Loyola of Los Angeles
Entertainment Law Review

Volume 46 | Number 1 Article 3

Winter 12-22-2025

The Myths and Legal Implications of Cancel Culture

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I. INTRODUCTION

Due to the rise of "wokeness" and prevalence of political correctness in the past few decades, people have become more and more familiar with a certain form of public "canceling" (such as shaming, boycotting, and attacks) for various reasons. The so-called phenomenon has been the subject of much discussion across various disciplines, including sociology, philosophy, communication, politics, and law over political correctness, social justice, free speech, and modern culture in general. Debates on cancel culture are concerned about the "mob justice" and its impact on freedom of speech. Especially in this era of digital capitalism and attention economy, individuals once canceled are increasingly less likely to get "uncanceled" and start over. All being said, the terminology, nature, and structure of cancel culture remain amorphous. This subject matter is thus conceptualized variedly among scholars, commentators, and the general public.[1]

This article explores various forms of legal intervention to prevent unjust or disproportionate consequences arising from public canceling. Specifically, this paper focuses on regulation *ex ante* and *ex post*. By "*ex ante*," this article explores ways to prevent harmful public cancellations from occurring. By "*ex post*," this article tries to address the disproportionate or irrelevant consequences arising from the cancellations.

For the purpose of legal analysis, this article conceptualizes cancel culture as a grand spectacle of denunciation where people call for public repent, accountability and/or disappear from the public view altogether. Cancel culture is rooted in progressive sociopolitical ideals which goes through the following phases: "trigger," "identification," "reaction," and "aftermath."

This article argues that although cancel culture is not novel, its predominance in the cultural zeitgeist (which can be attributed to the rapid evolution of communication technologies) has raised issues relating to social justice and freedom of speech. From the social justice perspective, this article finds that cancel culture is an important form of popular action against the unjust and the immoral which can be powerful when legislation and judiciaries prove unpromising, ineffective, or impotent. With respect to freedom of speech, this article identifies cancel culture, in essence, a form of free speech and against the background of the "attention economy," examines the viability of the marketplace of ideas theory as applied in the digital era. Second, to prevent and/or mitigate the legal harms associated with

1. *See generally* Emily A. Vogels et al., *Americans and "Cancel Culture"*, PEW RESEARCH CENTER (May 19, 2021), https://www.pewresearch.org/internet/2021/05/19/americans-and-cancel-culture-where-some-see-calls-for-accountability-others-see-censorship-punishment/ [https://perma.cc/8SAV-FTMB] (noting that the public's opinion and familiarity with cancel culture varies greatly dependent on factors like age, political leanings, gender, and education level).

cancel culture, this article designs an experiment that applies frameworks borrowed from antitrust law to safeguard both free speech and fair competition. In this antitrust experiment on the marketplace of ideas, this article chooses social networking platforms as the main subjects. By proposing existing legal doctrines may come to the rescue when an individual is canceled unjustly, this article suggests potential remedies available to victims of cancel culture. But the legal remedies that can be readily invoked are not the emphasis of this article, but rather the remedies after usual ones are exhausted, such as the "right to be forgotten."

The legal analysis in this article mainly rests upon the practices in the United States ("U.S.") concentrates on U.S. institutions and laws which undoubtedly have global implications.[2] To properly narrow the scope of this study, the legal analysis focuses on how individuals (natural persons)—rather than institutions or corporations (legal persons)—interact with cancel culture. This distinction is necessary because of the difference in treatment of these two types of subjects.[3]

II. CANCEL CULTURE DEMYSTIFIED

On July 7, 2020, *Harper's Magazine* published "A Letter on Justice and Open Debate" (hereinafter the "*Harper's Letter*"), signed by 153 influential persons including J.K. Rowling (author of *Harry Potter* series), Margaret Atwood (author of *The Handmaid's Tale*), Salman Rushdie (author of *The Satanic Verses*), Noam Chomsky (linguist and political activist), and Gloria Steinem (feminist and journalist).[4] With no mention of the term "cancel culture" or "canceling," *Harper's Letter* draws a concrete picture of cancel culture—what it is generally about as well as the serious consequences that follow. It points out that this trend stems from the "overdue demands for police reform, along with wider calls for greater equality and inclusion across our society" which intensified new political commitments and

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2. David E. Pozen, *The Perilous Public Square: Structural Threats to Free Expression Today* 3 (David E. Pozen ed., Colum. Univ. Press 2023).

3. *See*, *e.g.*, Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 863 (2007) (arguing that corporations have rights to free speech, but they are more limited than the individuals'); *see also* Mary Lyn Stoll, *Corporate Rights to Free Speech?*, 58 J. BUS. ETHICS 261, 261 (2005) (concluding that granting corporations full freedom of speech will undercut attempts to maintain "good moral character"); *see also* John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 224 (2015) (finding that about half of the First Amendment legal challenges benefit business corporations and trade groups, rather than individuals or other types of organizations, and that these cases exemplify a kind of corruption that harms consumers, employees, and shareholders).

4. *A Letter on Justice and Open Debate*, HARPER'S MAG. (July 7, 2020), https://harpers.org/a-letter-on-justice-and-open-debate/ [https://perma.cc/6Q7F-YHNW].

moral attitudes that tend to diminish the norms of open debate and toleration of differences due to the inclination toward ideological conformity.[5] It demonstrates "an intolerance of opposing views" nowadays which escalates into "public shaming and ostracism" and grows into "the tendency to dissolve complex policy issues in a blinding moral certainty."[6] Such a tendency is characterized by "calls for swift and severe retribution in response to perceived transgressions of speech and thought."[7] Consequently editors are fired, books are withdrawn, journalists are barred from writing, organization heads are ousted…[8]

The vivid wording in the *Harper's Letter* presumably makes it the best description of what is going on. But only later does *The Objective* give a name to this phenomenon, calling it "cancel culture."[9] This counter-letter, entitled "A More Specific Letter on Justice and Open Debate," published on July 10, 2020 and signed by 160 journalists and academics, deems the *Harper's Letter* problematic for two reasons. First, most of the 153 signatories are in a superior status for being "white, wealthy, and endowed with massive platforms."[10] It is therefore ironic that they are afraid of being silenced by the uncontrollable cancel culture while failing to mention the fact that, for generations, marginalized voices have been muted in academia, publication, and journalism.[11] Second, cancel culture should not be viewed as a trend, as purported in the letter.[12] In other words, the signatories' privilege ensures they do not become *truly* canceled compared with the marginalized groups.

Mary McNamara, a culture columnist and critic for the Los Angeles Times, expresses a similar view in her article, clarifying that cancel culture is not anything new. [13] It can just be referred to as a "blanket criticism" of people to call out those

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5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *A Letter on Justice and Open Debate*, *supra* note 4.

10. *Id.*

11. *Id.*

12. *Id.*

13. Mary McNamara, *"Cancel Culture" Is Not the Problem. The Harper's Letter Is*, L.A. TIMES (July 9, 2020), https://www.latimes.com/entertainment-arts/story/2020-07-09/cancel-culture-harpers-letter [https://perma.cc/57F4-EHNB].

they believe are enabling or espousing sexism, racism, homophobia, etc., which violate political correctness.[14]

Irrespective of which side of the debate is sounder, the *Harper's Letter* did remind us to pay attention to this human phenomenon which appears to be increasingly ubiquitous. Cancel culture, as the letter addresses, might not be something novel and the term "cancel culture" can be somewhat fussy, but the incidents of cancel culture have been occurring all the time to individuals and organizations except for those mentioned in the letter. There are notable ones. Colin Kaepernick, National Football League quarterback, lost his NFL career after his kneeling during the national anthem which went viral on the internet.[15] Yang Li (杨笠), the Chinese "stand-up comedy queen" known for her bold expression on gender topics, lost her deals with Intel China and JD.com in 2021 and 2024, respectively, due to her "notorious" jokes about males.[16] After making a negative comment on President George W. Bush during a concert in London in 2003, the Dixie Chicks (today, known as "The Chicks"), experienced one of the gravest cases of boycotting in pop culture.[17] As a result, the group's songs were removed from the radio playlists across the U.S.,[18] country stations organized events for people to destroy the group's CDs,[19] and the music industry withdrew its support for the group.

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14. *Id.*

15. *See generally* Kurt Streeter, *Kneeling, Fiercely Debated in the N.F.L., Resonates in Protests*, N.Y. TIMES (Aug. 3, 2020), https://www.nytimes.com/2020/06/05/sports/football/george-floyd-kaepernick-kneeling-nfl-protests.html [https://perma.cc/X4DP-6PTU] (explaining Kaepernick has not played in N.F.L since January 2017 following kneeling objection).

16. *See* Xinyu Da & Qi'an Chen, *After Male Backlash, Intel China Cuts Ties With Comedy Queen*, SIXTH TONE (Mar. 22, 2021), https://www.sixthtone.com/news/1007019 [https://perma.cc/474V-L92N]; *see also* Ding Rui, *China's 'Comedy Queen' Loses Yet Another Deal Over Men Jokes*, SIXTH TONE (Oct. 22, 2024), https://www.sixthtone.com/news/1016060 [https://perma.cc/GN2Z-NCTT] (reporting the repercussions after the comedian made offensive jokes about men after signing a sponsorship deal with a primarily male customer base).

17. *See* Steve Knopper, *An Oral History of The Chicks' Seismic 2003 Controversy From The Industry Execs Who Lived It*, BILLBOARD (June 14, 2022), https://www.billboard.com/music/country/chicks-radio-banned-george-bush-oral-history-1235087442/ [https://perma.cc/UFD8-NN7F].

18. *Dixie Chicks Pulled From Air After Bashing Bush*, CNN (Mar. 15, 2003, at 8:45 HKT), https://edition.cnn.com/2003/SHOWBIZ/Music/03/14/dixie.chicks.reut/ [https://perma.cc/FAX3-4RGY].

19. *Protesters Destroy Dixie Chicks CDs*, BILLBOARD (Mar. 17, 2003), https://www.billboard.com/music/music-news/protesters-destroy-dixie-chicks-cds-71953/ [https://perma.cc/RUA2-9YXM].

There are also everyday examples. Amy Cooper, a white woman, called the police on Christian Cooper, a Black man, in Central Park after he asked her to leash her dog as required.[20] In the call, she said her safety was threatened, though the video showed otherwise.[21] Amy Cooper was fired from her job with the video going viral as a notorious case of racial profiling.[22] As of November 2023, when she published a self-clarification letter on Newsweek, she was still living "in hiding."[23] Alison Ettel, the woman who threatened to call the police on an African-American girl selling water without a permit on a San Francisco sidewalk, was mocked online as "Permit Patty."[24] After the incident, she resigned as CEO of TreatWell Health.[25] In 2013, Justine Sacco, a PR professional with merely 170 followers on Twitter posted a tweet before boarding a flight: "Going to Africa. Hope I don't get AIDS. Just kidding. I'm white!" The sarcastic tweet was soon widely interpreted as racist. She was fired from her job before landing.[26]

These stories are just the tip of the iceberg.

According to the aforementioned cases, cancel culture is indeed not something new, at least not at the time of the *Harper's Letter's* publication. And so, the following questions arise: How long has the phenomenon of cancel culture existed within human history? Has such a phenomenon ever evolved or mutated? Shall we pay special attention to it nowadays? More profound questions may be: Is cancel culture a sheer matter of morals? Or put differently, does cancel culture matter to the point of necessitating the law's attention? This next section tries to anatomize cancel

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20. *See* Amir Vera & Laura Ly, *White Woman Who Called Police on a Black Man Bird-Watching in Central Park Has Been Fired*, CNN (May 26, 2020, at 4:21 PM), https://edition.cnn.com/2020/05/26/us/central-park-video-dog-video-african-american-trnd/index.html [https://perma.cc/XQ9P-T5X3].

21. *Id.*

22. *Id.*

23. *See* Amy Cooper, *I Was Branded the 'Central Park Karen'. I Still Live in Hiding*, NEWSWEEK (Nov. 28, 2023, at 11:03 AM), https://www.newsweek.com/i-was-branded-central-park-karen-i-still-live-hiding-1839483 [https://perma.cc/79GJ-NQUA].

24. Jessica Campisi et al., *After Internet Mockery, 'Permit Patty' Resigns as CEO of Cannabis-Products Company*, CNN (June 26, 2018, at 10:47 PM), https://edition.cnn.com/2018/06/25/us/permit-patty-san-francisco-trnd/index.html [https://perma.cc/SN9S-BBPG].

25. *Id.*

26. Jon Ronson, *How One Stupid Tweet Blew Up Justine Sacco's Life*, N.Y. TIMES MAGAZINE (Feb. 12, 2015), https://www.nytimes.com/2015/02/15/magazine/how-one-stupid-tweet-ruined-justine-saccos-life.html [https://perma.cc/7E6N-SLEG].

culture from its genesis to identify the possible areas or elements of law it might touch.

A. Cancel Culture: New Wine in an Old Bottle?

Although the meaning, nature, and structure of cancel culture may be amorphous,[27] the phrase "cancel culture" has become such a craze that most classical dictionaries have now included it. The Merriam-Webster online dictionary, for instance, defines cancel culture as "the practice or tendency of engaging in mass canceling as a way of expressing disapproval and exerting social pressure,"[28] wherein "canceling" means withdrawing one's support for someone or something (such as a celebrity, a company, etc.) publicly and "especially on social media."[29] The Cambridge online dictionary defines cancel culture more thoroughly as "a way of behaving in a society or group, especially on social media, in which it is common to completely reject and stop supporting someone because they have said or done something that offends you."[30] The Oxford online dictionary also provides an "additional sense" to the verb "cancel" which is to "dismiss, reject, or get rid of (a person or thing)."[31] Oxford adds that when used in the social media context, "to cancel" is to publicly boycott, ostracize, or withdraw support from (a person, institution, etc.) thought to be promoting culturally unacceptable ideas."[32] Following the aforementioned dictionary definitions and notwithstanding the modern social media context human history has witnessed countless examples of cancel culture for thousands of years.

The genesis of cancellation as a human activity can be debatable. As early as the 5th century BCE in classical Athens, there was once "ostracism" (ὀστρακισμός), a political measure by which any citizen could be expelled from Athens for ten years

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27. Steven Arrigg Koh, "*Cancel Culture" and Criminal Justice*, 74 HASTINGS L.J. 79, 81 (2022).

28. *Cancel Culture,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/cancel%20culture [https://perma.cc/B7CF-YTNY].

29. *Id.*

30. *Id.*

31. *Cancel*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/cancel_v?tl=true [https://perma.cc/8JYZ-YUSH].

32. *Id.*

for being a threat to the state or being a tyranny.[33] Such measure was carried out by votes cast in anonymity on broken pottery shards (ostraka, ὄστρακα).[34] One famous incident is the Ostracism of Themistocles, the celebrated general who played a key role in gaining victory against the Persians. He was ostracized due to accusations of arrogance and political rivalries. Ostracism can well be considered a form of socio-political cancellation, where one was removed from the community life according to popular opinion. Activities of such kind can be considered a primitive form of cancel culture.

A more evolved form of cancel culture might be one that targets speech or ideas. Socrates, the Greek philosopher, was tried and sentenced to death for impiety and for allegedly corrupting the youth of Athens. He became unpopular with the Athenian authorities for questioning the established norms and for his promotion of critical thinking. He was eventually forced to drink hemlock. There is a similar case in biblical history where Jesus Christ suffered from arrest and execution for challenging the religious and political authorities. Socrates and Jesus are probably among the earliest celebrity victims of cancel culture, somewhat reflecting the concern about free speech in the *Harper's Letter*. Their challenges to the established norms of their times resembles individuals today who criticize "political correctness" in public forums (e.g., J.K. Rowling faced extensive backlash after voicing concerns about how the issues of transgender individuals affect women's rights[35]).

As human civilization progressed, cancellations occurred when individuals simply did not fit the social mainstream. Oscar Wilde, the outstanding playwright and poet, was convicted of "gross indecency" for his homosexuality.[36] After his imprisonment, he still suffered from public shaming, losing his career and social standing. Another example comes from the French Revolution, where those perceived as loyal to the monarchy or simply inadequately revolutionary would face public shaming, trial, and even execution. In hindsight, the execution of Marie Antoinette, the last Queen of France prior to the French Revolution, arguably reveals that she was a victim of cancel culture because much of the public hatred toward her

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33. M. Β. Σακελλαρίου, *Ο ΟΣΤΡΑΚΙΣΜΟΣ, Η ΑΘΗΝΑΪΚΗ ΔΗΜΟΚΡΑΤΙΑ,* http://www.ekivolos.gr/Ostrakismos.htm [https://perma.cc/X7EE-UDR9].

34. *Id.*

35. *JK Rowling Dismisses Backlash Over Trans Comments: 'I Don't Care About My Legacy'*, BBC (Feb. 23, 2023), https://www.bbc.com/news/entertainment-arts-64729304 [https://perma.cc/ZM88-Q3ZM].

36. Jennifer Latson, *When Oscar Wilde's Wit Couldn't Save Him*, TIME, (May 25, 2015).

was based on rumors and propaganda.[37] In modern China, the Cultural Revolution from 1966-1976 can well be seen as a massive and extreme movement of cancellation. This ideology-driven movement brought ostracism, humiliation, and persecution of many innocent individuals, including the once revered intellectuals, artists, teachers, and even national leaders.[38]

The aforementioned historical incidents might not represent all forms of cancel culture in pre-modern human societies, but they are proof that cancel culture, as we understand it today, did exist throughout human history, at least since the dawn of democracy. Those incidents mirror cancel culture in today's public debate in one way or another, though the aftermath of cancellation has become less and less brutal (i.e., at least no person is forced to die or exiled if canceled). One major difference between historical cancel culture and how we understand it today is that we have developed strong media through which people not only are susceptible to exposure but are more readily able to engage in activities of cancellation. As the biblical idiom goes, "old wine in new bottles," contemporary cancel culture is an old phenomenon channeled through a new modality.[39]

B. Cancel Culture in the Digital Age: Definition and Categorization

In the digital age, with social media amplifying public discourse and revolutionizing communication, cancel culture narratives, discourse, and practices today play out predominantly in online platforms.[40] Cancel culture today has gained even fiercer momentum, resulting in enormous outcomes. People exercise the constitutional right to free speech as a weapon to call for attention to others' actions. "Mobs" bring personal attacks on individuals and organizations across geographic boundaries. Everybody is thus empowered to sanction perceived bad behaviors.[41]

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37. *See, e.g.*, Nancy N. Barker, *"Let Them Eat Cake": The Mythical Marie Antoinette and the French Revolution*, 55 THE HISTORIAN 709, 724 (1993).

38. *See* Parris H. Chang, *China's Scientists in the Cultural Revolution*, BULLETIN OF THE ATOMIC SCIENTISTS (May 1969).

39. Koh, *supra* note 27, at 87.

40. *See generally* Elizabeth Farries et al., *Introduction to the Special Issue: The Platformization of Cancel Culture*, 26 TELEVISION & NEW MEDIA 4, 9 (2025) (outlining how popular figures such as Logan Paul, Harsha Walia, Shane Dawson and Scott Adams have been "cancelled" on platforms such as X, formerly known as Twitter, and YouTube among others).

41. *See generally* Luu Chi, *Cancel Culture is Chaotic Good*, JSTOR DAILY (Dec. 18, 2019) https://daily.jstor.org/cancel-culture-is-chaotic-good/ [https://perma.cc/4358-QCJS] (emphasizing the "virulently uncontrollable, and so dangerously unstable" nature of modern "Internet mobs" as a tool to condemn and sanction perceived inappropriate social behaviors).

Participants in cancel culture predominantly hold the attitude of "those accused must apologize immediately" when examining political identity, gender traits, and the overall involvement of cancellation.[42] As cancelers become more deeply involved, actions like calling for apologies and tracing an individual's past often increase.[43] Apart from network users, platforms are among the participants in the cancellations primarily because they benefit from the controversies and spectacles of the cancellations that create large quantities of content, forming the "communicative capitalism."[44] In an era of "attention economy," while users are attracted to engage in cancellation by browsing, commenting, reposting, etc., a platform has the opportunity to expose more advertisements to the users. Meanwhile, by collecting data from users' online behavior and with the boost of algorithms, platforms are able to serve more targeted information and commercials to the right users.[45] This phenomenon, in a nutshell, is how the platforms benefit from people's attention. With the rise of influencers and the combined effects of algorithms and platform design features, platforms may strengthen their model of "attention economy" to attract wider attention, thus expanding the scale of cancellations.[46] In this process, both the platforms and influencers capitalize attention.[47]

According to the aforementioned dictionary definitions, cancel culture features three common elements: (i) publicly unacceptable or offensive behavior/conduct/statements; (ii) public boycotting, support withdrawal, etc.; (iii) occurring especially in social media. Perhaps one quintessential point is missing in the above authoritative definitions—consequences resulting from public cancellation, which are often irrelevant and disproportionate to the offensive behavior. Besides, in the digital age, the individual is more often than not exposed

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42. *See* Thomas S. Mueller, *Blame, then Shame? Psychological Predictors in Cancel Culture Behavior*, 11 SOC. SCI. J. 1 (Jul. 9, 2021).

43. *Id.* at 12.

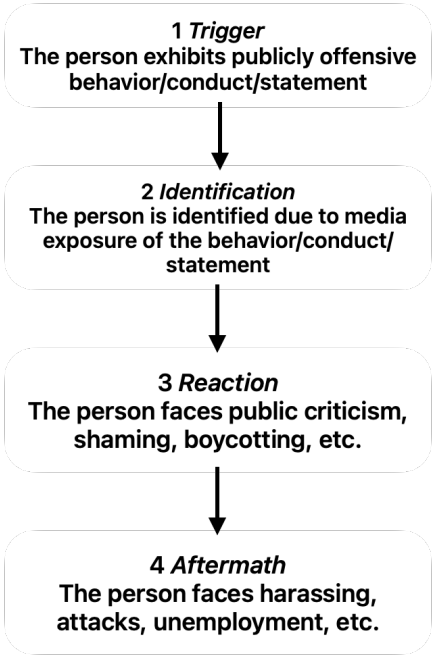
44. Jodi Dean, *Communicative Capitalism: Circulation and the Foreclosure of Politics*, 1 CULTURAL POL. 51, 58 (2005).

45. *See* Tim Wu, *Blind Spot: Attention Economy and the Law*, 82 ANTITRUST L. J. 771, 786–93 (2019) (discussing the mechanisms of the "attention economy" in more detail).

46. Elizabeth Farries et al., *Introduction to the Special Issue: The Platformization of Cancel Culture*, 26 TELEVISION & NEW MEDIA 4, 9 (2025).

47. Jacob Ørmen & Andreas Gregersen, *Towards the Engagement Economy: Interconnected Processes of Commodification on YouTube*, 45 MEDIA, CULTURE, AND SOC'Y 225, 228 (2023).

in the media and the transmission thereof goes viral.[48] Accordingly, the framework of contemporary cancel culture can be outlined as "Trigger-Identification-Reaction-Aftermath" ("TIRA").



Setting aside the real-world consequences of cancel culture, this part tries to categorize the different patterns of cancel culture as follows.

The first category represents cancellations that are well-founded and occur immediately. Specifically, the public shaming is based on truthful and immediate exposure (whether edited or not) of the person which he or she may not expect. A classic example is "BBQ Becky." In April 2018, a white woman called the police reporting a Black family that barbecued in a designated area of Lake Merritt Park in Oakland, California, claiming they were using a charcoal grill in a non-charcoal area. This incident was recorded and circulated online, giving rise to extensive criticism and the moniker, "BBQ Becky."[49]

48. Steven Arrigg Koh, *"Cancel Culture" and Criminal Justice*, 74 HASTINGS L.J. 79, 86 (2022).

49. Gianluca Mezzofiore, *A White Woman Called Police on Black People Barbecuing. This is How the Community Responded*, CNN, (May 22, 2018, at 3:25 PM), https://edition.cnn.com /2018/05/22/us/white-woman-black-people-oakland-bbq-trnd/index.html [https://perma.cc/DEL5-8L8K].

The second category represents ill-founded cancellation, meaning the public shaming is based on rumors, propaganda, misrepresentation, or lies regarding the person. For example, Monica Lewinsky was vilified in the media and in society for years after her affair with President Bill Clinton during her 1995-1997 internship in the White House was made public. Years later, the #MeToo movement reframed Lewinsky as a victim of misogyny and power dynamics, though the profound stigma persists.[50]

The third category represents cancellations that are well-founded but oddly retrospective. In such cases, public shaming is based on the person's history, which is dug out and unexpectedly exposed. For instance, Kevin Hart stepped down as the host of the 2019 Oscars after past homophobic tweets resurfaced.[51]

The fourth category represents purely identity-based cancellations, where public shaming is based on the person's identity or preexisting relation with certain individuals or groups. It can usually be exemplified by the relatives or friends of controversial figures. For example, in 2020, Wichita State University Tech canceled Ivanka Trump's commencement speech after students and faculty members condemned the Trump administration's response to protests.[52]

The fifth category represents ideology-driven cancellations, in which public shaming is based on the person's insufficient alignment with mainstream ideology. For instance, celebrities who remained silent during the 2020 Black Lives Matter protests faced backlash, with some accused of being complicit in silence.[53]

The sixth and last category represents cancellations that are self-inflicted. It involves a person participating in public discussion on certain topics and confronting

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50. Emily Steward, *The #MeToo Movement Means Rethinking Everything About Monica Lewinsky*, VOX (Feb. 27, 2018, at 9:30 AM), https://www.vox.com/policy-and-politics/2018/2/26/17053126/monica-lewinsky-me-too-vanity-fair [https://perma.cc/F56F-ZVNK].

51. Jacey Fortin, *Kevin Hart Steps Down as Oscars Host After Criticism Over Homophobic Tweets*, N.Y. TIMES (Dec. 7, 2018), https://www.nytimes.com/2018/12/06/arts/kevin-hart-homophobic-tweets.html [https://perma.cc/QKS4-BL3C].

52. Katie Rogers, *Ivanka Trump Blames 'Cancel Culture' for Pulled Speech. College Says It Took a Stand*, N.Y. TIMES (June 7, 2020), https://www.nytimes.com/2020/06/0/us/politics/ivanka-trump-speech-protests.html [https://perma.cc/BKR4-F52W].

53. *See*, *e.g.*, Charles Trepany, *KJ Apa Responds to Accusation of Being 'Silent' on BLM After Starring in Police Brutality Film*, USA TODAY (June 15, 2020, 8:14 ET), https://www.usatoday.com/story/entertainment/celebrities/2020/06/15/kj-apa-responds-accusation-hes-so-silent-blm-protests/3195611001/ [https://perma.cc/GF7W-EHXL]; Kat Tenbarge, *People are Urging Influencers and Celebrities to Support Black Lives Matter Online or Stop Posting Entirely*, BUSINESS INSIDER (June 1, 2020, 1:55 PT), https://www.businessinsider.com/celebrities-influencers-support-black-lives-matter-stop-posting-instagram-2020-6 [https://perma.cc/86GV-JU7Y].

public criticism. J.K. Rowling, for example, publicly commented on trans issues and argued with opposers online.[54]

The aftermath of cancel culture can be categorized as either direct or indirect. Direct cancellation is where the canceled person faces results directly caused by the public shaming. For instance, Alexander Rogers was a third-year student at Oxford University who took his own life following ostracism arising from a past sexual encounter.[55] On the other hand, indirect cancellation is where the canceled person faces results indirectly caused by the public shaming, regardless if the results relate to the offensive conduct/statement/behavior. For example, former U.S. Senator Al Franken resigned from the Senate in 2018 after allegations of inappropriate behavior surfaced, despite many of the accusations remaining disputed or deemed as minor. Later, he expressed his regret about his decision to resign.[56]

These categorizations, described above, are not made for their own sake. For one thing, this sort-out ensures this article considers the basic types of cancel culture. Additionally, it helps narrow the author's focus amidst the chaotic discourse of cancel culture, especially when adopting a legal perspective. Further, the examples listed in the categories above offer a glimpse of what cancel culture in the digital age is like in particular. This article thus defines contemporary cancel culture as, more often than not, a grand spectacle of denunciation where people call for public repentance, accountability, or/and simply disappearance founded upon progressive sociopolitical values.[57] "Disappearance" merely includes silencing someone or otherwise removing a person from a platform, position, or event. At its core, the discourse of contemporary cancel culture serves as a form of thought-policing which is characterized by "wokeism" and "political correctness" nowadays.[58]

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54. *JK Rowling Dismisses Backlash Over Trans Comments: 'I Don't Care About My Legacy'*, *supra* note 35.

55. Curtis Lancaster, *Student Suicide Prompts 'Cancel Culture' Warning*, BBC NEWS (Nov. 15, 2024), https://www.bbc.com/news/articles/cdd0gyjlqyvo [https://perma.cc/3RR6-V5UT].

56. It is extremely rare for a Senator to resign under pressure, and no senator has ever been expelled since the Civil War. According to Franken, he wished he had attended a Senate Ethics Committee hearing regarding the accusations. *See* Jane Mayer, *The Case of Al Franken*, NEW YORKER (July 22, 2019), https://www.newyorker.com/magazine/2019/07/29/the-case-of-al-franken [https://perma.cc/D9UF-6JX7].

57. Ashley Frawley, *The Carnival of Cancel Culture*, SUBLATION MAGAZINE (Mar. 5, 2023), https://sublationmedia.com/the-carnival-of-cancel-culture [https://perma.cc/ASQ7-LSAW]; Farries et al., *supra* note 40, at 5.

58. Farries et al., *supra* note 39, at 2.

III. CANCEL CULTURE AND SOCIAL JUSTICE

As suggested by the aforementioned examples and the second set of categorizations, the targeted individual often faces consequences disproportionate to or unrelated to either the offensive "trigger" or the effects thereof. In this way, cancel culture may, ironically, create social injustice. Despite the criticism against *Harper's Letter*—chiefly that those who denounced cancel culture were prestigious individuals who with greater speech power compared to that of marginalized communities in society, nowadays, ordinary people with minimal influence similarly suffer from the threat of cancellation. In today's digital age steeped in wokeness and political correctness, individuals may be involved in cancel culture—either actively or passively—for various reasons. Therefore, this article examines the necessity of legal intervention in cancel culture and possible legal remedies for the canceled victims.

From a legal perspective, cancel culture inevitably touches multiple dimensions of law, such as free speech, torts, platform liability, etc. This section finds that cancel culture serves as a normative system for achieving social justice, though such a system has limitations that may necessitate legal intervention.

Although cancel culture has been conceptualized as either positive "accountability culture" or the excessive "mob justice," it also functions as an important normative system that fills the gaps in our law and rectifies legal enforcement unproportionate to the circumstances.[59]

The gap-filling function of cancel culture addresses the limitation of our law. The criminal law system, for instance, criminalizes a small fraction of immoral or harmful conducts, as the majority of the omissions fail to satisfy the *actus reus* requirement.[60] In practice, cancel culture probably functions best in "grey areas," such as sexual misconduct in workplaces and campuses. A seminal example is the #MeToo movement in 2018, where survivors of sexual harassment and assault collectively shared their stories and demanded accountability for the perpetrators (particularly those in positions of power).[61] Cases of sexual harassment are extremely hard. In addition to the difficulties in producing physical evidence, most

59. Steven Arrigg Koh, *"Cancel Culture" and Criminal Justice*, 74 HASTINGS L.J. 79, 82–83 (2022).

60. *Id.* at 91; SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS (10th ed. 2017).

61. Leah Asmelash, *In 5 years of #MeToo, Here's What's Changed – and What Hasn't*, CNN (Oct. 27, 2022), https://edition.cnn.com/2022/10/27/us/metoo-five-years-later-cec/index.html [https://perma.cc/2MQS-BHFA].

of the time, the victims often do not report the sexual misconduct to preserve their career and/or reputation.[62]

In China, social media has seen numerous cases of sexual harassment. A recent example involves a professor at Renmin University of China who sexually harassed a doctoral student. The student known as Wang Di, publicized a video online accusing the professor of sexual harassment and coercive molestation. Wang claimed that the professor threatened to prevent her from graduating when she refused the sexual relationship. The university, under pressure, investigated the incident and eventually dismissed the professor.[63] This case is just one example of a victim trying to hold the perpetrator accountable through media exposure.

Stories like Wang Di's reflect the dysfunction of normative systems. Even if China has legislated against sexual harassment in terms of identification, prevention, and remedies,[64] the predicament remains. The prevention mechanisms on Chinese campuses still prove insufficient. Besides lack of physical evidence and future harm, victims avoid reporting for fear of further trauma as a result of recollection and storytelling during the investigation. Such cases indicate the under-enforcement of the law.[65] Civil plaintiffs often face insuperable substantive and procedural barriers to bringing successful claims for damages. As is the case for Title IX of the Education Amendments of 1972 on U.S. campuses, which covers issues of sexual misconduct in education settings. Its enforcement was hindered by poorly equipped mechanisms in fact-finding, due process norms, disciplinary processes, etc.[66]

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62. Even Shiori Ito, the heroic image that inspired the #MeToo movement in Japan, remained a lightning rod for victim-blaming and misogyny, with critics casting her as a naive young female who had let down her guard. *See*, *e.g.*, Justin MucCurry, *'Editing It Was Like Exposure Therapy': Shiori Ito, the Reluctant Face of Japan's #MeToo Movement*, The Guardian (Oct. 4, 2024, 3:00 EDT), https://www.theguardian.com/film/2024/oct/04/editing-it-was-like-exposure-therapy-shiori-ito-the-reluctant-face-of-japans-metoo-movement [https://perma.cc/AY5H-RJZQ].

63. Zhao Yimeng, *University Fires Professor After Sexual Misconduct Investigation*, CHINA DAILY, (July 22, 2024, 21:29), https://www.chinadaily.com.cn/a/202407/22/WS669e5ea1a31095c51c50f4e0.html [https://perma.cc/D8JE-ALBX].

64. *See, e.g.* (中华人民共和国法典) [CIVIL CODE OF THE PEOPLE'S REPUBLIC OF CHINA] (promulgated by the Nat'l People's Cong., May 28, 2020, effective Jan. 21, 2021), art. 1010.

65. Koh, *supra* note 59, at 91–92; *see also* Fei Guo et al., *Perceiving Sexual Harassment in Chinese Higher Education* (2022) (noting unclear campus reporting structures, insufficient staff training, light penalties for offenders, and broader legal loopholes that weaken China's mechanisms for addressing sexual harassment).

66. *See* Katharine Silbaugh, *Reactive to Proactive: Title IX's Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U.L. REV. 1049, 1050 (2015).

Further, cancel culture represents a progressive form of public opinion which somewhat shapes legal decision-making. For one thing, public opinions, legal development, and judicial practice are intertwined. A form of cancellation less focused on is targeting criminals in news media reports, which has an impact on judges' sentencing to a large extent. There have been loads of examples in China, the country with the largest cyber population.[67] In 2010, for instance, the Yao Jiaxin murder case shocked the internet. A 21-year-old music student known as Yao Jiaxin (药家鑫) from Xi'an, Shaanxi Province ran down a restaurant waitress named Zhang Miao (张妙) while driving. He then left his car and stabbed Zhang to death because he saw her memorizing the number on his license plate. Yao was sentenced to death on April 22, 2011 and executed on June 7, 2011.[68] The media coverage of the incident, as well as the judicial process, caused furious sensation online, which labeled him as "insane," "maniac," "psycho," etc. The public outrage was so alarming that perhaps the court found no reason to spare Yao's life and disregarded the possible factors for pardoning, including Yao's voluntary surrender,[69] his status as an only child,[70] and his identity as a college student.[71] This can be seen as a wave of cancel culture against Yao.

A case like this, with such widespread public outrage, likely made the judges feel that they had to consider public opinion and reaction in order to preserve confidence in the legitimacy of the judicial process. The public's anger at such a crime seems reasonable and may suggest that the more perplexing or outrageous a

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67. *See* Xinhua, *China's Internet Users Surpass 1.1 Billion, Powering Digital Economy and Innovation*, THE STATE COUNCIL INFORMATION OFFICE THE PEOPLE'S REPUBLIC OF CHINA (Jan. 19, 2025), http://english.scio.gov.cn/chinavoices/2025-01/19/content_117673023.html [https://perma.cc/U8TC-8D6Y].

68. *See*, *e.g.*, Oiwan Lam, *China: The Murder Case of Yao Jiaxin,* GLOB. VOICES (Apr. 21 2011), https://globalvoices.org/2011/04/21/china-the-murder-case-of-yao-jiaxin/ [https://perma.cc/ZP9G-YSJE]; Xinhua, *Murderous Driver Yao Jiaxin Executed*, CHINA DAILY, (June 7, 2011), https://www.chinadaily.com.cn/china/2011-06/07/content_12649653.htm [https://perma.cc/N2Q3-ZVQY].

69. (中华人民共和国刑法) [CRIMINAL LAW OF CHINA], (promulgated by the Nat'l People's Cong., July 1, 1979, effective Mar. 14 1997), art. 67.1.

70. 朱苏力 [Zhu Suli], *从药家鑫案看刑罚的殃及效果和罪责自负* [*The Yao Jiaxin Case Reveals the Harmful Effects of Criminal Punishment and the Importance of Personal Responsibility*], 爱思想 [AISIXIANG] (Oct. 10, 2011), https://www.aisixiang.com/data/44908.html [https://perma.cc/SXC2-GUWW].

71. 陈柏峰 [Chen Baifeng], *法治热点案件讨论中的传媒角色——以药家鑫案为例* [*The Role of the Media in Discussions of Hot Legal Cases: Taking the Yao Jiaxin Case as an Example*], 乌有之乡 [UTOPIA], (Aug. 12, 2011), https://www.wyzxwk.com/Article/shidai/2011/08/246069.html [https://perma.cc/S7HE-WZ5Z].

person's conduct is, the stronger people's moral sentiments toward it will be.[72] Hence, in the case of Yao, people would easily condemn his conduct as brutal and barbaric. As noted by Zhu Suli, one of China's most prominent contemporary legal scholars, had the Yao murder case been for the purpose of robbery, the public would probably not have been so outraged.[73] Though Yao's case might be an extreme example, it nevertheless reflects the impact of cancel culture on judicial process.

Lastly, cancel culture has a labeling, or stigmatizing, function.[74] Although the perceived offensive behavior may initially stem from various conditions and causes, once an individual has been labeled as something, they are often influenced by others and their own internalization to negative stereotypes (stigmas).[75] In such a sense, the labeling function of cancel culture is an alternative form of sanction. Often, cancellation produces stigmas because the perceived "triggering" conduct falls outside of the reach of the law. This occurs when the case goes beyond the statute of limitations, lacks evidence, or simply has no statutory basis to seek liabilities. A widely familiar case is the aforementioned story of Amy Cooper, who was fired from her job with an apparently racist video going viral online.[76] She was publicly mocked as "Central Park Karen," with "Karen" being a derogatory slang term typically referring to a white American woman who is perceived as entitled or exceedingly

72. *See* FRIEDRICH NIETZSCHE, DAWN 1, 13 (Brittain Smith trans., Stanford Univ. Press, 2011) ("To the extent that the sense of causality increases, the purview of the moral realm diminishes: for in every case where one has comprehended the necessary effects and has learned to think of them as separate from all chance occurrences and all incidental posteriority (*post hoc*), one has destroyed an immense number of fantastic causalities, which were believed in, and believed to be, foundations of mores - the real world is much smaller than that of fantasy- and each time a bit of anxiety and constraint disappears from the world, so too vanishes each time a bit of respect for the authority of custom."); *see also* Michel Foucault, *About the Concept of the 'Dangerous Individual' in 19th-Century Legal Psychiatry*, 1 INT'L J. L. & PSYCHIATRY 1 (Alain Baudot, Jane Couchman, trans., 1978) (explaining that crimes of "incomprehensible violence" in the 19th century tended to result in intense moral outrage and public demands of punitive intervention).

73. Suli, *supra* note 70, at 4-5.

74. *See* Koh, *supra* note 59, at 117–18 (2022).

75. Jón Gunnar Bernburg, *Labeling Theory*, HANDBOOK ON CRIME AND DEVIANCE 179 (Marvin D. Krohn, et al. eds., 2d ed. 2019).

76. Amir Vera & Laura Ly, *White Woman Who Called Police on a Black Man Bird-Watching in Central Park Has Been Fired*, CNN (May 26, 2020, at 4:21 PM), https://www.cnn.com/2020/05/26/us/central-park-video-dog-video-african-american-trnd [https://perma.cc/XQ9P-T5X3].

demanding.[77] As online shaming prevails in cancel culture, the labeling effect has become more and more persistent and ubiquitous. Bearing this stigma for years, Amy Cooper claimed three years later that she still lived in hiding for fear of personal attacks after her personal information was released online.[78]

The labeling function of cancel culture may also deter hate speech or harmful speech. By labeling hate and harmful speech as possessing an antisocial or deviant nature, people with an inclination to make harmful expressions are more likely to self-censor, i.e. think twice before speaking.[79] According to the confrontation theory by Richard Delgado and Jean Stefanic, hate speech on the internet should be confronted head-on, because cyberspace offers a "fertile breeding ground" for vituperation and contempt, where people are separate from one another and believe they can get away with expressing harsh thoughts or judgments.[80] Moreover, when legislatures and courts are unpromising sources of remediation, popular action proves the most likely channel for redress.[81] According to Delgado and Stefanic, the confrontation can be exercised through, *inter alia*, group condemnation, which is among the most likely actions against speech abusers in practice.[82] This theory echoes the metaphor of "marketplace of ideas" widely attributed to Justice Oliver Wendell Holmes Jr.'s dissenting opinion in *Abrams v. United States*, which suggests that truths and best ideas emerge through free and open competition in public discourse, just as the best products succeed in the competition within a free market.[83]

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77. Helen Lewis, *The Mythology of Karen*, THE ATLANTIC (Aug. 19, 2020) https://www.theatlantic.com/international/archive/2020/08/karen-meme-coronavirus/615355/ [https://perma.cc/Z7MS-FRSR].

78. Except for unemployment, Amy Cooper had constantly received graphic images, death threats, and hate mail. She was also scared to be in the public. *See* Amy Cooper, *I Was Branded the 'Central Park Karen'. I Still Live in Hiding*, NEWSWEEK (Nov. 28, 2023, 11:03), https://www.newsweek.com/i-was-branded-central-park-karen-i-still-live-hiding-1839483 [https://perma.cc/79GJ-NQUA].

79. *See*, *e.g.*, Amalia Álvarez-Benjumea & Fabian Winter, *The Breakdown of Antiracist Norms: A Natural Experiment on Hate Speech After Terrorist Attacks*, 117 PROC. NAT'L ACAD. SCI. 22,800, 22,804 (2020).

80. Richard Delgado & Jean Stefancic, *Hate Speech in Cyberspace*, 49 WAKE FOREST L. REV. 319, 335–39 (2014).

81. *Id.* at 342.

82. *Id.* at 340–43.

83. *See* Abrams v. United States, 250 U.S. 616, 630 (1919).

This article analyzes cancel culture under the theory of the marketplace of ideas in the next section.

Accordingly, cancel culture seems to promote social justice in terms of results. But justice in a democratic society is evaluated not only through results, but also how the results are decided or, in legal language, whether they are rendered through due process.[84] The "mob justice" achieved via cancellations can thus be arbitrary, which challenges democratic principles.[85]

IV. ONLINE CANCEL CULTURE AS FREE SPEECH

As the aforementioned examples suggest, cancel culture as a progressive form of free speech reflects reasonable human senses, but it can go to extremes and lack sensibility.

Participants in cancellations are prone to rash judgments. The public's perception of all the happenings emerging online may not always be the accurate or whole story. The source of information can be a mere excerpt. For instance, Amy Cooper ("Central Park Karen"), in her 2023 open letter begs the audience to understand the whole truth about why she called the police on Christian Cooper, illustrating the context at that moment that she was alone in the secluded area with him and panicked for her safety as a victim of sexual assault in her teenage years.[86] Had the video conveyed such background information, the incident would have appeared much less offensive. However, in this era of "attention economy," since the collective attention span has grown shorter as new information bursts in the cyberspace every day, people today are less likely to "uncancel" the individuals they once targeted.[87]

Further, during the transmission of the triggering offensive information, the media, for the purpose of accumulating attention, may frame the individual in a biased, twisted, or inauthentic manner. Similarly, the dynamics between the audience and the media can inflame the public even further. In the above Yao Jiaxin

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84. *See* Dorina Pătrunsu, *Is the Public Moral Instigation Against Inappropriate Free Speech Moral? Two Arguments Against the Cancel Culture*, 3 ATHENA: CRITICAL INQUIRIES IN L., PHIL. & GLOBALIZATION (2023).

85. *Id.* at 38.

86. Amy Cooper, *I Was Branded the 'Central Park Karen'. I Still Live in Hiding*, NEWSWEEK (Nov. 28, 2023, at 11:03 AM), https://www.newsweek.com/i-was-branded-central-park-karen-i-still-live-hiding-1839483 [https://perma.cc/79GJ-NQUA].

87. *See, e.g.,* Giovanni Luca Ciampaglia et al., *The Production of Information in the Attention Economy*, 5 SCI. REPORTS 9452 (2015).

murder case, for instance, the public rage was not only kindled by influential figures' harsh comments on this horrible incident,[88] but also found to have been intensified by media discussion which a large portion of netizens believed to be biased towards the murderer for "framing" him as a "good son" at home.[89] In turn, the individuals may face consequences disproportionate to the offensive mistakes, especially with the enduring labeling effects which virtually leave an individual no chance to reinvent themselves.

The public's sentiments can also be exacerbated by crowd psychology. According to Gustave Le Bon's classical theory and the postmodern scholarly examination, the cyber "crowd" can be an effectively synchronized and de-individualized gathering which is less adapted to reasoning and quick to act, which is characterized by people's inclination to rely on the media's stance as well as user-generated comments and the predominant mindset of "those accused must apologize immediately."[90] Such a "crowd" state of mind is found to be motivated and sharpened by people's fundamental fear of isolation.[91]

Given these circumstances, cancel culture, rather than free speech itself, is more about limitations of free speech[92] and instinctively cathartic activities. The "mob" speech in cancel culture constitutes a kind of hegemony in the competition

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88. *See, e.g.*, *Kong Qingdong (孔庆东), Yaojiaxin An Ershen Beihou Heie Shili Hen Changkuang* (药家鑫案二审背后黑恶势力很猖狂) [Behind the Second Trial of The Yao Jiaxin Case, Evil Forces Were Running Rampant], CHINA DIGIT. TIMES (May 20, 2011) https://chinadigitaltimes.net/chinese/154191.html [https://perma.cc/6UTL-G33F].

89. 陈柏峰 [Chen Baifeng], 法治热点案件讨论中的传媒角色——以药家鑫案为例 [*The Role of the Media in Discussions of Hot Legal Cases: Taking the Yao Jiaxin Case as an Example*], 乌有之乡 [Utopia], (Aug. 12, 2011), https://www.wyzxwk.com/Article/shidai/2011/08/246069.html [https://perma.cc/S7HE-WZ5Z].

90. Thomas S. Mueller, *Blame, then Shame? Psychological Predictors in Cancel Culture Behavior*, 11 SOC. SCI. J. 1, 11 (July 9, 2021); *see generally* German Neubaum & Nicole C. Kr. . .mer, *Monitoring the Opinion of the Crowd: Psychological Mechanisms Underlying Public Opinion Perceptions on Social Media*, 20 MEDIA PSYCH. 502 (2017) (putting forward the theory that an individual's perception of the "opinion climate" has the effect of shifting their own opinion to match the "prevailing norms and opinions" which culminates in a vanishing of deviant opinions from the public scene); *see generally* Gustave Le Bon, *The Crowd: A Study of the Popular Mind* xi, 2 (Viking, 1960) (detailing characteristics of the "crowd" including "[t]he disappearance of the conscious personality, the turning of feelings and thoughts in a definite direction" and the tendency to turn suggestions into immediate action).

91. Elisabeth Noelle-Neumann, *The Spiral of Silence: Public Opinion, Our Social Skin* 35–38 (2d ed. 1993).

92. Dorina Pătrunsu, *Is the Public Moral Instigation Against Inappropriate Free Speech Moral? Two Arguments Against the Cancel Culture*, 3 ATHENA: CRITICAL INQUIRIES IN L., PHIL. & GLOBALIZATION (2023).

of the marketplace of ideas, stifling the participation of less favored expressions. Hence, there is a need to reflect on whether in the context of cancel culture, the "marketplace of ideas," has developed into so hysterical a stage that it has to be restrained. Specifically, the question is, to avoid unjust results from cancellations, whether the crowd speech can be limited by legal power with any prior or ongoing restraint. This section takes on a legal perspective to examine the applicability of existing speech regulations and possible remedies for canceled individuals. Although this article does not focus on a specific jurisdiction, the theory of "marketplace of ideas" is founded on U.S. constitutional law and this article believes that this theory is representative of social media and public fora around the world. Therefore, this article examines the "marketplace of ideas" through examples across jurisdictions.

A. The Viability of the Marketplace of Ideas in the Context of Cyber Cancel Culture

As analyzed above, cancel culture is primarily an activity of free speech. The clashes among progressive voices, right-wing viewpoints, deviant expressions, etc. constitute competition in the "marketplace of ideas" (hereinafter "the marketplace theory"). However, this most influential theory in modern First Amendment Law was born in a time with no internet. Throughout the century, the technologies that sustain the "marketplace" and the cultures in it have evolved and been amplified tremendously. This is all the more reason to examine whether it remains viable for the time being, especially in contemporary cases of cancel culture.

As mentioned above, Justice Oliver Wendell Holmes Jr. raised the metaphor of "marketplace of ideas" in his dissenting opinion for *Abrams v. United States*. Justice Holmes proposed that rather than censoring and sanctioning the "expression of opinions that we loathe," a democratic society should allow ideas to test themselves in "free trade" and win acceptance in the "market competition."[93] He advocated that we protect the "free trade in ideas" as much as possible, unless the expressions "so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[94] In other words, the only exception to the "free trade of ideas" is when free speech immediately interferes with the law's urgent purposes in an imminent manner.

Perhaps the crux of the matter is whether the marketplace theory is viable in responding to algorithmic social media. In an era of "cheap speech," ever-evolving

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

94. *Id.*

technologies have drastically reduced the cost of generating and disseminating speech, which allow equal opportunities for both rich and poor to participate in the marketplace of ideas.[95] This revolution, as prudently predicted by Eugene Volokh three decades ago, should have democratized and diversified the marketplace of ideas, so that more and more speakers are able to make themselves widely heard.[96] In such an idealized vision, the marketplace of ideas is expected to work better than it ever did.

Unfortunately, this ideal is now facing immense challenges, particularly because the algorithms of social networking platforms have the power to manipulate people's cognitive processes in making judgments and choices.[97] In 1995, Volokh accurately foresaw people's greater control over the information served to them.[98] He believed, in disagreement with many, that people in the new media era would do a better job in informing themselves than the intermediaries (publishers and broadcasters), of which people used to be "a captive audience."[99] Today, his optimism is called into question with the advent of algorithms. The technique of algorithms can be explained by the popular metaphor that someone "knows how to push your buttons."[100] Through algorithms, a platform tracks users' interests, gets familiar with users' habits, builds users' profiles, and prioritizes relevant content. Specifically, the algorithmic technique has the so-called "microtargeting" ability to aim well-tailored content at a small number of users.[101] More subtly, seemingly trivial elements like the phrasing of the headlines and placement of advertisements adjacent to news reports have been found to help motivate or discourage individuals' decision-making.[102] Instead of persuasive influence, these elements are

95. Eugene Volokh, *Cheap Speech and What it Will Do*, 104 YALE L.J. 1805, 1847 (1995).

96. *Id.*

97. Robert L. Kerr, *From Holmes to Zuckerberg: Keeping Marketplace-of-Ideas Theory Viable in the Age of Algorithms*, 24 COMMC'N L. & POL'Y 477, 489 (2019).

98. Volokh, *supra* note 95, at 1849.

99. *Id.*

100. *Id.*; Kerr, *supra* note 97, at 489.

101. *See generally* Philipp Lorenz-Spreen et al., *Boosting People's Ability to Detect Microtargeted Advertising*, SCI. REP. 15541 (2021) (describing that companies with an online presence are able to gather personal information on its users through specially tailored messages in the form of exploitative "microtargeting").

102. *See*, *e.g.*, Jaana Simola et al., *Attention and Memory for Newspaper Advertisements: Effects of Ad-Editorial Congruency and Location*, 27 APPL. COGN. PSYCH. 429, 430–31, 438–40

"extensions" to users' being that structure their connection to others and change the way they conceive of the world either inside or outside themselves.[103] Some scholars warn of the effects of people's daily check of social media, which include reinforcing beliefs, limiting exposure to diversified viewpoints, and, in turn, harming democracy.[104]

An extreme example is how the use of Facebook has contributed to the persecution of the Rohingya in Myanmar.[105] Amnesty International reported that Facebook played a prominent role in intensifying the anti-Muslim and anti-Rohingya sentiment of in Myanmar since 2012.[106] During this process, Meta's algorithms fueled such violence by, for example, auto-playing the videos that conveyed certain ideologies, keeping users glued not only to their screens but also to their beliefs.[107] In essence, people have more control over the information they consume, but are not actually better informed because such control is being subtly manipulated.

Furthermore, the flow of information seems less diversified than the sources of information. In other words, "equal opportunities" for speakers do promote diversity in theory, but such diversity is hindered in the course of dissemination. In the judicial history of the U.S. First Amendment, the Supreme Court has consistently

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(2013); Florian Kutzner et al., *Effects of Verbatim Repetition of the Headline Message on the Proceed Button on Click-Through Rates in Online Retail*, FRONTIERS IN PSYCH. 2 (2024).

103. JARON LANIER, YOU ARE NOT A GADGET: A MANIFESTO 9 (2010); *see also* ROGER MCNAMEE, ZUCKED: WAKING UP TO THE FACEBOOK CATASTROPHE 277 (2019) (discussing the impact of attention manipulation by isolating Facebook and Google users in "filter and preference bubbles" leading to real-life "behavior modification").

104. MCNAMEE, *supra* note 103, at 277; *see also* Georgette Jasen, *5 Questions: Law Prof. Tim Wu on the First Amend., Social Media, and Net Neutrality*, COLUM. NEWS (Dec. 20, 2017), https://news.columbia.edu/news/5-questions-law-prof-tim-wu-first-amendment-social-media-and-net-neutrality [https://perma.cc/26SU-4K2W] (discussing the First Amednment's authority and whether social media and/or the internet can be regulated).

105. *See generally* Jennifer Whitten-Woodring et al., *Poison If You Don't Know How To Use It: Facebook, Democracy, and Human Rights in Myan.*, 25 THE INT'L J. OF PRESS/POL. 407 (2020) (explaining that Facebook contributed to a proliferation of extreme speech and disinformation targeting the Rohingya and this rise correlated with increased violence and persecution).

106. *Myanmar: The Social Atrocity: Meta and the Right to Remedy for the Rohingya,* Amnesty Int'l. (Sept. 29, 2022), https://www.amnesty.org/en/documents/asa16/5933/2022/en/ [https://perma.cc/LPM2-LU2D].

107. *Id.* at 46.

emphasized the importance in protecting various forms of false expressions.[108] Given such tolerance, incomplete and biased information in cancel culture undoubtedly enjoys great legal leniency. While raising the uncertainty about how the protected speech of extremism and falsity in the new media era will develop, Volokh demonstrates in his 1995 article that what's more dangerous is "content regulation."[109] Such danger can be exacerbated by the aforementioned problem that people will have greater autonomy in deciding their own feed of content.[110] Volokh fails to define the notion of "content regulation," but in hindsight, the "content regulation" seems to have been carried out by platforms rather than governments. One evident assumption of marketplace theory—according to Justice Holmes' logic—is that the general public would be able to discern truths from misinformation when both are accessible. Yet, more evidence shows that algorithmic social media have leveraged humans' innate appetite for falsehood. [111] In the context of cancel culture, such appetite can extend to twisted, biased, and slanted information. People have increasingly indulged in "filter bubbles" where they are exposed to opinions they agree with or believe and are isolated from opposing or diverse information.[112] According to research, false and slanted news in the algorithmic era spreads considerably faster and more broadly than true news.[113] Studies also show that selectively congenial media exposure contributes to higher polarization.[114] Hence,

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108. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964); *see also* United States v. Alvarez, 567 U.S. 709, 716 (2012) (it is unconstitutional to criminalize falsely claiming military honors).

109. Volokh, *supra* note 95, at 1849.

110. *Id.* at 1849–50.

111. *See generally* Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCI. 1146 (2018) (noting that individuals participating in the authors' study routinely spread falsehoods which diffused rapidly reaching up to 100,000 people while the truth rarely reached 1,000 people).

112. *See generally* ELI PRAISER, THE FILTER BUDDLE: WHAT THE INTERNET IS HIDING FROM YOU (2011) (defining a "filter bubble" as a "new generation of Internet filters" that observes online user patterns to generate a personalized user experience); *see also* Eytan Bakshy et al., *Exposure to Ideologically Diverse News and Opinion on Facebook*, 348 SCI. 1130 (2015) (highlighting that echo-chamber-like "filter bubbles" or online content which "is selected by algorithms according to a viewer's previous behaviors" lacks content which challenges user attitudes).

113. *See* Vosoughi, et al., *supra* note 111.

114. *See, e.g.,* Natalie Jomini Stroud, *Polarization and Partisan Selective Exposure*, 60 J. OF COMMC'N 556 (2010).

speech of biases and falsity is not triumphed by truths. Instead, it has gained even greater momentum and exerted stronger impact on the public. Therefore, the nub of the problem is that people nowadays have a weaker ability to sort out the truths from falsity and biases and are more inclined to cling to misbeliefs. This is probably the fundamental threat to the objectives of the marketplace of ideas.

Some eminent voices thus call for attention to the impact of social media, demonstrating that the democratic processes and the marketplace of ideas is "under attack."[115] Legal scholars, in particular, point out that overwhelming social and technological changes have made it increasingly difficult for First Amendment practitioners and scholars to solve communication and information issues nowadays.[116] In the legal debate over algorithms' role in the contemporary marketplace of ideas, Tim Wu argues that platforms as communication tools which basically serve as information carriers, generally do not enjoy First Amendment protection as speech conducts do.[117] On the contrary, Stuart M. Benjamin believes that algorithm-based outputs of speech are still, for First Amendment purposes, observing that the distinction between algorithmic and purely human expressions can be unreasonably arbitrary, since the technology has been extensively integrated into our everyday communication processes.[118] Regarding this debate, the Supreme Court has not yet articulated a clear framework. In the recent controversial TikTok case, the Supreme Court still makes no effort to answer this question by assuming without deciding that the concerned regulation targeting a foreign adversary's control over a communication platform is subject to First Amendment scrutiny.[119] It seems that the system has yet no intention to regulate algorithmic practices in the sphere of the First Amendment.

In furtherance of the marketplace theory, some invoke Justice Brandeis' influential viewpoint that the remedy for averting falsehood and fallacies is "more speech" rather than "enforced silence," believing that more speech is necessary to alter microtargeting, because algorithmic practices are stifling diversity so that ideas

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115. *See* Jasen, *supra* note 104, at 2.

116. *See* Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 919 (2010).

117. Tim Wu, *How Twitter Killed the First Amendment*, N.Y. TIMES (Oct. 27, 2017), https://www.nytimes.com/2017/10/27/opinion/twitter-first-amendment.html [https://perma.cc/TC3M-8SM6].

118. Stuart Minor Benjamin, *Debate: Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1447, 1493 (2013).

119. TikTok Inc. v. Garland, 604 U.S. 56, 80 (2025).

in the marketplace lose vigor to compete against each other.[120] This is also the case of cancel culture. Online discourse of political correctness and wokeness, fueled by algorithms, can quickly form hegemonies against minority voices from either prominent figures or marginalized individuals. According to the survey of adults in the U.S., the U.K., France, and Germany conducted by the Pew Research Center, which has long studied the tension between free speech and "feeling safe online," a majority of Americans (57%) said people today are too easily offended by others' expressions, while 40% said people nowadays should be prudent about what they say to avoid offending others.[121] Hence, it is evident that cancellation discourse has chilling effects on people's freedom of expression, thus affecting the diverse ecology of the marketplace of ideas to some extent. However, it is still uncertain if "more speech" is an effective solution to issues of either algorithm or cancel culture, because the input of a larger quantity does not guarantee that it has the qualitative power to alter the algorithmic effects or squeeze excessive canceling discourses.

There have been critiques of the marketplace theory over the years, especially when the online marketplace of ideas today has been besieged by the escalated polarization because of the widespread dissemination of false content, which renders Holmes' theory less effective.[122] Nevertheless, a holistic view of the essence of free speech and the Supreme Court's body of First Amendment decisions suggests that the marketplace of ideas is irreversible—any imposed regulation will be detrimental.

There is intuitively a need to take the "marketplace" literally from a socioeconomic sense, as the Supreme Court's rhetoric of First Amendment law showed more and more resemblance to that of economic competition. Just as Justice Brennan demonstrated in *Lamont v. Postmaster Gen. of U. S.* that it is a fundamental right to receive publications; otherwise the marketplace of ideas would be barren with sellers being the only participants.[123] Such conceptualization of the marketplace of ideas is reminiscent of the most classic theories of "free market" or capitalism, which are often attributed to Adam Smith's classic magnum opus *An Inquiry into the Nature and Causes of the Wealth of Nations* (hereinafter "The Wealth of

120. Kerr, *supra* note 97, at 489; Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

121. Katherine Schaeffer, *How Americans Feel About 'Cancel Culture' and Offensive Speech in 6 Charts*, PEW RESEARCH CENTER (Aug. 17, 2021), https://www.pewresearch.org/short-reads/2021/08/17/how-americans-feel-about-cancel-culture-and-offensive-speech-in-6-charts/ [https://perma.cc/T536-M9PW].

122. Dawn Carla Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1519, 1521 (2019).

123. *Id.*; Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965).

Nations"), in which the concept of "invisible hand" has reportedly been interpreted out of context to promote the laissez-faire ideology. Rather than wholly laissez-faire, Smith particularly emphasizes similar opportunities for all competitors in the market, cautioning that the strongest competitors can run against social benefits and freedom in market competition.[124] To promote fair competition and maintain a free market, he stressed that a justice system was indispensable to protect all social members to the utmost.[125] For this reason, antitrust law was developed in the late 19th century.[126] The next part attempts to employ an antitrust approach to cancel culture within the marketplace of ideas.

B. Antitrust Review of the Marketplace of Ideas

1. Precedents on Antitrust Review of the Marketplace of Ideas

This article proposes to apply antitrust law to competition in the online marketplace of ideas, which primarily takes place on social media platforms today. At the inception of antitrust law, legislators in the pursuit of decentralizing market power believed that a certain amount of market inefficiency had to be sacrificed.[127] In addition to market efficiency, antitrust law is believed to have been designed to support democratic advancement and individual development.[128] Just as Justice Brandeis was concerned about the impact of economic powers on democracy after witnessing how trusts tried to influence the legislature, he stressed that trusts had not only economic interests, but political motives in maintaining their market power.[129] With the social and political purposes identified, the antitrust discussion of free speech, at least conceptually, is not fundamentally unviable.

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124. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 278 (Edwin Cannan & George J. Stigler eds., Univ. of Chi. Press 2008) (1776).

125. *See, e.g.*, JERRY Z. MULLER, ADAM SMITH IN HIS TIME AND OURS: DESIGNING THE DECENT SOCIETY 19 (Princeton University Press 1995) (1993).

126. *See generally* Barry E. Hawk, *Antitrust in History*, 63 THE ANTITRUST BULL 275, 276 (2018) (analyzing historical antitrust practices and subsequent passage of the Sherman Act of 1890).

127. *See* LOUIS BRANDEIS, THE CURSE OF BIGNESS 105 (1934).

128. Jan Polánski, *The Marketplace of Ideas and EU Competition Law: Can Antitrust Be Used to Protect the Freedom of Speech?, YSEC Yearbook of Socio-Economic Constitutions 2021*, 203 (Hidelang, S, Moberg A. eds. 2021).

129. GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION 1900-1932 43 (2009).

The U.S. Supreme Court has determined that competition-related efficiencies yield to certain societal benefits in many cases. Justice Warren, for example, in *Brown Shoe Co. v. United States*, observed Congress' intent to foster competition by protecting fragmented industries and markets, even though it could result in occasional higher costs.[130] The Court has also recognized the necessary accommodation to be made between policies of labor and antitrust.[131] This is especially the case in the marketplace of ideas, which thrives as the diversity of ideas persists. The world would be unimaginable if every newspaper, website, or media account carries the same stories, comments, and visuals. Consumers will pay less for information, and they will receive less information as well. In the age of social networks, algorithmic practices may be able to consolidate information of the same storytelling or ideology, causing dramatic social sensation. The marketplace of ideas thus needs decentralization much more than an economic market does.

The antitrust review of the marketplace of ideas can find its foundation in the legal treatment of media mergers.[132] As early as 1945 in *Associated Press v. United States*, a landmark U.S. antitrust case involving a major news agency known as Associated Press (the "AP") was accused of engaging in anti-competitive activities. The AP's policies restricted member organizations from sharing news content with nonmembers and ruled that they subscribe to the AP content only. Such practice withheld news content from minor news organizations, harming competition. The Supreme Court eventually ruled that the AP violated the Sherman Antitrust Act by so doing, concluding that the AP's policies restrained trade because they prohibited news outlets. The ruling of this case concerns the economic press market but does not touch the marketplace of ideas. In his concurring opinion, Justice Frankfurter expressed his concern beyond the economic facet, highlighting that the press business is more than a commercial enterprise, it is related to the promotion of truth, which is indispensable to a democratic society.[133] Justice Frankfurter also quotes Judge Learned Hand, who demonstrated the newspaper industry "serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible," in alignment with the First Amendment which "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative

130. Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

131. *See, e.g.*, Connell Constr. Co. v. Plumbers & Steamfitters Loc. Union No. 100, 421 U.S. 616, 636 (1975).

132. Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L. J. 249, 252–53 (2001).

133. Associated Press et al. v. United States, 326 U.S. 1, 28 (1945).

selection."[134] This quote suggests the importance of diversity in not only the press industry but also the marketplace of ideas as a whole, which is the very interest the pure economic analysis on AP failed to cover. However, Justice Frankfurter went no further to link antitrust review of media mergers and maintaining diversity in the marketplace of ideas.

Frankfurter's concerns were years later echoed by, Robert Pitofsky, former chairman of the U.S. Federal Trade Commission. In an interview on media mergers, Pitofsky stated that "antitrust is more than economics," and that the treatment of competition issues in newspaper business, publication, and entertainment should be extra careful as contrasted with problems in other industries such as "cosmetics, or lumber, or coal mining," because the former involves implications of democratic values rather than consumers' pockets.[135] However, the dissenting judges feared that governmental intervention as upheld by the majority, would probably do more harm to the First Amendment, especially because Justice Murphy pointed out the risk that the Sherman Act would be used as a vehicle for affirmative governmental intervention in the dissemination of information, signifying the beginning of "shackling of the press."[136]

Antitrust review of the marketplace was later found in *Turner Broadcasting System v. FCC*, where the Turner Broadcasting System (TBS) challenged the "must-carry provisions" of the 1992 Cable Television Consumer Protection and Competition Act. The provisions required cable television companies to carry local broadcast channels. TBS contended that the provisions violated the First Amendment by imposing such a duty on cable television companies. The Court upheld the provisions, concluding that assuring the public of access to "a multiplicity of information sources" is "a governmental purpose of the highest order" in alignment with the core values of the First Amendment.[137]

Specifically in the cable industry, cable companies possess the power to eliminate certain TV stations from their networking, thus precluding their subscribers from accessing the channels excluded.[138] To preserve the "multiplicity of information sources," the First Amendment should not allow for "unlimited

134. *Id.*

135. Alec Klein, *A Hard Look at Media Mergers*, WASH. POST (Nov. 28, 2000), https://www.washingtonpost.com/archive/business/2000/11/29/a-hard-look-at-media-mergers/d8380c2d-92ee-4b1b-8ffd-f43893ab0055/ [https://perma.cc/9DTR-LCTQ].

136. *Associated Press et al.*, 326 U.S. at 48 (Roberts, J., dissenting).

137. *Turner Broad. Sys., Inc.*, v. FCC, 512 U.S. 622, 663 (1994).

138. *Id.* at 656.

private censorship,"[139] which can be exemplified by cable operators' exclusion or selection of television stations. The plurality, rather than the traditional antitrust rationale, underscored the importance of television broadcasting as an essential public source of information.[140] Dissenting justices agreed on the antitrust approach, but disagreed as to the majority's reasoning which failed to identify an actual antitrust jury.[141] Moreover, they believed that rather than private capital, the government itself posed the major threat to the marketplace of ideas.[142]

Apart from the seminal cases above, an antitrust review of the marketplace of ideas under the First Amendment has also occurred in other areas such as telecommunication services. A quintessential example is the break-up of the Bell System in 1982. In 1974, the Department of Justice filed an antitrust complaint alleging that the Bell System had monopolized the manufacture of telecommunications equipment and long-distance service by virtue of its control over communications infrastructure in the U.S.[143] In the trial, AT&T (then parent company of the Bell System) and The FTC concluded a tentative settlement, which stipulated, *inter alia*, that AT&T sell its regional Bell telephone operating companies, that these companies provide connections non-discriminatorily, and that these companies refrain from offering only on-local telecommunication services or products.[144] The decree was finalized with some modifications ordered by the district court, including precluding AT&T from engaging in electronic publication until the risk of its dominance in this field diminished.[145] Because the court was concerned that AT&T would stifle other electronic publishers' efforts and obtain a monopoly over news content in more general terms.[146] In particular, Judge Greene

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139. *Id.* at 663, 669; *see* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 392 (1969).

140. *See Turner Broad. Sys., Inc.* v. FCC, 520 U.S. 180, 194 (1997).

141. *Turner Broad. Sys., Inc.*, 512 U.S. at 683 (1994) (O'Connor, J., concurring in part and dissenting in part, joined by Scalia & Ginsburg, JJ.).

142. *Id.* at 685.

143. DAVID FRUM, HOW WE GOT HERE: THE 70S, 327 (2000); *Department of Justice Filed an Antitrust Suit Charging American Telephone & Telegraph with Monopolizing Telecommunications Service and Equipment*, U.S. Dep't of Just., (Nov. 20, 1974), https://www.justice.gov/archive/atr/public/press_releases/1974/338834.pdf [https://perma.cc/MLW3-FNYE].

144. U.S. v. AT&T Co., 552 F. Supp. 131, 224 (D.D.C. 1982).

145. *Id.* at 225.

146. *Id.* at 223–24.

demonstrated the relentless trend toward consolidation in media control and ownership, which had caused the disappearance of diversity. Notably, Judge Greene indicated that the speedy and convenient electronic publishing would someday surpass the traditional journalism, which would allow one to exert tremendous influence on news service across the nation.[147] However, the original text of the opinion does not suggest whether Judge Greene based this conclusion on the then-effective Horizontal Merger Guidelines which emphasized evaluating competition within a narrowly defined "market" of price competition.[148]

A recent and relevant case is *Federal Trade Commission v. Meta Platforms, Inc.*, an ongoing antitrust lawsuit brought by the Federal Trade Commission (FTC) against Meta Platforms alleging Meta accumulated monopoly power through anti-competitive mergers, with the focus on its acquisitions of two former competitors, WhatsApp and Instagram.[149] But nowhere in FTC's allegations did it raise concerns related to the marketplace of ideas in general or people's source of information in particular. However, it did discuss the manifestation of monopoly power in reduced non-price benefits of the consumers such as reduced product quality by invoking, *inter alia*, the then effective 2010 Horizontal Merger Guidelines.[150] The consumer interests the FTC referred to included benefits from additional innovation of the platforms, quality improvements, and consumer choice.[151] "Consumer choice" means users ability to select a networking provider that better suits their preferences regarding the nature or the amount of ads, the quality of data protection, etc.[152] Such reasoning can apparently be articulated within the framework of the marketplace of ideas; for example, the enhanced market power of Meta will deprive consumers of

147. *Id.* at 184.

148. Stucke & Grunes, *supra* note 132, at 270.

149. *FTC Sues Facebook for Illegal Monopolization*, FED. TRADE COMM'N. (Dec. 9, 2020),

https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization [https://perma.cc/X5Z6-BJR9].

150. Plaintiff FTC's Memorandum of Law in Opposition to Defendant Facebook, Inc.'s Motion to Dismiss at 7, *State of New York v. Facebook, Inc.*, No. 1:20-cv-03589 (JEB) (D.D.C. Apr. 7, 2021).

151. Complaint for Injunctive and Other Equitable Relief at 48, FTC v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. Jan. 13, 2021).

152. *Id.*

the availability to choose preferable networking providers, thus restraining the public from being informed by plural sources—FTC did not make it this far.

In fact, the Bureau of Competition of FTC had already launched a task force to monitor market-leading online platforms before its action against Meta, but its main focus does not seem to go beyond price competition.[153] In recent years, FTC started to attach greater importance to "preserving online innovation and free speech" by, for instance, calling for reform of Section 230 of the Communications Decency Act (CDA) (47 U.S.C. § 230), which provides legal immunity to online platforms from liabilities arising out of content posted by their users.[154] However, FTC recommends that federal antitrust claims be uncovered by Section 230 immunity because the liabilities on harm to competition and on third-party speech are intrinsically different.[155] Therefore, it is not yet certain whether the mergers of social media should be subject to an antitrust review within the marketplace of ideas.

The precedents above (except the ongoing *Meta Platforms* case) suggest that the marketplace of ideas has been within the ambit of antitrust review. Analogies can well be drawn between these precedents and the case of contemporary cancel culture at hand. First and foremost, the social network platforms are not substantially distinct from, but basically an evolved form, of media or technology concerned in those precedents, because in essence, they are all providers of communication services. Whoever the information generators were and are, they have strong command in deciding the content to transmit. Such practices are further facilitated by the delicate utilization of technologies. Besides mere information dissemination, social networks today are capable of creating an ecological system for the development and flow of information and proactively participate in it by selectively adjusting the information flow and identifying the right audience. More importantly, Associate Press in 1945, AT&T in 1974, and social network companies today such as Meta today were/are each in a dominant position in their own fields. That position allowed/allows them to exercise certain monopoly in determining the public's access to information and enjoy the public dependence for information supply, thus

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153. *See FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets,* FED. TRADE COMM'N. (Feb. 26, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology-markets [https://perma.cc/T6VP-JC24]; *Justice Department Reviewing the Practices of Market-Leading Online Platforms*, U.S. DEP'T OF JUST. (July 23, 2019), https://www.justice.gov/opalpr/justice-department-reviewing-practices-marketleading-online-platforms [https://perma.cc/D5WY-5F87].

154. *Justice Department Issues Recommendations for Section 230 Reform*, U.S. DEP'T OF JUST. (Feb. 5, 2025), https://www.justice.gov/archives/opa/pr/justice-department-issues-recommendations-section-230-reform [https://perma.cc/N553-Q62E].

155. *Id.*

affecting the diversity in the marketplace of ideas, the central values of the First Amendment. Specifically, as Congress has already been concerned about the dominant legacy media, social network companies may "slant" information to their own inclinations and limit or block channels for unpopular or unorthodox speech.[156] This can be achieved through content moderation, recommendation systems, and invisible algorithmic operations.[157]

It should also be noted that "diversity" invoked in the precedents regarding cancel culture's alignment with the First Amendment's concern for diversity and viewpoints. In other words, the "multitude of tongues," the guarantee of the public's access to "a multiplicity of information sources," the call for decentralization of media ownership and control, and the diversified voices and nonhomogeneous serving of information in algorithmic platforms serve the same interest. They all lead to the First Amendment's core principle: freedom. Just as Justice Brandeis wrote, it is of the spirit of the Constitution since its birth that people enjoy liberty "both as an end and as a means."[158] People's freedom to think and speak is "indispensable to the discovery and spread of political truth," defeating "the dissemination of noxious doctrine."[159] The greatest threat to such freedom is "an inert people."[160]

2. Concerns Regarding Governmental Interference in Free Speech

There are still concerns to be addressed in reviewing the marketplace of ideas within antitrust law. The primary concern is the disturbance of governmental intervention as raised in both *Associated Press* and *AT&T* by dissenting Justices.[161]

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156. S. REP. No. 102–92, at 32–33 (1991), 1992 U.S.C.C.A.N. at 1165–66.

157. *See generally* Hibby Thach et al., *(In)visible Moderation: A Digital Ethnography of Marginalized Users and Content Moderation on Twitch and Reddit*, 26 NEW MEDIA & SOC'Y 4034, 3–4 (2024) (describing content moderation as a silencing tool including "shadowbanning" which makes "users' content invisible to other users without removing it entirely"); Jiang Shan, Ronald E. Robertson & Christo Wilson, *Reasoning about political bias in content moderation*, 34 PROC. OF THE AAAI CONF. ON A.I. 13669, 13669–72 (2020), https://ojs.aaai.org/index.php/AAAI/article/view/7117 [https://doi.org/10.1609/aaai.v34i09.7117]; Xu Jincheng, *Analysis of social media algorithm recommendation system*, 1 STUD. IN SOC. SCI. & HUM. 57, 57–59 (2022).

158. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

159. *Id.*

160. *Id.*

161. *See Associated Press et al.*, 326 U.S. at 49–50, (Murphy, J., dissenting); *see also Turner Broad. Sys., Inc.*, 512 U.S. at 685 (O'Connor, Scalia, Ginsburg & Thomas JJ. concurring in part and dissenting in part).

As the *Associated Press* case marks the Court's first-time use of the Sherman Act for governmental intervention in the realm of information dissemination, Justice Murphy was deeply concerned and warned against authorization for unjustified affirmative interference with information distribution.[162] Dissenting Justices in *AT&T* opined that the First Amendment in contemporary understanding rests on the premise that government power, rather than private power, is the main menace to free expression, and that consequently, the First Amendment sets substantial limitations on the government even when it makes efforts to "serve concededly praiseworthy goals."[163] In sum, dissenting Justices in both cases viewed antitrust law and First Amendment law as inherently incompatible due to the different degrees of legitimacy for affirmative interference.

In response to dissenting concerns, there are probably some gaps to fill in before concluding, *inter alia*, specific questions as to whether or not certain practices constitute "speech." Answering such questions will help justify the government's affirmative intervention in the marketplace of ideas under antitrust law. As for online cancel culture, such queries also concern a crucial premise for the antitrust approach discussed herein: the platforms' operations and moderation are not "speech" protected under the First Amendment. Hence, the platforms may not invoke the First Amendment in defense. Currently, it remains controversial whether the platform's operational practices such as the application of algorithms and the listing of trending topics can constitute First Amendment "speech." The Supreme Court chose not to delve into this question in the most recent TikTok case, though it was an appropriate opportunity for the Court to address it.[164] Relevant debates emerged around 2016 when U.S. Senator, John Thune, asked Facebook Chairman, Mark Zuckerberg, to respond to reports alleging Facebook employees "actively suppressed" news on "topics of interest" to "politically conservative users" on the platform.[165] Presumably, such practices can also be carried out via algorithms. There were commentators claiming that Facebook is analogous to newspapers, and that some of its features such as trending topics akin to editorial decisions.[166] The editorial

162. *Associated Press et al.,* 326 U.S. at 51–53 (Murphy, J., dissenting).

163. *Turner Broad. Sys., Inc.*, 512 U.S. at 685 (O'Connor, Scalia, Ginsburg & Thomas JJ. concurring in part and dissenting in part).

164. *See TikTok,* 604 U.S. at 78–79.

165. *Thune Seeks Answers from Facebook on Political Manipulation Allegations,* U.S. S. COMM. ON COM., SCI., & TRANSP. (2016).

166. *See, e.g.,* Jeff John Roberts, *Like it or Not, Facebook Has the Right to Choose Your News*, FORTUNE (May 10, 2016), http://fortune.com/2016/05/10/facebook-first-amendment [https://perma.cc/P9H4-KTST]; *see also* Hope King, *Is Facebook Protected Under the First Amendment?*, CNN (May 12, 2016), https://money.cnn.com/2016/05/12/media/facebook-first-

analogy seems to have been true until today.[167] Thus, governmental review of such issues can be constitutionally problematic.

The editorial analogy has been a strong argument wielded by tech companies in litigation, and most courts have been open to it.[168] Existing cases involving search engine companies have revealed the rationale for the viability of such an analogy. For instance, in *Zhang v. Baidu.com, Inc.*, some self-claimed "promoters of democracy in China" (the plaintiffs) claimed that Baidu (the defendant), the mainstream Chinese search engine, actively removed their publicity web pages from the search results in the U.S. due to the pressure from the Chinese government, and that Baidu in so doing violated their freedom of speech under the First Amendment.[169] In defense, Baidu claimed that its listing decisions were speech protected under the First Amendment.[170] The district court ruled in favor of Baidu with references to precedents such as *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* and *Miami Herald Publishing Co. v. Tornillo*.[171] *Tornillo* involves a statute requiring newspapers to provide political candidates with a "right of reply" to critical editorials.[172] The Supreme Court found the statute unconstitutional. In *Hurley*, the Supreme Court ruled that ordering a parade organizer to allow LGBTQ groups' participation in the parade means compelling the parade organizer to speak, which is unconstitutional.[173] By making analogies with the two precedents and the case at hand, the district court considered Baidu an information organizer whose judgments on the sites to list were protected "speech,"

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amendment/index.html [https://perma.cc/4UU7-DDXT] (pointing out that the Facebook "Trending Topics" feature being overseen by a team of reviewers gives leeway or potential to suppress information).

167. *See, e.g.*, Fay M. Johnson, *Ye and the Limits of Free Speech Online*, N.Y. TIMES (Feb. 19, 2025), https://www.nytimes.com/2025/02/19/opinion/kanye-west-x-antisemitism.html [https://perma.cc/6UCU-4QBR] ("Free speech is essential for a healthy democracy. But social media platforms don't merely host speech — they also make decisions about what speech to broadcast and how widely…").

168. DAVID E. POZEN, THE PERILOUS PUBLIC SQUARE: STRUCTURAL THREATS TO FREE EXPRESSION TODAY 1 (David E. Pozen ed., Colum. Univ. Press 2023).

169. Zhang v. Baidu.Com Inc., 10 F. Supp. 3d 433, 435 (S.D.N.Y. 2014).

170. *Id.* at 443.

171. *Id.* at 436–37.

172. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 244 (1974).

173. Zhang, 10 F. Supp. 3d at 437 (citing Hurley, 515 U.S. 557, 557 (1995)).

otherwise it would be unconstitutionally compelled to speak if required to relist the sites in the search results.[174]

As for issues of cancel culture, social media companies would likely raise the editorial analogy and prevail if their platform operations and moderation are challenged by authorities. Such possibilities will fundamentally undermine the antitrust approach to the cyber marketplace of ideas. A key task for the antitrust approach is to reveal how the platforms affect the marketplace of ideas by, for example, exposing controversies and extremist content to the public, furthering the dissemination of contents of certain ideologies, etc. With a defense based on the editorial analogy, platforms would be free from concerns of possible flaws and instead take pride in them by claiming that all those operations and moderations are constitutional freedom of speech, thus getting away with creating more and more controversies in the online public square.

Nevertheless, the legal authority of this theory is not yet definitive. There is still room for questioning and rethinking, especially when there are a few competing analogies.[175] For example, in *Pruneyard Shopping Center v. Robins*, several local students (the appellees), set up a stand in a privately owned shopping center collecting petition signatures, and later evicted by the security guards. The students sued the shopping center, claiming their solicitation of petition signatures was protected by the state's Constitution. The Pruneyard Shopping Center appealed after the California Supreme Court ruled in the students' favor, claiming such ruling violated its constitutional right to free speech. Pruneyard, by invoking *Tornillo*, contended that requiring it to permit signature solicitation was no different to compelling the press to publish the criticized political candidates' replies.[176] In other words, they would be unconstitutionally compelled to speak. However, the U.S. Supreme Court disagreed, opining that allowing the students' signature solicitation at Pruneyard's premises was not "speech" at all, and concerns in *Tornillo* did not apply in this case because the controversial requirement of publishing right-of-reply article had chilling effects on editors' freedom of publishing debatable political views, thus abating the "variety" and "vigor" of public discussion.[177] Notably, the Court also rejected the *Tornillo* editorial analogy in *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, wherein law schools claimed that requiring them to

174. *Id.* at 438.

175. *See generally* Pozen, *supra* note 168, at 113-177 (enumerating the various approaches to freedom of expression including liberal and other political theories, "First Amendment law, internet law, media law, legal history and legal theory.").

176. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980).

177. *Id.*

welcome military recruiters was essentially compelling speech, i.e., their standing on military policy they opposed.[178] Unlike *Tornillo*, where the court found newspapers' making editorial decisions is certainly one of the most salient First-Amendment-protected activities, law schools are not speaking when hosting recruiting receptions and interviews.[179]

Following the above reasoning, whether the editorial analogy applies to social networks remains unclear. Some may argue platform technologies enable machines to "make decisions" based on users' data, the dynamics between different users and all sorts of everyday information,[180] and whether such decision making is editorial. Also, with the advent of generative artificial intelligence, platforms are now capable of engaging in the public sphere by generating ideas. This article believes that, even if the editorial analogy applies to networking platforms in theory, proposing it in practice might not be promising. As the cases above suggest, when platforms carry out algorithmic practices, content moderation, and recommendation systems, a court can say they are not "speaking" as a newspaper does and that appropriate restraints on the platforms' moderation and operation practices would have no chilling effects on freedom of expression by users or any other participants in the platforms and would not harm diversity in the public debate. Additionally, it would be risky for platforms to argue their technical practices are editorial, because that will further confirm the countless allegations that they are intentionally influencing the social discourse and contributing to the disturbance of democracy. This is shown by Google's variable stance as to whether it is a "speaker." In one case *Search King v. Google*, Google countered charges of unfair business practices by contending its search results are editorial opinions protected under the First Amendment instead of factual statements or products.[181] In another case, *Bundesgerichtshof* (BGH), Judgment of May 14, 2013, VI ZR 269/12, where the court found violation of personal rights by its autocomplete, Google argued otherwise that autocomplete is merely a "reflection" of users' search activities and the content of web pages but not

178. Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 63 (2006).

179. *Id.* at 64.

180. YUVAL NOAH HARARI, NEXUS: A BRIEF HISTORY OF INFORMATION NETWORKS FORM THE STONE AGE TO AI 198 (2024).

181. *See* Search King Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568, at *2 (W.D. Okla. May 27, 2003).

speech.[182] Regardless, one can hardly find autocomplete and search results differ much in terms of their delivery.

Nevertheless, in practice, whether and how such controversies will end up in courts may also depend on the degree of the government's tolerance of the current cyber environment and inclination to let it run its course. Whether the ecology of social media is in harmony with political rulers' policies and the sociopolitical environment could also be among the most important factors. For instance, Mark Zuckerberg has accused Joe Biden's administration of pressuring Meta to censor COVID-19-related content in a letter to the House Judiciary Committee.[183] Given such circumstances, the government became pro-moderation for administrative purposes and was thus more tolerant of a platform being more like a "speaker." Conceivably, chances are that platforms would be considered "speakers" and somehow circumvent the moral hazards. Although Biden's pressuring on Meta was arguably a governmental attempt to interfere in the marketplace of ideas, it is not the antitrust type of government interference as concerned by the dissenting Justices in *Associated Press* and *AT&T*. As such, governmental interference can threaten free speech in many ways irrespective of whether antitrust has the power to review the marketplace of ideas.

After all, there should at least be a bottom line for possible governmental inference in the marketplace of ideas. This article finds this line to be whether governmental interference promotes free speech for *all* against speech for *some*. This principle is already well drawn in *Associated Press* where AP tried to defend itself from antitrust liabilities by claiming First Amendment rights.[184] The Supreme Court rejected AP's idea, stressing that because the First Amendment is established upon the essential social welfare of "widest possible" dissemination of information from "diverse and antagonistic sources," AP's freedom to publish is constitutionally guaranteed, but its freedom to prevent others from publishing is not—freedom to publish means freedom for all and not for some.[185] To extend this reasoning in terms of networking platforms and cancel culture, antitrust agencies when intervening in platforms' practices—if recognized as speech at all—should find that platforms' activities restrict outlets for certain ideas while making visibility of *some* expressions

182. Bundesgerichtshof [BGH] [Federal Court of Justice] May 14, 2013, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 5–8 (Ger.).

183. *Did Biden's White House Pressure Mark Zuckerberg to Censor COVID Content?*, AL JAZEERA (Aug. 27, 2024), https://www.aljazeera.com/news/2024/8/27/did-bidens-white-house-pressure-mark-zuckerberg-to-censor-covid-content [https://perma.cc/JHW4-X7ZK].

184. *Associated Press et al.*, 326 U.S. at 19.

185. *Id.* at 20.

available amount to hegemonies of certain controversial discourses. With this principle in mind, this article next delves into the implementation of the antitrust approach, especially regarding how to identify such discourse hegemonies.

3. Application of Antitrust Law to Cancel Culture

Another major concern is the compatibility of antitrust law based on its nature. Although all the antitrust precedents above concern the policy of maintaining the marketplace of ideas for the purpose of the First Amendment, their rationales are not closely attached to the rules that are usually applied in antitrust reviews (e.g., the Horizontal Merger Guidelines, the Clayton Act…), deviating from its economic feature.[186] Theoretically, the marketplace of ideas may not be adequately compared to a market as defined under the Horizontal Merger Guidelines.

This concern affects implementing the antitrust approach. In applying antitrust law to cancel culture cases in social networking platforms, the most practical inquiry is whether a platform has committed any anticompetitive unilateral conducts. A tentative hypothesis includes: a social networking platform, through certain technologies, unfairly affecting the free trade or competition of ideas in the speech marketplace, constituting unfair trade practices. It thus violates, for example, Section 5 of the Federal Trade Commission Act.[187] Alternatively, it is an abuse of dominant position under Article 102 of the Treaty on the Functioning of the European Union (TFEU) by "applying dissimilar conditions" to "equivalent transactions" of information with other trading parties (information generators), thereby placing them at a competitive disadvantage. In the following discussion on anticompetitive acts, this article uses "abuse of dominant position," "abuse of (dominant) market power," and "unfair trade practices" interchangeably as it sees fit.

Before application, we need to figure out how much antitrust law since its inception and its development has encompassed noneconomic competition. Over the years, the antitrust discussion on the marketplace of ideas (or information dissemination in particular) focused on market power and the abuse thereof, though the notion of "market" technically denotes something differently in terms of "market power" and "marketplace of ideas," with the former being generally economic and the latter wholly noneconomic. With respect to the non-economic matters, the currently inactive 2010 Horizontal Merger Guidelines indicate that enhancement of market power can be manifested in "non-price terms and conditions" which affect

186. *See* Stucke & Grunes, *supra* note 132, at 275.

187. Federal Trade Commission Act § 5, 15 U.S.C. § 45 (2025) (Such practices are described as "using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce.").

customers adversely, such as "product quality, reduced product variety, reduced service, or diminished innovation."[188] Such non-price effects may either coexist with price effects or arise in the absence of price effects.[189] Simply put, market power may come to exist when something is free.[190] In the now effective 2023 Merger Guidelines, such expressions are nowhere to be found, except that it lists "non-price indicators" like "number of users or frequency of use" as useful indicators for the calculation of market shares where price forms a relatively trivial or no part of the value exchange.[191]

Disregarding the alteration in the Merger Guidelines, the notions of nonprice metrics in both the old and new documents are interconnected, and both are well applicable in the marketplace of ideas in the context of social media. One possible application to online cancel culture might be that a platform through content moderation, can expose hate speech or hatred stories against someone based on poorly reported facts to a wider audience, arousing conflicts, controversies, and personal attacks all over the platform. Users may become overwhelmed by fury merely because of the partially reported and poorly disseminated information and increasingly rely on such supply of information. In the context of cancel culture, target individuals' personal information is discovered and circulated, incurring and facilitating personal attacks. These scenarios are where the "non-price effects" under the 2010 Guidelines apply, namely "reduced service" that disrupts the popular pursuit of truth and incidentally harms the certain individuals' personal interests. Under the 2023 Guidelines, this process goes on with virtually no price as value exchange. Aligning with precedents about media mergers, the platforms moderations limit the public's access to information from plural sources. If the platform is home to hundreds of millions of users (like X), the aforementioned scenes happen more frequently or/and in increasingly larger quantities and consequently affect the general public's or at least the social majority's perception of that individual. In light of the Guidelines, the platform may be deemed dominant in *some* kind of market. The proof of market power can also be strengthened by showing the platform's position as being the major source of information for a

188. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *Horizontal Merger Guidelines* (2010).

189. *Id.*

190. ALLEN P. GRUNES, *Is 'Fake News' A Competitive Problem?*, CPI Antitrust Chron. 1, 6 (2017).

191. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *Horizontal Merger Guidelines* (2023).

substantial portion of the country's population.[192]This can be translated within the antitrust discourse as the platform occupying a dominant position in information supply (or the marketplace of ideas in general terms).[193]

According to antitrust precedents in the U.S., proving there is an abuse of dominant market power requires demonstrating a platform's abuse of dominant power or anticompetitive acts. The abuse can be described this way: first, the platform maintains power because of "superior" services and technologies in social networking (as characterized by, e.g., "microtargeting" via algorithms); [194] second, the platform in using such advantages "impairs the opportunities" of certain participants in the speech marketplace; third, such practices do not "further competition" in the marketplace of ideas but are not done "in an unnecessarily restrictive way.[195] Alternatively, the platform, by allowing players in and attracting their attention in their daily usage, also profit from, *inter alia*, advertising. The more users engaged with content, platforms are able to sell more advertisements and accrue a larger share of the information market, thereby attracting investors and driving up the platform company's stock price.[196] The interactions between users and the platforms, whether it be disseminating the content they generate or serving certain information to them, can be regarded as transactions that are equivalent among them. The platform, through algorithmic "microtargeting" and content moderation, applies "dissimilar conditions" for different sources of information to be transmitted and for different users in terms of information feed, placing certain players at a "competitive disadvantage" in the marketplace of ideas. These are anticompetitive transactions under Article 102 of the TFEU.

But this is not the end for finding an abuse of dominant market power. Another question is raised regarding the standard of proof for an antitrust injury to the marketplace of ideas, which was also at the heart of debates among Justices in the aforementioned Supreme Court cases.[197] The proof of an antitrust injury might be

192. *See* United States v. Sw. Cable Co., 392 U.S. 157, 177 (1968) (indicating that broadcasting is a "principal source of information and entertainment" for a great part of the Nation's population).

193. *See* Stefan Theil, *Private Censorship and Structural Dominance: Why Social Media Platforms Should Have Obligations to Their Users Under Freedom of Expression*, 81 CAMBRIDGE L.J. 645, 663–66 (2022).

194. United States v. Grinnell Corp., 384 U.S. 563, 570 (1966).

195. Aspen Skiing v. Aspen Highlands Skiing Corp., 472 U.S. 585, 595, 605 n.32 (1985).

196. *See* Harari, *supra* note 180, at 203.

197. Stucke & Grunes, *supra* note 132, at 266.

necessary for cancellation-related cases, because the platform's technological practices may hardly fit into the classical theories that are considered illegal *per se*, such as horizontal agreements, tying, etc. Therefore, courts have to apply the rule of reason for a case-by-case analysis: (1) whether the defendant platform can prove a plausible procompetitive justification of its practices, (2) if so, then the plaintiff has the burden to prove any anticompetitive effects through either direct proof or inference by showing market power, and (3) if both are proven, the court must examine whether the procompetitive effects outweigh the anticompetitive effects.[198] The evidence of antitrust injury falls within step (2) above wherein antitrust agencies bear the burden of proof.

To reconcile the policies of antitrust law and First Amendment law, the standard of proof should probably be actual rather than potential evidence for such injury either in the past or ongoing. Otherwise, the debate in the precedents will go on and on, affirmative intervention in the online platforms will never be fully justified, and courts may work out arbitrary rules and criteria to find potential injury to the free flow of information. Actual evidence can be either direct or circumstantial.[199] Circumstantial evidence, according to precedents of media mergers, entails the finding of whether the platform's operational practices deprive the public of an important source of information.[200] For cases of online cancellation, circumstantial evidence embraces facts of certain stories going dramatically viral and people facing disproportionate personal attacks on the platforms, resulting in certain unpopular but legitimate speech on the platform substantially declining.

Furthermore, considering the uniqueness of cancel culture online, circumstantial evidence can rest upon newsworthiness, which can be evaluated by the public's reaction to certain events or persons as displayed on the platform as compared with reports by legacy media and/or other forms of media. Such comparison is important because of legacy media's longstanding "Fourth Estate" status, which represents an indispensable role of monitoring governmental powers, fostering social transparency, and most importantly, informing the public.[201] The

198. EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 141, 144 n.110 (2d ed. 2011).

199. Stucke & Grunes, *supra* note 132, at 302.

200. *Id.*

201. *See generally* Erin C. Carroll, *Platforms and the Fall of the Fourth Estate: Looking Beyond the First Amendment to Protect Watchdog Journalism*, 79 MD. L. REV. 529 (2020) ("The Fourth Estate metaphor captures the understanding of the press as being both an institution and independent. Implicit in the metaphor is also that the press will serve as a check on government power and potential abuse by shining a light on its actions.").

"Fourth Estate" metaphor has also been embedded in the First Amendment judicial history of the Supreme Court.[202] For purposes of evidence, the comparison should indicate that there is substantial deviation in the cancellation discourse on the platform from the mainstream legacy media's reports on the same individuals, incidents, or subject matters in terms of the quantities or frequency of and the inclinations in the information. Identifying antitrust injuries on the marketplace of ideas will have significance in revitalizing today's First Amendment law, particularly as a disconnect has been discovered between the media today and the media which the Constitution is designed to protect.[203]

After all, this article proposes only a vision, the standards are yet to be refined by lawyers (if not legislators) and interdisciplinary experts across law and the internet.

4. Conclusion on Antitrust Review of Online Cancel Culture

Accordingly, there are possibilities for legal intervention in the contemporary cancel culture for the preservation of the marketplace of ideas under antitrust law or at least within a quasi-antitrust framework, although, the practicality of such legal intervention was yet to be proven given the ever-evolving technological and commercial intricacies in the media operation today. The antitrust approach, if established, can be effective in preventing unjust results arising from online public cancellation. But it has obvious limitations. As antitrust agencies in cases of media mergers deal with the "players" with huge impacts on the marketplace of ideas, they cannot cross the line to intervene in the "ideas." In other words, antitrust agencies may not regulate the ideas directly, but through the transmission or circulation of these ideas. Moreover, in the present scenarios, antitrust serves as regulation *ex ante* which prevents injuries to the marketplace of ideas. Given the increasing intricacies of social networking technologies especially with the advent and striking advancement of artificial intelligence, the development of effective prevention mechanisms can be costly and struggling to keep up with the times. Nonetheless, legislative efforts are probably still important, considering the Supreme Court in *Turner* was concerned about the considerable expense of money and time inherent in antitrust litigation and the vast disparities in terms of resources and sophistication among participants in the marketplace of ideas.[204] More importantly, injustice

202. *Id.* at 541–42; *see, e.g.,* Richmond Newspapers, Inc. v. Virginia, 488 U.S. 555, 586, 586 n.2 (1980) (Brennan, J., concurring); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 781 (1978).

203. Carroll, *supra* note 201, at 536.

204. *Turner Broad. Sys.*, 520 U.S. at 225 (Stevens, J., concurring).

arising from cancel culture concerns not only freedom of speech, but also disproportionate or irrelevant after-effects, which are beyond the competence of the antitrust approach.

V. POSSIBLE REMEDIES FOR THE CANCELED: EXPERIMENT WITH THE RIGHT TO BE FORGOTTEN

The antitrust approach described proposed above might be just a vision for regulation *ex ante*, but the currently effective law can still provide legal remedies *ex post* for the canceled individuals. As analyzed above, cancel culture can serve as a normative system for achieving social justice. In contrast, the antitrust approach might not be able or authorized to discern whether an ongoing cancellation promotes social good or not, because such differentiation will surely constitute content-based regulation of speech. Therefore, greater importance should be attached to the remedies under the existing law.

Individuals suffering from cancellation often find themselves confronted by repercussions such as invasion of privacy, defamation, etc. and after-effects such as psychological trauma, economic losses… These results can well be resolved through traditional tort law. For example, regarding the ill-founded cancellation categorized earlier, individuals face public shaming based on untruthful information. In such scenarios, the law of defamation can help. In the following discussion, this article pays special attention to the remedies that would particularly be employed in cases of cancellation, especially when the canceled individuals have exhausted the most conceivable remedies or found no feasible remedies at all.

It should be noted that information privacy is an indispensable aspect in analyzing cancel culture. Consequences of public canceling are often aggravated by people's invasion of the target person's privacy. For example, in the "Central Park Karen" case, Amy Cooper's personal information was soon released online after the notorious video went viral.[205] Because of the combination of exposure of private information and widespread media coverage, Amy Cooper's life was terribly disrupted by relentless personal attacks.[206] In addition, her job fire her and Amy subsequently lost the labor lawsuit claiming that she was unjustly fired, which

205. *See* Amir Vera & Laura Ly, *White Woman Who Called Police on a Black Man Bird-Watching in Central Park Has Been Fired*, CNN (May 25, 2020, at 4:21 PM), https://www.cnn.com/2020/05/26/us/central-park-video-dog-video-african-american-trnd [https://perma.cc/XQ9P-T5X3].

206. *Id.*

allegedly led to her substantial loss of earnings and benefits.[207] In this lawsuit, Amy Cooper claimed employment discrimination and defamation. The appellate court which affirmed the district court's decision in favor of the employer, reasoning that Cooper failed to plausibly allege that she was prejudiced by a "company-wide double standard" merely by pointing out three male comparators who engaged in some other forms of misconduct but were dismissed differently.[208] Further, she did not she meet the standard of defamation because the controversial content had already gone viral before the employer's tweet "we do not tolerate racism."[209] As a result, Amy Cooper is basically facing the predicament of how to start her life and career over. As mentioned earlier, the labeling effect of cancel culture can be persistent especially with the eternal memory of the internet. After the exhaustion of labor law and defamation law, Amy Cooper may try exercising "the right to be forgotten."

A landmark case concerning both the right to be forgotten and its relationship with freedom of information is *Google Spain SL and Google Inc. v. AEPD and Mario Costeja González* (2014). In this case, a Spanish man known as Mario Costeja González requested Google remove links in the search results to a 1998 newspaper article about an auction for his foreclosed house. The EU Court of Justice ("ECJ") ruled in favor of González under the "right to be forgotten" doctrine, by which citizens of the European Union have a right to the deletion of outdated or irrelevant personal information under the General Data Protection Regulation ("GDPR").[210] The ECJ concluded Google as a search engine operator is obliged to delist the results displayed following a search based on a person's name, even if they are published by third parties and the publication is lawful.[211] The ECJ also noted that invasions of privacy arising from the search engines are not justifiable by mere economic interest that the operator has in the processing of information relating to that person. The ECJ further pointed out that a balance should be made between the data subject's privacy rights and the public's access to certain information. In other

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207. Aimee Picchi, *Amy Cooper, "Central Park Karen," Loses Lawsuit Claiming She Was Unfairly Fired*, CBS NEWS (Sep. 23, 2022), https://www.cbsnews.com/news/amy-cooper-central-park-karen-loses-lawsuit-against-employer/ [https://perma.cc/DS95-XTB3].

208. Cooper v. Franklin Templeton Invs., No. 22-2763-CV, 2023 WL 3882977, at *3 (2d Cir. June 8, 2023).

209. *Id.* at *1, *4.

210. *See* Regulation 2016/679 of Apr. 27, 2016, Gen. Data Prot. Regul., OJ (L 119), Art. 17.1(a).

211. Case C-131/12, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos, 2014 EU:C:2014:317, ¶ 94 (May 13, 2014).

words, the right to be forgotten is not absolute, because the erasure of certain search results affects internet users' legitimate interests in accessing relevant information. Thus, whether certain links can be removed depends not only on the sensitivity of the data subject's private life, but also the nature of the information at issue and the public's interest in accessing the information, which may vary "according to the role played by the data subject in public life." Based on this, an inference from the ECJ is that public figures may have fewer chances to exercise the right to be forgotten, because public figures play a relatively significant role in public information.

There might still be obstacles to exercising the right to be forgotten.

First, the doctrine of the right to be forgotten is yet to mature. In the U.S., the California Consumer Privacy Act ("CCPA") includes a similar "right to request deletion of personal information" (Section 1798.105). However, this is a right that can be claimed by consumers to businesses, service providers, or contractors. Such a relationship is much narrower than the GDPR. In China, Article 47 of the Personal Information Protection Law added in 2021 has incorporated the right to be forgotten in legislation, which resembles the "right to erasure ('right to be forgotten')" under Article 17 of the GDPR.[212] But according to the judicial practice so far, cases in favor of data erasure mainly concern the correction of information about individuals' social credit and illegitimate collection/processing of personal data. Given the immaturity in legislation and judicial practice in the major jurisdictions, the practicality of using the doctrine of right to be forgotten against cancel culture in non-EU jurisdictions still needs time to examine.

Second, although this doctrine seems best fit for private individuals, the division between private persons and public figures can be blurry, and individuals that are private in the first place, through widespread exposure, would become known to the general public like a public figure. The information generated in the cancellation narratives may be of great importance for the public's access to information.

Third, a question may arise as to when an individual can claim the right to be forgotten. In the *González* case, the time span between the lawsuit and the source of information is 16 years (1998-2014). To ensure that the deletion of the information at issue does not affect the public's interest in getting such information, courts may feel obliged to have the information run its course for some time. Therefore, without a clear standard on time span for the outdatedness of certain information, the canceled individuals may not be able to exercise the right to be forgotten immediately. This might not be a problem for the retrospective category of cancellations, where public backlash is based on people's history. However, in such

212. *Personal Information Protection Law of China* (promulgated by the STANDING COMM. NAT'L PEOPLE'S CONG., Aug. 20, 2021, effective Nov. 1, 2021), art. 47 (China).

cases, the remedies of the right to be forgotten may only serve as a placebo for the canceled individuals, because the personal information, though long gone, has just revived as something new.

Fourth, even if the right to be forgotten was claimed successfully, according to the *González* case, it is the search results instead of the information itself that are to be deleted, and there are still chances for these old memories to resurface. This is especially the case when cancellation arises out of inglorious past which was intentionally dug out by others, as shown by the case of Carson King. In September 2019, Carson King, a 24-year-old Iowa State University student, showed up on live TV during a College GameDay broadcast.[213] He was holding a sign asking for beer money for his "Busch Light" beer fund. As the lighthearted request went viral, he ended up collecting hundreds of thousands of dollars.[214] The money raised was even meant to be used for good cause as King announced his plan to donate the funds to the Stead Family Children's Hospital.[215] This story made headlines across the U.S. However, controversies arose when a local newspaper exposed King's past offensive tweets that he posted as a 16-year-old teenager.[216] As a result, the swift backlash caused him to lose a few sponsorship deals.[217]Accordingly, the right to be forgotten could be a last resort for the canceled private individuals. Its effectiveness is yet to be proven as legislation and judicial practice advance.

VI. CONCLUSION: CANCEL CULTURE, REGULATION, REMEDIES, AND BEYOND

Fuzzy as the concept is, there are many dimensions in cancel culture that are worthy of legal attention. Besides mere attention, this article finds that the issues of cancel culture—especially in this digital era of "communicative capitalism" and

213. *Carson's Story*, CARSON KING FOUND., https://carsonkingfoundation.org/carsons-story [https://perma.cc/63CL-RCJJ].

214. *Id.*

215. Christina Zdanowicz, *Almost $3 Million in Donations Later, the Man Who Raised Money with a Beer Sign Has Ended His Campaign*, CNN (Oct. 1, 2019), https://www.cnn.com/2019/10/01/us/carson-king-hospital-fundraiser-ends-trnd/index.html [https://perma.cc/EPB2-FLY4].

216. Samara Lynn, *Viral 'Beer Money' Fundraiser Erupts into Racist Tweets, a Fired Reporter and Online Drama*, ABC NEWS (Oct. 1, 2019), https://abcnews.go.com/US/racist-tweets-backlash-drama-surround-viral-beer-money/story?id=65849942 [https://perma.cc/5UCE-4EFA].

217. *Id.*

"attention economy"—have amounted to a level that necessitates legal intervention. In particular, the law may probably not turn a blind eye to the "mob justice" that over-corrects the socially unjust, as it often leads to disproportionate and irrelevant consequences to individuals canceled for either legitimate reasons or not, leading to as unemployment, loss of business opportunities, personal injuries, etc. However, we must admit that there is some legitimacy for the phenomenon of cancel culture to have persisted for thousands of years of human history; its gap-filling function when law is somewhat ineffective or unpromising. In other words, the existence of cancel culture reflects the dysfunction and inherent limitation of law in certain cases, and in such cases, cancel culture often serves as a normative system positioned between law and morals. The reason for the powerfulness of cancel culture is probably its labeling effects on individuals. The effects can be even more chronic and profound in the era of social networks, where the dissemination of information is increasingly rapid and widespread and people's personal information are vulnerable to invasion.

This article anatomizes cancel culture as free speech but does not rely on speech laws in developing solutions to cancel culture issues, given that cancel culture is a universal question embedded in humanity across history, races, governments, and religions, and that different jurisdictions nowadays have varying degrees (if measurable) or particularities of freedom of speech. For this reason, this article designs an experiment to regulate cancellation discourse under an antitrust approach into the online marketplace of ideas. According to legal history, antitrust law and the review of the marketplace of ideas are both theoretically and practically compatible. But the compatibility is facing challenges as the communication technology evolves and the social network eco-system alters. Although this article finds an antitrust review of the marketplace of ideas within cancel culture is probably necessary, it only provides a tentative vision for it to get fully implemented.

Considering the lack of practicality of the antitrust approach and that this approach is for regulation *ex ante*, this article proposes that existing law can provide remedies for individuals who find themselves wrongfully canceled for one reason or another. In this regard, this article focuses on the last-resort remedies when the individuals have exhausted the claims based on traditional torts, labor law, etc.: the right to be forgotten. Although in the context of cancel culture, the right to be forgotten may still not be effective in getting the canceled persons back on track in their lives and careers, it remains an indispensable invention of personality rights for victims of labeling to reinvent themselves out of the depths of cancellation.

Issues of radical public cancellation will likely be complicated by the dominant social network platforms' recent shift away from censorship against detrimental content. X (formerly known as Twitter), under the "reign" of Elon Musk, shifted away from proactive measures against hate, meaning there is no more intervening before certain problematic content goes public or reducing the number

of users who see it.[218] Meta (Facebook, Instagram, etc.), as announced by Mark Zuckerberg in the wake of Donald Trump's election victory, scaled back its interventions in certain hate speech and shut down its third-party fact-checking program in the U.S.[219] It seems that such policy revolution has turned the cyber marketplace of ideas virtually laissez-faire, but the results do not appear desirable. Perhaps it is because being laissez-faire does not necessarily mean going neutral and truly diversified. It has been reported that X since Elon Musk's acquisition has declined from a "communal town square into a polarized hub" where contents have become even more controversial.[220] Without showing any interest in making any effort to address it, Musk himself even celebrated what has become of this platform by saying "[S]orry for turning Twitter from nurturing paradise into a place that has…trolls" in one tweet, and "[T]rolls are kinda fun" in another.[221] In light of such circumstances, the "more speech" solution as proposed by Justice Brandeis might not be an effective one to sustain diversity in the marketplace of ideas. Once again, just as Adam Smith had never advocated a laissez-faire economy, there should be some degree of interference on the competition in the marketplace of ideas.

An even more complicated kind of situation is governmental participation in the cancel culture, especially in countries with relatively stringent or sophisticated censorship. For instance, some governments exercise the so-called "reverse censorship" or "flooding" as a speech control technique, which is carried out by "counterprogramming" with an adequate amount of information to "drown out" undesirable discourse or effectively adjust the discourse environment.[222] The Russian government, for example, has been developing and practicing politically

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218. *See* Matt O'Brien et al., *Explainer: How Elon Musk is Changing What You See on Twitter*, THE ASSOCIATED PRESS (Dec. 13, 2022, 2:09 PDT), https://apnews.com/article/elon-musk-twitter-inc-technology-europe-business-1b3d4266c5acdab47fc1c95fe8026590 [https://perma.cc/R3KW-AS32].

219. Joe Kaplan, *More Speech and Fewer Mistakes*, META (Jan. 7, 2025), https://about.fb.com/news/2025/01/meta-more-speech-fewer-mistakes/ [https://perma.cc/CY97-AZ7W].

220. *See* Marianna Spring, *Elon Musk's 'Social Experiment on Humanity': How X Evolved in 2024*, BBC (Dec. 26, 2024), https://www.bbc.com/news/articles/c1elddq34p7o [https://perma.cc/753V-5KKG].

221. *See* Marianna Spring, *How Elon Musk's Tweets Unleashed a Wave of Hate*, BBC (Mar. 20, 2023), https://www.bbc.com/news/technology-64989720 [https://perma.cc/N76P-XPD9].

222. *See* Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, (Sep. 1, 2017) https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete [https://perma.cc/KC8U-8KPS].

motivated flooding techniques.[223] Conceivably, such techniques can work as effectively as platforms' content moderation and algorithmic practices to cancel individuals or groups that run afoul of governmental policies. However, such issues may be too politically sensitive to be discussed openly, and the law can be virtually impotent to do anything about it.

Apart from demystification and problem-solving regarding issues of cancel culture, this article hopefully conveys a futuristic message for the studies of First Amendment or free speech irrespective of jurisdictions. Contemporary studies on free speech have long dwelled on the "freedom" or "right" itself. But as this article reveals, freedom of speech in the digital age pertains more than ever to the freedom of thought—while "speech" mainly concerns expression, "thought" cares more about cognition. Again, "[t]hose who won our independence…believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth"—Justice Brandeis in his famous explanation of free speech pointed out this important premise of people *thinking* freely. As the freedom to think has been long taken for granted, these two decades have seen popular minds' growing vulnerable to influence by the microtargeting of information and the increasing polarization of cyberspace. Particularly, social networks have excessively affected people's cognitive processes through algorithmic practices. To better ensure peoples' freedom of expression is exercised based on free thinking, the First Amendment law and the studies thereof should allocate more attention on the cognitive aspects of free speech in terms of what freedom to think was and is, the relationship between free thinking and free speech, the materiality of the risks posed to people's freedom to think, etc. Audacious as it may sound, this article believes it is high time the law tried jumping out of the canon in response to the mind-blowingly rapid advancement of technologies which has been transforming every dimension of humanity.

223. *See* Diwen Xue, et al., *Throttling Twitter: An Emerging Censorship Technique in Russia*, PROC. OF THE 21ST ACM INTERNET MEASUREMENT CONF. 435, 435 (2021); *see also* Wu, *supra* note 222 ("Reverse censorship, which is also called flooding, is another contemporary technique of speech control…[I]t relies on counter-programming with a sufficient volume of information to drown out disfavored speech, or at least distort the information environment.") (citation modified).