitement is shouted into a void, when the absence of a realistic probability of “concrete results” makes the incitement as harmless as a merely academic discussion. I may intend to incite violence against you, and I may “enthusiastically” desire that result, but if nobody takes me seriously or if nobody is around to hear me, then neither my intent nor my enthusiasm is causing much harm. I might still be criminally culpable—perhaps I attempted to incite violence with an undercover police officer whom I mistook as a fellow traveler ready to carry out my command. But the social harm in this example differs substantially from the harm that would have been caused had

¹⁷ MODEL PENAL CODE § 1.13(12) (1962) (“‘intentionally’ or ‘with intent’ means purposely”).

¹⁸ Brief for Plaintiff-in-Error at 5, *Gitlow v. New York*, 268 U.S. 652 (1925).

¹⁹ *Id.* at 1.

²⁰ *Schenck v. United States*, 249 U.S. 47, 52 (1919); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

the officer actually been a fellow traveler ready to carry out my command. As the ACLU's *Gitlow* brief pithily noted, "To approve assault in a soliloquy is not a crime."²¹

Perhaps one reason that Holmes felt comfortable liberalizing speech protections in his famous dissents is that he had stopped seeing speech as possessing a necessary causal link to social harm.²² A speaker's incitement might be less culpable when his words lack actionable circumstances that would give them power. A successful call for revolution creates a different social harm than the "surreptitious publishing of a silly leaflet by an unknown man" (as Holmes characterized the petitioner in *Abrams*).²³

This is one reason that the speaker's intent is a necessary but not sufficient condition for criminal liability. As the Supreme Court has recently underscored in *Counterman v. Colorado*, "incitement to disorder is commonly a hair's-breadth away from political 'advocacy'—and particularly from strong protests against the government and prevailing social order."²⁴ Given this close proximity to constitutionally protected speech, the Court's longstanding line for prohibiting speech requires that unprotected expression be "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."²⁵ This two-part test captures both the intent element presumed in *Gitlow* and the circumstances that make the actions resulting from the speaker's words likely to occur.

²¹ Brief for Plaintiff-in-Error at 31–32, *Gitlow*; see also *Gitlow*, 268 U.S. at 664 ("The statute does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action.").

²² See Joseph Russomanno, *Cause and Effect: The Free Speech Transformation as Scientific Revolution*, 20 COMM. L. & POL'Y 213 (2015). Russomanno notes that Holmes still held the "traditional view" of the causal link between speech and harm when he wrote in his 1881 book, *The Common Law*, that most "acts are rendered criminal because they are done under circumstances in which they will probably cause some harm which the law seeks to prevent." *Id.* at 232 (quoting OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 61 (1881)). But he eventually "helped refute the notion that every expression of thought necessarily has the effect of causing harm." *Id.* at 233.

²³ *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

²⁴ *Counterman v. Colorado*, 600 U.S. 66, 81 (2023).

²⁵ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). *Counterman* underscored that the government must prove specific intent to satisfy *Brandenburg*.

B. *Speech and Attempt*

A second dimension of incitement is its inchoate nature. As with other criminal attempts, the danger of incitement lies in the harm it might produce, not the harm it creates by its utterance. In his famous work, *The Common Law*, Holmes emphasizes the importance of distinguishing criminal attempt from mere preparation.²⁶ He uses the example of someone lighting a match with the intent to set fire to a haystack.²⁷ Holmes notes that this act could evidence an attempt to commit arson, even if the person extinguished the match upon realizing they were being watched.²⁸ But Holmes also thought that acts should be judged by their likely consequences given the circumstances, rather than solely by the actor's intent.²⁹ His distinction between "mere preparation" and criminal attempt highlights that intent alone is not sufficient to establish culpability; rather, the context and likelihood of harm play a crucial role. This distinction becomes particularly relevant in the realm of speech, where ideas may be expressed without causing immediate harm but may still have the potential to incite others to unlawful behavior depending on the context in which the speech is made and how others respond to it.

The key question is at what point speech crosses the line from protected expression to criminal attempt. Holmes's reasoning suggests that the focus should not be solely on the speaker's intent but also on whether the speech in context has a tendency to produce harmful consequences. In its strongest form, Holmes may be suggesting that intent *only* matters to the constitutional analysis when and to the extent that it bears upon the likelihood that the speech uttered will cause the imminent harm.³⁰ In *Gitlow* itself, Holmes suggested that the constitutional analysis was

²⁶ HOLMES, *supra* note 22, at 67.

²⁷ *Id.*

²⁸ *Id.* Holmes writes "When a man buys matches to fire a haystack, or starts on a journey meaning to murder at the end of it, there is still a considerable chance that he will change his mind before he comes to the point. But when he has struck the match, or cocked and aimed the pistol, there is very little chance that he will not persist to the end, and the danger becomes so great that the law steps in." *Id.* at 68–69.

²⁹ This perspective is part of his broader legal philosophy that emphasizes the practical effects and social outcomes of legal actions rather than abstract principles. See generally HOLMES, *supra* note 22.

³⁰ See Vincent Blasi, *Holmes's Understanding of His Clear-and-Present-Danger Test: Why Exactly Did He Require Imminence?*, 51 SETON HALL L. REV. 175, 192 (2020). Blasi notes that Holmes

“subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences.”³¹

Holmes’s speech-protective posture was motivated by his conviction that more comprehensive restrictions would deprive society of ideas important to its health and progress.³² As he noted in *Abrams*, Congress may only limit expression of opinions based on “the present danger of immediate evil or an intent to bring it about” and “certainly cannot forbid all effort to change the mind of the country.”³³ That every idea is an incitement means that every idea conveyed to a hearer carries with it the potential to convince the hearer of its veracity or its call to action. What follows from those words, however, is impossible to know in advance. Words spoken to move people to action might result in criminalizable behavior; they might also be the starting point for a different possibility always latent in “a present world constituted by a system of tension between reality and vision.”³⁴

Holmes’s approach and its underlying normative concerns point toward *Brandenburg*’s requirement that speech be “directed to inciting or producing imminent lawless action” and be “likely to incite or produce such action” before it can be restricted.³⁵ Holmes’s emphasis on the “tendency under the known circumstances” aligns with *Brandenburg*’s focus on the likelihood of imminent harm. But his reflections also invite a deeper inquiry into how we evaluate that tendency—whether

believed the publication in *Gitlow* might have been restricted if it “had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future . . . subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences.” *Id.* He reads Holmes as justifying the consideration of intent “not to identify personal agency as a precondition for assigning legal responsibility, [but] rather as a variable that bears on the likelihood that harm will occur forthwith.” *Id.*

³¹ *Gitlow*, 268 U.S. at 673.

³² Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 40 (“The cultural/intellectual/political combat facilitated by free speech is, in Holmes’s vision, messy, unpredictable, often nasty, and impossible to domesticate. But it is what human flourishing in a competitive, evolving world is all about.”)

³³ *Abrams*, 250 U.S. at 628.

³⁴ Rober Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983).

³⁵ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

it is based on the words themselves, the surrounding environment, the nature of the audience, or some combination of these.

Holmes's reflections on criminal attempts suggest that courts must carefully navigate the line between a speaker's words and the consequence of those words, recognizing that not all expressions of harmful ideas will result in imminent danger sufficient to limit them, and some expression of purportedly harmful ideas will also be useful and necessary for the health of the nation. This balancing of interests is particularly important in the context within which many incitement cases unfold, at the core of political speech.

Holmes's understanding of attempt law also intersects with his clear-and-present-danger test. As Professor Vincent Blasi has observed, Holmes did not view his test as a rigid, mechanical rule but rather as a flexible principle designed to protect free speech while acknowledging the potential for harm in exceptional circumstances.³⁶ Holmes believed the government's ability to restrict speech must be narrowly confined to situations where the risk of imminent harm was concrete and substantial. His *Gitlow* dissent underscored that mere advocacy of abstract doctrines, even if they seem dangerous, does not justify state intervention unless those ideas are likely to incite imminent unlawful action.

The Supreme Court reinforced the line between advocacy and violence in its 1949 decision, *Terminiello v. City of Chicago*.³⁷ The petitioner in that case had been charged with disorderly conduct after provoking a large crowd protesting his address to the Christian Veterans of America.³⁸ The Court reversed the conviction, noting that "a function of free speech under our system of government is to invite dispute."³⁹ Melvin Rishe has pointed out that *Terminiello* and the ideas it advances are as much about assembly as they are about speech:

It would appear that the [C]ourt has made a fine distinction in the application of the clear and present danger doctrine to the right of assembly. When one directs a riot, encourages acts of violence, he has brought immediate danger to the public and therefore has lost his constitutional guarantee of assembly. Contrarily, merely because a

³⁶ Blasi, *supra* note 30.

³⁷ *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

³⁸ *Id.* at 3.

³⁹ *Id.* at 4.

riot results from his words is not sufficient to remove the protection of the first amendment.⁴⁰

As the *Terminiello* majority noted, speech—and we might add assembly—“may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”⁴¹

C. *Speakers and Hearers*

The preceding sections explored connections between a speaker’s enthusiasm and intent and the inchoate nature of much speech that incites. They have focused on speakers. And Holmes’s *Gitlow* dissent is generally seen as an argument about speech. But the *political* implications of Holmes’s dissent are even more salient when we shift the focus from speech to assembly and introduce the equally important role of listeners. Doing so requires moving beyond the criminal advocacy prosecutions in *Schenck*, *Abrams*, and *Gitlow*, all of which involved future audiences not physically present with the speaker. Nobody expected an imminent response from someone encountering The Left Wing Manifesto. *Gitlow* and these other cases involved incitements that lacked immediate and proximate audiences, and they occurred in an era in which transmission of written ideas to large audiences took time.

Incitements involving proximate assemblies mean that a speaker’s words might have a much faster—and perhaps more forceful—connection to action.⁴² The most straightforward cases will involve an immediate audience reaction in response to the speech uttered.⁴³ But most assembly cases do not involve this kind of instantaneous action, and the longer the gap between the speaker’s words and the hearer’s actions, the more opportunity exists for other factors to contribute to those actions.

⁴⁰ Melvin Rishe, *Freedom of Assembly*, 15 DEPAUL L. REV. 317, 322 (1965).

⁴¹ *Terminiello*, 337 U.S. at 4.

⁴² See *Whitney v. California*, 274 U.S. 357 (1927); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Thomas v. Collins*, 323 U.S. 516 (1945); *Herndon v. Lowry*, 301 U.S. 242 (1937); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939); *Brandenburg v. Ohio*, 395 U.S. 444 (1969). There is also a growing possibility of online assemblies reacting proximately and forcefully to a speaker’s words. See John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2, 49–52 (2017).

⁴³ See, e.g., JOHN STUART MILL, ON LIBERTY 121 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) (discussing the difference between a speaker telling the press that corn dealers are starvers of the poor and that same message “delivered orally to an excited mob assembled before the house of a corn-dealer”).

Courts can and do find imminence even when some amount of time has transpired.⁴⁴ But the presence of a gap casts some doubt on the direct culpability of the speaker by introducing variables that separate speech from action, including the listener's own agency to act.⁴⁵

The agency of the listener is evident in the Ninth Circuit's 2008 decision in *Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff's Dept.*⁴⁶ In that case, anti-abortion protesters brought a First Amendment challenge after being forced to move their demonstration.⁴⁷ The court sided with the protesters, emphasizing that the state cannot impose restrictions on speech solely on the possibility that others might react violently.⁴⁸ The court rejected the idea that the mere presence of a crowd, or the potentially inflammatory nature of the speech, was sufficient to justify suppressing it.⁴⁹

These questions are even more complicated when we consider *how* an audience interprets a speaker's words and message. As Professor Lyrrisa Lidsky has noted, there is reason to question the common assumption that audiences in public discourse are simply rational actors who process speech logically and without undue influence.⁵⁰ The ACLU's brief in *Gitlow* similarly cautioned against relying too much on "unthinking members of the community" who "may undertake to act upon" a "mere utterance."⁵¹ This concern is especially relevant in the context of a physical assembly, where the surrounding crowd can amplify visceral or emotional

⁴⁴ See, e.g., *People v. Rubin*, 96 Cal. App. 3d 968, 978 (1979) ("Imminence, a function of time, refers to an event which threatens to happen momentarily, is about to happen, or is at the point of happening. But time is a relative dimension and imminence a relative term, and the imminence of an event is related to its nature.").

⁴⁵ Even though the listener still retains agency to act in the immediate moment, the more time that passes, the more surrounding context is likelier to differ from the one in which the words were uttered.

⁴⁶ 533 F.3d 780 (9th Cir. 2008).

⁴⁷ *Id.* at 785–86.

⁴⁸ *Id.* at 787–88.

⁴⁹ *Id.* at 794.

⁵⁰ Lyrrisa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 825.

⁵¹ Brief for the Plaintiff-in-Error at 20, *Gitlow v. New York*, 268 U.S. 652 (1925).

responses and reduce the likelihood that listeners will engage with speech in a measured, rational manner.

II. CONTEMPORARY EXAMPLES

Holmes's *Gitlow* dissent made clear that because *every* idea is an incitement, the intent to incite—to stir to action—is not reason enough to suppress speech. By the time of *Gitlow*, Holmes had also been persuaded by Learned Hand that the purportedly high *mens rea* for criminalizing speech still allowed a jury to assume a causal relationship between the words spoken and their future effect, which could then imply “the purpose of the utterer” every time “probable results” were linked to an utterance.⁵² Based in part on this influence, Holmes's *Gitlow* dissent reconceived the clear and present danger test as “a substantive evaluation of the seriousness of the threat posed by the speech at issue.”⁵³

In *Gitlow*, the speaker's intent to incite was clear but no harm resulted. Requiring that a speech-restricting law—in this case, the Espionage Act—be confined to regulating only that speech which comes dangerously close to, and is capable of, producing harmful acts would protect any defendant in a case where no such acts have actually occurred. But what about cases in which harmful acts *have* occurred? In these instances, the speaker's *mens rea* once again becomes relevant. This section considers two recent examples and then posits a potential middle ground form of liability.

A. *Mckesson v. Doe*

The challenges and limits of Holmes's approach to incitement are evident in *Mckesson v. Doe*, a procedurally complex case that has worked its way up and down the Fifth Circuit.⁵⁴ The case involves a protest in front of the Baton Rouge police

⁵² G. Edward White has noted the significance of Hand's criticism of Holmes's “clear and present danger” approach in *Debs*. G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391, 425–26 (1992).

⁵³ *Id.* at 452.

⁵⁴ *Doe v. Mckesson*, 272 F. Supp. 3d 841, 844–45 (M.D. La. 2017), *aff'd in part, rev'd in part, and remanded*, 922 F.3d 604 (5th Cir. 2019), *withdrawn and superseded*, 935 F.3d 253 (5th Cir. 2019), *withdrawn and superseded*, 945 F.3d 818 (5th Cir. 2019), *vacated*, 592 U.S. 1 (2020), *aff'd in part, rev'd in part, and remanded*, 71 F.4th 278 (5th Cir. 2023). Following the Supreme Court's decision in *Counterman v. Colorado*, 600 U.S. 66 (2023), the district court granted summary judgment to the defendant in *Ford v. Mckesson*, 739 F. Supp. 3d 344 (M.D. La. 2024). I have chosen to rely

department led by DeRay Mckesson, a Black Lives Matter movement leader.⁵⁵ Mckesson eventually led the protesters onto a local interstate to block traffic.⁵⁶ At this point, Baton Rouge police began making arrests, and during this confrontation an unidentified protester struck and severely injured an officer.⁵⁷

Nobody disputes that the protester who struck the officer would be criminally and civilly liable for those actions. The complication in this case arises because that protester was never personally identified and the officer instead sued Mckesson in his capacity as protest organizer.⁵⁸ The officer argued that because Mckesson led the protest and engaged in lawbreaking by obstructing traffic, he should be personally responsible for the officer's injuries at the hands of another protester.⁵⁹

The Fifth Circuit concluded that the First Amendment did not shield Mckesson from potential tort liability for the violent actions of the unidentified protester.⁶⁰ The court explained: "It was patently foreseeable that the Baton Rouge police would be required to respond to the demonstration by clearing the highway and, when necessary, making arrests. . . . Mckesson should have known that leading the demonstrators onto a busy highway was likely to provoke a confrontation between police and the mass of demonstrators, yet he ignored the foreseeable danger to officers, bystanders, and demonstrators, and notwithstanding, did so anyway."⁶¹

Under the court's reasoning, Mckesson could be liable for the officer's injuries simply because it was foreseeable that the protest could lead to injuries, even though Mckesson did not direct, encourage, or engage in any violent conduct. In reaching this conclusion, the Fifth Circuit effectively established a tort of negligent protest.⁶²

principally on the Fifth Circuit's 2023 decision for the facts because it is the last appellate decision in this litigation to rely on the negligent protest claim.

⁵⁵ 71 F.4th at 281.

⁵⁶ *Id.* at 282. As the district court noted in its grant of summary judgment, "The Fifth Circuit itself acknowledged that the act of blocking a road on its own would not suffice to establish liability." *Ford v. Mckesson*, 739 F. Supp. 3d 344, 252 (M.D. La. 2024).

⁵⁷ 71 F.4th at 282.

⁵⁸ *Id.* at 281.

⁵⁹ *Doe v. Mckesson*, 272 F. Supp. 3d at 844–45.

⁶⁰ *McKesson*, 71 F.4th at 291.

⁶¹ *Doe v. Mckesson*, 945 F.3d 818, 827 (5th Cir. 2019).

⁶² *Id.* (noting "a duty not to negligently precipitate the crime of a third party").

This reasoning is astonishingly broad and could apply to nearly any public gathering. Based on the Fifth Circuit's logic, the organizers of everyday gatherings would risk liability merely for organizing events. For example, the owner of a baseball team might be liable for a fight between fans inside a stadium. The same could be said for a protest leader who fails to call off a demonstration despite anticipating the presence of violent counter-protestors.

Judge Willett, dissenting in the Fifth Circuit's *Mckesson* decision, noted that the Supreme Court's decision in *Claiborne Hardware*⁶³ and "a wealth of precedent before and since" protect "raucous public protests—even 'impassioned' and 'emotionally charged' appeals for the use of force . . . unless intended to, and likely to, spark immediate violence."⁶⁴ Willett argued that because *Mckesson* was participating in core First Amendment activities—non-violently protesting on public streets and sidewalks to express dissenting political views—any regulation of this conduct must be narrowly tailored to protect the state's legitimate interest and may not sweep so broadly as to deter protected conduct.⁶⁵

Mckesson shows the dangers of ignoring intent. As the Supreme Court subsequently recognized in *Counterman v. Colorado*, the First Amendment does not allow punishment for political speech absent a specific intent to incite violence.⁶⁶ Similarly, the Court has held in *New York Times v. Sullivan* that public figures

⁶³ NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

⁶⁴ *Mckesson*, 945 F.3d at 840 (Willett, J., dissenting).

⁶⁵ Cf. *Frisby v. Schultz*, 487 U.S. 474, 479, 485 (1988) (subjecting anti-picketing ordinance to "careful scrutiny" and determining it must be "narrowly tailored" because the challenged ordinance "operates at the core of the First Amendment").

⁶⁶ *Counterman v. Colorado*, 600 U.S. 66, 76 (2023) ("Like threats, incitement inheres in particular words used in particular contexts: Its harm can arise even when a clueless speaker fails to grasp his expression's nature and consequence. But still, the First Amendment precludes punishment, whether civil or criminal, unless the speaker's words were 'intended' (not just likely) to produce imminent disorder.") (citing *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (per curiam)); see *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927–29 (1982). See also *Counterman*, 600 U.S. at 112 (Barrett, J., dissenting) ("Speakers must specifically intend to incite violence before they lose First Amendment protection. . . . A specific intent requirement helps draw the line between incitement and political rhetoric lying at the core of the First Amendment.") (internal quotations omitted).

bringing defamation suits must establish that a speaker acted with actual malice instead of mere negligence.⁶⁷

While *Gitlow*, *Counterterm*, and *Sullivan* are free speech cases, there is no reason the standard governing assembly should be lower than that for free speech.⁶⁸ If anything, assembly might provide an even greater justification than speech for focusing on the speaker's intent. The act of gathering with sympathetic listeners is part of what gives speech its efficacy—part of what makes the resulting action likelier. But conflating the efficacy of a protest organizer's speech with the intent of the organizer to commit harm could expose protest organizers to virtually unlimited liability. Protest leaders should not be held liable when engaged in peaceful assembly that, at most, negligently leads to injuries.⁶⁹

The Fifth Circuit's negligence standard exposes Mckesson and other protest leaders for engaging, even peaceably, with social movements that have more disorderly wings simply because they would have constructive notice that other members may engage in violent action. The court relied on the fact that "Mckesson had recently participated in other Black Lives Matter protests in which demonstrators

⁶⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) ("A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.'"); *id.* (concluding that imposing liability for merely negligent conduct "deter[s] [critics] from voicing their criticism," and "thus dampens the vigor and limits the variety of public debate").

⁶⁸ As the Court makes clear in *Brandenburg*, "[s]tatutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action." *Brandenburg*, 395 U.S. at 449 n.4. The Court has even determined that individuals may not sue protestors for *intentional* infliction of emotional distress where liability turns on the "highly malleable" standard of "outrageous" conduct because it is likely to deter the exercise of protected First Amendment rights. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). See Timothy Zick, *The Costs of Dissent: Protest and Civil Liabilities*, 89 GEO. WASH. L. REV. 233, 270–73 (2021) (explaining that the "negligence tort's 'reasonable care' and 'foreseeability' standards are far too imprecise to offer the requisite protection for protest organizing" based on the Court's First Amendment precedents).

⁶⁹ Judge Willett's dissent recognized this requirement: "If negligence is not constitutionally protected, then I don't know what conduct would be. Negligence sits at or near the far end of the 'unlawfulness' spectrum that begins with violent crimes before running through property crimes, civil torts like battery, intentional-but-nonviolent civil torts such as trespass, and torts that require recklessness." *Doe v. Mckesson*, 71 F.4th 278, 307 (5th Cir. 2023) (Willett, J., concurring in part and dissenting in part).

blocked public highways, and in which police officers were injured,” purportedly supporting the conclusion that “Mckesson knew or should have known that the protest at issue here . . . would end in a violent confrontation.”⁷⁰ Left unaddressed, this “constructive notice” rule would have a disproportionate effect on disfavored dissenters, such as those affiliated with the Black Lives Matter movement.⁷¹ And it would mean that movements associated with any history of violent protest would be held to a higher standard.⁷²

B. Donald Trump on January 6, 2021

On January 6, 2021, then-President Trump addressed a large crowd at the Ellipse in Washington, D.C., reiterating his claims of a stolen election and urging his supporters to “fight like hell” to “take back our country” and if “you don’t fight like hell, you’re not going to have a country anymore.”⁷³ Later that day, some of his supporters marched to the U.S. Capitol, where they breached security barriers, attacked law enforcement officers, and disrupted the certification of the Electoral College vote. As the crowd moved toward the Capitol, Trump returned to the White House, where he reportedly watched the unfolding events on television. Even as the violence escalated, Trump’s initial responses were subdued, with tweets that appeared to both encourage and attempt to pacify the crowd.⁷⁴

⁷⁰ *Id.* at 288.

⁷¹ See Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Speech*, 80 MO. L. REV. 963 (2015) (noting that “the Black Lives Matter protests often bear little resemblance to our idealized conceptions of public discourse—as reasoned disquisitions on difficult choices of public policy”).

⁷² See Inazu, *Unlawful Assembly as Social Control*, *supra* note 42, at 21–22 (explaining the overbreadth concerns with tying legitimacy of assemblies to whether individuals were on notice of previous violence).

⁷³ Brian Naylor, *Read Trump’s Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR (Feb. 10, 2021).

⁷⁴ See Scott Patterson, *Jan. 6 Capitol Attack: Key Moments Leading to Riot and How It Unfolded*, WALL ST. J. (Aug. 1, 2023) (quoting President Trump’s tweet which stated that “Mike Pence didn’t have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!”). See also Scott MacFarlane & Cassidy McDonald, *Jan. 6 Timeline: Key Moments from the Attack on the Capitol*, CBS NEWS (Jan. 6, 2023) (quoting President Trump’s tweet which stated: “Please support our Capitol Police and Law Enforcement. They are truly on the side of our Country. Stay peaceful!”); Amber Phillips, *What We*

How similar are Trump's actions—and his potential liability—to those of Mckesson? Neither directly engaged in violence, but both were central figures in events that ultimately turned violent. One key similarity between the two cases is the issue of foreseeability. The Fifth Circuit held that Mckesson should have foreseen the potential for violence when leading a protest onto a public highway, especially given previous incidents during Black Lives Matter protests. This foreseeability was central to the court's justification for imposing liability under its "negligent protest" theory. Similarly, Trump's rhetoric leading up to and during January 6 could be seen as creating a foreseeable risk of violence. His repeated claims of a stolen election, combined with his call to "fight like hell," could be interpreted as inciting his supporters to take drastic actions. The fact that Trump was aware of the potential for violence, as evidenced by his communication with close advisors, further supports the argument that the violence on January 6 was foreseeable.⁷⁵

On the other hand, neither Mckesson nor Trump appeared to have the specific intent to incite violence. The Supreme Court announced in *Brandenburg* that for speech to lose its First Amendment protection as incitement, it must not only be foreseeable but must be "directed to inciting or producing imminent lawless action."⁷⁶ And in *Counterman*, the Court clarified that *Brandenburg* requires a showing of specific intent.⁷⁷ The Fifth Circuit's broad application of negligence liability

Know—and Don't Know—About What Trump Did on Jan. 6, WASH. POST (June 29, 2022, updated Oct. 14, 2022) (quoting President Trump's tweet which stated: "I am asking for everyone at the U.S. Capitol to remain peaceful. No violence! Remember, WE are the Party of Law & Order—respect the Law and our great men and women in Blue. Thank you!").

⁷⁵ Some commentators believed that Trump's actions were criminally culpable under existing law. See, e.g., David Rothkopf, *If Merrick Garland Doesn't Charge Trump and His Coup Plotters, Our Democracy is Toast*, DAILY BEAST (Nov. 28, 2021) (quoting Professor Laurence Tribe as saying "I'll be both disappointed and angry if we find ourselves going into January 2022 without strong evidence—in a town that leaks like a sieve—that DOJ is moving full speed ahead on holding Trump and his enablers, facilitators, funders and co-conspirators criminally accountable for the coup d'état they tried to pull off and the violent insurrection they mounted against the Capitol to delay, obstruct and, if possible, subvert the solemn electoral proceeding there underway.").

⁷⁶ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁷⁷ *Counterman v. Colorado*, 600 U.S. 66, 81 (2023) (explaining that incitement requires a stringent showing of specific intent because "incitement to disorder is commonly a hair's-breadth away from political 'advocacy'—and particularly from strong protests against the government and prevailing social order").

in *McKesson* did not require proof that McKesson specifically intended to incite violence, which raises concerns about the erosion of First Amendment protections for protest leaders. Contrary to that approach, any legal action against Trump for incitement would need to prove that his speech was intended to and likely to produce imminent lawless action. While Trump's speech on January 6 included language that could be interpreted as encouraging violence, the ambiguity in other statements he made that day, such as his call to "peacefully and patriotically make your voices heard," complicates efforts to meet this legal standard.⁷⁸

As with potential liability for McKesson, holding Trump liable for the actions of his supporters on January 6 could have far-reaching consequences for political speech. Holding leaders responsible for actions of individuals within their movements not reasonably foreseeable to the leaders could stifle political discourse and discourage participation in public demonstrations. Both cases highlight the delicate balance between protecting public safety and safeguarding First Amendment rights.

C. *Reckless Protest*

The Fifth Circuit's *McKesson* decision, and commentary around potential liability for Trump related to the events of January 6, 2021, both point to the dangers of embracing a concept like negligent protest and the ways that imposing liability on protest organizers and movement leaders undervalues the expressive and political dimensions of "enthusiastic" but noncriminal advocacy issued in the context of assemblies. If, however, the dynamic and potentially volatile nature of assemblies should constrain speakers more than *Brandenburg*'s requirements of imminence and likelihood,⁷⁹ one possibility is to apply the *mens rea* of recklessness established

⁷⁸ It is plausible that President Trump could be liable for engaging in an insurrection under Section Three of the Fourteenth Amendment to the United States Constitution based on his words and actions on and around January 6th. That analysis depends on the meaning of "engaged in" and "insurrection" and raises inquiries similar to but distinct from those explored in this Article. See *Anderson v. Griswold* for an example of one court concluding that Trump's words and actions indeed qualified as engaging in an insurrection. 543 P.3d 283 (Colo. 2023), *rev'd sub nom.* *Trump v. Anderson*, 601 U.S. 100 (2024), *and cert. dismissed sub nom.* *Colorado Republican State Cent. Comm. v. Anderson*, 144 S. Ct. 1085 (2024).

⁷⁹ See John Inazu, *Factions for the Rest of Us*, 89 WASH. U. L. REV. 1435, 1440 (2012) ("[T]here may well be differences between groups and individuals. But I am not sure that these differences doom a *Brandenburg*-like standard for assembly. Conspiracy law aims at an agreement to commit an illegal act, and it is generally the agreement itself (and some overt act) that triggers liability, not

in *Counterman* to certain protest settings.⁸⁰ In other words, while rejecting the Fifth Circuit's concept of negligent protest, courts might still adopt something like an offense of reckless protest.⁸¹

The Model Penal Code defines recklessness as the “conscious disregard of a substantial and unjustifiable risk” related to a material element of a criminal offense.⁸² In contrast to a negligence standard based upon a quasi-objective standard of reasonableness, recklessness requires proof of a defendant's subjective awareness. In other words, it is not enough that most people would understand the risk to be substantial and unjustifiable—the defendant must actually be aware of that risk and then “consciously disregard” it.

The Model Penal Code imposes liability for riot under Section 250.1 when a person “participates with [two] or more others in a course of disorderly conduct.”⁸³ Section 250.2(1) sets forth the conditions for disorderly conduct:

A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, *or recklessly creating a risk thereof*, he:

- (a) engages in fighting or threatening, or in violent or tumultuous behavior; or
- (b) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or
- (c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.⁸⁴

The MPC elaborates that the focus on “public” means “affecting or likely to affect persons in a place to which the public or a substantial group has access; among the

the imminence of the target offense. This focus leaves criminal conspiracy outside of *Brandenburg* even under a free speech analysis. Assemblies that are not criminal conspiracies may thus still be governable under a *Brandenburg*-like standard.”).

⁸⁰ *Counterman*, 600 U.S. 66 at 82 (noting that in “true threat” speech cases, “the recklessness standard offers ‘enough breathing space for protected speech,’ without sacrificing too many of the benefits of enforcing laws against true threats”).

⁸¹ The following discussion proposes a standard for criminal liability; *Mckesson* itself addressed only civil liability.

⁸² MODEL PENAL CODE § 2.02 (1962).

⁸³ MODEL PENAL CODE § 250.1(1) (1962).

⁸⁴ MODEL PENAL CODE § 250.2(1) (1962).

places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.”⁸⁵

Neither of the first two subprovisions is in play in *Mckesson* or the events of January 6th. At first glance, subprovision (c)’s focus on hazardous conditions looks more relevant. But its focus on acts rather than words suggests something different than the kind of verbal incitement and advocacy at issue in these cases. That said, we could easily establish recklessness liability for actual harm by adding a fourth subsection: “(d) advocates that persons present engage in disruptive activity and such activity results in actual violence.”⁸⁶

Note that liability under the proposed addition is qualified in two important ways. First, the speaker must still purposely or recklessly create a risk of public inconvenience, as required under the general disorderly conduct provision. Second, the resulting harm of violence must actually occur. On the other hand, the speaker would not need to advocate for the ensuing violence—it would be enough to have advocated for reasonably foreseeable disruptive activity. Ellen Bublick and Jane Bambauer have suggested one possible standard for culpability:

[A] reasonable person in the speaker’s position must be able to foresee, in real time, that their speech or expressive conduct poses an unreasonable risk that listeners will harm others, and liability must be limited to risks that are created in that particular spatial-temporal context. The potential for liability should be closely tied to context such that, at nearly every other place or time, the speaker would be able to express the same message without risk of legal penalty.⁸⁷

A recklessness standard would make clear that a speaker must consciously disregard the substantial and unjustifiable risk of foreseeable violence resulting from his

⁸⁵ MODEL PENAL CODE § 250.2 (1962).

⁸⁶ In *Mckesson*, the fact that comes closest to liability under this revised standard is *Mckesson*’s leading protesters to block a highway. Although this is a common protest tactic, it would in some circumstances also qualify as “creat[ing] a hazardous or physically offensive condition.” Subprovision (d)’s specification that “such activity” result in actual violence could be one way to narrow the scope of liability, but courts might construe the provision more broadly.

⁸⁷ Ellen M. Bublick & Jane R. Bambauer, *Tort Liability for Physical Harm to Police Arising from Protest: Common-Law Principles for A Politicized World*, 73 DEPAUL L. REV. 263, 288 (2024). Bublick and Bambauer suggest this language would “permit negligence liability” but observe in a footnote citing *Counterman* that “[i]f the defendant has engaged in pure speech and has not used unlawful conduct, First Amendment law very likely requires proof of subjective awareness of risk—a recklessness mental state standard.” *Id.* at n.127.

or her advocacy. Whether either Mckesson or Trump would be liable under this standard would thus require proof beyond a reasonable doubt of such recklessness. It is possible that even if Mckesson would escape liability, Trump's advocacy to "fight like hell" in the context of volatile crowd might still make him liable.

Finally, it is worth noting that a recklessness standard for protest organizers still leaves officials able to regulate illegal conduct. Commenting on both the January 6 protesters and the protesters in Minneapolis who burned down a police precinct building after George Floyd's murder, Professor Rachel Moran has noted:

Police and prosecutors had—and used—plenty of options to prosecute these people for charges like assault, arson, damage to property, theft, and more. Many states and the federal government also separately criminalize threatening speech that creates or incites imminent danger. Given these (and many other) criminal laws at law enforcement's disposal, judges can strike down overbroad laws without fear of leaving the government powerless to intervene in violent or damaging protests. And legislators, when considering how to rewrite overbroad laws, should first ask themselves whether the laws are needed at all, or whether they risk preserving an appearance of domestic tranquility at an unfair cost to First Amendment rights.⁸⁸

In other words, existing laws and longstanding criminal doctrines will in many cases be sufficient to preserve order and pursue liability without compromising the breathing space for protest and dissent.⁸⁹

CONCLUSION

Free speech law from *Gitlow* to *Brandenburg* and beyond has aimed to protect speech while balancing the potential for social harm. These inquiries become even more difficult when we move from speech to assembly, and particularly, those assemblies that transpire over time. The intervening variables of listener agency and temporal distance complicate efforts to determine the culpability of the original speaker. As Holmes understood in *Gitlow*, focusing solely on speaker intent risks criminalizing speech that poses little social harm. Recent developments like the

⁸⁸ Rachel Moran, *Overbroad Protest Laws*, 125 COLUM. L. REV. 1197, 1269–70 (2025). *See id.* at 1270 ("Laws criminalizing unlawful assembly, riot, and civil disorder—or any other criminal law that predicates liability in part on presence or participation in a group event—should require individualized proof of reckless, knowing, or intentional participation in violence, destruction, threats of imminent harm and violence, or, in limited contexts, disturbance to public order.").

⁸⁹ As Bublick and Bambauer point out, "[l]aws of general applicability do not receive heightened First Amendment scrutiny, even if they are violated by journalists who are exercising free-speech rights." Bublick & Bambauer, *supra* note 87, at 283.

Fifth Circuit's decision in *Mckesson v. Doe* underscore the dangers of expanding liability for protest organizers based on foreseeability alone.

The events of January 6th further demonstrate the tension between protecting free speech and addressing the harm caused by collective action. While Trump's rhetoric certainly raised concerns about incitement, holding him—or any political leader—liable for downstream violence could set a dangerous precedent that undermines First Amendment protections. Ultimately, the law must tread carefully, ensuring that it protects the right to dissent and assemble by not leaving protest organizers and political speakers unduly vulnerable to liability for the unpredictable actions of others. But focusing on a recklessness standard which is between narrow intent liability and broad negligence liability could mitigate against some of the risk of instability.

More generally, suppressing the speech of protest leaders or organizers simply because they associate with violent factions of a broader social movement calls to mind egregious violations of civil liberties in our not-too-distant past. In 1927, the state of California prosecuted Anita Whitney for her participation with the sometimes-violent Communist Labor Party of California, even though Whitney herself actively advocated for non-militant political strategies.⁹⁰ During the Civil Rights Era, non-violent leaders such as Martin Luther King Jr. occasionally associated and protested with more violent protest efforts.⁹¹ Indeed, during the Memphis Sanitation Workers' Strike of 1968, only months before his assassination, King himself led a demonstration of over 20,000 people to protest the City's treatment of black union workers that ultimately turned violent and led to looting in the city.⁹² A negligent protest theory might have held King liable for any violence at any future

⁹⁰ See Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 658 (1988). As Justice Brandeis memorably wrote in his *Whitney* concurrence, “[f]ear of serious injury cannot alone justify suppression of free speech and assembly” and that “[i]t is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.” *Whitney v. California*, 274 U.S. 357, 376–77 (1927) (Brandies, J., concurring).

⁹¹ See, e.g., SNCC: *The Student Nonviolent Coordinating Committee*, NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE., <https://nmaahc.si.edu/explore/stories/sncc-student-nonviolent-coordinating-committee> (last visited Aug. 13, 2025).

⁹² See *Memphis Sanitation Workers' Strike*, MARTIN LUTHER KING, JR. RSCH & EDUC. INST., <https://kinginstitute.stanford.edu/memphis-sanitation-workers-strike> (last visited Aug. 13, 2025).

demonstration because he would have been on notice that civil rights movement protests were foreseeably violent.

Every idea may be an incitement, but not every incitement is a crime. Any successful protest or movement depends on the enthusiasm of its organizers and leaders in their communication to listeners that calls them to action. What happens in those moments—and the ones that follow—can be messy, unpredictable, and even dangerous. One of the enduring lessons of Holmes’s *Gitlow* dissent is that our civic aspirations demand these costs in order to keep open the ongoing conversation that makes democracy possible.

