RONALD K. RANDALL

Proposed Federal "Disinformation Liability Act"

I ask:

> ***What is the difference between falsely shouting "fire" in a crowded theatre and actively discouraging the public from wearing masks in a pandemic?***

Background

There is a recognized limitation on First Amendment rights to free speech generally drawn from Justice Oliver Wendell Holmes, Jr.'s opinion in ***Schenck v. United States***, 249 U.S. 47 (1919):

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. ... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Subsequent decisions have narrowed the limitations on free speech by asserting that expressions of honest opinion and inflammatory statements not causing immediate harm or violating established law are protected under the First Amendment. But none of these has challenged limitations on "imminent lawless action" or "causing imminent harm."

In both the crowded theatre case and the mask-wearing case, the speaker is inciting people to take actions that have the demonstrated potential to cause imminent harm and possible death.

Proposal

I therefore **propose legal research and drafting of a model federal law** something like:

> WHEREAS incitement to behavior contrary to the established principles of science or the directives of federal agencies charged with maintaining public order, safety and health can, and has been shown to, cause significant public harm;
>
> WHEREAS the federal government is charged with the responsibility to "… insure domestic Tranquility… promote the general Welfare";
>
> THEREFORE:
>
> Speech and other actions adjudicated as a primary or major motivating cause of others' actions causing demonstrable harm to third parties is not protected by the First Amendment and causes liability of the speaker or actor for the harm caused.
>
> a) The speech covered by this section specifically includes statements or exhortations made in opposition to established scientific fact or the directives of public health and safety authorities of the federal government;
>
> b) The speech covered by this section specifically includes each repetition, with substantially the same content or exhortation, between the originator and the person ultimately causing harm.

A law of that type would free social media from liability of the speech of users made on or through them – essentially the intent of now-questioned Section 230 of the Communications Decency Act of 1996.

However, complete disqualification of platform media from liability would make identifying the sources and promoters of harm-causing speech virtually impossible. The law would be effectively unenforceable if the originators and repeaters of the harm-causing speech could not be identified.

I believe Section 230 should be amended to say that freedom from liability is obained ***only*** so long as full traceability of all speech adjudicated as causing harm is maintained. There cannot be liability for speech causing harm if there is no identifiability of its source and repeaters.

After all, we can know who it was who cried "fire" in the crowded theater.

Quid pro Quo for Retention of Section 230

Requiring identification and traceability of content would obligate "platform" media to perform the very difficult task of tracking dissemination of content through their platforms all the way back to its identifiable originator from the ultimate point of its causative impact. That obligation (and cost) would be the price of retaining Section 230's "platform freedom from liability." It would also requiring firm identification of each user of the platform, denying anonymous use, an admittedly difficult thing to achieve.

But this obligation and approach to the problem has a really valuable byproduct: it eliminates the need for censorship -- equally distasteful whether by Google or by government – and replaces it with legal remedies and deterrence effects analogous to those under libel and slander law. I believe there is already some precedent of liability for videos posted on YouTube that have led to suicide or other harmful effects.

This approach does not restrict free speech in any way. It just puts a pricey risk on speech causing harm and tasks the very profitable and near-monopoly media platforms with the costly task of maintaining traceability of content.

It also adds liability to platform-permormed *algorithmic* repetition and dissemination of content that is ultimately judged responsible for harm. So it will push the platform media to limit algorithmic distribution of content to that which cannot risk liability. I think this is not censorship of speech in any way, but care in dissemination, and is a good side-effect.

What do you think?