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# Hate Speech in Social Media: An Exploration of the Problem and Its Proposed Solutions

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**HATE SPEECH IN SOCIAL MEDIA: AN EXPLORATION OF THE  
PROBLEM AND ITS PROPOSED SOLUTIONS**

by

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B.A., Clemson University, 2001

M.S., University of Denver, 2004

A dissertation submitted to the  
Faculty of the Graduate School of the  
University of Colorado in partial fulfillment  
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This dissertation entitled: Hate Speech in Social Media: An Exploration of the Problem  
and Its Proposed Solutions  
Written by Caitlin Elizabeth Ring  
has been approved for the Department of Journalism and Mass Communication

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Dr. Robert Trager

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Dr. Andrew Calabrese

Date\_\_\_\_\_

The final copy of this thesis has been examined by the signatories, and we find that both the content and the form meet acceptable presentation standards of scholarly work in the above mentioned discipline.

## ABSTRACT

Ring, Caitlin Elizabeth (Ph.D., Communication [Dept. of Journalism and Mass Communication])

Hate Speech in Social Media: An Exploration of the Problem and Its Proposed Solutions

Dissertation directed by Professor Emeritus Robert Trager, Ph.D., J.D.

Social media are rife with hate speech. A quick glance through the comments section of a racially charged YouTube video demonstrates how pervasive the problem is. Although most major social media companies such as Google, Facebook and Twitter have their own policies regarding whether and what kinds of hate speech are permitted on their sites, the policies are often inconsistently applied and can be difficult for users to understand.

Many of the decisions made by the content removal teams at these organizations are not nearly as speech protective as the First Amendment and U.S. Supreme Court precedent on the subject would mandate. Thus, the current situation gives social media companies' unprecedented power to control what videos, text, images, etc. users may or may not post or access on those social media sites.

In an effort to identify solutions for curtailing hate speech in social media, this dissertation will explore the scope and nature of the problem of hate speech in social media today, using YouTube as an exemplar. A review of arguments for and against regulating hate speech online is then presented, along with an overview of current U.S. hate speech and Internet regulations and relevant jurisprudence. The approaches proposed by other legal and communication scholars about whether and how to limit hate speech online are examined and evaluated. Finally, a solution that seeks to minimize hate speech on social media Web sites, while still respecting the protections established by the First Amendment, is proposed.

Specifically, a recommendation is made to encourage self-regulation on the part of social media companies, which involves a move from a ".com" generic top-level domain to one called ".social." In order to be part of the consortium of companies included on the ".social" domain, which will hopefully include YouTube, Facebook, Twitter, Instagram and others, an organization must abide by the industry-developed, uniform rules regarding what kinds of hate speech content are and are not permitted on these sites. A working group comprised of social media decision-makers will develop the policy and staff members of the Federal Communications Commission will facilitate this process. Hopefully, the resulting approach will better reflect precedent on the issue, which hesitates to place any restrictions on expression, regardless of how offensive it may be.

## ACKNOWLEDGEMENT

I would like to thank my advisor and dissertation chair, Dr. Robert Trager for teaching me to be a passionate educator, a rigorous scholar and an enthusiastic servant to the demands of life in academia. His attention to detail, respect for his students and love of the law are traits I can only hope to take with me as I move on to the next stage of my career. Trager has made it possible for me to complete this dissertation and secure a tenure-track job as an assistant professor, even in the face of the substantial personal obstacles we've both faced during this time. For that, and for everything he has done for me and taught me, I am eternally grateful. At the end of the day, Trager is the kind of professor we should all aspire to be. I know I will.

In addition, I owe an enormous debt of gratitude to the members of my committee: Dr. Andrew Calabrese, Dr. Shu-Ling Berggreen, Rothgerber Professor of Constitutional Law Robert Nagel, and Dr. Peter Simonson. Their teaching, guidance, feedback and personal support have helped this project come to fruition.

Along with my committee, I would also like to personally thank Martha LaForge and the rest of the faculty and staff at Journalism and Mass Communication for all of their support throughout my four years in the JMC graduate program.

I would also like to thank my family and friends for all of their help throughout the process of researching and writing this dissertation. In particular, I want to acknowledge my mother, Jackie Ring, who served as my copy editor, sounding board and number-one cheerleader. Thank you also to my Dad, Mike Ring; my sister, Melissa Perricone; my boyfriend, Wayne Carlson, and my friends Ben Razes, Shawna Golden and Kate Stokley for their unwavering support.

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## Chapter I

### Scope and Nature of Hate Speech on Social Media Web Sites

#### Introduction:

The Internet is changing the face of communication and culture. In the United States, the Internet has drastically altered the way we get our news, talk to our friends and generally live our lives. Its de-centralized nature makes it a perfect place for amateurs and professionals alike to create and share ideas, information, images, videos, art, music and more. In spite of, or perhaps because of, its democratic nature, the Internet is also populated with Web sites dedicated to inciting hatred against particular ethnic, religious, racial or sexually-oriented groups such as women, Jews, African-Americans, Muslims and members of the lesbian, gay, bi-sexual and transgendered (LGBT) community. According to the Southern Poverty Law Center (SPLC), a civil rights organization that tracks and litigates hate group activity, there has been a 69 percent rise in the number of active hate groups from 2000 to 2012.<sup>1</sup> This increase is due in large part to the fear and anger surrounding issues of non-white immigration, the sluggish economy and the re-election of an African-American president.<sup>2</sup> Today, there are more than 1,000 active hate groups<sup>3</sup> in the United States and many of these, including the Ku Klux Klan, the Creativity Movement and the Family Research Institute, have a substantial presence online.

According to the Simon Wiesenthal Center's 2012 Digital Terror and Hate Report, there

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<sup>1</sup> *What We Do*, Southern Poverty Law Center.com, <http://www.splcenter.org/what-we-do/hate-andextremism> (last visited Nov. 29, 2012).

<sup>2</sup> *Hate Map*, Southern Poverty Law Center.com, <http://www.splcenter.org/get-informed/hate-map> (last visited Nov. 29, 2012).

<sup>3</sup> *Id.*

are approximately 15,000 problematic Web sites, social networking pages, forums and newer online technologies such as games and applications, dedicated to inciting hatred based on ethnicity, race or sexual preference. According to Websense, which is tracking the 15,000 hate and militancy sites, the total number of these sites has tripled since 2009.<sup>4</sup> However, the U.S. Department of Homeland Security currently has only one person tracking these suspicious, non-Islamic groups.<sup>5</sup>

Several of these sites encourage the creation and dissemination of hateful rhetoric, videos and music, while others go so far as to call for physical violence against an out-group. For example, the Creativity Movement's Web site asks visitors to "arm yourselves and join the fight against the mud races" a reference to the racial holy war (often referred to as "RAHOWA") called for by the group.<sup>6</sup> Another white pride site, Stormfront, boasts over nine million posts and 130,000 registered members.<sup>7</sup> Like the Creativity Movement Web site, many of these sites encourage violence toward racial and ethnic minorities as acts of collective preservation of the white race. For example, in a 2007 post, Creativity Movement member Preston Wiginton wrote, "Beating down a mud [a non-white person] when they try to poison [sic] one of our own or when they try to seduce one of our girls

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<sup>4</sup> For purposes of this inquiry, a hate site will be defined as a Web site (or Web page) maintained by an organized hate group on which hatred is expressed, through any form of textual, visual or audio-based rhetoric, for a person or persons, which provides information about how individuals can support the group's ideological objective.

<sup>5</sup> *U.S., to Crack Down on Hate Groups*, ALJAZEERA ENGLISH, Aug. 10, 2012, available at <http://www.youtube.com/WATCH?V=9P5OH1USH-W>.

<sup>6</sup> *Creativity Movement Kids*, Creativity Movement.org, <http://www.creativitymovement.org/kids/videos.html> (last visited Dec. 1, 2012).

<sup>7</sup> *Intelligence Files: Stormfront*, Southern Poverty Law Center.com, <http://www.splcenter.org/get-informed/intelligence-files/groups/stormfront> (last visited Feb. 1, 2013).



may not be God inspired, but rather a righteous act of collective preservation.”<sup>8</sup> The March 2012 attack of a Jewish school in Toulouse, France demonstrates exactly how the subculture of hate that is proliferated online can have very real consequences offline. In this instance, a lone gunman entered a Jewish school and opened fire, killing one teacher and three children.<sup>9</sup> According to Rabbi Abraham Cooper, Associate Dean of the Simon Wiesenthal Jewish Human Rights Center and head of the organization’s hate project, “the perpetrator in the horrific attack in Toulouse, France may have learned how to create a bomb in Afghanistan, but he supercharged his hate from the Internet.”<sup>10</sup>

However, hate speech on hate sites is just the first part of a two-part problem. Racially, ethnically or even religiously charged hate speech also appears frequently on popular social media Web sites, such as YouTube, Facebook and Twitter, as well as Yahoo! groups and Google groups. Like the proliferation of hate sites in recent years, there has also been a substantial increase in the amount of hateful content posted on social networking and other Web 2.0 sites.<sup>11</sup> For example, recent data gathered by Dr. Monica Stephens demonstrates the extent to which hate speech pervades social media, particularly in certain regions of the country. Dr. Stephens and her team analyzed all of the tweets sent

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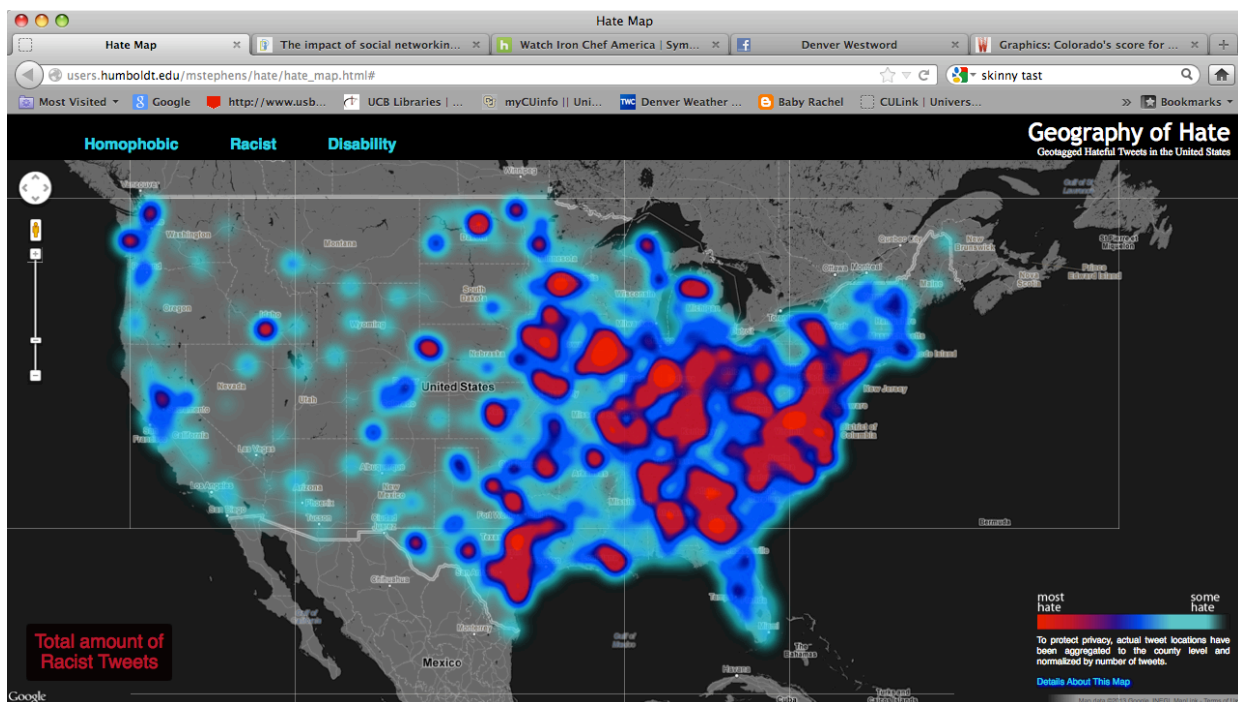
<sup>8</sup> *Id.*

<sup>9</sup> *France Shooting: Toulouse Jewish School Attack Kills Four*, BBC.COM, Mar. 29, 2012, available at <http://www.bbc.co.uk/news/world-us-canada-17426313>.

<sup>10</sup> *Id.*

<sup>11</sup> *Mapping Study on Projects Against Hate Speech Online Institute of Human Rights*, BRITISH INSTITUTE OF HUMAN RIGHTS (Apr. 15, 2012), [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDIQFjAA&url=http%3A%2F%2Fwww.coe.int%2Ft%2Fdg4%2Fyouth%2FSource%2FTraining%2FTraining\\_courses%2F2012\\_Map\\_ping\\_projects\\_against\\_Hate\\_Speech.pdf&ei=z9cnUbm8I5D-rAH75oGoBg&usg=AFQjCNFerL6dnOWwQibhEz8aC\\_ozXfypdQ&sig2=2rVJALDuOIH92fgRB\\_75cw&vm=bv.42768644,d.aWM](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDIQFjAA&url=http%3A%2F%2Fwww.coe.int%2Ft%2Fdg4%2Fyouth%2FSource%2FTraining%2FTraining_courses%2F2012_Map_ping_projects_against_Hate_Speech.pdf&ei=z9cnUbm8I5D-rAH75oGoBg&usg=AFQjCNFerL6dnOWwQibhEz8aC_ozXfypdQ&sig2=2rVJALDuOIH92fgRB_75cw&vm=bv.42768644,d.aWM) [hereinafter *Mapping Study*].

from June 2012 to April 2013 that contained hate words and then performed content analysis to determine whether the tweet was positive, negative or neutral. The resulting maps represent the frequency and location of tweets containing the words “nigger” or “fag,” for example.<sup>12</sup> As the map below indicates, racist tweets containing the words “nigger,” “gook” or “wetback” were most prevalent in the southern part of the United States. In addition, the sheer volume of these hate tweets is worth noting. During the 11 months Dr. Stevens and her team collected data, there were a total of 150,000 discriminating tweets.<sup>13</sup>



*Geography of Hate – Map of Tweets Containing Negative Racial Slurs*<sup>14</sup>

Each social media company has its own policy regarding what content is or is not permitted online and Twitter’s approach is among the most permissive. However, there is

<sup>12</sup> Matt Peckham, *The Geography of U.S. Hate, Mapped Using Twitter*, TIME.COM, May 20, 2013, available at <http://newsfeed.time.com/2013/05/20/the-geography-of-u-s-hate-mapped-using-twitter/#ixzz2XMZRFQnu.com>

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

very little transparency regarding what these policies include and, more importantly, how they are applied. For example, in late 2012 Google was publicly criticized for its decision to remove the hate-propaganda film, “The Innocence of Muslims,” from its video-sharing site YouTube in certain countries and not others. The hour-long film, which mocked the prophet Mohammed and was highly offensive to many Muslims, sparked violent riots throughout the Middle East.<sup>15</sup> Google blocked the content in seven countries, including Egypt and Libya, but left it up in others saying that it failed to meet its definition of “hate speech.”<sup>16</sup> In Pakistan, 19 people were killed in the resulting riots, and critics blamed Google for allowing the content, which they said was directly responsible for global upheaval, to remain posted as long as it did.<sup>17</sup>

Regardless of who or what was to blame, this incident shed light on the enormous amount of power corporations like Google have to police and, if they choose, to censor content on the Internet. Because there are no federal U.S. regulations or even guidelines prohibiting hate speech or incitement online, Google, Facebook and other social media companies must rely on their own individually crafted policies and procedures to determine on a case-by-case basis which videos, photos and even Web sites are considered hate speech and therefore not permitted online.

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<sup>15</sup> Chris Stephen, *Controversial Film Sparks Protests and Violence Across the Muslim World*, GUARDIAN, Sept. 14, 2012, available at <http://www.guardian.co.uk/world/2012/sep/14/islam-film-muslim-protests>.

<sup>16</sup> Somini Sengupta, *On Web a Fine Line on Free Speech*, N.Y. TIMES, Sept. 16, 2012, available at <http://www.nytimes.com/2012/09/17/technology/on-the-web-a-fine-line-on-free-speech-across-globe.html>.

<sup>17</sup> *Id.*

Recognizing their role as Internet censors, in April 2012 the individuals in charge of the content policies at Facebook, Twitter, Google and other companies met at Stanford University to discuss the challenges associated with enforcing their community guidelines for speech.<sup>18</sup> Loosely dubbed the “Anti-Cyber Hate Working Group,” these individuals expressed a great deal of disagreement among their ranks about the best approach to handling the hate speech issues facing social media.<sup>19</sup> Some companies, such as Twitter, have concluded that they want to be a platform for democracy instead of civility. Unlike Google or Facebook, Twitter does not ban hate speech at all. Instead it focuses on true threats, “direct specific threats of violence against others.” Facebook, on the other hand, bans attacks on groups, but not institutions.<sup>20</sup> Thus, there is fairly severe disagreement among the largest social media companies regarding the best approach to dealing with offensive and threatening speech on their sites. Some argue that it makes the most sense to focus exclusively on speech that is likely to cause imminent violence or threats, while other social media content managers like those at Google or Facebook seek to maintain the more nuanced approach to enforcing their own policies.<sup>21</sup>

Not only does the current approach give social media companies unprecedented power to control content online, but the policies crafted and enforced by these organizations are also far less speech protective than U.S. Supreme Court precedent

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<sup>18</sup> Jeffery Rosen, *The Delete Squad: Google, Twitter, Facebook and the New Global Battle Over the Future of Free Speech*, NEW REPUBLIC, Apr. 29, 2013, available at <http://www.newrepublic.com/article/113045/free-speech-internet-silicon-valley-making-rules#>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

regarding hate speech would mandate.<sup>22</sup> Moreover, these organizations are subject to be influenced by market pressures and public opinion and as a result should not be placed in the position of unbiased arbiter, which they very much are not.

Given the issues associated with the current approach to handling hate speech online, this dissertation intends to offer a revised solution that takes Supreme Court precedent, Internet regulations and, most importantly, the role of social media companies into consideration. That said, the research questions this dissertation seeks to answer are:

1.) *Should hate speech that appears on social media companies' Web sites, in particular YouTube, be protected by the First Amendment?*

2.) *If this speech does not warrant full protection, how should it be regulated?*

This chapter will begin by discussing why YouTube has been selected as the exemplar here. Next, the key terms being used in this inquiry will be defined, including hate speech and social media. Finally, an overview of the complete dissertation, outlining each chapter, will be provided.

## **Section I: Hate Speech on YouTube**

Of the popular social media companies, some experts have found that Google's YouTube struggles the most to effectively craft and execute a consistent policy toward removing content and comments filled with hate speech from their site.<sup>23</sup> According to

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<sup>22</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>23</sup> *News Release: Social Media Must Do More To Thwart Subculture Of Hate Fueling Lone Wolf Terrorism*, SIMON WIESENTHAL CENTER.COM (Mar. 12, 2012), available at <http://www.wiesenthal.com/site/apps/nlnet/content2.aspx?c=lsKWLbPJLnf&b=4441467&ct=11675937#.URaWO4XKY7A>.

Rabbi Cooper, “social networking companies’ commitment to deter the use of their services by terrorists and bigots is uneven. If social media outlets were to receive grades, they would receive the following: YouTube (C-), Facebook (A-) and Twitter (N/A). If the world is going to effectively deal with the growing threat from lone wolf terrorists, says Cooper, then social media companies lead by Facebook, Google, YouTube and Twitter must do more.”<sup>24</sup>

In addition to the low marks YouTube receives for its ability to deter bigots from using its site to spread hateful propaganda, the sheer amount of user-generated content featuring hate speech on YouTube makes it an excellent case study. Every minute, users upload 13 hours of content onto the site.<sup>25</sup> Although the site prohibits hate speech, which it defines as speech that “attacks or demeans a group based on race or ethnic origin, religion, disability, gender, age, veteran status and sexual orientation/gender identity,”<sup>26</sup> a sizable portion of its channels, content and comments contain hateful rhetoric. In fact, many teachers and local leaders have observed that YouTube is rapidly becoming a viral breeding ground for videos that express “anti-Semitism and misogyny and homophobia.”<sup>27</sup>

YouTube features a host of channels dedicated to sharing racist, misogynistic or even homophobic ideas about women and minorities. A portion of these channels are affiliated with a particular group, whereas others act as a virtual home base for hate, where

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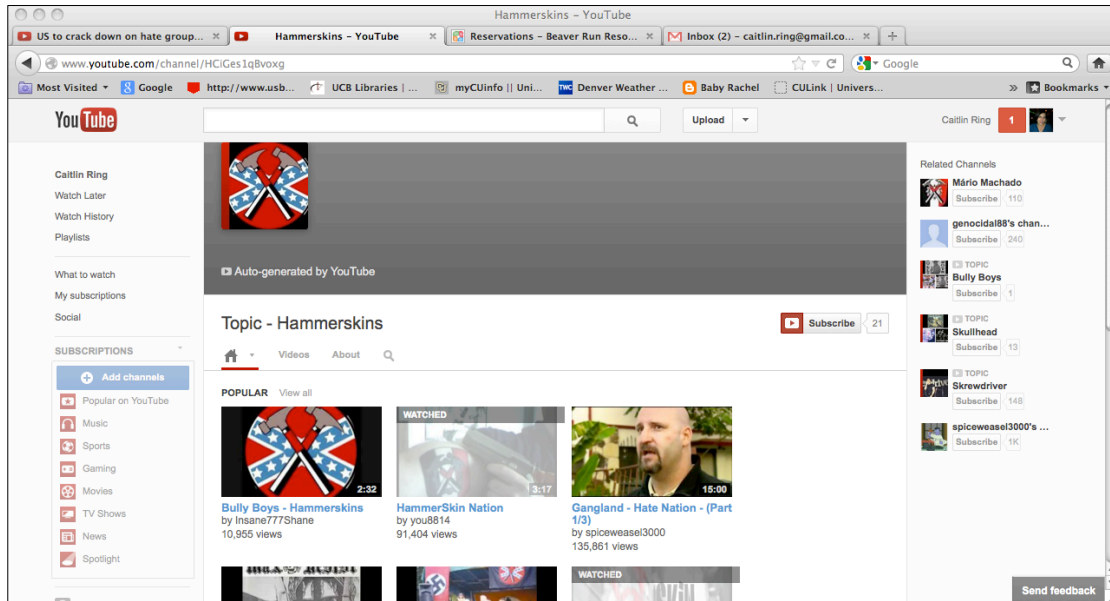
<sup>24</sup> *Id.*

<sup>25</sup> YOUTUBE COMMUNITY GUIDELINES, [http://www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines) (last visited Feb. 22, 2013).

<sup>26</sup> *Id.*

<sup>27</sup> Will Doig, *Homophobosphere*, ADVOCATE, Jan. 25, 2008, available at <http://www.advocate.com/news/2008/01/25/homophobosphere>.

an individual can upload and share hateful content. For example, Hammerskin Nation, a white supremacist group that the Southern Poverty Law Center calls the “best organized, most widely dispersed and most dangerous Skinhead group known,” hosts a YouTube channel that features scores of videos about the group and its racist ideals.<sup>28</sup> Many of these videos have more than 100,000 views.<sup>29</sup>



*Hammerskin Nation YouTube Channel*<sup>30</sup>

The site’s content includes videos and songs produced by Hammerskin members that boast their white pride, readiness for violence and overall social dominance over others.<sup>31</sup> The Hammerskin Nation channel also features several videos of racist songs and slide presentations containing photos of group members engaged in offline activity.<sup>32</sup> This

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<sup>28</sup> HAMMERSKIN NATION YOUTUBE CHANNEL, <http://www.youtube.com/channel/HCiGes1qBvoxg/videos> (last visited Feb. 21, 2013).

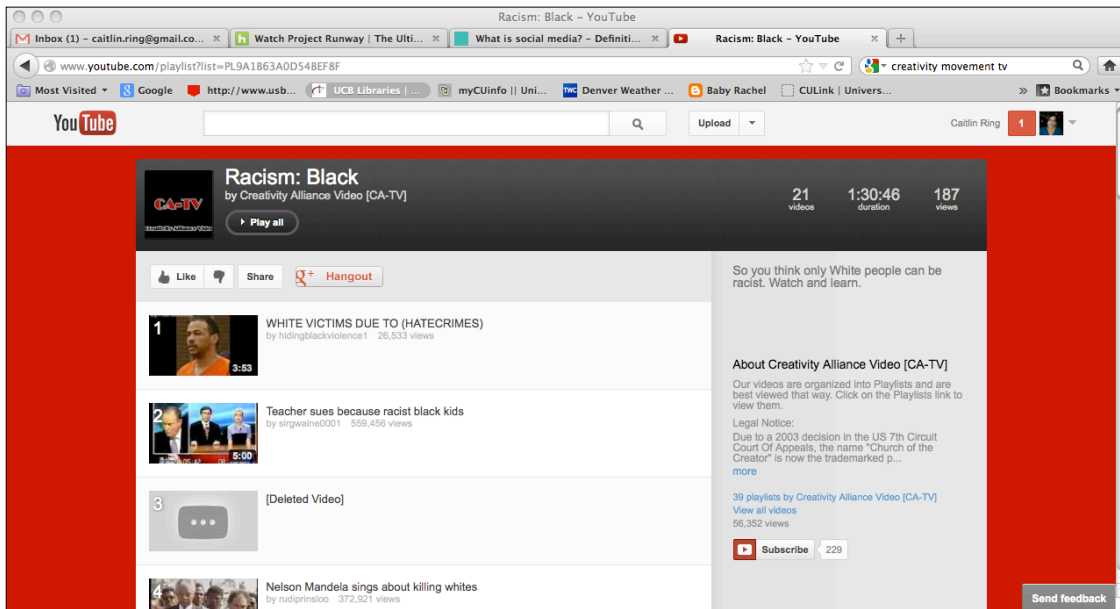
<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

group's site is only one among many of these kinds of channels that currently exist on YouTube. For example, the hate group Creativity Alliance maintains the popular YouTube channel, CA-TV. The channel, which boasts 229 subscribers and 56,325 video views, features videos of bands playing racially-charged music; the group's founder, Ben Klassen, speaking; and perhaps most interesting, a four-minute video honoring the white victims of hate crimes committed by blacks.<sup>33</sup>



*Creativity Alliance YouTube Channel*<sup>34</sup>

In addition to the YouTube channels of white supremacist groups like those discussed above, there are also channels dedicated to the persecution of gays and lesbians. “Fuck You Faggots” is a YouTube channel with only five subscribers and a handful of videos but the content still encourages disdain for members of the LGBT community.<sup>35</sup>

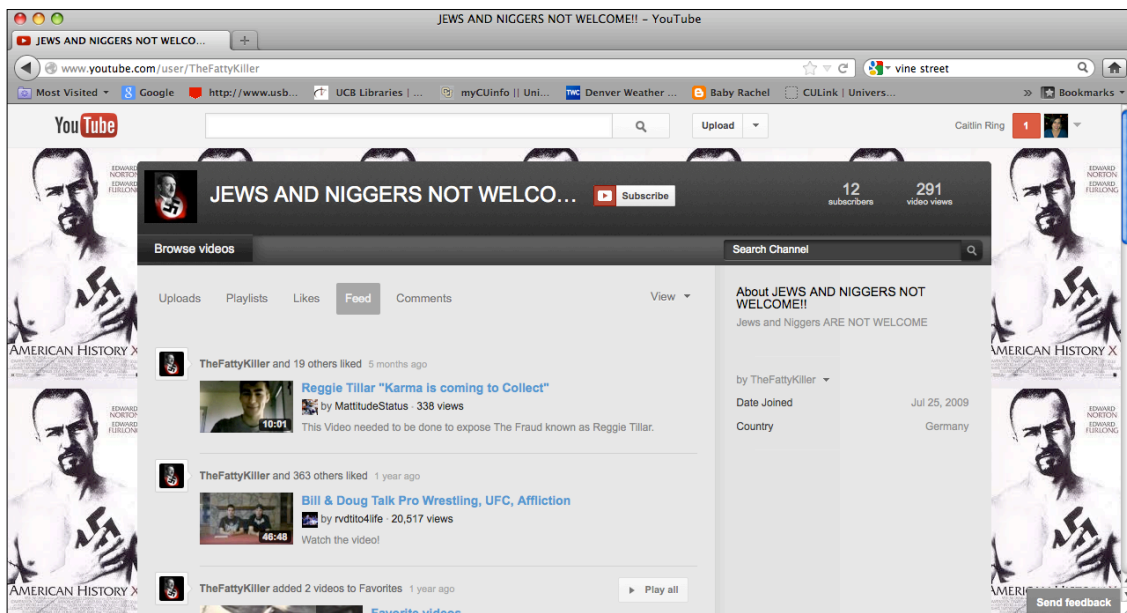
<sup>33</sup> CREATIVITY ALLIANCE YOUTUBE CHANNEL, <http://www.youtube.com/user/CreativityAlliance> (last visited Feb. 22, 2013).

<sup>34</sup> *Id.*

<sup>35</sup> FUCK YOU FAGGOTS YOUTUBE CHANNEL, <http://www.youtube.com/user/ihatefaggots0000> (last visited Feb. 22, 2013).



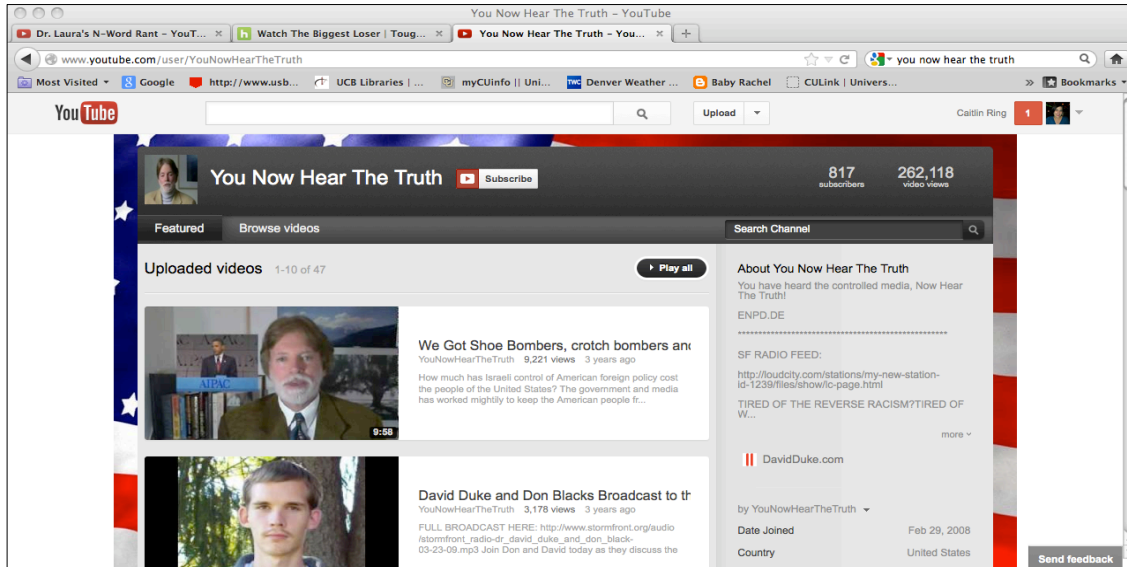
In fact, there are channels aimed at degrading Hispanics, blacks, women and others. It seems on YouTube no ethnic or minority group is exempt from exposure to hateful rhetoric. For example, the site below is entitled “Jews and Niggers Not Welcome,” and features videos of young people talking to the camera about how disgusting members of these other races and ethnicities are.



*Jews and Niggers Not Welcome YouTube Channel<sup>36</sup>*

Like the preceding site, the channel “You Now Hear the Truth” does not seem to be affiliated with any particular group. Instead, it is simply a place for an individual to compile hateful content into a single virtual location, so that it is easier for others to find and watch.

<sup>36</sup> JEWS AND NIGGERS NOT WELCOME YOUTUBE CHANNEL, <http://www.youtube.com/user/theFattyKiller> (last visited Feb. 22, 2013).



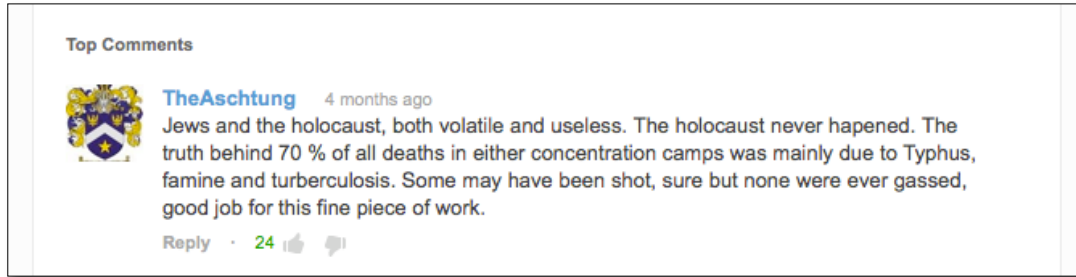
*You Now Hear The Truth YouTube Channel<sup>37</sup>*

In addition to channels and content featuring hate speech, the comments section on YouTube regularly contains hate speech. For example, in June 2013, YouTube and General Mills made the decision to disable the entire comments section of a video of a new Cheerios commercial featuring a multi-racial family because users posted racist and hateful comments about the spot.<sup>38</sup>

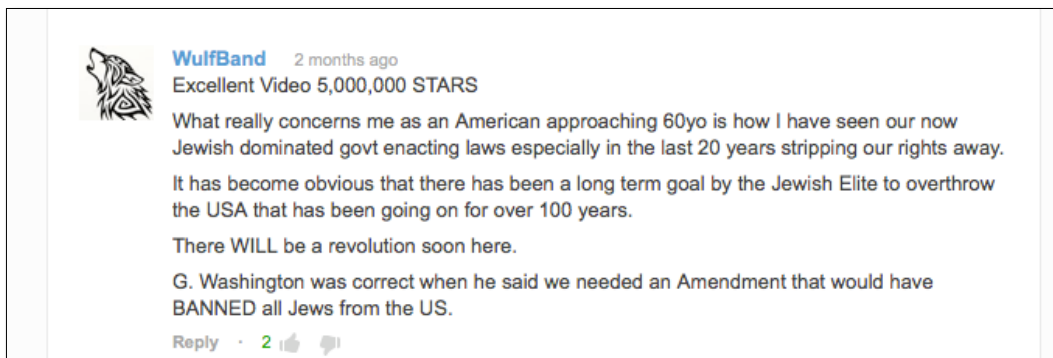
Perhaps even more extreme, the comments featured below were posted in response to one of the many holocaust denial films on YouTube. They claim that Jewish people are volatile, useless and should have long ago been banned from the United States.

<sup>37</sup> YOU NOW HEAR THE TRUTH YOUTUBE CHANNEL, <http://www.youtube.com/user/YouNowHearTheTruth> (last visited Feb. 21, 2013).

<sup>38</sup> Alexandra Cheney, *General Mills Blocks Racist Comments on YouTube Cheerios Ad*, WALL ST. J., June 3, 2013, available at <http://blogs.wsj.com/speakeasy/2013/06/03/general-mills-blocks-racist-comments-on-youtube-cheerios-ad/>.



*User Comment from “TheAschtung” on YouTube Site: Were the Germans so Stupid?<sup>39</sup>*



*User Comment from “WulfBand” on YouTube Site: Were the Germans so Stupid?<sup>40</sup>*

As the examples here demonstrate, Google’s YouTube is rife with hate speech. Although YouTube has a community-based system that allows users to flag potentially inappropriate content, it does not prevent the proliferation of hate speech on the site. Once flagged, a video is not removed, it is simply preceded by a message stating that “the following content has been identified by the YouTube community as being potentially offensive or inappropriate. Viewer discretion is advised.”<sup>41</sup>

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<sup>39</sup> HATE SPEECH & WERE THE GERMANS SO STUPID, [http://www.youtube.com/watch?v=fh\\_wrJ7sjYI&bpctr=1361570650](http://www.youtube.com/watch?v=fh_wrJ7sjYI&bpctr=1361570650) (last visited Feb. 21, 2013).

<sup>40</sup> *Id.*

<sup>41</sup> YOUTUBE COMMUNITY GUIDELINES, [http://www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines) (last visited Feb. 22, 2013).

In sum, given the amount of hate speech on YouTube, its struggle to effectively apply its own hate speech policy and its identification by the Simon Wiesenthal Center as the worst offender among leading social media companies when it comes to hate speech online, YouTube is an appropriate case on which to focus this inquiry.

## **Section II: Defining Hate Speech**

Before moving on in Chapter II to examine the arguments for and against hate speech online, it is first necessary to clearly define the key terms being used here. First, the word “hate” will be understood as “extreme negative feelings and beliefs held about a group of individuals or a specific representative of that group because of their race, ethnicity, religion, gender or sexual orientation.”<sup>42</sup> The term “hate speech” will be understood as covering all forms of expression that “spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.”<sup>43</sup> Both of these definitions come directly from the Council of Europe’s Protocol to the Convention on Cybercrime so that any proposed U.S. regulations would be consistent with the current online hate speech prohibitions enacted by the European Union.

Although hate speech may not be difficult to define, determining what hate speech is or is not protected by the First Amendment is a far more complex issue. Therefore, it is important to note here that most online and in-person hate speech is protected by the First

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<sup>42</sup> *Mapping Study*, *supra* note 11.

<sup>43</sup> *Id.*

Amendment. For example, in a recent case involving the Westboro Baptist Church, which is nationally known in the United States for picketing military funerals with signs featuring slogans such as “God hates Fags,” Chief Justice John G. Roberts Jr. wrote that while Westboro Baptist Church’s picketing at fallen soldiers’ funerals “is certainly hurtful and its contribution to public discourse may be negligible, the reaction may not be ‘punishing the speaker.’”<sup>44</sup> Instead, wrote Roberts for the majority, “as a nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”<sup>45</sup> That said, the Supreme Court has over time identified certain areas of expression that are not protected. Some hate speech, which may fall into one of the three relevant categories discussed here – fighting words, incitement and true threats – is not protected by the First Amendment.

### *Fighting Words*

Fighting words were defined by the Supreme Court in *Chaplinsky v. New Hampshire*<sup>46</sup> as “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction.”<sup>47</sup> An example of hate speech that might be considered fighting words would be a racial or gendered insult uttered about someone’s mother. However, since the *Chaplinsky* decision in 1942, the Supreme Court has been reluctant to find much expression that falls within the narrow definition of this standard. In the 1971 case, *Cohen v. California*, the

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<sup>44</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1219-1220 (2011).

<sup>45</sup> *Id.*

<sup>46</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

<sup>47</sup> *Id.*

Supreme Court said that wearing a jacket with the words “fuck the draft” on the back in a corridor outside a courtroom did not violate a California statute prohibiting “maliciously disturbing the peace with offensive conduct.”<sup>48</sup> Although the Supreme Court did take into account the fact that the audience in the courtroom was a captive one, Justice John M. Harlan said that anyone offended by the message on the jacket could simply avert their eyes.<sup>49</sup> The Supreme Court’s decision in this case established its strong commitment to the idea that it is better to tolerate vulgar speech than potentially limit political argument or expression. After all, said Justice Harlan, “One man’s vulgarity is another man’s lyric.”<sup>50</sup>

In *R.A.V. v. St. Paul*, a 1992 case dealing with the constitutionality of a cross burning statute, the Supreme Court said that what makes fighting words unprotected are their non-speech elements. Like regulating a sound truck, it is the noise or verbal cacophony caused by fighting words that the Supreme Court said warrants regulation.<sup>51</sup> However, the government may not regulate the use of fighting words based on hostility or favoritism toward the underlying message because the First Amendment imposes a viewpoint discrimination limitation.<sup>52</sup> Because the Minnesota ordinance applied only to fighting words that insult on the basis of race, color, creed, religion or gender and not to all fighting words, the Supreme Court found it to be unconstitutional. In addition, this case established the doctrine that said content-based regulations must meet the threshold of

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<sup>48</sup> *Cohen v. California*, 403 U.S. 15 (1971).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 25.

<sup>51</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>52</sup> *Id.*

strict scrutiny, which requires the government to demonstrate a compelling interest and for the regulation to be narrowly drawn. Thus, it is possible that content-neutral bans on fighting words may be used to limit hate speech on YouTube because of the “noise” it creates in that online environment.

### *True Threats*

Like *R.A.V. v. St. Paul*, the 2003 *Virginia v. Black* case also asked the Supreme Court to consider whether a state’s cross-burning statute was permissible. The majority opinion in *Virginia v. Black*, written by Justice Sandra Day O’Connor, diverted from the *R.A.V.* decision and established the category of unprotected speech known as “true threats.” These are defined by the Supreme Court as threats that “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>53</sup>

The majority decision in the *Virginia* case noted that the ruling in *R.A.V.* established that some types of content-discrimination did not violate the First Amendment. In particular, this includes those restrictions that were based on the non-speech elements of expression, the very reason the entire class of speech at issue is proscribable or the secondary effects associated with speech. Citing these reasons, the majority opinion in *Black* granted the state of Virginia permission to prohibit a subset of intimidating messages given their history as a precursor for violence. “Instead of prohibiting all intimidating messages,” wrote Justice O’Connor, “Virginia may choose to regulate this subset of intimidating messages in light of cross burning’s long and pernicious history as a signal of

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<sup>53</sup> *Virginia v. Black*, 538 U.S. 343, 359 (2003).

impending violence.”<sup>54</sup> Just like the state may regulate a subset of advertising it deems most harmful (e.g., cigarette advertising), so too may it regulate a subset of expression based on content, but not viewpoint.

This was a split decision on the part of the Supreme Court. Concurring in part and dissenting in part, Justices Souter, Kennedy and Ginsberg said that despite the relationship between cross-burning and violence toward minorities, the Virginia statute was not exempt from the holding in *R.A.V.*, which prohibited viewpoint discrimination by the government. Justice Thomas dissented, claiming that the expression in question – cross burning – was not expression at all and instead should be considered pure conduct.

Regardless of the validity of the dissenter’s arguments, the majority opinion said that content-based restrictions may be permitted only when they are intended to communicate a serious expression of an intent to commit an unlawful act of violence.<sup>55</sup> Otherwise, the speech remains protected. Thus, it is worth noting here that the true threats doctrine is unlike incitement to illegal advocacy in that it does not include an imminence requirement and therefore may be more suited to guiding regulations designed for an online environment.

### *Incitement to Illegal Advocacy*

The final category of speech exempt from First Amendment protection that will be considered here is incitement to illegal advocacy. Again, some hate speech may fall into

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*



this category if it meets the definition of incitement laid out by the Supreme Court in the landmark case, *Brandenburg v. Ohio*.<sup>56</sup> Here, the Supreme Court reversed the conviction of a Ku Klux Klan leader who had been convicted under Ohio's criminal syndicalism statute for advocating violent political and industrial reform. The Supreme Court said in *Brandenburg* that the state may not limit advocacy unless it is "directed to inciting or producing imminent lawless actions and is likely to produce such action."<sup>57</sup> Moreover, the Supreme Court underscored the importance of the imminence requirement in the *Brandenburg* test when they said that the state cannot punish a protestor who said, "we'll take to the streets" because it was mere advocacy of future unlawfulness, was not directed at anyone and was not likely to create immediate danger.<sup>58</sup>

The imminence standard in the *Brandenburg* test is what makes it difficult to apply this precedent to cases involving incitement online. Recently though, a white supremacist named William White was sentenced to three years in prison for using his Web site, [www.overthrow.com](http://www.overthrow.com), to incite violence against the foreman in a jury trial of a fellow neo-Nazi, Mathew Hale.<sup>59</sup> In the case against White, a judge said that posting the jury foreman's name, address and phone numbers online amounted to incitement and found White guilty.<sup>60</sup>

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<sup>56</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>57</sup> *Id.*

<sup>58</sup> *Hess v. Indiana*, 414 U.S. 105 (1973).

<sup>59</sup> Kim Janssen, *White Supremacist Sentenced to 42 Months for Inciting Violence Against Juror*, CHI. SUN-TIMES, Feb. 20, 2013, available at [www.suntimes.com/news/18355576-418/white-supremacist-sentenced-to-42-months-for-inciting-violence-against-juror.html](http://www.suntimes.com/news/18355576-418/white-supremacist-sentenced-to-42-months-for-inciting-violence-against-juror.html).

<sup>60</sup> *Id.*

Given the outcome of this case, it is possible that some hate speech online may rise to the level of incitement. Therefore it will be essential to take the *Brandenberg* test into consideration when crafting future regulations designed to limit or curtail hate speech online.

### **Section III: Defining Social Media**

For purposes of this inquiry, “social media” will be defined as, “the collective of online communications channels dedicated to community-based input, interaction, content-sharing and collaboration. Web sites and applications dedicated to forums, microblogging, social networking, social bookmarking, social curating and wikis are among the different types of social media.”<sup>61</sup> Examples of social media companies include Facebook, Twitter and the focus of this inquiry, YouTube. Although this project focuses on hate speech in the channels, content and comments of YouTube, the goal of this inquiry is to offer recommendations that are applicable to all social media companies.

### **Conclusion:**

Now that the scope and nature of the problem of hate speech on YouTube has been established, Chapter II of this inquiry will be dedicated to understanding what others have said about online hate speech regulation. Specifically, that chapter will examine arguments for and against hate speech regulation on the Internet.

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<sup>61</sup> WHAT IS SOCIAL MEDIA, <http://whatis.techtarget.com/definition/social-media> (last visited Feb. 22, 2013).

Chapter III will focus on the current approaches to regulating hate speech in the United States and abroad. The chapter will provide a deeper review of the relevant U.S. jurisprudence in those areas of law having to do with unprotected hate speech: incitement, true threats, fighting words and group defamation. Next, Chapter III will explore what relevant cases reveal about the Supreme Court's position regarding hate speech regulation. Finally, this chapter will conclude with an examination of the various ways in which other countries handle hate speech on social media sites.

Next, Chapter IV will discuss regulation of the Internet. First, the ways in which the Internet is similar and different to other mediums will be explored. Then current Internet rules and regulations, including those enacted by legislatures as well as social media companies themselves, will be examined. Finally, this chapter will conclude by addressing some of the technological and jurisdictional issues associated with Internet regulation.

Chapter V of this inquiry will explore solutions to the problem of online hate speech proposed by legal scholars and other activists. Recommended approaches will be reviewed and analyzed in an effort to identify the strengths and weaknesses of each.

After the various solutions have been discussed, Chapter VI will answer the initial research questions and recommend a path forward for dealing with hate speech on social media companies' Web sites. Finally, Chapter VII will examine the limitations of this work and explore suggestions for future research.

## Chapter II

### Arguments For and Against Hate Speech Protection

#### **Introduction:**

Before delving into specifics regarding online hate speech regulation, it is essential to review the work done by legal scholars, social theorists and others to examine the broader question of whether or not hate speech should be protected by the First Amendment. Part I of this chapter addresses arguments in favor of protecting harmful speech online. Part II examines the arguments for limiting or banning hate speech on the Internet.

#### **Section I: Why Protect Harmful Speech?**

##### *Marketplace of Ideas*

Perhaps the most widely used justification for protecting harmful or degrading speech is that censorship of any sort limits the search for truth and narrows the marketplace of ideas. Truth, many scholars believe, is made stronger and clearer when it has the opportunity to collide with error.<sup>1</sup> Therefore it is best not to silence any opinion before it has had an opportunity to be heard. Building on John Stuart Mill's ideas about the dangers of silencing expression, legal scholar Zachariah Chafee characterized the attainment and spread of truth as the key force driving the First Amendment.<sup>2</sup> For Chafee, the search for truth was more than mere abstraction. It was the basis of all political and

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<sup>1</sup> John Stuart Mill, *On Liberty*, reprinted in SOCIAL & POLITICAL PHILOSOPHY 283-84 (John Arthur & William Shaw eds., 1992).

<sup>2</sup> ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 137 (1969).

social progress.<sup>3</sup> Speech, said Chafee, must be protected so that it may enter what Justice Oliver Wendell Holmes, Jr. famously described in his *Abrams v. United States* dissent as the marketplace of ideas. According to Holmes, the open market, guided by Adam Smith's "invisible hand," was the best place for both favorable and unfavorable ideas to compete so that the best among them would emerge. "The ultimate good desired is better reached by free trade in ideas," said Holmes.<sup>4</sup> "The best test of truth is the power of the thought to get itself accepted in the competition of the market."<sup>5</sup> Very much reflective of the thinking of the Enlightenment period, Holmes and Chafee both felt strongly that once the most insightful, right and truthful ideas emerged, they would be immediately adopted and used to guide the "favorable" progress of society.

Critical of this approach, C. Edwin Baker said many years later that the notion that truth is discovered through competition with falsehood wrongly assumes that truth is objective and that people are rational and have similar aims.<sup>6</sup> According to Baker, Adam Smith's invisible hand does not always produce the results desired in the marketplace of ideas because we do not all have adequate, much less equal, access to the marketplace. It is far more difficult for social or cultural groups without access to mainstream media, for example, to have their ideas widely accepted and adopted. For Baker, the marketplace of

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<sup>3</sup> *Id.*

<sup>4</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919).

<sup>5</sup> *Id.*

<sup>6</sup> C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 6 (1989).

ideas is doomed to fail until all viewpoints and individuals have adequate access, which at this time they do not.<sup>7</sup>

Thus, proponents of the marketplace of ideas as justification for protecting harmful speech suggest that hate speech is a necessary foil for civility. In theory, exposure to even the most controversial viewpoints ensures that no viewpoint is ever excluded from consideration. However, as Baker noted, many opinions are often omitted from public debate because those who hold those opinions do not have the power, prestige or wealth to access the marketplace of ideas.

### *Self-Governance*

Unlike Holmes and Chafee, legal scholar Alexander Meiklejohn, argued that the ultimate value in free expression was self-government.<sup>8</sup> Meiklejohn described self-governance as a social contract. Rules are not imposed from on high, he said. Instead, we as citizens are continually making and remaking an agreement with one another regarding how our cities, states and country should be run. To do this successfully, said Meiklejohn, we need the First Amendment to leave people the “fullest possible freedom to praise, criticize or discuss...all governmental policies and to suggest, if they desire, that even the most fundamental postulates are bad and must be changed.”<sup>9</sup> When expression is

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<sup>7</sup> *Id.*

<sup>8</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 9 (1948).

<sup>9</sup> *Id.* at 10.

abridged, members of the body politic have neither the information nor understanding they need to vote and otherwise engage in the business of self-governance.<sup>10</sup>

Owen Fiss agrees with this perspective and feels that social ends, like the search for truth or political self-governance, are the true purpose of the First Amendment.<sup>11</sup> The First Amendment, according to Fiss, is designed to preserve the openness of public debate in order to achieve social or democratic ends. Therefore, both Fiss and Meiklejohn would likely agree that political expression that goes to the core of our constitutional values should be protected to the fullest extent, whereas private expression that fulfills self-identity and self-worth should be less protected.

Applying this rationale to protecting hate speech, the question Meiklejohn and Fiss would likely want answered is, “To what extent is hate speech political speech?” If a convincing argument could be made that it was a form of political speech, then it is likely that both Fiss and Meiklejohn would argue in favor of its continued protection.

However, Fiss was also critical of Meiklejohn and his contemporary, Harry Kalven. Both Meiklejohn and Kalven, Fiss said, considered the role of government in questions of speech protection to be that of parliamentarian and suggested that the duties associated with that role could be fulfilled simply by following Robert’s Rules of Order. However, a modern parliamentarian must be able to deal with the nuances of today’s political, public sphere, something Fiss felt the government was not able to effectively do. According to Fiss, Meiklejohn and Kalven treated society as if it were one large town

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<sup>10</sup> *Id.* at 12.

<sup>11</sup> OWEN FISS, *IRONY OF FREE SPEECH* 22 (1996).

meeting but “in the constant conversation that is civil society, no one is ever out of order and no idea is ever beyond consideration.”<sup>12</sup> Society is more than a town meeting and the state is more than a parliamentarian. The state is also the “embodiment of distinctive, substantive policies and those in control of its power have a vested interest in how debates are resolved.”<sup>13</sup> Fiss is drawing attention to the assertion that while theoretically sound, in practice he does not believe that the state will be able to effectively execute any ban on speech, because it does not have the resources.<sup>14</sup>

### *Personal Liberty and Self-Fulfillment*

Whereas some thinkers, such as Chafee, Holmes, Meiklejohn and Kalven, base their justification for protecting speech on the societal benefits achieved through an absence of government censorship, others such as Baker believe that the primary reason we should not curtail even hateful or derogatory speech is because every human being has an inherent right to express herself or himself. This includes racists and bigots. To infringe on this right by silencing hateful speech is to infringe on the speaker’s personal liberty.

Thus, Baker views free expression not as a means of discovering truth or reaching societal decisions but as a necessity for achieving individual self-fulfillment and ensuring that all members of society have the opportunity to participate in change. Rather than placing the emphasis on the collective ends achieved by the First Amendment, Baker sees

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 24.



the ability to express oneself freely as an essential component of individual human liberty and autonomy, which the government should protect.

Baker develops this thesis most completely in *Human Liberty and Freedom of Speech*.<sup>15</sup> Here, Baker outlines what he calls the liberty model, which justifies protection of expression because of the way it fosters individual self-fulfillment and self-determination without interfering with the claims of others.<sup>16</sup> Baker wisely uses social theory to justify the idea that free expression helps give people the agency required to realize their full human potential. Moreover, he holds strongly to the notion that even in a representative democracy, society should not deny anyone the right to speak.<sup>17</sup>

### *Safety Valve*

Another argument that is often offered as justification for protecting harmful speech is that it acts as a “safety valve” by giving racists, bigots and others an opportunity to vent anger harmlessly through expression, as opposed to violent action. Prohibiting hate speech, the argument goes, could potentially send this type of talk underground where it would be difficult to monitor and could therefore be even more dangerous.<sup>18</sup> For example, legal scholar James Weinstein argues that removing this outlet by suppressing of hate speech might actually increase violence against women and

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<sup>15</sup> BAKER, *supra* note 6, at 10.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS? 110 (1997).

minorities.<sup>19</sup> Proponent of hate speech regulation Richard Delgado says that arguments like the safety valve or the claim that regulation may inadvertently be used against the very population it was designed to protect are paternalistic. According to Delgado, these claims rest on the notion that if blacks and other minorities knew their own self-interest, they would oppose hate speech regulations.<sup>20</sup> More importantly, says Delgado, claims such as the safety valve are not founded on empirical evidence. In fact, research suggests that allowing people to stigmatize others actually makes them more, not less, aggressive.<sup>21</sup>

### *Hate Speech as Bellwether*

Proponents of hate speech protection argue that this form of expression serves as a bellwether for racism, homophobia, xenophobia, etc. This argument suggests that if hate speech rules were enacted and hate speech curtailed, society would be woefully unaware of whether or not these negative viewpoints continued to exist.<sup>22</sup> Moreover, proponents of this argument suggest that if racists and bigots were prevented from expressing their views publicly, it could give the rest of the public a false sense of security that racism no longer exists, when in fact it has gone underground.<sup>23</sup> Therefore, the argument goes, hate speech is needed to remind us how racist, bigoted and

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<sup>19</sup> JAMES WEINSTEIN, HATE SPEECH, PORNOGRAPHY AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE 150-51 (1999).

<sup>20</sup> DELGADO & STEFANCIC, *supra* note 18, at 95.

<sup>21</sup> *Id.* at 100.

<sup>22</sup> *Id.* at 115.

<sup>23</sup> WEINSTEIN, *supra* note 19, at 151.

homophobic we truly are.

## **Section II: Why Ban Hate Speech?**

### *Psychological Damage and Self-Hatred*

One reason that is often cited for banning or at least curtailing hate speech is the psychological harm this speech inflicts on groups attacked by such propaganda. If people's daily experience tells them they are not respected or given the same dignity or courtesy as others, then eventually they will begin to doubt their own self-worth.<sup>24</sup> Research shows that the accumulation of negative messages over time may cause self-hatred among victims or targets of hate speech.<sup>25</sup> Worse yet, victims of hate speech may come to believe the accusations being made.<sup>26</sup> According to critical race theorist Mari Matsuda, this tendency for members of the defamed group to internalize the message and come to believe in their own inferiority is the worst effect hate speech has on those targeted.<sup>27</sup> Social scientists who study the effects of racism have noted that speech communicating a low regard for an individual, because of race in particular, tends to create in the victim the traits of inferiority ascribed to him or her.<sup>28</sup>

Of the different types of expression that make up the universe of hate speech discourse, insults are considered particularly damaging to the person or group being

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<sup>24</sup> KENNETH B. CLARK, DARK GHETTO 63-64 (1965).

<sup>25</sup> JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY 195 (1970).

<sup>26</sup> GORDAN W. ALLPORT, THE NATURE OF PREJUDICE 107 (1954).

<sup>27</sup> MARI J. MATSUDA, WORDS THAT WOUND 12 (1993).

<sup>28</sup> DELGADO & STEFANCIC, *supra* note 18, at 9.

targeted. According to Delgado, insults based on immutable characteristics, such as race, gender or ethnicity, can be particularly harmful because these traits are fixed and cannot be changed.<sup>29</sup> Thus, the victims of these kinds of verbal assaults have little or no recourse to become less black, less gay or less Semitic. Empirical evidence suggests that racial insults serve as a primary channel for the delivery of discriminatory attitudes.<sup>30</sup> In an online environment it is not unusual to see racial or gendered insults included in users' content and comments on YouTube, for example. When the United States government does nothing to stop the proliferation of these sites, it sends a clear message to women and minorities about the value the federal government places on their psychological health.

While it may seem that upper-class minorities are immune or exempt from the psychological damage of racism, in reality the inconsistent and unpredictable treatment they face at the hands of others, both of the same race and different races, causes stress, strain and frustration.<sup>31</sup> Thus, not only does the widespread existence of hate propaganda impact people on a psychological level, this damage in turn shades the relationships that women and minorities, for example, have with others. A gay woman may find it more difficult to interact with her boss, for instance, because she hears him use the word "fag" and assumes that his attitude is similar to that of other homophobes she has encountered in the past, both in person and online.

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<sup>29</sup> *Id.* at 5.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 9.

Finally, it is worth separately considering how hate propaganda online impacts children. How would a Jewish adolescent feel if, when searching for podcasts on iTunes, she was to stumble onto the Radio Horeb KKK podcast? What would she think about herself after listening to claims about her ethnic inferiority? According to Delgado and Stefancic, when minority children hear racist messages on a regular basis, they come to question their own competence and self-worth.<sup>32</sup> Racial or gendered epithets and insults are part of each child's formation of thoughts and feelings about race or sexual preference. Thus, while it is often easier to think only of adults when asking questions about hate speech restrictions, it is essential to take into account the effect this rhetoric has on children.

*Promotes Racist and Sexist Beliefs, Which May Lead to Violence*

In addition to the negative effects racial and ethnic insults have on individuals, and particularly children, their use has, throughout the course of history, served as the proverbial bark that occurs before the bite of racial violence. In other words, the widespread adoption of racial and ethnic slurs often precedes acts of racial violence, which range from hate crimes targeted at individuals to mass genocide. Legal scholar Alexander Tsesis has conceptualized how the casual use of racial slurs can create a climate that will tolerate crimes against humanity such as American slavery or the Holocaust.<sup>33</sup> According to Tsesis, language plays a critical role in developing the

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<sup>32</sup> *Id.* at 10.

<sup>33</sup> ALEXANDER TSEISIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS 202 (2002).

psychological mechanisms necessary for engaging in racist conduct.<sup>34</sup> Hate speech then, provides the “vocabulary and grammar depicting a common enemy...[and establishes] a mutual interest in trying to rid society of the designated pest.”<sup>35</sup> Moreover, hate speech is considered dangerous simply because it tries to instill truth into the notion of racial inferiority.

In 2010, a representative from the World Policy Institute and the United Nations Special Advisor on the Prevention of Genocide forged a partnership to study hate speech as a precursor to mass violence.<sup>36</sup> This research, which seeks to identify methods for preventing or at least limiting violence by examining the effects of hate speech on targeted populations, was inspired by the high levels of inflammatory speech that preceded the Rwandan genocide and the Bosnian war of the mid-1990s. The International Criminal Tribunal for Rwanda has acknowledged the relationship between hate speech and genocide by trying the first “incitement to genocide” cases in 1997.<sup>37</sup>

However, not everyone agrees that hate speech can lead to genocide. James Weinstein, for example, says that racist speech does not always lead to racist acts.<sup>38</sup> Proponents of hate speech bans are unable to present any data showing that racist

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 198.

<sup>36</sup> Elizabeth Duvell, *Hate Speech Leads to Genocide*, WORLD POLICY BLOG (Nov. 11, 2010), <http://www.worldpolicy.org/blog/2010/11/11/hate-speech-leads-genocide>.

<sup>37</sup> *Incitement to Genocide in International Law*, U.S. HOLOCAUST ENCYCLOPEDIA (May 11, 2012), <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007839>.

<sup>38</sup> WEINSTEIN, *supra* note 19, at 130-32.

propaganda is a significant cause of unlawful discriminatory acts, says Weinstein.<sup>39</sup> In addition, he says that private communication, from parent to child for example, is far more influential than public communication in mainstream media or online.<sup>40</sup> It is these face-to-face epithets that Weinstein thinks we should concern ourselves with.

### *Hate Speech Silences Women and Minorities*

Although it seems counter-intuitive, it is likely that the continued, unchecked presence of hate speech in public discourse may actually have a silencing effect on women, minorities and others targeted by bigoted speech. Rather than encouraging these individuals to participate in the ongoing public debate, hate speech may limit the amount of speech or expression coming from women and minorities by creating an environment that dissuades these individuals from speaking out against the various forms of discrimination they face.<sup>41</sup> In this way, failing to regulate hate speech can serve to close the existing universe of discourse about any number of subjects, particularly those related to race or gender. Thus, in order to encourage more speech by minorities and women, it may be necessary to use regulation to help establish a space for public discourse where every individual can be free from fear. At present, many women and minorities may be fearful of the repercussions associated with speaking out about controversial issues and therefore it may seem safer to remain silent. In this way, allowing or permitting hate speech is actually serving to chill the speech of certain minority groups.

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 136.

<sup>41</sup> FISS, *supra* note 11, at 18.

### *Causes Illegal Acts of Discrimination*

The proliferation of hate group web sites and hate speech on social networking sites such as Google's YouTube has very real impacts on women, minorities and members of the lesbian, gay, bisexual and transgender (LGBT) community. The more widely these viewpoints are held, the more likely women and minorities are to be discriminated against, particularly in the workplace.<sup>42</sup> Although Title VII of the Civil Rights Act of 1964 protects individuals against employment discrimination on the basis of race, color, national origin, sex or religion,<sup>43</sup> statistics show that women and minorities still make less than their white, male counterparts.<sup>44</sup> In 2012, the median female wage in the United States was only 81 percent of the median male wage.<sup>45</sup> Moreover, black men in America only earn 74.5 percent of a typical white man's wage. On average, the difference in wages between blacks and whites is about 25 to 30 percent.<sup>46</sup>

In addition, a 2011 study conducted by National Bureau of Economic Research scholars Roland Fryer, Devah Pager and Jorg L. Spenkuch looked at the extent to which racial discrimination is responsible for differences in earnings. The study found that

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<sup>42</sup> Meghan Casserly, *The Real Origins of the Gender Pay Gap and How We Can Turn it Around* FORBES.COM, July 5, 2012, available at <http://www.forbes.com/sites/meghancasserly/2012/07/05/real-origins-gender-pay-gap-how-we-can-turn-it-around/>.

<sup>43</sup> Civil Rights Act, 42 U.S.C. §§ 2000-2002 (1964).

<sup>44</sup> Casserly, *supra* note 42.

<sup>45</sup> *Id.*

<sup>46</sup> Azure Gilman, *Explaining the Black-White Wage Gap*, FREAKONOMICS.COM, Oct. 6, 2011, available at <http://www.freakonomics.com/2011/10/06/explaining-the-black-white-wage-gap/>.



racial discrimination accounted for one-third of the difference in wages among workers.<sup>47</sup> Throughout their research, the authors observed that in many cases, employers would discriminate against blacks in terms of initial wage, but then slowly raise wages as they learn more about the individual employee. From this the authors concluded that, “alleviating racial inequality may take a combination of policies to both eliminate barriers to investing in pre-market skills and anti-discrimination enforcement so that minorities are appropriately rewarded for those skills.”<sup>48</sup> Legal scholars, such as Ronald Dworkin, argue that allowing First Amendment protection for hate speech is the price we have to pay in exchange for having discrimination laws for housing or employment.<sup>49</sup> According to federal law, having and expressing negative attitudes is permitted, but acting on those prejudices is not.<sup>50</sup>

### *Creates a Disordered Society*

According to legal philosopher Jeremy Waldron, a well-ordered society requires that all people must be protected by the law and are able to live in confidence of this protection.<sup>51</sup> “Each person should be able to go about his or her business, with the assurance that there will be no need to face hostility, violence, discrimination or

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<sup>47</sup> Roland Fryer, Devah Pager & Jorg L. Spenkuch, *Racial Disparities in Job Finding and Offered Wages* 17-20 (National Bureau of Economic Research, Working Paper 17462, 2011), available at <http://www.nber.org/papers/w17462>.

<sup>48</sup> *Id.*

<sup>49</sup> Ronald Dworkin, *Reply to Jeremy Waldron*, in *THE CONTENT AND CONTEXT OF HATE SPEECH* 341-44 (Michael Herz & Peter Molnar eds., 2012).

<sup>50</sup> Civil Rights Act, 42 U.S.C. §§ 2000-2002 (1964).

<sup>51</sup> Jeremy Waldron, *Hate Speech and Political Legitimacy*, in *THE CONTENT AND CONTEXT OF HATE SPEECH* 329-40 (Michael Herz & Peter Molnar eds., 2012).

exclusion by others,” says Waldron. Hate speech, he argues, undermines this essential right and causes women and minorities to live in fear of these very things. By prohibiting hate speech, society will be more peaceful and race relations will improve, says Waldron.<sup>52</sup>

### *Protecting Hate Speech Is Inconsistent With the Fourteenth Amendment*

Yet another reason cited in favor of banning hate speech is that its mere existence is inconsistent with the principle of equality established by the Fourteenth Amendment, which says that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>53</sup> Thus, if the Fourteenth Amendment embodies an anti-discrimination principle, then anything that supports and further perpetuates racial inequality should be regulated.<sup>54</sup>

### **Conclusion:**

There are viable arguments both for and against the regulation of hate speech in the United States. Proponents of First Amendment protection for hateful speech argue that in order to protect the marketplace of ideas; effectively self-govern; and ensure a robust, wide-open public debate, this society must permit hateful expression. Adherents of this position also cite an individual’s right to liberty and self-expression as justification for allowing even racists or bigots to express themselves freely and without fear of

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<sup>52</sup> *Id.*

<sup>53</sup> U.S. CONST. amend. XVI, § 2.

<sup>54</sup> STEVEN J. HEYMAN, HATE SPEECH AND THE CONSTITUTION 124 (1996).

reprimand. Lastly, those in opposition to curtailing hate speech cite the safety valve and bellwether arguments, which essentially hold that by allowing hate speech, society is better able to track and monitor racism and sexism, while at the same time providing those with uncivil points of view the opportunity to express themselves freely.

On the other hand, those scholars and activists calling for prohibitions on hate speech, whether online or off, cite the psychological damage this kind of rhetoric has on its targets, particularly children. Moreover, a climate that tolerates hate speech is also one in which women and people of color make far less money than their white, male counterparts. Proponents of hate speech regulation also note that allowing vitriolic rhetoric to persist is not in line with the Fourteenth Amendment. Finally, those in favor of regulation argue that failing to protect the victims of hate speech creates a culture conducive to violence toward women, minorities and members of the LGBT community.

Moving forward, it will be important to consider both the arguments for and against the regulation of hate speech when considering proposed solutions to the issue of online hate speech. For example, any solution offered at the conclusion of this inquiry must certainly be able to stand-up to arguments that regulation on harmful speech is at odds with the First Amendment. On the other hand, it will also be essential to take into account the arguments in favor of regulation as justification for any proposed action.

## **Chapter III**

### **Current Regulation of Online Hate Speech in the United States and Abroad**

#### **Introduction:**

Before considering potential solutions for dealing with the problem of hate speech online, it is essential to begin with a road map of those rules and regulations that already exist and apply to the content being examined here. Therefore, this chapter will look at the current regulation of hate speech on the Internet both in the United States and in other Western democracies. The focus of Section I of this chapter is United States jurisprudence regarding online and offline hate speech. Next, Section II of this chapter will explore relevant cases, which are intended to provide insight regarding what the U.S. Supreme Court may or may not accept in terms of online hate speech regulation. Finally, Section III will look at the ways in which Canada, Germany and the European Union (EU) have attempted to regulate online hate speech and the successes and failures associated with each of these efforts.

#### **Section I: Supreme Court Rulings on Hate Speech Statutes**

This section will explore the lines already drawn by the Supreme Court regarding which kinds of hate speech will and will not be protected by the First Amendment. Specifically, the areas of law known as fighting words, incitement, true threats and group libel will be examined.

## *Fighting Words*

Fighting words were defined by the Supreme Court in *Chaplinsky v. New Hampshire*<sup>1</sup> as “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction.”<sup>2</sup> However, since the *Chaplinsky* decision in 1942, the Supreme Court has been reluctant to find much expression that falls within the narrow definition of this standard. For example, the Supreme Court invalidated a breach of peace conviction against a man who denounced Jews to a crowd outside an auditorium as “slimy scum” and “bed bugs.”<sup>3</sup> The trial judge in that case had instructed the jury to convict if the speech “stirs public anger, invites dispute or brings about a condition of unrest.” The Supreme Court deemed that instruction an error in violation of the First Amendment and thus a conviction based on those grounds would not be able to stand.<sup>4</sup>

In addition, in *R.A.V. v. St. Paul*, a 1992 case dealing with the constitutionality of a cross burning statute, the Supreme Court said what makes fighting words unprotected are their non-speech elements. Like regulating a sound truck, it is the noise or verbal cacophony caused by fighting words that the Supreme Court has said warrants regulation.<sup>5</sup> However, the government may not regulate the use of fighting words based

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<sup>1</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>2</sup> *Id.* at 571-72.

<sup>3</sup> *Terminiello v. Chicago*, 337 U.S. 1 (1949).

<sup>4</sup> *Id.*

<sup>5</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

on hostility or favoritism toward the underlying message because the First Amendment imposes a viewpoint discrimination limitation.<sup>6</sup> Because the Minnesota ordinance in *R.A.V.* applied only to fighting words that insult on the basis of race, color, creed, religion or gender and not all fighting words, the Supreme Court found it to be unconstitutional.

Not only did the *R.A.V.* case reinforce the Supreme Court's opposition to viewpoint discrimination, it also serves as a reminder that content-based regulations must meet the threshold of strict scrutiny, which requires the government to demonstrate a compelling interest and for the regulation to be narrowly drawn. In fact, in the past, courts have found hate speech statutes not limited to the narrow definition of fighting words to be unconstitutional.<sup>7</sup>

In addition, the Supreme Court in *R.A.V.* indicated that hate crime statutes would also be struck down as unconstitutional. However, the Supreme Court in *Wisconsin v. Mitchell* upheld penalty enhancements for perpetrators of hate crimes. In the *Mitchell* case, the respondent incited a group of black men to assault a white man after viewing the film *Mississippi Burning*. Todd Mitchell led the group to beat the man so badly that he was unconscious and in a coma for days. Here, the Supreme Court said that enhanced sentences for those who "intentionally select the person against whom the crime ... is committed or selects the property which is damaged...because of the race, religion, color,

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<sup>6</sup> *Id.*

<sup>7</sup> *Gooding v. Wilson*, 405 U.S. 518 (1972).

disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property” are permitted.<sup>8</sup>

Regardless, any online hate speech regulations proposed would be content-based and as such, must meet the threshold of strict scrutiny. This means that the rules or regulations offered here must be as narrowly drawn as possible. In addition, it will be necessary to demonstrate that the regulation is necessary to protect the public health, safety or welfare. Finally, the Supreme Court’s claim that what makes fighting words unprotected is their non-speech elements should be carefully considered. It is likely that arguments in favor of hate speech restrictions based on the non-speech elements of expression, such as secondary effects, will be the most convincing.

### *Incitement*

In 1919 Justice Oliver Wendell Holmes, speaking for a unanimous Supreme Court, wrote that, “the question in every case is whether the words are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”<sup>9</sup> Although in that case, the conviction of a man charged with violating the Espionage Act was upheld, the decision provided the foundation on which precedent regarding incitement to illegal advocacy would be built. During that same term, Justices Holmes and Brandeis dissented in a similar case dealing with print materials disseminated by Russian revolutionaries. “We should be vigilant against attempts to check expressions of opinions we loath, unless

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<sup>8</sup> Wisconsin v. Mitchell, 508 U.S. 476, 481 (1993).

<sup>9</sup> Schenck v. United States, 249 U.S. 47, 48 (1919).

they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country,” said Holmes.<sup>10</sup> From that point forward, the immediacy of the potential harm caused by speech has been a key consideration of the courts.

For example, in the landmark case, *Brandenburg v. Ohio*,<sup>11</sup> the Supreme Court reversed the conviction of a Ku Klux Klan leader who had been charged under Ohio’s criminal syndicalism statute for advocating violent political and industrial reform when a local news outlet aired comments he made during a Klan meeting. The Supreme Court said in *Brandenburg* that the state cannot limit advocacy unless it is “directed to inciting or producing imminent lawless action and is likely to produce such action.”<sup>12</sup>

Another case, *Paladin Enterprises v. Rice*, exemplifies the Supreme Court’s position that even printed content is not immune from liability for damages caused by one of its readers.<sup>13</sup> Here, the Supreme Court denied a writ of certiorari to an appeal of the decision of the lower court. In doing so, the Supreme Court essentially refused to extend protection to a book, *Hit Man: A Technical Manual for Independent Contractors*, which had instructions that had allegedly been relied upon in a triple murder-for-hire crime.<sup>14</sup> The Supreme Court’s position in this case suggests that the creators of Internet content

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<sup>10</sup> *Abrams v. United States*, 250 U.S. 616 (1919).

<sup>11</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>12</sup> *Id.*

<sup>13</sup> *Rice v. Paladin Enters., Inc.*, 128 F.3d. 233 (4<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

<sup>14</sup> *Id.*



that incites violence among readers may also be accountable for the harm caused by the content.

However, it is important to recognize the extent to which the imminence standard in the *Brandenburg* test makes it difficult to apply this precedent to cases involving incitement online. William White, an active white supremacist, received a three-year jail sentence for using his Web site, [www.overthrow.com](http://www.overthrow.com), to incite violence against the jury foreman in a trial of another neo-Nazi named Mathew Hale.<sup>15</sup> In this instance, a judge said that posting the jury foreman's name, address and phone numbers online was considered incitement to illegal activity and White was found guilty.<sup>16</sup>

Although not dealing directly with hate speech, another pivotal incitement case, *Planned Parenthood v. American Coalition of Life Activists*,<sup>17</sup> provides valuable information regarding what specifically constitutes incitement online in the eyes of the courts. This case involved an anti-abortion organization's Web site, referred to as the "Nuremberg Files," which featured photos of abortion providers, their home addresses, license plate numbers and the names of their spouses and children. In three instances, the names of doctors who had been killed were lined through in black. Those who had been wounded were lined through in gray. Although a three-judge panel of the U. S. Court of Appeals for the Ninth Circuit originally ruled in favor of the site's creators, the full court

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<sup>15</sup> Kim Janssen, *White Supremacist Sentenced to 42 Months for Inciting Violence Against Juror*, CHI. SUN-TIMES, Feb. 20, 2013, available at [www.suntimes.com/news/18355576-418/white-supremacist-sentenced-to-42-months-for-inciting-violence-against-juror.html](http://www.suntimes.com/news/18355576-418/white-supremacist-sentenced-to-42-months-for-inciting-violence-against-juror.html).

<sup>16</sup> *Id.*

<sup>17</sup> *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA*, 290 F.3d 1058, 1079 (9th Cir. 2002), *cert. denied*, 539 U.S. 958 (2003).

eventually decided in a six to five vote that the speech in question encouraged violence against the abortion doctors and therefore should not be protected by the First Amendment.<sup>18</sup> Here, the majority rejected the notion that speech advocating violence be protected unless it is directed to “inciting imminent lawless action.”<sup>19</sup> As Judge Pamela Ann Rymer wrote for the majority, “while advocating violence is protected, threatening a person with violence is not,” particularly when people were named and made to fear for their safety.<sup>20</sup>

The Supreme Court’s decision in this complex case suggests that the *Brandenburg* definition of incitement is slowly being replaced by the notion of true threats. Even without meeting the imminence requirement, the majority decision in the “Nuremberg Files” case has established that, in the eyes of the judiciary, making a threat to a specific individual, whether done in person, in print or online, should not be considered protected speech.

### *True Threats*

Like *R.A.V. v. St. Paul*, the *Virginia v. Black* case also asked the Supreme Court to consider whether a State’s cross-burning statute was permissible. The majority opinion, written by Justice Sandra Day O’Connor, diverged from the *R.A.V.* decision and formally established the category of unprotected speech known as “true threats.” These are defined by the Supreme Court as threats that “encompass those statements where the

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<sup>18</sup> Adam Liptak, *Posters by Abortion Foes Posed Threat, Court Rules*, N.Y. TIMES, May 17, 2002, available at <http://www.nytimes.com/2002/05/17/us/posters-by-abortion-foes-posed-threat-court-rules.html>.

<sup>19</sup> *Planned Parenthood*, 290 F.3d at 1079.

<sup>20</sup> *Id.* at 1082.

speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>21</sup>

The *R.A.V.* decision established that some types of content-discrimination do not violate the First Amendment. In particular, the ruling in *R.A.V.* said that restrictions based on the non-speech elements of expression or the secondary effects caused by the expression may sometimes be constitutional. Thus, the majority opinion in *Black* granted Virginia permission to prohibit a subset of intimidating messages because of their history as a precursor for violence. “Instead of prohibiting all intimidating messages,” wrote Justice O’Connor, “Virginia may choose to regulate this subset of intimidating messages in light of cross burning’s long and pernicious history as a signal of impending violence.”<sup>22</sup> Here Justice O’Connor established that a state may constitutionally regulate a subset of expression based on content, but not the viewpoint being espoused.<sup>23</sup>

The Supreme Court’s decision in this case was divided. Concurring in part and dissenting in part, Justices Souter, Kennedy and Ginsberg said that even though the historic relationship between cross-burning and violence toward minorities was undeniable, the Virginia statute was not exempt from the holding in *R.A.V.*, which prohibited viewpoint discrimination by the government.<sup>24</sup> Justice Thomas also dissented,

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<sup>21</sup> *Virginia v. Black*, 538 U.S. 343, 360 (2003).

<sup>22</sup> *Id.*

<sup>23</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>24</sup> *Virginia v. Black*, 538 U.S. 343, 352 (2003).

claiming that cross burning was not expression at all and instead should be considered pure conduct.<sup>25</sup>

Regardless of the validity of the dissenting judges' arguments, the majority opinion in *Black* said that content-based restrictions may be permitted only when they are intended to communicate a serious expression of an intent to commit an unlawful act of violence.<sup>26</sup> Otherwise, the speech remains protected. However, the true threats doctrine is unlike incitement to illegal advocacy in that it does not include an imminence requirement and therefore may be more suited to guiding regulations designed for an online environment. In addition, any revised approach to regulating hate speech online must be viewpoint neutral and, again, meet the threshold of strict scrutiny.

Although the Supreme Court did not carve out the true threats exception for Virginia's cross-burning statute until 2003, in the late 1990s Congress adopted a law<sup>27</sup> that articulates the elements of a true threat. Since then, there have been a handful of successful prosecutions of individuals who create and disseminate threats online.<sup>28</sup> For example, the U.S. Circuit Court of Appeals for the Fifth Circuit upheld in 2001 an 18-year-old high school student's guilt of making true threats when he repeatedly said in an

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<sup>25</sup> *Id.* at 389.

<sup>26</sup> *Id.* at 360

<sup>27</sup> 18 U.S.C. § 875(c).

<sup>28</sup> *United States v. Morales*, 272 F.3d 284 (9<sup>th</sup> Cir. 2001), *cert. denied*, 536 U.S. 941 (2002).

Internet chat room that he planned to kill other students at his school, and gave no indication he was joking.<sup>29</sup>

In order to support a conviction like this one under the true threats statute, the government must prove three elements of the crime: a transmission in interstate or foreign commerce, a communication containing a threat and a threat to injure or kidnap the person of another.<sup>30</sup> Specifically, the U. S. Code states:

Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.<sup>31</sup>

Cases regarding a violation of this statute often fail to meet the threshold of a direct threat to injure or kidnap an individual.<sup>32</sup> In their application of this law, courts have considered the extent to which the threat is believable — an essential determinant of whether or not an utterance or expression should be considered a true threat.<sup>33</sup> For example, the Sixth Circuit's decision in *United States v. Alkhabaz* held that emails exchanged between the two parties presumably containing sexually threatening content about a mutual acquaintance did not rise to the level of true threats. In other words, it was not believable that the threats were serious. In this case, the decision said that true threats

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<sup>29</sup> *Id.* at 287.

<sup>30</sup> *United States v. DeAndino*, 958 F.2d 146, 147 (6th Cir. 1992), *cert. denied*.

<sup>31</sup> 18 U.S.C. § 875(c).

<sup>32</sup> *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997).

<sup>33</sup> *Id.*

convictions were heavily dependent upon whether a jury could find that a reasonable recipient of the communications would objectively tend to believe that the speaker was serious about his stated intention.<sup>34</sup> Threats, the judges said, are “tools that are employed when one wishes to have some effect, or achieve some goal, through intimidation.”<sup>35</sup> This is true regardless of whether the goal is highly reprehensible or seemingly innocuous. As long as the intent is to intimidate, there may be grounds for a successful prosecution for violation of this statute.<sup>36</sup> Therefore, it is essential to take into consideration the language used to define true threats by the judiciary, as well as Congress, in crafting Section 875(c).

Although the content of the email in the *Alkhabaz* case did not meet the threshold required for true threats because “no reasonable person would perceive the e-mails as intending to effect change or achieve a goal through intimidation,”<sup>37</sup> in 1998 a previously-enrolled student at the University of California at Irvine was sentenced to one year in prison for sending email death threats to 60 Asian-American students at the university.<sup>38</sup> His email was signed “Asian hater” and threatened that he would “make it my life [sic] career to find and kill everyone one [sic] of you personally.” It seems that the judge here is indicating that proscribable threats must be communicated either to the threatened individual or to a third party with “some connection” to the threatened

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<sup>34</sup> *Id.* at 1495.

<sup>35</sup> *Id.* at 1496.

<sup>36</sup> 18 U.S.C. § 875(c).

<sup>37</sup> *Alkhabaz*, 104 F.3d at 1493.

<sup>38</sup> *United States v. Bellrichard*, 779 F. Supp. 454, 459 (D. Minn. 1991), *aff'd*, 994 F.2d 1318 (8th Cir. 1993).

individual.<sup>39</sup>

### *Group Libel*

Despite the outcome of the landmark case, *Beauharnais v. Illinois*,<sup>40</sup> the judiciary does not necessarily support the constitutionality of a general hate speech ban.<sup>41</sup> In this instance, the Supreme Court did uphold an Illinois group libel statute that declared the distribution of publications that disseminate hate-laden information to be an act of criminal libel, which only some states continue to recognize.<sup>42</sup> Writing for the majority, Justice Frankfurter noted in the decision that the justification for protecting this particular statute prohibiting racist speech directed at a class of citizens was “for the benefit of free ordered life in a metropolitan, polyglot community.”<sup>43</sup> However, it is important to note that to be defamatory, a statement must contain a false factual assertion damaging to the reputation of an individual, entity or group.<sup>44</sup> Not much online hate speech meets this definition; therefore the logic offered in the *Beauharnais* case is rarely relied upon as the justification for exempting hate speech from First Amendment protection.

Although the notion of group defamation is probably not valid, the larger question of whether civil action for racially insulting language is possible under the intentional

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<sup>39</sup> *Id.*

<sup>40</sup> 343 U.S. 250 (1952).

<sup>41</sup> JAMES WEINSTEIN, HATE SPEECH, PORNOGRAPHY AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE 57 (1999).

<sup>42</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 259 (1952).

<sup>43</sup> *Id.*

<sup>44</sup> WEINSTEIN, *supra* note 40, at 57.

infliction of emotional distress tort is. The question here is whether the victims of racial insults can successfully claim that they have suffered emotional harm as a result of reading a racist comment on YouTube, for example.

In *Hustler v. Falwell*, the Supreme Court has said that an outrageousness standard runs afoul of its longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.<sup>45</sup>

Even before *Hustler v. Falwell*, it was difficult for plaintiffs to bring successful group libel cases. For example, in 1983 a New York state judge dismissed a libel case brought by several Puerto Rican groups against an individual who had publically called food stamps “basically a Puerto Rican program.”<sup>46</sup> The First Amendment, Judge Eve Preminger wrote in the majority decision, “does not allow even false statements about racial or ethnic groups to be suppressed or punished just because they may increase the general level of prejudice.”<sup>47</sup> Thus, because of the *Hustler* ruling, group libel and emotional distress torts no longer seem to be a viable path to pursue in an effort to find and punish those who create and disseminate hate speech on social media sites.

### *Section Summary*

Looking at the judiciary’s approach to handling hate speech cases provides valuable insights for crafting a revised approach to dealing with the problem of hate speech on social media Web sites such as YouTube. For example, the Supreme Court’s

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<sup>45</sup> *Hustler v. Falwell*, 485 U.S. 46, 55 (1988).

<sup>46</sup> Liptak, *supra* note 18.

<sup>47</sup> *Id.*



position regarding fighting words suggests that non-content-based prohibitions on speech are the ones most likely to be accepted.<sup>48</sup> The power to proscribe speech, the Supreme Court said, comes from the non-content elements of that expression.<sup>49</sup> Moreover, if content-based restrictions are proposed, it will be essential that the regulations be able to meet the threshold of strict scrutiny.<sup>50</sup> This means that any regulations proposed must serve a compelling government interest and be narrowly drawn. In addition, while the restriction proposed is likely to be content-based, it should not be viewpoint based. That is, the government should not be showing preference for a particular position on a given issue. However, the Supreme Court's position in *R.A.V.* should also serve as a caution that content-based regulations of hate speech in particular may not be permitted in the United States, which has traditionally banned the imposition of "special prohibitions on speakers who express their views on disfavored subjects such as race, color or religion."<sup>51</sup>

The examination of the relevant fighting words and incitement cases suggests that intent is perhaps now the most important element considered by courts in these instances.<sup>52</sup> Thus, the intent of the creators and disseminators of online hate speech should be thoroughly considered before a revised approach is offered. In addition, the outcomes of the incitement cases discussed here suggest that posting personal

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<sup>48</sup> Yulia A. Timofeeva, *Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany*, 12 J. TRANSNAT'L & POL'Y 271 (2003).

<sup>49</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>50</sup> *Morse v. Frederick*, 551 U.S. 393 (2007).

<sup>51</sup> Timofeeva, *supra* note 47, at 271.

<sup>52</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

information such as a person's name and home address, along with a call to harm that individual, will not be tolerated by the judiciary.

Of the areas of law examined here, true threats may be the most effective legal concept used to successfully prosecute perpetrators of hate speech or expression. However, it is important to note that much of the online hate speech on YouTube, for example, would not be able to meet the requirements of a true threat outlined by Congress or the Supreme Court.<sup>53</sup> Finally, the notion of group libel, while not necessarily immediately effective, raises the interesting question of whether a tort solution is perhaps the best approach to regulating hate speech on social media Web sites.<sup>54</sup>

## **Section II: Supreme Court Rulings Regarding Related Cases**

Although an exploration of the judiciary's position on past hate speech cases is informative, there is also value in examining ancillary but relevant areas of law. Understanding how the courts feel about content-based broadcast regulation, captive audiences, secondary effects and intentional infliction of emotional distress, can better inform efforts to craft an approach to deal with hate speech on social media Web sites.

### *Content-Based Broadcast Regulations*

Introduced in 1949, the Fairness Doctrine mandated that radio and television broadcasters, and eventually cablecasters who originated content, air programs about issues affecting the public and present a variety of viewpoints regarding controversial

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<sup>53</sup> See, e.g., 18 U.S.C. § 875(c); *Virginia v. Black*, 538 U.S. 343 (2003).

<sup>54</sup> *Timofeeva*, *supra* note 47, at 272.

issues.<sup>55</sup> Although it was not necessary for broadcasters to include multiple perspectives in a particular program, the Fairness Doctrine held that an outlet's overall coverage of an issue needed to include a wide range of diverse viewpoints.<sup>56</sup>

Challenged in the landmark *Red Lion* case as unconstitutional under the First Amendment, the Supreme Court decided then that spectrum scarcity justified the FCC's requirement that broadcasters present multiple viewpoints.<sup>57</sup> Print media, the Supreme Court said, do not have the same requirement. The Supreme Court justified its decision by noting that the spectrum prevents everyone who wants to broadcast from doing so.<sup>58</sup> However, in an era of sweeping telecommunications deregulation that took place during the 1980s, the FCC repealed the doctrine on grounds that it violated broadcasters' First Amendment rights. The commission claimed that the policy was causing broadcasters to censor themselves. In essence, the Fairness Doctrine was accused of having a chilling effect on broadcasters. According to the FCC, broadcasters were choosing not to present discussions about important public issues rather than be burdened with the task of presenting multiple viewpoints.<sup>59</sup> The FCC's decision to eliminate the doctrine was upheld by a federal appellate court in 1989.<sup>60</sup>

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<sup>55</sup> Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

<sup>56</sup> *Id.*

<sup>57</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 391 (1969).

<sup>58</sup> *Id.*

<sup>59</sup> *See Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 169 (1985).

<sup>60</sup> *Syracuse Peace Council*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

Although not directly related to hate speech online, the Supreme Court's decision in the *Red Lion* case may indicate that the court may tolerate content-based regulation of Internet images or video, for example, if a successful comparison could be drawn between the nature of broadcasting as a mass medium at the time of the *Red Lion* case and the nature of the Internet as a mass medium today. However, this argument will be a difficult one to make, given that the Supreme Court said in the landmark Internet regulation case, *Reno v. ACLU*, that it considered the Internet more akin to print than broadcast media.<sup>61</sup> Finally, the Supreme Court's comfort with the FCC providing oversight for the execution of the fairness doctrine suggests that they may be the best organization to oversee the regulation of hate speech on social media Web sites.

#### *Captive Audience*

The decision in *Cohen v. California* illuminated the Supreme Court's position that offensive speech or expressive conduct that takes place in the vicinity of others does not warrant punishment.<sup>62</sup> In a notably speech-protective decision, the Supreme Court held that wearing a jacket with the words "Fuck the Draft" emblazoned on the back to the courthouse did not violate a California statute prohibiting malicious disturbance of the peace with offensive conduct.<sup>63</sup>

Writing for the majority, Justice Harlan established that according to the "fighting words" doctrine, expression must be directed to the hearer in order to be prohibited. In

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<sup>61</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

<sup>62</sup> *Cohen v. California*, 403 U.S. 15 (1971).

<sup>63</sup> *Id.*

this case, the Supreme Court held that “no individual actually or likely to be present could reasonably have regarded the words on the appellant’s jacket as a direct personal insult.”<sup>64</sup> Justice Harlan recognized, however, that the State might legitimately act to prevent a captive audience from being subjected to objectionable speech. Specifically, he noted that, “the ability of government...to shut off discourse solely to protect others from hearing it is dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”<sup>65</sup> According to the Supreme Court’s decision in *Cohen*, those present in the Los Angeles courthouse could avoid an infringement on their privacy or sensibilities simply by averting their eyes. While individuals may have a more reasonable expectation of privacy in a public courthouse than they would in a public park, it is “nothing like the interest in being free from unwanted expression in the confines of one’s own home,” which is what the Supreme Court says the captive audience exception seeks to protect.<sup>66</sup>

Thus, the individuals in the courtroom exposed to the message on Cohen’s jacket were not considered a captive audience by the Supreme Court and the message itself was not deemed “directed at the hearer” and therefore not considered unprotected expression under the “fighting words” doctrine.<sup>67</sup> Notably, this case raises the question of whether or not people visiting a YouTube video site or channel home page might be considered a captive audience. Might the same argument apply or would members of the judiciary

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<sup>64</sup> *Id.* at 27.

<sup>65</sup> *Id.* at 21.

<sup>66</sup> *Id.* at 22.

<sup>67</sup> *Id.*

simply instruct visitors to these sites to look away from the screen or ignore the hateful rhetoric they are confronted with?

### *Secondary Effects*

While the direct impact of exposure to offensive speech may not be grounds for criminal prohibition of hate speech on social media sites like YouTube, what may really be at issue are the secondary effects caused by online hate speech. In *R.A.V. v. St. Paul*, the Supreme Court said that “secondary effects” served as another valid basis for “accord[ing] differential treatment to even a content-defined subclass of proscribable speech,” as long as the regulation is justified without reference to the content of that speech.

Moreover, in *Young v. American Mini Theaters, Inc.*<sup>68</sup> the Supreme Court said, as it did in *R.A.V.*, that speech may be restricted as long as the restriction is based on the non-speech elements of expression. For example, in the *American Mini Theaters* case, the Supreme Court said restricting the location of adult bookstores is permitted because the goal of the State is to minimize the secondary effects associated with this type of speech – such as prostitution – not to curtail the pornographic message inherent in this form of sexual expression.<sup>69</sup> With this in mind, it may be possible to legally justify the revised approach to managing online hate speech on social media Web sites if the negative psychological effects of hate speech are as dangerous as those sanctioned by the

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<sup>68</sup> *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976).

<sup>69</sup> *Id.*

Supreme Court in the *American Mini Theaters* case.<sup>70</sup>

### *Intentional Infliction of Emotional Distress*

Taking a more direct approach, legal scholars such as Richard Delgado have suggested focusing on pursuing cases under harassment and emotional distress torts instead of true threats or fighting words statutes. For scholars in this camp, a tort action is a more viable option for redress than a criminal penalty. To bring action under Delgado's theory, the plaintiff must show that the conduct was extreme and outrageous – beyond the bounds of human decency in civilized society, caused severe emotional distress and was intentional or reckless. Specifically, the language must be addressed to the plaintiff by the defendant and be intended to demean through reference to race that a reasonable person would recognize as a racial insult.<sup>71</sup> Finally, public officials and figures must prove actual malice to win an intentional infliction of emotional distress (IIED) suit. Therefore successful suits could be those brought by individuals personally and negatively impacted by hate speech on social media sites. In more recent decisions, such as *Hustler v. Falwell*, the Supreme Court has said that an outrageousness standard runs afoul of its longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.<sup>72</sup> Since that ruling, it has been difficult for plaintiffs to bring successful IIED suits based upon the effects of racial insults.

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<sup>70</sup> *Id.*

<sup>71</sup> See Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 149 (1982).

<sup>72</sup> *Hustler v. Falwell*, 485 U.S. 46, 55 (1988).

### *Section Summary*

The outcomes of these cases provide valuable insights regarding what the Supreme Court may or may not tolerate in terms of regulating hate speech on social media Web sites. The Supreme Court's acceptance of the Fairness Doctrine suggests that it may be possible to regulate content on the Internet based on the same reasons that broadcast content may be restricted. Chapter IV will explore this possibility in further detail. Along those lines, it will be essential to consider the nature of the audience for social media content. Is the Internet as pervasive a mass medium as broadcast is thought to be? Also, is the audience of a YouTube video, for example, considered captive or should Internet users simply look, or in this case click, away from content that is hateful or offensive.

Perhaps most noteworthy is the extent to which the negative psychological impacts of hate speech may serve as justification for a content-based regulation. Finally, despite the ruling in the *Hustler* case, emotional distress may still be a viable path to consider when evaluating all of the options available for the victims of online hate speech to pursue.

### **Section III: International Hate Speech Regulations**

The final section of this chapter will examine the ways in which other Western democracies attempt to regulate online hate speech. Several countries, including Austria, Belgium, Canada, Cyprus, England, France, Germany, India, Israel, Italy, the Netherlands and Switzerland, have enacted laws penalizing the dissemination of hate



speech.<sup>73</sup> The Internet hate speech policies of Canada, Germany and the European Union will be examined to identify the lessons learned by the entities executing these policies. The successes and failures of other countries' approaches may inform the policy being offered here. Of particular importance is learning how social media companies deal with the jurisdictional issues that arise as they work to abide by the rules of each country in which they operate.

### *Canada*

In Canada, the distribution of online hate speech is illegal. Specifically, the Canadian Criminal Code contains a cause of action against the public incitement of others to hatred.

“Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.”<sup>74</sup>

Moreover, the willful promotion of hatred through public statements about an identifiable group is punishable by up to two years imprisonment. In addition, the Canadian Human Rights Act also prohibits the technological distribution of hate materials.<sup>75</sup> In fact, the head of the Human Rights Commission has said that the

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<sup>73</sup> Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 SAN DIEGO L. REV. 817, 858 (2001).

<sup>74</sup> Canada Criminal Code, R.S.C. 1985, c. C-46, § 319(1).

<sup>75</sup> See Canadian Human Rights Act, R.S.C., ch. H-6, § 13(1) (1985) (Can.), available at <http://laws.justice.gc.ca/en/H-6/26085.html>.

Commission can prevent Internet sites from transmitting hate messages even when the source servers are based in other countries.<sup>76</sup> Thus, not only is it illegal to create and electronically disseminate hateful rhetoric within the Canadian borders, Canada also has jurisdiction as long as Internet signals are received in Canada. This means that the administrators of hate group Web sites and those who post hate speech on social media sites such as YouTube, are susceptible to prosecution under Canadian law, even if the content was created in a country where hate speech is protected, such as the United States.

Finally, the constitutionality of Canada's hate speech ban<sup>77</sup> has been upheld two times by the Canadian Supreme Court.<sup>78</sup> In one case, two white nationalists who published *The National Reporter*, a publication that promoted white supremacy and contained phrases such as "Nigger go home," "Hoax on the Holocaust," and "Israel stinks," were convicted under the ban.<sup>79</sup>

### *Germany*

Germany's Internet hate speech laws are considered particularly stringent, which makes sense considering the country's long and pernicious history with ethnic genocide.<sup>80</sup> Although German Basic Law provides that "everyone has the right to freely express and disseminate his opinion in speech writing and pictures and to inform himself

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<sup>76</sup> See *Human Rights Body to Investigate hate on Internet*, CAN. PRESS NEWSWIRE Nov. 22, 1996 available at LEXIS, News Group File, All.

<sup>77</sup> Canada Criminal Code, R.S.C. 1985, c. C-46, § 319(1).

<sup>78</sup> Tsesis, *supra* note 72, at 838.

<sup>79</sup> *Regina v. Andrews*, 3 S.C.R. 870 (1990).

<sup>80</sup> Timofeeva, *supra* note 47, at 262.

from accessible sources,” these rights are subject to limitations in the provisions of general statutes.<sup>81</sup> There are several provisions of the German Penal Code that target hate speech. For example, Section 130 criminalizes incitement to hatred or violence against parts of the population and attacks on the human dignity. This statute also prohibits the distribution and publication of hate messages, including those distributed via broadcast. Moreover, Section 130 penalizes Holocaust denial, which is defined as the approval, denial and minimization of the acts Nazis committed during WWII.

In 1997 Germany passed the Multimedia Law, which was meant to keep illegal material out of cyberspace and update the previously written statutes to address the technology of the 21<sup>st</sup> century.<sup>82</sup> As is the case in the United States, the German law releases Internet service providers (ISPs) from responsibility for storing illegal third party content unless they initiate, select or modify the information. However, unlike the United States, German law also mandates that the ISPs make an effort to remove or disable access to such information. In the United States however, ISPs and social media companies in particular are free to define for themselves which content is considered obscene, inappropriate or even hateful.

In addition, German laws against racial hatred apply to Internet material created outside of Germany but accessible to German users. In fact, since attempts to deny the Holocaust began in the 1960s, certain forms of political speech in Germany have been banned from all media. Today, the country’s legislation banning communications

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<sup>81</sup> Art. 5, GUNDESEZ [German Constitution], *translated in* CONSTITUTIONS OF THE WORLD 106 (Albert P. Blaustein & Gisbert H. Flants eds. 1994).

<sup>82</sup> Timofeeva, *supra* note 47, at 263.

glorifying the Nazis and denying the Holocaust apply to all aspects of the Internet, no matter what their country of origin or how the information was presented.<sup>83</sup> Notably, Germany's approach has been instrumental in shaping the approach of the European Union (EU). After the country's largest ISP cut off Germans' access to the more than 1,500 Web sites operated by an American provider and housing Holocaust revisionist sites, the European Union's Consultative Commission on Racism and Xenophobia urged all other member states to follow the example of Germany.<sup>84</sup> In 2012, Twitter, Facebook and YouTube complied with German law by either taking down material posted by a neo-Nazi group or by blocking users in Germany from access to the content.<sup>85</sup>

#### *The European Protocol*

At the turn of the millennium, the Council of Europe, an international organization promoting cooperation among the countries of Europe regarding legal standards, human rights protection and democratic development, sought to criminalize racist and xenophobic content online.<sup>86</sup> To do this, the Council's European Commission against Racial Intolerance (ECRI) issued the Additional Protocol on Internet Hate Speech as an addendum to the 2000 Convention on Cybercrime, which dealt primarily with intellectual property laws. The rigorous ban on Internet hate speech mandated by the Protocol prompted President George W. Bush's refusal to comply with the Convention.

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<sup>83</sup> Timofeeva, *supra* note 47, at 264.

<sup>84</sup> *Id.*

<sup>85</sup> Alina Sharon, *European, U.S. Laws Clash on Policing Hate Speech*, JWEEKLY.COM, Mar. 21, 2013, available at <http://www.jweekly.com/article/full/68076/european-u.s.-laws-clash-on-policing-online-hate-speech/>.

<sup>86</sup> COUNCIL OF EUROPE, [http://en.wikipedia.org/wiki/Council\\_of\\_Europe](http://en.wikipedia.org/wiki/Council_of_Europe) (last visited Apr. 4, 2013).

All other European Union countries however, complied with the protocol under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which provides that all parties shall criminalize the dissemination of ideas based on racial superiority or hatred, declare illegal and prohibit organizations that promote and incite racial discrimination and recognize participation in such organizations as an offense to the law, and finally, prohibit public authorities and public institutions from promoting or inciting racial discrimination.”<sup>87</sup>

The Additional Protocol on Internet Hate Speech updates European Union countries’ offline laws to also prohibit racist or xenophobic material online. The Additional Protocol defines this content as:

“Any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, color, descent or national or ethnic origin, as well as religion if used as a pre-text for any of these factors.”<sup>88</sup>

Specifically, there are five types of conduct that parties to the Protocol are required to criminalize:

- Each party must criminalize distributing or otherwise making available racist and xenophobic material to the public through a computer system.
- The Additional Protocol requires each country to criminalize the act of directing a threat to a person through the Internet purely because of race,

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<sup>87</sup> Christopher D. Van Blarcum, *Internet Hate Speech: The European Framework and the Emerging American Haven*, 62 WASH. & Lee L. Rev. 781, 786 (2005).

<sup>88</sup> *Id.*

national origin or religion.

- The Protocol requires each country to criminalize the act of publicly insulting a person through a computer system because of their race, national origin or religion.
- Each party must pass legislation making it a crime to distribute or make available through the Internet material which denies, grossly minimizes, approves or justifies acts constituting genocide or crimes against humanity.
- The Protocol provides for extradition between parities.

While this multilateral effort may be commendable, it is not without problems. Of particular concern is the difficulty in identifying the responsible party in the appropriate jurisdiction. The EU, like Germany and Canada, has chosen to relieve ISPs of responsibility. Instead, the Protocol primarily provides for liability of individuals who actually post the racist content on the Internet and limits the liability of others, such as ISPs.<sup>89</sup>

Still, the Additional Protocol has jurisdictional issues and it is often unclear whose rules apply in a conflict. The EU says that jurisdiction should extend to all cases where the offense is committed through an information system and, (a) the offender commits the offense when physically present in its territory, whether or not racial material hosted on the information system in that territory; (b) the offense involves racist material hosted on an information system in its territory whether or not the offender commits the offense

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<sup>89</sup> Article 12 of the European Union's Directive on Electronic Commerce says ISPs should not be held liable for info transmitted so long as the provider (a) does not initiate the transmission, (b) does not select the receiver of the transmission and (c) does not select or modify the information contained in the transmission. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), art. 12, § 4, 2000 O.J. (L 178), *available* at <http://europa.eu.int> (last visited Feb. 21, 2013).

when physically present in the territory.<sup>90</sup> Recent cases in Germany, for example, suggest that German authorities will take legal action against foreigners who upload content that is illegal in Germany – even though the Web sites may be created and hosted elsewhere.<sup>91</sup>

### *Section Summary*

Regardless of the issues inherent in this approach, the effort itself is commendable. Although, many aspects of the Protocol would be considered unconstitutional in the United States, much can be learned from the way EU, Germany and Canada approach regulation of hate speech online. For example, the EU's Additional Protocol for Internet Hate Speech provides for extradition among cooperating parties. Rather than creating its own hate speech regulations, perhaps the United States government could allow for extradition of speakers of hate speech, something which it has until now been unwilling to do.<sup>92</sup> For example, in 2004 a California district court said France did not have jurisdiction to demand Yahoo! prevent French users from accessing an auction Web site selling Nazi paraphernalia. If the United States did not serve as a safe haven for those producing and distributing this kind of hateful material, perhaps the efforts of the EU and individual nations would be more successful.

Finally, the successes of the efforts of other western democracies to curtail hate speech online and in particular on social media Web sites suggest that there is in fact a tangible benefit to a more stringent approach. Recently, for example, a French court ruled that several tweets posted with the hashtag #agoodjew had broken a French law

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<sup>90</sup> Timofeeva, *supra* note 47, at 274.

<sup>91</sup> Van Blarcum, *supra* note 86, at 800.

<sup>92</sup> *Id.* at 801.

prohibiting incitement to racial hatred.<sup>93</sup> Under the ruling, Twitter must also provide an easy way for French users to flag tweets deemed illegal under French law. Moreover, in a 2009 Canadian survey, about one in six Internet users came across content promoting hate or violence toward an identifiable group, whether they accidentally encountered that content or they were searching for it.<sup>94</sup> Of the material encountered, the majority focused on ethnic or religious minorities, followed by homosexuals and then women. In the United States however, exposure to hateful content is much higher.<sup>95</sup>

### **Conclusion:**

As this chapter has demonstrated, attempts by legislators to regulate hate speech both on and offline is an extremely complex and nuanced process. Not only is it essential to consider the Supreme Court's rulings areas of expression such as fighting words, incitement and true threats, but it is also key to consider related cases. Oftentimes, related cases<sup>96</sup> bring to light a myriad of ways that legislators and judges have sought to achieve a balance between the right to free expression with the right to be free from the harm caused by online hate speech, such as discrimination or even violence. Examining the outcome of related cases, allows proponents of hate speech regulation to identify

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<sup>93</sup> Olga Khazan, *What the French War on Anti-Semitic Tweets Says About Hate Speech in France*, WASH. POST Jan. 26, 2013, available at <http://www.washingtonpost.com/blogs/worldviews/wp/2013/01/26/what-the-french-war-on-anti-semitic-tweets-says-about-hate-speech-in-france/>.

<sup>94</sup> STATISTICS CANADA, <http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11530-eng.htm#a2> (last visited Apr. 8, 2013).

<sup>95</sup> *Digital Terrorism and Hate Report Launched at Museum of Tolerance*, SIMON WIESENTHAL FOUNDATION, Feb. 11, 2011, available at <http://www.wiesenthal.com/site/apps/nlnet/content2.aspx?c=IsKWLBpJLnF&b=4441467&ct=9141065>.

<sup>96</sup> *E.g.*, *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976).



potentially viable arguments for content-based restrictions, such as secondary effects or emotional distress.

Examining how other Western democracies address the issue of hate speech online and in particular, on social media Web sites, provides legislators, regulators and social media company themselves a framework to measure their own efforts against. It is beneficial for decision-makers in the United States to understand the benefits and shortcomings of other countries' and organizations' approaches to curtailing hate speech online in order to guide their own efforts. Finally, exploring current international policies and procedures has helped to illuminate how any efforts on the part of the United States to curtail hate speech on social media sites may potentially interact with existing international efforts in this arena.

## **Chapter IV**

### **Regulating the Internet**

#### **Introduction:**

In order to identify the best approach for minimizing the presence of hate speech on social media sites, it is essential to comprehensively understand how the Internet is currently regulated — by the government and by social media companies such as YouTube.

However, before delving into an extensive discussion of Internet regulation in Section II, Section I of this chapter first examines how other mass media, including print, broadcast, cable and direct broadcast satellite (DBS), are regulated by the government and corporate entities. In particular, attention is paid to the scope and nature of each form of media, types and enforcement of regulation and challenges to the established rules. Comparing and contrasting the Internet with these more well-established media will provide insight regarding how lower courts and the Supreme Court may treat cases dealing with online hate speech regulations.

Section II of this chapter moves on to examine Internet-specific regulation in detail. Key terms will be defined and then current regulations, including those established by Congress as well as the Federal Communications Commission (FCC) and Federal Trade Commission (FTC), will be explored. Section II will also look at content regulations enacted and enforced by social media companies, such as YouTube. Next, challenges to these rules and the position of the Supreme Court regarding restrictions on Internet content will be discussed. Finally, this chapter will conclude by identifying lessons learned from the government's and corporations' current approach to Internet

regulation. The successes and failures of government and corporate entities to regulate the Internet and the Supreme Court's interpretation of those efforts should help shape any solution proposed to address the issue of online hate speech.

## **Section I: Regulating the Mass Media**

### *Print Media*

It is no secret that as an industry, print media have taken a drastic financial hit because of the emergence of the Internet and the extensive availability of online content. In fact, today Google generates more advertising dollars than all of U.S. print media combined.<sup>1</sup> Still, newspapers and magazines accounted for 22 percent of the total advertising dollars spent in the United States in 2012.<sup>2</sup> Thus, print news and entertainment sources should still be considered a viable part of today's media landscape.

As a general rule, there are few governmental restrictions placed on print media outlets, reporters and content. The FCC does not regulate print media as it does broadcasting, for example, because unlike broadcasting, there are low barriers to entry and no scarcity of available resources for print media.

Print advertisements and other forms of commercial speech, however, are subject to rules against false or misleading advertising enacted by Congress and enforced by the

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<sup>1</sup> Will Oremus, *Google Officially Eats Newspaper Industry*, SLATE.COM, Nov. 12, 2012, available at [http://www.slate.com/blogs/future\\_tense/2012/11/12/google\\_ad\\_revenue\\_tops\\_entire\\_us\\_print\\_media\\_industry\\_chart.html](http://www.slate.com/blogs/future_tense/2012/11/12/google_ad_revenue_tops_entire_us_print_media_industry_chart.html).

<sup>2</sup> *Share of Overall Media Spend 2012*, OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, June 1, 2012, available at <http://www.oaaa.org/ResourceCenter/MarketingSales/Factsamp;Figures/Revenue/OOHMarketShare.aspx>.

FTC.<sup>3</sup> In addition print material may be the subject of libel or copyright suits. It is important to note though, that these challenges occur after publication or use has occurred. Any prior restraints on print media are limited solely to those exceptions identified by the Supreme Court, including obscenity, fighting words, foreseeable overthrow of government, incitement to violence, obstruction of military recruitment and publication of troop locations, numbers or movements during a time of war.<sup>4</sup>

When restrictions that fall outside of these categories are imposed on print media content, courts must determine whether those constraints are at odds with the protection afforded by the First Amendment. When asked to decide whether rules designed to govern mass media are constitutional, courts first determine whether the law targets the idea expressed or aims at another ancillary goal, unrelated to the message content. If a law against print, or any other form of media for that matter, regulates the content of speech or expression then it must pass the strict scrutiny test, which requires a content-based law to be necessary, advance a compelling government interest and go no further than necessary in limiting First Amendment rights.<sup>5</sup> Here, a compelling government interest in favor of regulation is that which is needed to protect public health, safety and welfare. If the law is determined to be content-neutral, it need only pass intermediate scrutiny, which holds that a content neutral law will be constitutional if the law is not

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<sup>3</sup> See, e.g., Cheryl Dancy Balough, *A Survey of False Advertising in Cyberspace*, 68 BUS. LAW 297 (2012).

<sup>4</sup> ROBERT TRAGER ET AL., *THE LAW OF JOURNALISM AND MASS COMMUNICATION* 67 (3d ed. 2013).

<sup>5</sup> *Id.*

related to the suppression of speech, advances an important government interest and is narrowly tailored to achieve that interest.<sup>6</sup>

Finally, it is worth noting the many similarities that exist between print media and Internet media as the Supreme Court in *Reno* viewed these two mediums as being very much alike.<sup>7</sup> Both offer users easy access to publishing tools. Word processing programs on laptop and desktop computers make writing and distributing thoughts in print as easy as ever. Publishing is equally accessible on the Web. Today there are 65 million (free) WordPress blogs online.<sup>8</sup> Essentially all that is needed for individuals or groups, in this case hate groups, to publish online is Internet access. In addition to the low barriers to entry, the Internet also provides an ease of distribution. Therefore, it is quite possible that any efforts to regulate the Internet should consider print media regulation as the most relevant touchstone.

### *Broadcast Media*

The U.S. broadcast radio and television industries are large, powerful and heavily regulated. Television broadcasting revenues in 2012 topped \$31 billion and radio networks and stations together generated about \$15 billion in revenues that same year.<sup>9</sup> Broadcast television boasts 23 percent of 2012's total ad expenditures across all media

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<sup>6</sup> *Id.* at 69.

<sup>7</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

<sup>8</sup> WORD PRESS STATS, <http://en.wordpress.com/stats/> (last visited July 15, 2013).

<sup>9</sup> *The 2012 Statistical Abstract: Radio and TV Broadcasting and Cable TV*, U.S. CENSUS BUREAU (June 27, 2012), available at [http://www.census.gov/compendia/statab/cats/information\\_communications/radio\\_and\\_tv\\_broadcasting\\_and\\_cable\\_tv.html](http://www.census.gov/compendia/statab/cats/information_communications/radio_and_tv_broadcasting_and_cable_tv.html).

outlets, while radio earned a 10 percent share of the total spent on advertising.<sup>10</sup>

Traditionally, the primary justification for regulating broadcast content has been spectrum scarcity.<sup>11</sup> The finite nature of the spectrum, the U.S. Supreme Court has said, justifies regulation of broadcasters.<sup>12</sup> Unlike print media, which can be created and distributed by anyone with funds to do so, broadcast programming is subject to certain regulations in exchange for permission to transmit signals over the public airwaves. The reason broadcast television and radio content are treated differently is because of the finite nature of the spectrum. In the past, there has not been enough space on the electromagnetic spectrum for everyone who would like to own a television or radio station.<sup>13</sup> The select few given the privilege of holding a broadcast license are subject to certain rules, which do not apply to other media of expression.<sup>14</sup> Despite the emergence of cable and satellite television, which does increase availability, the Supreme Court has said that it would not alter its spectrum scarcity rationale “without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.”<sup>15</sup>

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<sup>10</sup> *OOH Share of Overall Media Spend 2012*, OUTDOOR ADVERTISING ASSOCIATION OF AMERICA (June 1, 2012), available at <http://www.oaaa.org/ResourceCenter/MarketingSales/Facts&Figures/Revenue/OOHMarketShare.aspx>

<sup>11</sup> The electromagnetic spectrum used by broadcasters to transmit signals is a publicly owned resource with limited space available. Therefore, only a certain number of radio and television stations in a geographic area may use the public’s airwaves without causing interference with one another. *See National Broadcasting Co. v. FCC*, 319 U.S. 190 (1943).

<sup>12</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 391 (1969).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *FCC v. League of Women Voters*, 468 U.S. 364, 376n.11 (1984).

In addition to spectrum scarcity, courts also justify regulation of broadcast television and radio by claiming that these media have a greater influence – a “special impact” – on audiences because of the number of households reached by a single broadcast.<sup>16</sup> For example, according to the Web site traffic-measurement site, Quantcast, YouTube reaches an average of about 187 million people per month in the United States.<sup>17</sup> On the other hand, the 2013 Super Bowl boasted an estimated 108 million viewers in the United States in a single day.<sup>18</sup> Thus, the influence of a given broadcast program is often characterized as greater than an Internet site or print publication because of the number of people exposed.

In the 1979 case, *FCC v. Pacifica Foundation*, the Supreme Court said that broadcasting, as a medium was also far more pervasive than its print or cable counterparts. Unlike subscribing to a newspaper or premium cable channel, such as HBO, broadcast content is not invited into our homes and our lives in the same way. Here, the Supreme Court stressed radio and television’s pervasiveness in the lives of all Americans, but focused specifically on children. The nature of broadcasting makes it uniquely accessible to children and therefore subject to tighter regulation.<sup>19</sup> Here, the Supreme Court maintained its position that broadcasting’s pervasiveness is part of what makes it unique. For offensive messages in other forms, the Supreme Court has routinely ruled

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<sup>16</sup> See *Robinson v. American Broadcasting Co.*, 441 F.2d 1396, 1399 (6<sup>th</sup> Cir. 1971).

<sup>17</sup> YOUTUBE SITE VISITS, <http://www.quantcast.com/youtube.com> (last visited Apr. 23, 2013).

<sup>18</sup> *Ravens’ Super Bowl 2013 Victory Sets TV Ratings Record*, L.A. TIMES.COM, Feb. 4, 2013, available at <http://articles.latimes.com/2013/feb/04/sports/la-sp-sn-super-bowl-ratings-20130204>.

<sup>19</sup> *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

that viewers should simply look away from the potentially objectionable message or image.<sup>20</sup>

Lastly, the public interest standard is cited as a central justification for regulating broadcasters. In addition to creating the FCC to oversee the licensing of radio and later television broadcast stations, the Communications Act of 1934 also established that the public's interest should be paramount to stations' interests.<sup>21</sup> Specifically, the Act says that federal regulation should be guided not by broadcasters' demands, but instead by the "public interest, convenience and necessity."<sup>22</sup> Until the massive deregulation of the broadcast industry in the 1980s, the public interest standard was often cited by the FCC – along with spectrum scarcity – as the reason for adopting regulations.<sup>23</sup>

These regulations not only govern broadcasters' behavior but also the content they air. For example, the FCC and FTC dictate the rules regarding how stations and their managers may interact with politicians. Section 315 ensures that broadcasters may not show favoritism to a particular political party or candidate.<sup>24</sup> In addition, there are rules regarding indecency, hoaxes and news distortion. There are also rules regarding advertising to children and advertising for products and services considered vices by the government, such as gambling, alcohol and cigarettes. In fact, all advertising is subject to

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<sup>20</sup> *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

<sup>21</sup> FCC - Telecommunications falls under Title 47 of the Code of Federal Regulations. AM, FM, and TV broadcast stations fall under Part 73 of Title 47. Additional rule sections pertaining to radio broadcasting are contained in Parts 0 and 1 of Title 47.

<sup>22</sup> *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

<sup>23</sup> *Id.*

<sup>24</sup> 47 U.S.C. § 315.



the FTC's regulations regarding false or misleading advertising, regardless of the medium on which it appears.

The FCC and FTC's approaches to regulating broadcast media and its content suggest that if the Internet was able to be classified as being as pervasive or impactful as broadcast, then specific regulations may be warranted. In addition, the regulation of broadcast content in the name of the public's interest creates a potentially interesting opportunity. The rationale for the trustee model of broadcasting in the United States holds that the public owns the airwaves and in exchange for the privilege of using those airwaves, broadcasters must act in the public interest, convenience and necessity.<sup>25</sup> If an argument could be made that the public owns a portion of the Internet's infrastructure, for example the airwaves used to transmit Internet signals up to orbiting satellites and back down, then perhaps Internet regulation could be justified on the same grounds. Similarly, the FCC's approach to broadcast regulation asks the larger question of whether or not the government thinks that social media companies, such as YouTube, have a duty to act in the public's interest. Is that something we as consumers could demand in exchange for the unfettered access handed over to social media companies each time a user clicks "I agree" to the companies' terms and conditions? If so, then it may be justified to ask social media companies to regulate hate speech on their Web sites in a way that is mindful of the well-being of their users and the general public.

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<sup>25</sup> See, e.g., 47 U.S.C. §§ 302 (a), 307(d), 309 (a) and 316 (a).

## *Cable*

While broadcast media have been regulated since their emergence in the early twentieth century,<sup>26</sup> cable television, which in 2010 had almost 61 million subscribers, earned \$93 million in revenue and received 18 percent of total U.S. ad expenditures in 2012,<sup>27</sup> was not initially viewed by the FCC as under its regulatory jurisdiction. This was because cable uses coaxial or fiber optic lines running under streets and sidewalks that belonged to cities. However, in 1962 the FCC claimed that some CATV operators were using microwave transmitters to get signals from stations to cable system antennas, meaning they too were using the spectrum. This culminated in *United States v. Southwestern Cable*,<sup>28</sup> in which the Supreme Court agreed that the FCC had ancillary jurisdiction over cable. This jurisdiction was made permanent when Congress adopted the Cable Communications Policy Act of 1984.<sup>29</sup>

In response to complaints that the 1984 law gave cable companies an opportunity to monopolize a given market and drive out competition, Congress re-regulated the cable industry again in 1992 with the Cable Television Consumer Protection and Competition Act.<sup>30</sup> In an effort to foster competition between cable companies, those regulations were

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<sup>26</sup> Pub. L. 264, 27 Stat. 302 (1912).

<sup>27</sup> *Cable and Premium TV Summary 1980 to 2010*, U.S. CENSUS BUREAU (June 27, 2012), [http://www.census.gov/compendia/statab/cats/information\\_communications/radio\\_and\\_tv\\_broadcasting\\_and\\_cable\\_tv.html](http://www.census.gov/compendia/statab/cats/information_communications/radio_and_tv_broadcasting_and_cable_tv.html).

<sup>28</sup> *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

<sup>29</sup> Pub. L. No. 98-549, 98 Stat. 2779.

<sup>30</sup> Pub. L. No. 102-385, 106 Stat. 1460.

severely loosened in the Telecommunications Act of 1996 and as a result, cable companies are able to set subscriber rates with little governmental interference.<sup>31</sup>

However, this tightening and loosening of the rules regarding cable ownership and rate regulation did little to clarify cable's First Amendment status as a mass medium. Over time, the Supreme Court has gone back and forth about the level of protection that should be afforded to cablecasters. Finally in 2000, the Supreme Court said content specific cable regulations are to be judged by the strict scrutiny test.

### *Direct Broadcast Satellites*

Although more than 20 million American households receive their television programming via Direct Broadcast Satellites (DBS), such as Dish Network, satellite service is not classified as broadcast or cable. Instead, the FCC labels it a “point-to-multipoint non-broadcast service.”<sup>32</sup> However, DBS programming is still subject to several of the same limitations that apply to cable programming, such as Section 315 regarding equal opportunity for political candidates. Notably, in the late 1990s the FCC returned to its earlier objective of having DBS operators use some of their capacity for educational programming. The agency was successful in its second attempt to enact some form of must carry rules – four percent of capacity – using the spectrum scarcity argument.<sup>33</sup> The FCC was also able to ensure that DBS operators would abide by

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<sup>31</sup> Pub. L. No. 104-104, 110 Stat. 56.

<sup>32</sup> *Evolution of Cable Television*, FEDERAL COMMUNICATIONS COMMISSION (Mar. 14, 2012), <http://www.fcc.gov/encyclopedia/evolution-cable-television>.

<sup>33</sup> *Time Warner Entertainment Co., L.P. v. FCC*, 320 U.S.App.D.C. 294, 93 F.3d 957 (1996), *reh. denied*, 323 U.S.App.D.C. 109, 105 F.3d 723 (1997).

restrictions on advertising in children’s television programming.<sup>34</sup> Thus, the FCC’s approach to regulating DBS suggests that media technologies classified as non-broadcast, may still be subject to some form of content regulation, in particular if it is done in the name of education or protection children.

## **Section II: Current Internet Regulations**

### *Defining the Internet and Social Media*

In the landmark case, *Reno v. American Civil Liberties Union*,<sup>35</sup> Supreme Court Justice John Paul Stevens said that the Supreme Court understood the Internet to be “an international network of interconnected computers.”<sup>36</sup> The Internet, said Justice Stevens, enables millions of people to communicate with one another and to access vast amounts of information from around the world. It is “a unique and wholly new medium of worldwide human communication.”<sup>37</sup> Using Justice Stevens’ words as a guideline, the Internet will be defined here as a network of networks in which users at any one computer can, if they have permission, get information from any other computer, anywhere in the world.<sup>38</sup>

While all Internet communication involves the sharing of information, social media will be uniquely defined here as, “the collective of online communications

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<sup>34</sup> Children’s Television Programming, 6 F.C.C.R. 5093 (1991).

<sup>35</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

channels dedicated to community-based input, interaction, content-sharing and collaboration.”<sup>39</sup> Web sites and applications dedicated to forums, microblogging, social networking, social bookmarking, social curation and wikis are among the different types of social media. Prominent examples of social media include Facebook, Twitter, LinkedIn, Pinterest and YouTube.

### *Scope of the Internet and Social Media*

Access to and use of the Internet has grown exponentially in recent years. In 2009, advertising revenue generated from Internet Web sites was estimated to be almost \$20 million.<sup>40</sup> Three years after that, Internet advertising accounted for 23 percent of the total media ad spending in the United States. While retail advertisers may have initially been hesitant to spend money online, these data suggest that in 2013 the Internet has become a commercially dominant mass medium.

This phenomenon is evident not only in the amount of revenue generated, but also in the current rates of access. According to 2010 U.S. Census data, 60 percent of all Americans connect to the Internet and 76 percent of Americans over the age of three live in a house with Internet access.<sup>41</sup> An April 2012 Pew Internet and American Life Project survey said that those rates were now much higher, with 82 percent of American adults

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<sup>39</sup> *What Is: Social Media?*, TECHTARGET.COM (May 1, 2013), <http://whatis.techtargget.com/definition/social-media>.

<sup>40</sup> *The 2012 Statistical Abstract: Radio and TV Broadcasting and Cable TV*, U.S. CENSUS BUREAU (June 27, 2012), available at [http://www.census.gov/compendia/statab/cats/information\\_communications/radio\\_and\\_tv\\_broadcasting\\_and\\_cable\\_tv.html](http://www.census.gov/compendia/statab/cats/information_communications/radio_and_tv_broadcasting_and_cable_tv.html).

<sup>41</sup> *The 2012 Statistical Abstract: Computer and Internet Use in the United States 2010*, U.S. CENSUS BUREAU (June 27, 2012), available at <http://www.census.gov/hhes/computer/publications/2010.html>.

reporting that they used the Internet and 66 percent reported having high speed broadband Internet access at home.<sup>42</sup> Regardless of the disparities in the reports, it seems evident from current data that Internet access is available to the great majority of Americans, particularly those 18-29, 97 percent of whom are online.<sup>43</sup>

Although the digital divide — the idea that digital disparities exist between lower income or minority groups and their wealthier counterparts — may have decreased in recent years, it certainly has not disappeared. In fact, while 84 percent of whites regularly connect to the Internet, only 77 percent of blacks and 75 percent of Hispanic people use the Internet regularly.<sup>44</sup> In addition, disparities in Internet access and use also exist based on differences in income and education.<sup>45</sup> For example, 87 percent of families with incomes greater than \$75,000 per year have broadband Internet access at home, whereas only 46 percent of households earning less than \$30,000 each year have broadband access in the home.<sup>46</sup>

Not surprisingly, these disparities persist on social media sites. For example, 78 percent of Facebook users are white, whereas only 9 percent are black and 9 percent are Hispanic. Regardless of race or ethnicity, social media use makes-up a large portion of individuals' Internet activity. According to Mashable, social media accounts for 18

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<sup>42</sup> *Internet Use and Home Broadband Connections Demographics*, PEW INTERNET AND AMERICAN LIFE PROJECT (July 24, 2012), <http://www.pewinternet.org/Infographics/2012/Internet-Use-and-Home-Broadband-Connections.aspx>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

percent, or about 6.9 hours, of the time Internet users spend online each month.<sup>47</sup> In total, almost 60 percent of Internet users say they use social networking sites.<sup>48</sup> Of those 56 percent are female, and the average age of a social media user is 38.<sup>49</sup> Specifically, users spend almost seven hours per month on Facebook, only 21 minutes on Twitter, two and a half hours on Hulu and three hours per month on YouTube.<sup>50</sup>

The time users spend on these social media sites is dedicated to a range of activities – including “liking” other people’s photos or status updates, watching videos or creating their own content.<sup>51</sup> Today, social media are used to chronicle daily life. Users let their friends and followers know where they go, what they do and who they are with. In a sense, social media is a public diary used by people to share certain aspects of their lives with friends and family. However, it is also a place where discussion happens, among both acquaintances and strangers and communities are built and maintained.

### *Current Internet Regulation*

Each branch of the federal government, as well as all 50 states, plays some role in how the Internet is regulated. For example, Congress enacts legislation regarding Internet commerce or content, while courts work to determine whether these rules and their

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<sup>47</sup> Zoe Fox, *This is How Much Time You Spend on Facebook, Twitter, Tumblr*, MASHABLE, Nov. 28, 2012, available at <http://mashable.com/2012/11/28/social-media-time/>.

<sup>48</sup> *Social Networking Sites and Our Lives*, PEW INTERNET AND AMERICAN LIFE PROJECT, Jun. 16, 2011, available at <http://www.pewinternet.org/Reports/2011/Technology-and-social-networks/Part-2/Demographics.aspx> [hereinafter *Social Networking Study*].

<sup>49</sup> *Id.*

<sup>50</sup> Fox, *supra* note 47.

<sup>51</sup> *Id.*

application are constitutionally protected. At the other end of the spectrum, state libel laws apply to Internet news and entertainment content. Regulating the Internet and enforcing those regulations is a complex process, one which this sub-section will attempt to dissect in order to best understand how the potential rules designed to curtail hate speech on social media sites being considered here, may fit into the current regulatory landscape of the Internet.

### Congressional Legislation

Many of the rules regulating mass media originate in congressional legislation. For example, the Lanham Act prohibits false or misleading advertising, regardless of medium, and provides the basis for more specific regulations crafted by the FTC. Most significantly for the purposes of this study, Congress passed the Telecommunications Act of 1996 that substantially deregulated a range of mass media industries, including radio, television and cable, all in the name of technological innovation. Title V of that legislation, which came to be called the Communications Decency Act (CDA), said that indecent and obscene material should be regulated in cyberspace.<sup>52</sup> Although the indecency portion of the law was struck down in *Reno v. ACLU*, Section 230 of the Act was upheld by the Supreme Court.<sup>53</sup> Notably, this portion of the CDA was interpreted to say that operators of Internet services are not to be construed as publishers (and thus not legally liable for the words of third parties who use their services).<sup>54</sup> In that sense,

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<sup>52</sup> Communications Decency Act of 1996, 47 U.S. § 230(c)(2) (2011).

<sup>53</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

<sup>54</sup> *Id.*



YouTube and other Internet companies are not responsible for illegal content posted by third parties on its site.<sup>55</sup>

In addition to issues regarding indecent material online, Congress has also worked to address infringements on intellectual property or personal privacy online. However, those efforts have been met with mixed results. For example, in May 2011 the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act or PROTECT IP Act, made it through the Senate Judiciary Committee but was placed on hold as a result of public protests to that piece of legislation, as well as a House Bill that emerged later that same year called the Stop Online Piracy Act or SOPA.<sup>56</sup>

### State Laws

Building on Congress' efforts to regulate the Internet, some states have enacted laws that expand upon some of the federal acts discussed earlier. For example, Article 250 of New York's penal code prohibits intercepting or accessing electronic communications without the consent of at least one party to the communication.<sup>57</sup> Virginia has modified its existing privacy laws so they apply to information collected over the Internet and other states have developed rules regarding online access to medical

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<sup>55</sup> See, e.g., *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 145 F.Supp.2d 1168, 1180 (N.D. Cal. 2001) & 169 F.Supp.2d 1181, 1194 (N.D. Cal. 2001), *aff'd*, 379 F.3d 1120 (9th Cir. 2004), *rehearing en banc granted*, 399 F.3d 1010 (9th Cir. 2005), *rev'd and remanded*, 433 F.3d 1199 (9th Cir. 2006).

<sup>56</sup> Jared Newman, *SOPA and PIPA: Just the Facts*, PC WORLD, Jan. 17, 2012, available at [http://www.pcworld.com/article/248298/sopa\\_and\\_pipa\\_just\\_the\\_facts.html](http://www.pcworld.com/article/248298/sopa_and_pipa_just_the_facts.html).

<sup>57</sup> N.Y. Penal L. §§ 250 et seq.

and employment records.<sup>58</sup> Thus, it may be possible for state legislatures to pass a bill making it illegal to *originate* online hate speech within the boundaries of that particular state. This would not, however, account for the fact that once sent the packets of information would travel from the original location through servers in many different states and even countries in order to reach their final destination.

### Other Federal, State and Municipal Laws

The regulations discussed here only begin to scratch the surface of the total amount of “black letter” law that exists, at both the federal and state level, to regulate content or behavior online. Laws and ordinances regarding cybercrime deal with a wide range of issues, such as identity or property theft, only a few of which are relevant here. As a general rule though, it is safe to assume that some form of black letter law exists to prevent most illegal offline activities from occurring online.<sup>59</sup> For example, the Computer Fraud and Abuse Act prevents extortion involving computers and causing damage / loss via unauthorized access to computer information.<sup>60</sup> In fact, federal grant money was recently made available through the “State Grant Program for Training and Prosecution of Cybercrime,”<sup>61</sup> to assist state and local law enforcement agencies in enforcing state

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<sup>58</sup> Va. Code Ann. § 2.1-379.

<sup>59</sup> *See, e.g.*, 15 U.S.C. § 7707; 22 U.S.C. § 2507i; 31 U.S.C. Ch. 53.

<sup>60</sup> 18 U.S.C. § 1030.

<sup>61</sup> 42 U.S.C. § 3713.

and local criminal laws relating to computer crime and to educate law enforcement officials and the general public about ways to prevent and identify computer crime.<sup>62</sup>

### Internet Regulation by the Federal Communications Commission

Since its emergence in the twentieth century, the Internet has developed largely outside of the FCC's traditional regulatory model, enjoying far more freedom from oversight than many of its mass media predecessors. In large part this may be due to the fact that the FCC has decided that each cable Internet access point is an information service, not a telecommunications service.<sup>63</sup> Because of this designation, and the nature of the medium itself, the FCC was not directly involved in Internet regulation until 2005. Then, in September of that year, the organization released a policy statement that recognized the FCC's authority over the national Internet policy, which was established in Section 230 of the Communications Act.<sup>64</sup> In the statement, the FCC recognized its "duty to preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age."<sup>65</sup> Essentially, the policy statement, which was without enforceable rules, sought to guarantee consumers the freedom to use their Internet connections to access any content, use any applications, and attach any devices, that they wished.

However, recent legal challenges regarding the organization's authority to regulate

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<sup>62</sup> *Id.*

<sup>63</sup> High-Speed Access to the Internet over Cable and Other Facilities, 17 F.C.C.R. 13028 (2008).

<sup>64</sup> See FEDERAL COMMUNICATIONS COMMISSION, 20 F.C.C.R. 14986, IN THE MATTERS OF APPROPRIATE FRAMEWORK FOR BROADBAND ACCESS TO THE INTERNET OVER WIRELINE FACILITIES (2005).

<sup>65</sup> *Id.* at 14989.

access to Internet content have been successful.<sup>66</sup> As a result, the FCC's authority over Internet regulation is considerably questionable and a heated debate has emerged between the FCC, Congress and broadband companies about the amount and type of Internet oversight in the United States. Even in 2013, the FCC commissioners insist that the agency does not regulate Internet content or applications.<sup>67</sup> According to the agency's Open Internet rules, the role of the FCC is to only to ensure that broadband Internet service providers do not block or slow down lawful content, for either mobile or stationary users.<sup>68</sup> However, the FCC's ability to enforce these rules remains in question.

Taking a step back, it is important to keep in mind that any authority the FCC has to create and enforce regulations, such as section 230 of the Communication Decency Act discussed above,<sup>69</sup> comes directly from Congress. The Communications Act of 1934 mandated that the Federal Radio Commission be disbanded and the Federal Communications Commission established to oversee wire and wireless communications in the United States.<sup>70</sup> Much like the FCC was able to successfully claim ancillary jurisdiction over cable,<sup>71</sup> so too has it been able to secure ancillary jurisdiction over broadband, meaning that the commission is able to regulate service and access.

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<sup>66</sup> See *Comcast v. FCC*, 600 F.3d 642 (2010).

<sup>67</sup> *Guide to the Open Internet*, FEDERAL COMMUNICATIONS COMMISSION (May 1, 2013), <http://www.fcc.gov/guides/open-internet> [hereinafter *FCC Internet Guide*].

<sup>68</sup> *Id.*

<sup>69</sup> Communications Decency Act of 1996, 47 U.S. § 230(c)(2) (2011).

<sup>70</sup> Ch. 652, 48 Stat. 1064.

<sup>71</sup> *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

According to the agency's own Web site, "The FCC is focused on ensuring that every American has access to open and robust high-speed Internet service — or broadband."<sup>72</sup>

Given that focus, the FCC does take some steps to provide an outlet for complaints regarding Internet service, but not content. For example, if those dissatisfied with their ability to connect to the Internet via their service providers may file an official complaint either online, via phone or by mail.<sup>73</sup>

Missing from the list of options are opportunities to provide feedback to the FCC regarding Internet content. Oftentimes, the only chance interested individuals have to contact the FCC regarding issues with particular Web sites or Internet-wide concerns, such as online hate speech, is during the public comment period of what seem to be poorly promoted public proceedings. For example, the FCC recently launched an examination of media and information needs in the digital age.<sup>74</sup> This might be one place that concerned citizens could go to share their comments with the agency regarding the growing problem of online hate speech.

However, what is most relevant here is the FCC's unwillingness to regulate Internet content of any form. Given that position, and the failed efforts of Congress to enact viable Internet indecency or privacy regulations, perhaps some form of industry

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<sup>72</sup> *FCC Internet Guide*, *supra* note 67.

<sup>73</sup> *Id.*

<sup>74</sup> Andrew Kaplan, *FCC Launches Examination of Future of Media and Information Needs of Communities In a Digital Age*, REBOOT: FEDERAL COMMUNICATIONS COMMISSION BLOG (Jan. 22, 2010), <http://reboot.fcc.gov/futureofmedia/blog?entryId=302806>.

self-regulation on the part of social media companies is the best potential solution to the problem of online hate speech.<sup>75</sup>

### Internet Regulation by the Federal Trade Commission

The FTC has been involved in regulating online advertising and privacy since the emergence of the online marketplace.<sup>76</sup> Today, the FTC is responsible for enforcing privacy statutes enacted by Congress, including the Gramm-Leach-Bliley Act and the Child Online Privacy Protection Act (COPPA), as well as truth-in-advertising rules.<sup>77</sup> The issue of online privacy and “dataveillance,” in which advertisers track users Web activities and use that information to target online advertising, is a major concern for the agency.<sup>78</sup>

In addition to protecting consumer privacy, the FTC is also charged with regulating false or misleading ads that appear on the Internet or on mobile applications accessed via a smart phone or tablet, for example. The FTC also regulates broadband service advertisements.<sup>79</sup>

Although the FTC’s regulatory scope is not particularly relevant to the question of how to best address hate speech on social media company Web sites, it is important to

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<sup>75</sup> Phillip J. Weiser, *The Future of Internet Regulation*, 43 U.C. DAVIS L. REV. 529, 534 (2009).

<sup>76</sup> *Online Advertising and Marketing Rules*, CONSUMER PROTECTION SERVICE, June 12, 2013, available at <http://business.ftc.gov/legal-resources/5/33>.

<sup>77</sup> *Id.*

<sup>78</sup> FEDERAL TRADE COMMISSION COMPLAINT ASSISTANT, <https://www.ftccomplaintassistant.gov/> (last visited May 11, 2013).

<sup>79</sup> *Id.*

note that commercial speech is in fact subject to the content-based regulations mandated by Congress. Perhaps if certain aspects of YouTube hate group channels could be categorized as commercial speech, such as video advertisements for clothing or other apparel, that content could be subject to greater regulation.

#### Internet Regulation by Social Media Companies / YouTube

Some legal scholars, such as Rebecca McKinnon, believe that the rules of digital corporate superpowers, such as Google and Facebook, have begun to clash with those of nation states.<sup>80</sup> While the federal government, in the form of Congress and the FCC, may have influence over issues affecting Internet access, Internet and social media companies are the entities with the autonomy to make decisions about which content will and will not be removed from these sites.<sup>81</sup>

Given that, it is no surprise that there are several forms of content restrictions that social media companies enforce— copyright, for example, and rules against indecency or obscenity. Although in this study the focus is YouTube’s hate speech policy, it is important to note that most social media companies have some form of content restrictions in place. For example, Facebook’s Community Standards make it clear that they do not permit individuals or groups to attack others based on their race, ethnicity,

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<sup>80</sup> REBECCA MCKINNON, *CONSENT OF THE NETWORKED 7* (2012).

<sup>81</sup> Somini Sengupta, *On Web a Fine Line on Free Speech*, N.Y. TIMES, Sept. 16, 2012, available at <http://www.nytimes.com/2012/09/17/technology/on-the-web-a-fine-line-on-free-speech-across-globe.html>.

national origin, religion, sex, gender, sexual orientation, disability or medical condition on their site.<sup>82</sup>

YouTube's approach to regulating offensive content is fairly simple. Hate speech, among many other forms of expression, is prohibited.<sup>83</sup> Here, potentially unsavory content may be flagged by users. If the content is found to be in violation of YouTube's policy, then YouTube employees may simply remove it. For example, in 2010 YouTube removed links to speeches by an American-born cleric, Anwar al-Awlaki, in which he advocated terrorist violence.<sup>84</sup> Finally, users also have the ability to block the offending poster so they are not exposed to content generated by that individual or group.<sup>85</sup>

According to YouTube's Community Guidelines<sup>86</sup> the company will not tolerate postings including gratuitous violence or illegal activity, such as drug use. While the company says that it encourages "free speech and defend everyone's right to express unpopular points of view," it does not permit hate speech. YouTube defines hate speech as "speech that attacks or demeans a group based on race or ethnic origin, religion, disability, gender, age, veteran status and sexual orientation/gender identity."<sup>87</sup> For

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<sup>82</sup> FACEBOOK COMMUNITY STANDARDS, <https://www.facebook.com/communitystandards> (last visited May 10, 2013).

<sup>83</sup> *Hate Speech Policy*, YOUTUBE.COM (Apr. 4, 2013), <http://support.google.com/youtube/bin/answer.py?hl=en&answer=2801939> [hereinafter *YouTube Policy*].

<sup>84</sup> Somini Sengupta, *Free Speech in the Age of YouTube*, N.Y. TIMES, Sept. 16, 2012, available at [http://www.nytimes.com/2012/09/23/sunday-review/free-speech-in-the-age-of-youtube.html?\\_r=0](http://www.nytimes.com/2012/09/23/sunday-review/free-speech-in-the-age-of-youtube.html?_r=0).

<sup>85</sup> *YouTube Policy*, *supra* note 83.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*



example, according to the YouTube hate speech policy it is generally acceptable to criticize a nation-state, but not to post malicious hateful comments about a group of people solely based on their race.<sup>88</sup> In addition, YouTube prohibits stalking, threats, harassment, intimidation, invading privacy, revealing other people's personal information and inciting others to commit violent acts or to violate the Terms of Use. These breaches are taken very seriously. Anyone caught doing these things may be permanently banned from YouTube and offending content can and will be removed.<sup>89</sup>

What is evident from the review of the company's hate speech policy is that, as an organization, YouTube possesses tremendous power to remove any content it interprets to be in violation of its own rules. According to Columbia Law Professor Timothy Wu, "We are just awakening to the need for some scrutiny or oversight or public attention to the decisions of the most powerful private speech controllers."<sup>90</sup> Under the current system, YouTube is able to police all of the content on its site, removing offensive video that may not meet the threshold of unprotected speech set out in Supreme Court decision regarding true threats or fighting words, for example. For purposes of this inquiry it is essential to make note of the autonomy and power YouTube has to regulate hate speech on its site. This suggests once again that perhaps industry self-regulation is the most viable option for identifying an approach to dealing with hate speech on social media sites. The sheer autonomy these organizations possess means that a change in their

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Sengupta, *supra* note 81.

approach to the current inconsistent handling of offensive content removal could be enacted swiftly and hopefully, effectively.

### Challenges to the Current Regulatory Approach

Congress' and the FCC's efforts to regulate Internet content have been met with varied responses, ranging from public and industry skepticism to a Supreme Court decision holding that prohibitions on indecent Internet content made in the name of protecting children would be considered unconstitutional. This section will examine that landmark case, *Reno v. ACLU*, which struck down portions of the Communications Decency Act as overly vague, content-based restrictions.<sup>91</sup> In addition, this section will also discuss the jurisdictional issues associated with Internet regulation.

#### *Reno v. ACLU*

The landmark Internet content regulation case, *Reno v. ACLU*, determined that the Communications Decency Act, a provision of the Telecommunications Act of 1996 that prohibited using the Internet to transmit indecent, patently offensive or obscene material to minors, was an unconstitutional content-based restriction because it restricted material from being made available online.<sup>92</sup> The Supreme Court also held that the CDA's terminology made it difficult to understand and thus unconstitutionally vague. While the congressional restrictions on indecent or patently offensive material were

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<sup>91</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

<sup>92</sup> Rachel Weintraub-Reiner, *Hate Speech Over the Internet: A Traditional Constitutional Analysis or a New Cyber Constitution*, 8 B.U. PUB. INT. L.J. 145, 161 (1998).

overturned, the prohibitions against using the Internet to transmit obscene content remain intact.<sup>93</sup>

In this case the Supreme Court was firm in its insistence that while each mass medium is unique, and adjustments need to be made accordingly, the First Amendment protects expression communicated by any means, but not all expression. Broadcasting, as discussed in Section 1, is subject to greater restrictions because of spectrum scarcity. The Supreme Court noted in *Reno* that the Internet does not use the spectrum, nor is it as invasive as broadcasting.<sup>94</sup> By not subscribing to Internet service, people are able to keep unwanted content from entering their home.

Justice Stevens, writing for majority, said the Internet is a unique medium that is “located in no particular geographical location but available to anyone, anywhere in the world.” The Internet is “ a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers and buyers.”<sup>95</sup> Any person or organization with a computer connected to the Internet can publish information, the Supreme Court said, including government agencies, educational institutions, commercial entities, advocacy groups and individuals.<sup>96</sup> In addition, publishers have a choice regarding whether they make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege.

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<sup>93</sup> 47 U.S.C. § 223(a)(1)(A) (2001). Section 223(a)(1)(A) survived the *Reno* decision and thus, the use of a telecommunications device to transmit messages that are obscene, lewd, or indecent with the intent to annoy, threaten or harass another person is prohibited by law.

<sup>94</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

<sup>95</sup> *Id.* at 867-68.

<sup>96</sup> *Id.*

“No single organization,” said Stevens, “controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web.”<sup>97</sup>

Moreover, the decision also said that the lower courts insistence on the lack of government intrusion into the Internet was based on the Internet’s low barriers to entry, the fact that those barriers are identical for speakers and listeners, the diversity of content available online and the level of access provided by the Internet to all who wish to speak.<sup>98</sup> Here, Stevens cited District Court Judge Steward Dalzell’s statement that the Internet might be the most participatory form of mass speech yet developed and should be guaranteed the highest protection from governmental intrusion.

Thus, it is possible that even if online hate speech regulations were to be passed by Congress and signed into law by the President, the Supreme Court would ultimately determine that the speech in question is protected because the Internet, as a mass medium, is far more like print than broadcast or cable technology. The *Reno* Court was very clear in its assertion that because the Internet does not use the spectrum and is not as invasive as broadcast, it will not tolerate content-based regulations on that medium, particularly those unable to meet the requirements of the strict scrutiny test.<sup>99</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> Edgar Burch, *Censoring Hate Speech in Cyberspace: A New Debate in New America*, 3 N.C. J.L. & TECH., 175, 177 (2001).

<sup>99</sup> *See* Ashcroft v. ACLU, 542 U.S. 656 (2004); *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003); *Ashcroft v. ACLU*, 535 U.S. 564 (2002); *Reno v. ACLU*, 521 U.S. 844 (1997).

## *Jurisdictional Issues*

The ability of data to travel across long distances in order to exchange information between computers on the same network is an astonishing technological achievement. The nature of the Internet's infrastructure makes it difficult to determine the appropriate jurisdiction for relevant online hate speech cases. For example, in a case between the California company, Yahoo! and La Ligue Contre Le Racisme et L'Antisemitisme (LICRA),<sup>100</sup> a U.S. District Court said that France did not have jurisdiction to demand that Yahoo! prevent users from accessing an online auction site selling Nazi paraphernalia, which was hosted by Yahoo! in France. Although the content was downloaded and viewed in France, it originated in the United States and therefore, according to a U.S. District Court, it was not subject to France's Internet regulations, which prohibit hate speech online.

The jurisdictional issues associated with cases involving Internet content are increased tenfold by the introduction of mobile technology. Is jurisdiction determined by where the content originated? What if the same content originates from a single device, but in multiple jurisdictions? For example, a person may use their smartphone to send emails as they travel across state lines in a car or plane. Thus, access to mobile technology creates potential confusion for those interested in any form of Internet regulation. Finally, enforcing regulations, particularly those designed to minimize online

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<sup>100</sup> Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 145 F.Supp.2d 1168, 1180 (N.D. Cal. 2001) & 169 F.Supp.2d 1181, 1194 (N.D. Cal. 2001), *aff'd*, 379 F.3d 1120 (9th Cir. 2004), *rehearing en banc granted*, 399 F.3d 1010 (9th Cir. 2005), *rev'd and remanded*, 433 F.3d 1199 (9th Cir. 2006).

hate speech, may be difficult because currently users are able to maintain anonymity on social media Web sites if they wish to do so.<sup>101</sup>

### **Conclusion:**

This examination of the current approach to Internet regulation by the government and social media companies, in particular YouTube, yields several relevant lessons regarding what may or may not work in terms of proposed solutions to the problem of hate speech on these sites. First, the review of current mass media regulation suggested that print and Internet are very similar mediums in that both boast low barriers to access and an ease of use or production. However, if it were possible to classify the Internet as being more like a broadcast medium based on arguments such as pervasiveness or special impact, then perhaps broadcast-like regulations might be considered. It is also possible that a viable claim could be made that because the Internet uses public infrastructure, the public has a right to demand that Internet companies and in particular social media companies act in the public's best interest in exchange for the privilege of using streets, sidewalks and waterways to lay their fiber optic cable.

However, the Supreme Court in its *Reno* decision made clear that it does not see the Internet as being as pervasive as broadcasting, nor does it believe the Internet uses the spectrum in any way. However, it is worth noting here that the *Reno* decision is almost 20 years old and Internet use has grown exponentially since 1997, with four out of five

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<sup>101</sup> Bianca Bosker, *Facebook's Randi Zuckerberg: Anonymity Online Has to Go Away*, HUFFINGTONPOST.COM, July 27, 2011, available at [http://www.huffingtonpost.com/2011/07/27/randi-zuckerberg-anonymity-online\\_n\\_910892.html](http://www.huffingtonpost.com/2011/07/27/randi-zuckerberg-anonymity-online_n_910892.html).

adults reporting that they access the Internet regularly.<sup>102</sup> In fact, today, 90 percent of 18 to 29 year-olds report that they sleep with their smartphone.<sup>103</sup> If that does not meet the definition of invasive, it is unlikely that Internet or mobile technology will ever achieve that designation.

Looking at the FCC's approach to regulating the Internet, it seems relevant to note that when both cable and DBS technologies emerged as new forms of media, the FCC did not think either was under its regulatory purview. However, that position changed as the agency began to better understand each medium. Therefore, it seems likely that a change in position on the part of the FCC regarding its own approach to content regulations on the Internet may come to fruition in the near future.

Next, while Congress has power to enact legislation to regulate the Internet, the examination of the *Reno* case suggests that any proposed content-based blanket restriction on speech will not be tolerated.<sup>104</sup> Although the legislation in the *Reno* case was aimed at indecent materials on the Internet, the Court's discussion of the CDA and the Internet itself suggests that it is likely they would rule in the same manner if confronted with issues of hate speech.<sup>105</sup>

Finally, throughout this examination of Internet regulations, one thing has remained consistently true in the eyes of the Court and that is that any content-based

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<sup>102</sup> *Social Networking Study*, *supra* note 48.

<sup>103</sup> Henry Blodget, 90% of 18-29 Year-Olds Sleep With Their Smartphones, BUSINESS INSIDER, (Nov. 21, 2012), <http://www.businessinsider.com/90-of-18-29-year-olds-sleep-with-their-smartphones-2012-11>.

<sup>104</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997).

<sup>105</sup> Burch, *supra* note 98, at 188.

regulations proposed must be able to meet the threshold of strict scrutiny.<sup>106</sup> However, given the difficulty in making an argument that the public's health, safety and welfare is negatively impacted by hate speech on social media sites, industry self-regulation may be the most promising approach explored thus far. After all, many social media companies already have hate speech policies in place. Perhaps the best solution is to simply mandate a revision to existing approaches and helps the organizations to develop more consistent models of application and enforcement.

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<sup>106</sup> *Reno*, 521 U.S. at 859.



## **Chapter V**

### **Potential Solutions**

#### **Introduction:**

Several media law scholars have addressed the question, “What, if anything, should be done to curtail hate speech on the Internet?”<sup>1</sup> While social media Web sites are the specific focus of this inquiry, it is still valuable to explore the various solutions offered to date to address hate speech across the Internet. Therefore, this chapter will examine the major solutions offered by various scholars about how to best solve the problem of hate speech online. Each section of this chapter will provide an overview of one of the approaches, which include: legislative action, international regulation, industry self-regulation, filtering by end-users and not regulating hate speech on social media sites. The strengths and weaknesses of each of these solutions will be evaluated and the chapter will conclude by identifying those ideas that seem most likely to be successful at addressing this issue.

#### **Section I: Legislative Action**

##### *Congress to Enact Law Giving FCC Oversight of Social Media Content*

One potential option for dealing with the issue of hate speech on social media sites is to ask Congress to pass legislation requiring social media companies to obtain a license from the government to publish on the Internet. In exchange for this right, the legislation would mandate, like the Communications Act of 1934 did for broadcasters,

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<sup>1</sup> See, e.g., Julian Baumrin, Paul Przybylski, Michael Siegal, Alexander Tsesis & Christopher D. Van Blarcum.

that Internet publishers must operate in the public's interest, convenience and necessity.<sup>2</sup> Much like broadcast regulation, social media Web site operators would have to abide by certain content-based regulations, in particular a prohibition on hate speech, in order to maintain their license. With this legislation, Congress would give the FCC the authority to enact rules and respond to user complaints, but not to monitor content online. Instead, users could report violations to the FCC, which would mandate action on the part of social media sites. If they refused, they may lose their license.

Any of the rules crafted by the FCC would need to address the concerns raised by the Supreme Court regarding the Communications Decency Act.<sup>3</sup> For example, rules prohibiting hate speech on social media Web sites would have to be narrowly drawn and precisely targeted. Specifically, any regulation offered by Congress and enforced by the FCC must pass the threshold of strict scrutiny, which requires that government regulation be narrowly tailored using the least restrictive means available in order to meet a compelling interest, which include those related to the public's health, safety or welfare.

In addition, it may be beneficial for the government to be prepared to demonstrate the invasive nature of the Internet and specifically, social media sites, as a medium warranting regulation. This will be particularly essential in the face of judicial challenges to the proposed rules, which are undoubtedly likely to arise.<sup>4</sup> In the *Reno* case, the

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<sup>2</sup> Ch. 652, 48 Stat. 1064.

<sup>3</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844, 867-68 (1997).

<sup>4</sup> Julian Baumrin, Note & Comment: *Internet Hate Speech and the First Amendment Revisited*, 37 RUTGERS COMPUTER & TECH. L.J. 223, 257-58 (2011).

Supreme Court said that the Internet was not invasive.<sup>5</sup> The Supreme Court also said there was insufficient existing regulation by the government on the Internet for people to think that the information accessed online was somehow an endorsed or accurate message. Today though, the Internet is more heavily regulated and more pervasive.<sup>6</sup> Much as with broadcast television and radio, children may also inadvertently be exposed to hate speech on social media Web sites, and on the Internet in general. For example, the fifth video returned on a search for the term “holocaust” on YouTube, which one could easily imagine a child researching for a school project, is called, “Holocaust Hoax Exposed” and is a denial of the mass killings at Auschwitz and other European concentration camps during the Second World War.<sup>7</sup>

That, combined with the amount of time users spend engaged with social media, about seven hours per month,<sup>8</sup> suggests that it too may be considered an invasive medium. Today it is far more likely for both children and their parents to think that what is presented online is true and socially approved.<sup>9</sup>

However, not everyone agrees with this assessment. Rachel Wientrub-Reiter echoes the lower court’s assessment in *Reno* that the Internet is unlike broadcasting and

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<sup>5</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844, 867-68 (1997).

<sup>6</sup> Baumrin, *supra* note 4, at 257-58.

<sup>7</sup> YOUTUBE “HOLOCAUST” SEARCH RESULTS, [http://www.youtube.com/results?search\\_query=holocaust&oq=holocaust&gs\\_l=youtube.3..0110.152.3103.0.3543.12.7.0.0.0.802.1992.2-1j1j0j1j1.4.0...0.0...1ac.1.11.youtube.pXhIYGmwLGE](http://www.youtube.com/results?search_query=holocaust&oq=holocaust&gs_l=youtube.3..0110.152.3103.0.3543.12.7.0.0.0.802.1992.2-1j1j0j1j1.4.0...0.0...1ac.1.11.youtube.pXhIYGmwLGE) (last visited May 23, 2013).

<sup>8</sup> Zoe Fox, *This Is How Much Time You Spend on Facebook, Twitter, Tumblr*, MASHABLE, Nov. 28, 2012, available at <http://mashable.com/2012/11/28/social-media-time/>.

<sup>9</sup> Baumrin, *supra* note 4, at 257-58.

even print.<sup>10</sup> It is the most accessible of any medium and therefore should be awarded the greatest protection.<sup>11</sup> Anyone with access to a computer and the Internet may transmit information. Because of this ease and accessibility of publishing online, Weintraub-Reiter argues that the Internet must remain free from regulation.<sup>12</sup> To do otherwise, would inhibit the growth of democratic society.<sup>13</sup> However, there are several regulations that already apply to the Internet and its content.<sup>14</sup>

It may also be necessary for the government to revisit the secondary effects argument in order to best craft an approach for minimizing hate speech on social media sites. As the *Reno* Court noted, the notion of secondary effects was at play in its decision regarding the Communications Decency Act.<sup>15</sup> Much like zoning of adult bookstores, the Supreme Court said the obscenity portion of the CDA constituted a form of cyber zoning on the Internet and therefore allowed the government to attack the effects of these Web sites directly as opposed to targeting the speech itself.<sup>16</sup>

Those in favor of this approach to government regulation note that FCC oversight of social media content would minimize both children's and adults' exposure to hate

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<sup>10</sup> Rachel Weintraub-Reiter, *Hate Speech over the Internet: A Traditional Constitutional Analysis or a New Cyber Constitution?*, 8 B.U. PUB. INT. L.J. 145, 162 (1998).

<sup>11</sup> *Id.* at 163.

<sup>12</sup> *Id.* at 162.

<sup>13</sup> *Id.* at 162-63.

<sup>14</sup> *Guide to the Open Internet*, FEDERAL COMMUNICATIONS COMMISSION (May 1, 2013), <http://www.fcc.gov/guides/open-internet>.

<sup>15</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844, 867-68 (1997).

<sup>16</sup> *Id.*

speech and other offensive content on these sites. Plus, because Congress and the FCC are using their own approaches to broadcast television and radio as a model, it is likely to be implemented and executed effectively. In addition, implementing formal governmental oversight to regulating hate speech on social media sites would mean that regulations would finally be consistent across various social media platforms. Moreover, creating the new hate speech regulations for these social media companies would provide the government with the opportunity to take U.S. hate speech and Internet jurisprudence into account more so than do current social media companies' hate speech policies.

Weintraub-Reiter vehemently disagrees with this approach to curtailing hate speech on social media and other Web sites.<sup>17</sup> First, she says, the Internet is not nearly as intrusive as other forms of regulated media because the user must take affirmative steps for the information to appear on screen.<sup>18</sup> However, this argument does not take into account the complex nature of search results, which may be based on user likes, number of hits or any of several other factors available to social media Web site developers to rank search results.

Weintraub-Reiter also says that no child could be bombarded by obscene material online as they could on broadcast radio or television, which is considered invasive.<sup>19</sup> However, given that 70 percent of men and 30 percent of women report watching

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<sup>17</sup> Weintraub-Reiter, *supra* note 10, at 167.

<sup>18</sup> *Id.* at 168.

<sup>19</sup> *Id.* at 172.

pornography online, that seems unlikely.<sup>20</sup> There are also those who argue that the difficulty in executing any form of regulations is reason enough to avoid the endeavor entirely.<sup>21</sup>

### *Criminal Laws Punishing Creators & Distributors*

Rather than having Congress give the FCC the power to oversee social media content as it does broadcast content, some scholars argue that the best approach to minimizing hate speech on these sites is to enact federal or state laws prohibiting the distribution of hate speech on social media sites.<sup>22</sup> According to John Stuart Mill's Harm Principle, the government should interfere with a person's liberty only when another individual is harmed.<sup>23</sup> Although in *Smith v. Collin* the Supreme Court determined that a verbal remark expressing animosity toward a specific religious or ethnic group does not constitute harm compelling government intervention,<sup>24</sup> legal scholars such as Alexander Tsesis believe the most viable solution to reducing discrimination is a criminal statute punishing the dissemination of hate speech on the Internet.<sup>25</sup> Although criminal laws against hate speech may reduce the autonomy of some, says Tsesis, enacting these laws

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<sup>20</sup> *Porn Sites Get More Visitors Each Month Than Netflix, Amazon and Twitter Combined*, HUFFINGTONPOST.COM, May 4, 2013, available at [http://www.huffingtonpost.com/2013/05/03/internet-porn-stats\\_n\\_3187682.html](http://www.huffingtonpost.com/2013/05/03/internet-porn-stats_n_3187682.html).

<sup>21</sup> See, e.g., C. Edwin Baker, Cass Sunstein & Rachel Weintraub-Reiter

<sup>22</sup> Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 SAN DIEGO L. REV. 817, 865 (2001).

<sup>23</sup> John Stuart Mill, *On Liberty*, reprinted in SOCIAL & POLITICAL PHILOSOPHY, 283-84 (John Arthur & William Shaw eds., 1992).

<sup>24</sup> *Smith v. Collin*, 436 U.S. 953 (1978).

<sup>25</sup> Tsesis, *supra* note 22, at 869.

will augment the freedoms of persons traditionally holding less power on account of their color, race, ethnic group, sexual orientation, or gender.<sup>26</sup>

Tthesis offers a model criminal law against the use of hate propaganda on the Internet.<sup>27</sup> It takes into account the special quality of cyberspace and the increased dangers associated with the spread of vitriol to a wide audience. Tthesis' law holds that:

(1) Anyone using the Internet, an electromagnetic media, whether in this state or in a foreign state, to communicate or post statements calling for the discrimination, violence, persecution, or oppression of an identifiable group;

(2) Where it is substantially probable or reasonably foreseeable that the dissemination of such communications could elicit such acts; and

(3) Where the communicator intends the message(s) to promote destructive behavior;

(4) Shall receive a term of imprisonment of at least three months and not exceeding three years; and

(5) In addition to the term of imprisonment, the Supreme Court may impose community service not to exceed four hundred hours.

*Defenses:* No one shall be convicted under this law if: the statements were uttered as an expression of opinion on a scientific, academic, or religious subject and/or the statements were made to eliminate the incidence of hatred toward an identifiable group.<sup>28</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 870-72.

Legal scholar Julian Baumrin agrees with Tthesis that hate speech should be prohibited online. However Baumrin suggests specifically that it should be the ability of Internet users to engage in online hate speech *anonymously* that should be restricted. According to Baumrin, many of the problems on the Internet are exacerbated by the fact that speakers are not always identifiable by other users, thus a regulation that focuses on Internet anonymity is appropriate.<sup>29</sup>

By enacting criminal sanctions, federal and state legislative bodies would demonstrate to women, religious and ethnic minorities and members of the LGBT community they are valued in society. More importantly, removing hate speech from social media sites should improve the level of public discourse in these arenas, as those who were previously victimized begin to feel more comfortable participating in discussions online. Advantages to a criminal law against hate speech on social media Web sites may include a decrease in the amount of hate speech visible on these sites; however, there are no data available to support this claim.

The primary drawback to this type of criminal punishment is that it flies in the face of the First Amendment. It would be difficult to imagine a federal law being passed that sent Internet users to jail for offensive material posted online. In addition, this type of regulation is unlikely to pass the threshold of strict scrutiny, which the Supreme Court has made clear would be required for any content-based restrictions on speech.<sup>30</sup>

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<sup>29</sup> Baumrin, *supra* note 4, at 257-58.

<sup>30</sup> Amy Oberdorfer Nyberg, *Is All Speech Local? Balancing Conflicting Free Speech Principles on the Internet*, 92 GEO L.J. 663, 665 (2004).



### *Criminal Laws Against End-Users*

Rather than punishing those who create and disseminate hate propaganda on social media Web sites, legal scholar Amy Oberdorger Nyberg suggests regulating end-users. Much like the country's approach to copyright enforcement, Nyberg suggests criminal punishments for accessing or uploading unlawful Web site content. This, she says, puts the onus on the government to regulate online hate speech, relieves social media companies from the job of policing content and ensures social media companies do not excessively block content or material.<sup>31</sup>

The primary benefit to enacting end-user sanctions is that it would remove the jurisdictional hurdles associated with any form of Internet regulation.<sup>32</sup> However, this type of regulation may also be very difficult to enforce. In addition, it would fail to punish those who create and distribute the hateful material and instead punish audiences for merely accessing the content.

### *Civil Tort Action*

Instead of criminal action or even oversight on the part of the government, legal scholar Richard Delgado suggests focusing on the civil torts for harassment and emotional distress. To bring action under Delgado's theory, language must be addressed to the plaintiff by the defendant, must intend to demean through reference to race and

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<sup>31</sup> See, e.g., Shamoil Shipchandler, Note, *The Wild Wild Web: Non-Regulation as the Answer to the Regulatory Question*, CORNELL INT'L L.J. 435, 442 (2000).

<sup>32</sup> Michael Siegal, *Hate Speech, Civil Rights, and the Internet: The Jurisdictional and Human Rights Nightmare*, 9 ALB. L.J. SCI. & TECH. 375, 383 (1999).

must be recognizable to a reasonable person as a racial insult.<sup>33</sup> Although Delgado focuses here on race, it is easy to see how this approach could be expanded to include insults made on the basis of ethnicity, gender and sexual orientation. A civil tort action based on the existing framework for Intentional Infliction of Emotional Distress (IIED) would give minorities, women and others a path for recourse when they feel that exposure to offensive content on social media sites has caused them severe emotional distress

Interestingly, this approach would not require the Supreme Court to reverse its earlier thinking regarding the responsibility of Internet publishers for third party content.<sup>34</sup> Instead, victims could take direct legal action against those who originated the hateful content. Specifically, the IIED tort requires that the plaintiff prove the defendant's conduct was extreme and outrageous, intentional or reckless and caused the plaintiff severe emotional distress.

One of the primary drawbacks of this approach stems from the fact that social media users are, at times, able to remain anonymous online. For example, Facebook responded to a court order to reveal the identity of anonymous cyberbullies accused of making a number of malicious attacks on the victim's home page stating that Facebook, "respect[s] our legal obligations and work with law enforcement to ensure that such

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<sup>33</sup> See Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV 133, 149 (1982).

<sup>34</sup> Communications Decency Act of 1996, 47 U.S. § 230(c)(2) (2011).

people are brought to justice.”<sup>35</sup> Therefore, while it may be difficult for plaintiffs to identify the sources of the offensive content in question, it is not impossible. As demonstrated here, prosecutions go forward in cases of libel, in spite of these challenges. Thus, it seems highly possible that the difficulties posed by online anonymity could be surmounted.

## **Section II: International Approaches to Regulation**

The United States may choose to forgo domestic approaches to regulating hate speech on social media Web sites in favor of an international solution. Potential options include joining the existing European Union protocol, which “provides for liability of individuals who post racist and misogynistic content on the Internet and limits the liability of Internet Service Providers.”<sup>36</sup> The United States may also consider signing a new international treaty against hate speech on social media sites or forming an international oversight body to regulate offensive online content.<sup>37</sup>

If the United States were to become a party to the European Union’s Additional Protocol on Internet Hate Speech, it would be required to criminalize the following types of conduct:

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<sup>35</sup> Tecca, *Bullying Victim Wins Court Case Forcing Facebook to Unmask Anonymous Tormentors*, Y! TECH, June 8, 2012, available at <http://news.yahoo.com/blogs/technology-blog/bullying-victim-wins-court-case-forcing-facebook-unmask-004214015.html>.

<sup>36</sup> Christopher D. Van Blarcum, *Internet Hate Speech: The European Framework and the Emerging American Haven*, 62 WASH. & LEE L. REV. 781, 792-93 (2005).

<sup>37</sup> Paul Przybylski, *A Common Tool for Individual Solutions: Why Countries Should Establish an International Organization to Regulate Internet Content*, 9 VAND. J. ENT. & TECH. L. 927 (2007).

- Distributing or otherwise making available racist and xenophobic material to the public through a computer system.
- Directing a threat to a person through the Internet purely because of race, national origin or religion.
- Publicly insulting a person through a computer system because of their race, national origin or religion.
- Distributing or making available through the Internet material, that which denies, grossly minimizes, approves or justifies acts constituting genocide or crimes against humanity.
- In addition, the protocol provides for extradition between parties.<sup>38</sup>

As noted in Chapter 3, all European Union countries have laws in place to limit hate speech and these laws often extend to the Internet.<sup>39</sup> However, the Council of Europe's Additional Protocol would further intergovernmental cooperation in prosecution of offenders by removing obstructions to prosecutions when the source of the information is located in another European country or the United States.<sup>40</sup>

Still, the Protocol is riddled with jurisdictional issues, which would not necessarily be alleviated by the United States' decision to join the Protocol.<sup>41</sup> Often, it is unclear whose rules apply in a conflict in which information is sent from one European Union country and received in another. For example, a German high court has ruled that

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<sup>38</sup> Van Blarcum, *supra* note 36, at 792-93.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 800.

<sup>41</sup> *Id.*

“German authorities may take legal action against foreigners who upload content that is illegal in Germany, even though the Web sites may be located elsewhere.”<sup>42</sup> Thus, unless countries outside the European Union were also included in this effort, the jurisdictional confusion will persist.

These jurisdictional challenges prompted legal scholar Michael Siegal to recommend that all countries, not just western democracies and members of the European Union, enact an international treaty prohibiting hate speech online.<sup>43</sup> The current approach, says Siegal, is too narrow.<sup>44</sup> Instead, those in favor of online hate speech prohibitions should work with the United Nations to enact a worldwide treaty.<sup>45</sup> This approach would solve the jurisdictional issues associated with domestic regulation and joining the European Protocol. However, it would likely be very difficult for all of the countries involved to find a middle ground.<sup>46</sup> For example, western democracies such as the United States or Canada may be in favor of far more speech-protective rules than China, for example. In addition, it is worth noting that in the past, international law has leaned more toward free expression than it has toward restrictions on speech.<sup>47</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> Siegal, *supra* note 32, at 383-37.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Universal Declaration of Human Rights, G.A. Res. 217 III (A), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, *reprinted in* INTERNATIONAL RIGHTS INSTRUMENTS at 170.7, 170.8 (Richard B. Lillic, ed.). The Universal Declaration of Human Rights says that everyone has a right to the freedom of opinion and expression without interference.

Rather than a treaty, Paul Przybylski says countries should establish an international organization to regulate Internet content.<sup>48</sup> This, he says, will be even more effective than the current approach of having Internet companies determine which content should or should not be permitted online.<sup>49</sup> This international organization would function as a forum in which countries could meet in regular predetermined intervals with ISPs and large, internationally operating Internet businesses to work out individual solutions with their ISP.<sup>50</sup> Working together, says Przybylski, would be mutually beneficial for Internet companies and governments.<sup>51</sup> However, Przybylski does not offer any evidence or explanation regarding how, exactly these complex issues will be worked out across geographic and cultural barriers. Perhaps if there were another industry model that could be followed, this approach may seem more viable.<sup>52</sup> Przybylski also says that this international organization could provide “centralized monitoring of Internet activity, pool expertise and address technical changes quickly and effectively.”<sup>53</sup> The notion of an international body monitoring Internet activity is unlikely to be accepted in the United States, where even broadcast content is not monitored by the government, which may act only when prompted by audience or user complaints.<sup>54</sup>

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<sup>48</sup> Przybylski, *supra* note 37, at 942.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 943.

<sup>53</sup> *Id.* at 944.

<sup>54</sup> *Id.* at 945.

### Section III: Self-Regulation by Social Media Companies

#### *Maintain the Status Quo*

Today, social media companies such as YouTube, Facebook and Twitter are responsible for creating and enforcing their own hate speech policies. As previously discussed, the result is often an inconsistent application of rules that are in many instances far less speech-protective than U.S. hate speech jurisprudence would mandate.<sup>55</sup> In addition, social media companies, in particular Google, which owns YouTube, has said that it would prefer not to act as an arbiter of free speech.<sup>56</sup>

One of the primary benefits to this approach is that it does not implicate the First Amendment because the government is not involved. However, the situation that would be created by this lack of oversight is one in which social media companies have unprecedented power to censor online content. According to Alexander Tsesis, it is a mistake to exclusively place the power to decide whether and to what extent hate speech should be blocked in the hands of commercial interests.<sup>57</sup> Keep in mind, says Tsesis, for-profit companies are not beholden to humanistic principles.<sup>58</sup>

However, the most compelling argument against maintaining the current approach to self-regulation on the part of social media companies is that it is simply not working.

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<sup>55</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>56</sup> Somini Sengupta, *On Web a Fine Line on Free Speech*, N.Y. TIMES, Sept. 16, 2012, available at <http://www.nytimes.com/2012/09/17/technology/on-the-web-a-fine-line-on-free-speech-across-globe.html>.

<sup>57</sup> Tsesis, *supra* note 22, at 867-69.

<sup>58</sup> *Id.*

Despite their best efforts to flag and even remove some hateful content, social media Web sites remain saturated with hate speech. According to the Simon Wiesenthal Center's 2012 Digital Terror and Hate Report, cyber hate is on the rise.<sup>59</sup> The report says social networking companies' commitment to deter the use of their services by terrorists and bigots is uneven and YouTube is among the worst of the offenders.<sup>60</sup> Thus, doing nothing will only perpetuate the high volume of hate speech currently present on social media Web sites.<sup>61</sup> In fact, one recent study found more than 150,000 negative tweets containing racially or sexually-charged words such as "nigger," "spic" or "fag" were sent during the 11 month period between June 2012 and April 2013.<sup>62</sup> Thus, it seems any effort to address this growing problem would be a step in a positive direction.

#### *New Generic Top-Level Domains*

One interesting idea offered to curtail hate speech on the Internet is to ask social media and other Internet companies to create new generic top-level domains<sup>63</sup> that would help parents, children and even filtering software recognize individuals' and institutions' official, approved Web sites, as well as those that are not sanctioned.<sup>64</sup> In 2010, the

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<sup>59</sup> *News Release: Social Media Must Do More To Thwart Subculture Of Hate Fueling Lone Wolf Terrorism*, SIMON WIESENTHAL CENTER.COM (Mar. 12, 2012), available at <http://www.wiesenthal.com/site/apps/nlnet/content2.aspx?c=lsKWLbPJLnF&b=4441467&ct=11675937#.URaWO4XKY7A>.

<sup>60</sup> *Id.*

<sup>61</sup> Matt Peckham, *The Geography of U.S. Hate, Mapped Using Twitter*, TIME, May 20, 2013, available at <http://newsfeed.time.com/2013/05/20/the-geography-of-u-s-hate-mapped-using-twitter/>.

<sup>62</sup> *Id.*

<sup>63</sup> Examples of generic top-level domains include: ".org," ".com" and ".gov."

<sup>64</sup> Baumrin, *supra* note 4, at 260.



Internet Corporation for Assigned Names and Numbers (ICANN) said that any corporation could apply for and bid on new generic top-level domains. Current top-level domains such as “.com” or “.org” may now be replaced with any combination of up to 64 characters. Therefore, it would be possible for all social media companies to agree to a new, generic top-level domain, such as “.social.” In order to join, “.social” companies would have to agree to certain restrictions on content, in particular, one uniform hate speech policy that would be jointly drafted and enforced by all companies using that top-level domain name.

The benefit to this approach is that it leaves the government out of the process of regulating content online. It is a voluntary effort on the part of social media companies and thus merely represents a form of cyber zoning, which Justice Sandra Day O’Connor said was permitted and even expected by the Supreme Court.<sup>65</sup> However, it is possible that without a legislative directive, social media companies may simply refuse to participate in this change. After all, it would be a major financial gamble to change the online location of their sites. Perhaps financial motivation, such as a federal tax incentive, could be offered to entice social media companies to consider this alternative.

#### **Section IV: Filtering Software**

Filtering software installed by end-users to block unwanted content is called censorware. Much like its name suggests, this software filters out or censors undesirable

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<sup>65</sup> Reno v. American Civil Liberties Union, 521 U.S. 844, 867-68 (1997).

Web sites.<sup>66</sup> Commercial software programs such as Cybersitter, N2H2, Netnanny, Surfwatch and Wisechoice are designed to restrict an individual's ability to send or receive certain types of information, such as sexual or other obscene content. Users install them on their computers and then select users on that machine, such as children, are restricted from accessing certain Web sites. However, this software does not eliminate hate speech that appears on social media Web sites. To combat the more specific issue of hate speech online, the Anti-Defamation League (ADL) has developed free *HateFilter* software, which blocks access to sites that advocate hatred, bigotry or violence toward groups based on their race, religion, ethnicity, sexual orientation or other immutable characteristics.<sup>67</sup> Once again though, this software does nothing to eliminate hate speech that appears on innocuous sites.

In addition to the available commercial options and the ADL's free *HateFilter* software, the Worldwide Web Consortium, an international computer industry organization hosted by MIT, developed the Platform for Internet Content Selection (PICS) in the late 1990s. PICS is computer software that makes it possible to filter the Internet by creating a consistent way to rate and block access to various kinds of material including pornography and violence.<sup>68</sup> Although PICS is a universal censorship system, it was designed not for the government to use to censor individuals, but for individuals to regulate their own choices regarding content, much like the V-chip was intended to do for

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<sup>66</sup> WHATIS CENSORWARE?, <http://whatis.techtarget.com/definition/censorware> (last visited May 18, 2013).

<sup>67</sup> Yulia A. Timofeeva, *Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany*, 12 J. TRANSNAT'L L. & POL'Y 253, 280 (2003).

<sup>68</sup> Weintraub-Reiter, *supra* note 10, at 167-69.

television.<sup>69</sup> The PICS software was integrated into Microsoft's Internet Explorer to help parents and teachers filter potentially objectionable sites and is still in use today.<sup>70</sup>

There are several benefits to filtering software. First and foremost, this approach puts the power to regulate content in the hands, or mouse, of the end-user. As Judge Harlan notoriously pointed out in the *Cohen* case, "one man's vulgarity is another's lyric."<sup>71</sup> Filtering software allows each individual, not the government or a corporation, to decide what kind of Internet sites are and are not appropriate for their family. Here, the individual maintains control over message transmissions and receptions.<sup>72</sup> When used properly, it is possible for this software to protect young children from being exposed to offensive or even obscene content online. Finally, and perhaps most importantly, this approach to the problem of hate speech online does not interfere with the First Amendment.

However, it is essential to keep in mind that these filters often do not block hate speech that appears on social media sites and therefore may not be a viable solution. In fact, there are several drawbacks to using filtering software to curtail hate speech on social media sites. First, end-users putting filters in place to restrict the content available to them will not minimize the amount of hate speech content that exists online. As a result, women and minorities will continue to feel marginalized, excluded and at worst, unwilling to participate in political or social discourse. In addition, those without access

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Cohen v. California*, 403 U.S. 15, 25 (1971).

<sup>72</sup> Tthesis, *supra* note 22, at 867-69.

to the filtering devices will continue to be exposed to bigotry online. Filtering software also often makes mistakes by casting too wide a net and accidentally or inadvertently blocking out nondiscriminatory Web sites.<sup>73</sup> For example, the filtering software CyberPatrol classifies the National Academy of Clinical Biochemistry as “full nude” and prevents access to its content.<sup>74</sup> Conversely, they may also inadvertently let undesirable content through. For example, this software does not have the capability to filter out and deliver to the user only that YouTube or Facebook content that does not include certain words or phrases, such as “fag” or “nigger.”

Finally, organizations such as the American Civil Liberties Union (ACLU) and the Electronic Privacy Information Center (EPIC) argue that the use of filtering software conflicts with individual rights to freedom of expression and freedom of association, as mandated by the United States Constitution.<sup>75</sup> For some,<sup>76</sup> even the warnings or blocking statements, which on YouTube warn users they are about to view flagged content, represent a kind of crowd sourcing or groupthink that may somehow hinder or impede individual thought.<sup>77</sup> Lastly, opponents of commercial filtering software warn that because these tools could someday be misused, potentially transformed into public filters

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<sup>73</sup> *Id.*

<sup>74</sup> The Censorvare Project, *Blacklisted by Cyber Patrol: From Ada to Y loyo*, available at <http://censorvare.net/reports/cyberpatrol/intro.html> (last visited Apr. 19, 2013).

<sup>75</sup> WHATIS CENSORWARE?, <http://whatis.techtarget.com/definition/censorware> (last visited May 18, 2013).

<sup>76</sup> Timofeeva, *supra* note 67, at 279-80.

<sup>77</sup> *Id.*

that would allow for massive government censorship of the Internet, they should be avoided at all costs.<sup>78</sup>

## **Section V: Do Not Regulate Hate Speech on Social Media Sites**

While there are several possible approaches to addressing hate speech on social media sites, many prominent legal scholars<sup>79</sup> think that the best action for the government to take here is no action at all. Citing many of the arguments<sup>80</sup> against hate speech regulation of any form, many legal scholars are against any proposed effort to curtail the amount of hateful rhetoric that persists on social media Web sites. As Justice Brandeis noted, when it comes to exposing the darkest corners of society, sunlight is the best disinfectant.<sup>81</sup> Therefore any attempts to restrict or curtail hate speech are a dangerous form of government censorship that should be avoided at all costs.

Weintraub-Reiter says that any form of Internet hate speech regulation would interfere with the free flow of ideas essential to any democratic society.<sup>82</sup> Echoing the philosophy of Alexander Meiklejohn, Weintraub-Reiter says that permitting hate speech on the Internet promotes democracy because citizens need access to all information, even

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<sup>78</sup> Tsesis, *supra* note 22, at 867-69.

<sup>79</sup> See, e.g., C. Edwin Baker, *Hate Speech*, in *THE CONTENT AND CONTEXT OF HATE SPEECH* 57-62 (Michael Herz & Peter Molnar eds., 2012); Rachel Weintraub-Reiter, *Hate Speech Over the Internet: A Traditional Constitutional Analysis or a New Cyber Constitution?*, 8 *B.U. PUB. INT. L.J.* 145, 162 (1998); JAMES WEINSTEIN, *HATE SPEECH, PORNOGRAPHY AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE* 150-51 (1999).

<sup>80</sup> See Chapter II.

<sup>81</sup> BRANDEIS, <http://www.brandeis.edu/legacyfund/bio.html> (last visited May 23, 2013).

<sup>82</sup> Weintraub-Reiter, *supra* note 10, at 178.

offensive or untrue information, in order to effectively govern themselves.<sup>83</sup> Weintraub-Reiter relies on the marketplace of ideas theory to justify the growing presence of hate speech online. When two opposing ideas exist, she says, the competitive market will ultimately choose truth.<sup>84</sup> However, she provides no evidence, statistical or anecdotal, to justify this claim. In fact, her point begs the question, “Do racist ideas *really* sink to the bottom of the pool of public discourse as deplorable untruths?” Or, do people believe the inaccurate, often racist or misogynistic comments on social media sites are true or accurate?

In addition, Weintraub-Reiter also cites the dangers of censorship as good reason to avoid regulating hate speech online. Individuals must have the liberty to decide for themselves what information they want to receive.<sup>85</sup> Any effort on the part of Congress or the Supreme Court to ban hate speech online infringes on both the speaker’s and the listener’s rights, to free expression and personal liberty.<sup>86</sup> C. Edwin Baker was also strongly opposed to any form of hate speech prohibitions, which he said would be ineffective, leaving too many bigoted practices and expressions to fly under the radar.<sup>87</sup> Additionally, the very nature of hate speech on the Internet inhibits regulation, said

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 179.

<sup>85</sup> *Id.* at 178.

<sup>86</sup> See CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 122 (1993).

<sup>87</sup> Baker, *supra* note 79.

Baker.<sup>88</sup> It is simply too difficult to identify, remove and then punish the creators of hateful online material.<sup>89</sup>

While there is no denying the difficulty associated with implementing any prohibitions against hate speech online, whether on social media sites or elsewhere on the Web, it is worth noting that fear of potential errors not prevent the government from banning obscene material on the Internet and enforcing that ban.<sup>90</sup> Why, then, should hate speech be exempt from possible regulation? If Congress and the Supreme Court were able to come to an agreement regarding what is considered obscene and therefore unprotected expression online, why then would they not be able to do the same for hate speech?<sup>91</sup>

Finally, proponents of free expression argue that best possible solution for curtailing hate speech on social media sites is more speech.<sup>92</sup> For example, on YouTube, some users have posted videos demonstrating how other users may report those whose comments or video posts include hate speech. This is just one of the many ways that more speech, more content can be used to curtail the effects of unwanted offensive content on social media sites.

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<sup>88</sup> Weintraub-Reiter, *supra* note 10, at 178.

<sup>89</sup> Baker, *supra* note 79, at 63-78.

<sup>90</sup> 47 U.S.C. § 230.

<sup>91</sup> Reno v. American Civil Liberties Union, 521 U.S. 844, 867-68 (1997).

<sup>92</sup> Baker, *supra* note 79, at 57-60.

## **Conclusion:**

While there are several valid approaches to dealing with the problem of hate speech on social media sites, some seem more viable than others. For example, maintaining the status quo, in other words, doing nothing, will only allow the problem to persist. In fact, if current trends continue, the amount of hate speech on social media sites should be expected to increase in the coming years if changes are not made.<sup>93</sup>

Although legislative action seems to be a solid potential outlet for addressing this issue, serious questions remain regarding whether the Supreme Court would uphold any Congressional effort to regulate Internet content. Moreover, would Congress even be willing and/ or able to pass such regulation? Whether in the form of licensing or criminal penalties on creators or end-users, it would be difficult for Congress or the FCC to craft and implement lasting content-based restrictions on the Internet without the ultimate support of the Supreme Court, which vehemently opposed a similar action in *Reno*. Thus, it seems that legislatively mandated regulation may not be the best approach for minimizing online hate speech.

Along those lines, the international approaches to regulation discussed here also face insurmountable challenges to being accepted in the United States. First, the way many other western democracies currently regulate hate speech online goes against the special protections afforded to American citizens by the First Amendment. Joining the European Protocol and criminalizing the distribution of racist or xenophobic material online would negate the First Amendment and ultimately, the action is likely to be

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<sup>93</sup> *Hate Map*, Southern Poverty Law Center.com, <http://www.splcenter.org/get-informed/hate-map> (last visited Nov. 29, 2012).



overturned by the Supreme Court. In addition, the monitoring approach to content regulation recommended as part of an international effort to reduce online hate speech would be difficult to get the American public to accept, let alone its government.

Filtering software provides a viable option that does not infringe on the rights afforded by the First Amendment. However, existing software is unable to address the specific issue of hate speech on social media sites. Commercial software such as NetNanny or even the ADL's *HateFilter* does not have the capability to remove only the racist comments from a YouTube page, while still allowing the user to access the remaining, less offensive content. Censorware is also notorious for its inaccuracy, often inadvertently blocking innocuous Web sites from access, (e.g., access to WebMD is denied because the page contains the word breast). Lastly, commercial filters only solve the problem of hate speech online for those with access to them. Online bigotry and hate is not erased for those unable to afford or install the software.

Julian Baumrin's idea to ask social media companies to prevent posters from remaining anonymous seems like a potentially workable solution. This would allow the F.B.I. to more easily investigate and prosecute offenders based on existing statutes. As noted previously, the United States Code articulates the elements of a true threat, which requires the government to prove a transmission in interstate or foreign commerce, a communication containing a threat and a threat to injure or kidnap the person of another.<sup>94</sup> It is possible that some of the individuals who create and disseminate hate

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<sup>94</sup> 18 U.S.C.A § 875(c) (West Supp. 1998).

speech propaganda on social media sites may be prosecuted under this statute, however, it is also important to recognize that much of the hate speech that serves to degrade and marginalize women and minorities online would not meet the definition of a “true threat.”

Given the problems associated with each of the approaches outlined above, it seems that a change in the social media industry’s approach to regulating its own online content is the most direct and effective way to address the problem of hate speech on these sites. In particular, a switch to a new generic Top-Level Domain, such as “.social,” would provide an opportunity for social media companies to work together, perhaps even with government, to craft a consistent hate speech policy, one that is hopefully better aligned with U.S. hate speech jurisprudence. In order to encourage companies to join this new domain, it would be helpful for the government to consider offering a tax incentive to these organizations in exchange for changing their domain and accepting the new, jointly crafted regulations. In a sense, this approach represents a type of co-regulation between the social media industry and the government. The specific details of this solution will be explored in extensive detail in Chapter VI.

## **Chapter VI**

### **Recommended Approach**

#### **Introduction:**

Previous chapters have explored the scope and nature of the problem of hate speech on social media Web sites. Arguments for and against regulating such hate speech have been examined, as have relevant court cases regarding when hate speech has and has not been granted First Amendment protection. In addition, the government's and Internet companies' approaches to regulating Web content have been analyzed, along with solutions to dealing with this issue that have been proposed by other scholars. This chapter will use the information and arguments discussed thus far to answer the research questions posed at the start of this inquiry. Included in the answers to the research questions is a series of recommendations for how to best minimize hate speech on social media sites. After discussing the development and implementation of the proposed recommendation, the arguments in favor of the recommended action will be addressed, along with counter-arguments.

#### **Section I: Addressing Research Questions**

*RQ1: Should hate speech that appears on social media companies' Web sites, for example YouTube, be protected by the First Amendment?*

As the various lines of reasoning presented in Chapter II suggest, there are valid reasons both for allowing hate speech to be freely used online and offline and for curtailing hate speech. For example, those in favor of First Amendment protection for hate speech are quick to point out the dangers of government censorship in any form. It is

preferable instead for all ideas, no matter how offensive or damaging, to be tossed into the marketplace of ideas for individuals to weigh and consider as valid or not.<sup>1</sup> In addition, scholars such as Rachel Weintraub-Reiner echo the arguments of Alexander Meiklejohn in this debate by pointing out that it is essential that all expression be allowed to enter the public sphere in order for a democracy to function effectively.<sup>2</sup> The business of self-governing, say these scholars, requires access to all information. Moreover, there are those who argue that any restriction on speech, on social media sites or elsewhere, infringes on individuals' personal liberty.<sup>3</sup> We should have the right, say Thomas Emerson and others, to express ourselves in any way we see fit.<sup>4</sup> If individuals choose to go on YouTube and make comments that label people as "faggots" or "niggers," then, these scholars say, they should be free to do so. Finally, those in favor of protecting hate speech say that any effort to curtail the growth of online hate speech will just send this type of activity further underground, where, presumably, it would be even more dangerous.

On the other hand, those in favor of curtailing hate speech on social media sites argue that the psychological damage this rhetoric has on its victims is reason enough for the government to step in and try to curtail it. In addition, some scholars argue that the country's permissive attitude toward hate speech, on social media sites and elsewhere,

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<sup>1</sup> *Abrams v. United States*, 250 U.S. 616 (1919).

<sup>2</sup> Rachel Weintraub-Reiter, *Hate Speech over the Internet: A Traditional Constitutional Analysis or a New Cyber Constitution?*, 8 B.U. PUB. INT. L.J. 145, 172 (1998).

<sup>3</sup> See, e.g., C. Edwin Baker, *Hate Speech*, in *THE CONTENT AND CONTEXT OF HATE SPEECH* 57-62 (Michael Herz & Peter Molnar eds., 2012).

<sup>4</sup> See, e.g., THOMAS EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 10 (1966).

causes racism and sexism to persist and that can potentially lead to violence against women, minorities and members of the LGBT community.<sup>5</sup> Moreover, as Chapter II discussed, racial and gender discrimination remains a pervasive problem in the twenty-first century workplace, leading to pay and opportunity gaps among women and their male counterparts.<sup>6</sup> Finally, allowing hate speech may be inconsistent with the Fourteenth Amendment, which says that no state shall “deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>7</sup> Thus, if the Fourteenth Amendment embodies an anti-discrimination principle, then anything that supports and further perpetuates racial inequality should be regulated.<sup>8</sup>

Despite the valid arguments on both sides of this debate, online hate speech in the United States remains fully protected by the First Amendment, whether it occurs on social media sites or elsewhere on the Internet, and the Supreme Court shows no signs of expanding exceptions to that protection beyond the categories such as fighting words, incitement and true threats.<sup>9</sup> While fighting words, those personally abusive epithets that by their very utterance inflict, injure or tend to incite an immediate breach of peace,

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<sup>5</sup> See, e.g., ALEXANDER TESIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* (2002).

<sup>6</sup> Meghan Casserly, *The Real Origins of the Gender Pay Gap and How We Can Turn it Around*, FORBES.COM, JULY 5, 2012, available at <http://www.forbes.com/sites/meghancasserly/2012/07/05/real-origins-gender-pay-gap-how-we-can-turn-it-around/>.

<sup>7</sup> U.S. CONST. amend.. XVI, § 2.

<sup>8</sup> STEVEN J. HEYMAN, *HATE SPEECH AND THE CONSTITUTION* 124 (1996).

<sup>9</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Brandenburg v. Ohio*, 395 U.S. 444, (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

remain unprotected,<sup>10</sup> the Supreme Court said in its *R.A.V.* decision that content-based prohibitions, such as the Minnesota cross-burning statute at issue in that case, would not be permitted.<sup>11</sup>

In addition, the *R.A.V.* decision also held that some types of content discrimination do not violate the First Amendment, in particular those restrictions that are based on the non-speech elements of expression such as secondary effects. Here, and again in the *Adult Mini Theaters* case, the Supreme Court said that secondary effects served as another valid basis for “according differential treatment to even a content-defined subclass of proscribable speech as long as the regulation is justified without reference to the content of that speech.”<sup>12</sup> Still, any content-based restriction offered must pass strict scrutiny, which requires that it be narrowly drawn to meet a compelling government interest, such as the public’s health, safety or welfare. In addition, it may not be viewpoint based.<sup>13</sup> Thus, even if a statute could be crafted that would pass strict scrutiny, perhaps based on the secondary effects caused by online hate speech such as workplace discrimination, it would likely be viewpoint based and thus, unconstitutional.

More recently, in *Virginia v. Black*, the Supreme Court established the category of unprotected speech known as “true threats.”<sup>14</sup> These are defined as threats that encompass those statements where the speaker means to communicate a serious

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<sup>10</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942).

<sup>11</sup> *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>12</sup> *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 56 (1976).

<sup>13</sup> *R.A.V.*, 505 U.S. at 379.

<sup>14</sup> *Virginia v. Black*, 538 U.S. 343 (2003).

expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.<sup>15</sup> True threats are also prohibited by federal law.<sup>16</sup> This existing framework seems to provide one of, if not the, most viable statute for prosecuting some of the more targeted hate speech that appears on social media sites. Although the threshold for this statute is difficult to meet because the threat must be directed at a specific individual and believable, it at least provides certain victims with an opportunity for recourse against the creators and distributors of online hate speech.

In addition to true threats, incitement also provides an opportunity for recourse for the specific victims of hate speech on social media sites. According the Supreme Court's decision in the *Brandenberg* case, speech that is "directed to inciting or producing imminent lawless action and is likely to produce such action" may be limited.<sup>17</sup> The Supreme Court's position in this case and others suggests that the creators of Internet content that incites violence among readers may also be accountable for the harm caused by the content.<sup>18</sup> However, it is important to recognize the extent to which the imminence standard in the *Brandenberg* test makes it difficult to apply this precedent to cases involving incitement online. Recently, though, a white supremacist named William White was sentenced to three years in prison for using his Web site, [www.overthrow.com](http://www.overthrow.com),

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<sup>15</sup> *Id.*

<sup>16</sup> 18 U.S.C. § 875(c).

<sup>17</sup> *Brandenberg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>18</sup> *Rice v. Paladin Enters., Inc.*, 128 F. 3d. 233 (4<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

to incite violence against the jury foreman in the trial of fellow neo-Nazi, Mathew Hale.<sup>19</sup> In the case against White, a judge said that posting the jury foreman's name, address and phone numbers online amounted to incitement and found White guilty.<sup>20</sup> Thus, incitement, like true threats, provides an opportunity for recourse in those situations where the hate speech is directly targeted at an individual and is likely to produce imminent lawless action against that person.

Along those lines, it is also important to note here that FCC oversight of the Internet as a mass medium is also unlikely to be accepted by the Supreme Court. The Supreme Court said in its *Reno* decision that it does not see the Internet as being as pervasive as broadcasting, nor does it believe the Internet uses the spectrum in the same way as broadcasting. Thus, the *Reno* case also suggests that any proposed content-based blanket restriction on speech will not be tolerated by the Supreme Court.<sup>21</sup> Although the legislation in the *Reno* case was aimed at indecent materials on the Internet, the Supreme Court's discussion of the CDA and the Internet suggests that it is likely they would rule in the same manner if confronted with issues of hate speech.<sup>22</sup>

With all of this in mind, legislatively-mandated government regulation does not seem to be best approach to curtailing hate speech on social media. Instead, it may be

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<sup>19</sup> Kim Janssen, *White Supremacist Sentenced to 42 Months for Inciting Violence Against Juror*, CHI. SUN-TIMES, Feb. 20, 2013, available at [www.suntimes.com/news/18355576-418/white-supremacist-sentenced-to-42-months-for-inciting-violence-against-juror.html](http://www.suntimes.com/news/18355576-418/white-supremacist-sentenced-to-42-months-for-inciting-violence-against-juror.html).

<sup>20</sup> *Id.*

<sup>21</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

<sup>22</sup> Edgar Burch, *Censoring Hate Speech in Cyberspace: A New Debate in New America*, 3 N. C. L.J. & TECH, 175, 188 (2001).



better to ask social media companies to voluntarily submit to certain regulations in exchange for adoption of (at least) a new hate speech policy that better reflects hate speech jurisprudence in the United States. Although the research question posed was, “Should hate speech be protected on social media sites?,” the answer this research has yielded is: It already is. Regardless of the very valid arguments offered by scholars in favor of government oversight, the fact remains that hate speech is fully protected by the First Amendment as long as it does not fall into the fighting words or true threats categories. Moreover, the Supreme Court shows no signs of changing its position on this issue. Therefore, regardless of the moral and ethical value of answering such a question, the answer that matters in this instance is that, hate speech is protected by the First Amendment in the United States and that is unlikely to change in the near future, despite the many good reasons for doing so.

*RQ2: If this speech does not warrant the full protection the Constitution and courts give it, how should it be regulated?*

Although hate speech in social media remains protected by the First Amendment, the research gathered here provides a sense of the landscape in which efforts to curtail hate speech online should proceed. While additional government oversight or regulation is unlikely, there are two specific solutions that emerge as most feasible and most likely to have an immediate impact on minimizing the amount of hate speech currently on social media Web sites.

The first part of the two-pronged solution being proposed is for Congress and state legislatures to increase funding for federal and local law enforcement officials to

enforce existing regulations, such as those against threats made over the Internet.<sup>23</sup> Even though the concern here is threats based on race, gender, sexual preference, ethnicity or religion, by increasing the financial and human resources available to address the problem of all threats online, those threats aimed at the protected classes listed above should also be reduced. The federal government’s “State Grant Program for Training and Prosecution of Cybercrime,”<sup>24</sup> is an excellent example of how an increase in funding may encourage greater enforcement of existing regulations, as well as provide money for educating the public about the nature of these rules. In the case of the true threats statute,<sup>25</sup> that may take the form of educational programs aimed at encouraging civility online.

The second, and far more complicated part of this two-part solution is to ask social media companies to adopt a new generic top-level domain, such as “.social.” In order to join, “.social” companies such as Google, Facebook, Instagram, Twitter and others would have to agree to a uniform hate speech policy that would be jointly drafted by representatives from the social media companies themselves. In exchange for making the move to “.social” and participating in the process of industry self-regulation, a process that will be facilitated by the FCC, social media organizations would receive a substantial tax incentive or other financial benefit from the federal government.

## **Section II: Solution Explanation and Implementation**

Executing the first part of the two-part solution being proposed here is not

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<sup>23</sup> 18 U.S.C. § 875(c).

<sup>24</sup> 42 U.S.C. § 3713.

<sup>25</sup> 18 U.S.C. § 875(c).

complicated, but it may be difficult. In order to be awarded funding by Congress or state legislatures, it is likely that media activists, such as members of FreePress.org or Media Matters for America for example, will have to organize a federal or local lobbying effort to encourage lawmakers to allocate funding to enforce rules preventing threatening speech online. Although these groups would be among many other organizations seeking lawmakers' attention, the pervasiveness of the problem of hate speech on social media and the prevalence of social media use itself may help activists to secure the funding needed to enforce existing regulations against online threats.

Carrying out the second prong of the proposed solution is far more complex. Proposing a generic top-level domain change from “.com” to “.social” is to ask of social media companies to make a major transformation, even with the financial incentives that may be provided. Although concerns about losing site users could most likely be abated with the knowledge that users visiting “YouTube.com” would be automatically redirected to “YouTube.social,” the financial risks are great enough that the benefits need to be so substantial they convince social media executives to participate in such an undertaking.

Ideally, the policy itself would be developed during an online civility forum that would bring together FCC staff members – to act as facilitators – and representatives from both large and small social media companies. During this multi-day conference or forum, the leaders of the content teams from the participating social media organizations would work together to craft a hate speech policy that is more clear and consistent than the individual approaches currently being applied by social media companies.

In addition to the financial incentives being offered in the form of tax incentives, the leaders of the content teams at social media companies may be willing to participate given their own apparent discomfort with how to best handle their current role as the arbiters of free speech on the Internet.<sup>26</sup> As previously discussed, the leaders of the content removal teams at Facebook, Google and Twitter are already having a private discussion about how to enforce their own community guidelines, which for many include a specific policy against hate speech.<sup>27</sup> Loosely dubbed the “Anti-Cyber Hate Working Group,” these “deciders” have expressed a great deal of disagreement among their ranks about the best approach to handling the issues facing social media.<sup>28</sup> This online civility forum would provide a platform for these individuals and organizations to find a middle ground and develop a consistent policy regarding how to handle hate speech on social media Web sites.

First, the policy developed during the forum would address information about content removal, what types of images, videos, or comments will or will not be permitted on all “.social” sites. In addition, the policy may also cover information about how social media organizations plan to work with (or not) domestic and international law enforcement agencies. For example, the policy may address whether “.social” companies must provide for extradition of offending parties outside of the United States.

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<sup>26</sup> Jeffery Rosen, *The Delete Squad: Google, Twitter, Facebook and the New Global Battle Over the Future of Free Speech*, NEW REPUBLIC, Apr. 29, 2013, available at <http://www.newrepublic.com/article/113045/free-speech-internet-silicon-valley-making-rules#>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

Along those lines, crafting the new unified hate speech policy may provide an opportunity for social media companies to (re)consider the issue of identification and anonymity on their sites. Currently the question regarding whether or not social media companies are required to identify users who violate foreign countries' anti-hate speech remains unclear. This creates confusion and problems for social media companies and the countries in which they operate. For example, in July 2013 Twitter finally yielded to a court order to release user information in response to a law enforcement request in a case dealing with France's anti-hate speech laws.<sup>29</sup> Twitter fought for months to protect the privacy of its users but in the end, relented to pressure in the form of a lawsuit from a citizens' group, which was dropped once local law enforcement received the information sought.<sup>30</sup> Hopefully, the process of drafting this new policy would provide social media organizations with an opportunity to develop a more cohesive approach to effectively deal with requests for information from local, federal and international law enforcement agencies in cases related to hate speech activity on their Web sites.<sup>31</sup>

Lastly, this approach would provide the FCC with a seat at the table in these discussions, which it currently does not have. If an experienced, dedicated FCC staff person who knows the social media industry from both a business and technical perspective is assigned this role, that person or team of people could become an asset to the social media content-removal team leaders working to develop the new, cohesive hate speech policy. As a resource and a facilitator, the dedicated FCC staff person could ensure that critical issues such as content removal, flagging, anonymity and even

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<sup>29</sup> Somini Sengupta, *Twitter Yields to Pressure in Hate Case in France*, N.Y. TIMES, July 12, 2013, at B1.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

extradition are addressed. This person would also be in a position to remind the social media organization representatives of the Supreme Court's position regarding hate speech protection and encourage the decision-makers to consider exceptions to First Amendment protection such as true threats and incitement as they craft their new policy.

As a guidepost, the FCC may want to examine the FTC's 2009 efforts to assist the online behavioral advertising industry to develop self-regulations<sup>32</sup> that worked for both the FTC and the ad serving<sup>33</sup> companies. Here, the FTC invited large and small organizations to participate in an online behavioral advertising summit in Washington, D.C.. During this event, the agency worked with ad serving companies to develop a comprehensive approach to the ethical and procedural issues facing that industry at the time.<sup>34</sup> The result was a set of revised regulations that could be accepted and implemented by advertisers immediately.<sup>35</sup> While the nature of the online behavioral advertising industry continues to shift and change, having the industry-wide regulations starts everyone on the same page when new problems arise and new solutions must be identified. Moreover, because they have worked together on the process of developing the new policy, channels of communication between FTC staff members and employees

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<sup>32</sup> *News Release: FTC Staff Revises Online Behavioral Advertising Forum*, FTC.GOV (Feb. 12, 2009), available at <http://www.ftc.gov/opa/2009/02/behavad.shtm> [hereinafter *Ad Forum Release*].

<sup>33</sup> Ad serving companies, such as DoubleClick, are responsible for populating web sites with ads targeted to a particular user. For example, a consumer who recently browsed baby toys on Amazon.com may be "served" an ad for baby toys while reading the news on the Denver Post.com.

<sup>34</sup> *Ad Forum Release*, *supra* note 32.

<sup>35</sup> *Id.*

at ad serving companies such as DoubleClick or TrueEffect exist, and can be utilized to address new issues and concerns as they arise.<sup>36</sup>

Finally, this solution will bring the process of content censorship on YouTube, for example, out of the back rooms of Google and into the sunlight. Today very little is known about how these censorship teams operate.<sup>37</sup> This approach brings that process into the public eye where activists, journalists and others can watch as decision-makers debate what hateful or threatening content will or will not be permitted on social media Web sites.

### **Section III: Arguments in Favor of the Recommended Approach**

There are several positive aspects to the approach being offered here. The first part of the proposed solution – adding financial resources, and subsequently personnel, to efforts to prosecute those who post information on social media Web sites – will hopefully minimize the amount of hate speech online. In addition, this effort does not require major changes on the part of social media organizations and could be pursued even if the social media companies were unwilling to participate in the suggested effort to craft a new, unified hate speech policy for all “.social” companies.

The second prong of the two-part approach, the push for industry self-regulation as part of a move to a new top-level domain, also has several benefits. First, it leaves the government largely out of the business of content removal, while still giving the FCC a

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<sup>36</sup> *Id.*

<sup>37</sup> Steve Henn, *Facebook's Online Speech Rules Keep Users on a Tight Leash*, NPR.COM, Apr. 29, 2013, available at <http://www.npr.org/blogs/alltechconsidered/2013/04/03/176147408/facebooks-online-speech-rules-keep-users-on-a-tight-leash>.

seat at the table. Crafting a collective policy provides social media organizations with an opportunity to clarify and even reconsider their own current, disparate approaches to handling hate speech on their sites. The end result will hopefully be a more clear, cohesive policy that outlines what content is and is not permitted on “.social” Web sites, how issues regarding anonymity will be handled and how the organizations plan to cooperate, or not, with law enforcement officials, all of which will undoubtedly benefit the social media organizations themselves.

Although the proposed solution prevents the government from potentially acting as a censor of speech, it also takes sole control away from corporate hands. The content policy decision-makers at social media companies are already meeting and working together to determine their own positions on questions regarding hate speech, as well as obscene speech.<sup>38</sup> By allowing the FCC to act as moderator, facilitator and overall participant in this process, the resulting policy should better reflect the decisions of the Supreme Court and the protections afforded by the First Amendment, as opposed to the personal or professional preferences of the members of Google’s censorship team.

Plus, a policy developed by social media companies themselves would also be in line with the Supreme Court’s position on Internet regulation set forth in *Reno*. The Internet, said the Supreme Court, is not invasive, nor does it have a special impact.<sup>39</sup> Therefore it does not warrant regulation similar to broadcasting. The FCC’s hands off,

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<sup>38</sup> *Id.*

<sup>39</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844, 867-68 (1997).



moderator role in the recommended approach to regulation development would likely be supported by the Supreme Court.

In addition to minimizing government oversight while removing the monopoly of control from the hands of Internet companies, the proposed approach is also better for users of social media because it clarifies what content is or is not permitted on these sites. This will let users, in particular parents, know what kinds of videos, images and text they can expect to see when they visit these sites. The uniform hate speech policy developed by social media companies would act much like the labels on cigarettes do, warning users of the potential dangers associated with even proper use of the product.

Perhaps even more importantly though, changing the policy regarding hate speech in social media will hopefully mean that less women, minorities and members of the LGBT community are inadvertently exposed to this kind of hateful rhetoric. If this two-part solution is pursued, fewer individuals will suffer the emotional distress caused by that kind of victimization. This may, in turn, lead to larger societal shifts, including an increase in the number of female and minority voices in the public sphere and a subsequent improvement in the functioning of the nation's democratic processes. Moreover, any decrease in hate speech would signal a decrease in racist attitudes, which would hopefully lead to less racially charged violence or workplace discrimination based on race or gender.<sup>40</sup>

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<sup>40</sup> Tsesis, *supra* note 5, at 202.

## Section IV: Addressing Counter-Arguments

While there are many valid arguments in favor of the recommended solution, there are also several potential drawbacks to increasing funding and advocating an industry-guided approach to crafting a uniform hate speech policy. First, an offer of a tax incentive may not be enough to convince social media companies to make the move to “.social.” Although the technology exists to ensure that users would be redirected to the new domain location, these companies may still fear a decrease in their number of users or advertisers as a result of any change. For example, companies such as Google or Facebook may not want to create the impression among the general public that they are succumbing to government pressure to regulate content in a particular way.

Critics of the proposed approach will also be quick to point out that any effort to curtail hate speech on social media sites will simply encourage the creators and distributors of this rhetoric to find another outlet to disseminate their hate. Instead of focusing on eliminating the existing offensive speech, many media activists and scholars argue that the government’s time and money would be better spent focusing on efforts at counter-speech, such as social equality public information campaigns.<sup>41</sup>

Along those same lines, it is also worth noting that the solution offered here would do nothing to target the 15,000 hate Web sites and blogs currently online.<sup>42</sup> Thus, while there will likely be less hate speech on social media sites as a result of these efforts,

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<sup>41</sup> See Baker, *supra* note 3, at 61.

<sup>42</sup> *News Release: Social Media Must Do More To Thwart Subculture Of Hate Fueling Lone Wolf Terrorism*, SIMON WIESENTHAL CENTER.COM (Mar. 12, 2012), available at <http://www.wiesenthal.com/site/apps/nlnet/content2.aspx?c=IsKWLbPJLnF&b=4441467&ct=11675937#.URaWO4XKY7A>.

there will still be a substantial amount of hate content on the Web, although with this solution it is less likely that people may inadvertently stumble on it.

Taking a more meta-view of the situation, perhaps the biggest drawback to the proposed solution is that even if it is successful in its efforts to minimize hate speech online, it may do very little to impact the root issue, which is the racism that persists in the United States today. Instead of focusing on the symptom, which is the hate speech that appears on social media sites, perhaps scholars and activists should focus on the disease, which is violence, discrimination and inequality enacted on the basis of race, gender, ethnicity or sexual preference.

### **Conclusion:**

Although there are viable arguments both for and against efforts to try to curtail hate speech via government regulation, the fact remains that hate speech online or offline is fully protected by the First Amendment.<sup>43</sup> Instead of legislatively mandated, content-based regulations, the first part of the solution proposed here suggests that activists and scholars would be most successful advocating for greater resources to prosecute offenders under existing regulations, such as the federal statute prohibiting true threats.<sup>44</sup> While this would only address hate speech that includes targeted threats aimed at specific individuals, it could be easily done with funding from Congress and does not require changes on the part of social media companies.

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<sup>43</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

<sup>44</sup> 18 U.S.C. § 875(c).

The second prong of the recommended approach calls for the creation of a new generic top-level domain, “.social,” that would require adherence to industry-created, uniform hate speech policies and procedures. As discussed, this approach would:

- Minimize hate speech on social media sites.
- Benefit social media organizations currently struggling to implement their own hate speech policies.<sup>45</sup>
- Prevent either the government or social media companies from having total control over determining which offensive content will and will not be permitted on these platforms.
- Be consistent with the Supreme Court’s position regarding Internet regulation.<sup>46</sup>
- Provide users with more clear information about what kind of videos, images, text or comments they can expect to see on these sites.
- Limit the number of women, minorities and members of other protected classes who are exposed to hateful rhetoric on these sites, which may lead to an increase in the number and types of voices heard in the public sphere.

Still, there are potential drawbacks to the recommended approach, including the fact that social media organizations may not be willing to participate in the online civility forum and subsequent move to “.social.” In addition, it is likely that critics of any hate speech regulation<sup>47</sup> would claim that the actions proposed here to reduce hate speech on social media sites will do very little to impact people’s racist and misogynistic attitudes.

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<sup>45</sup> Rosen, *supra* note 26.

<sup>46</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844, 867-68 (1997).

<sup>47</sup> *E.g.*, C. Edwin Baker; Rachel Weintraub-Reiter; James Weinstein.

In fact, efforts to curtail hate speech on social media sites may even send this expression offline, where it would be even more difficult to monitor.

However, one can hardly expect improvement to come from inaction. The proposed approach offers an outline for how to best address the problem of hate speech on social media Web sites that is based on: scholarly work regarding arguments for and against restricting hate speech; consideration of past hate speech regulations in the U.S. and abroad; current Internet regulations and related jurisprudence; and an examination of the solutions to the problem of hate speech online proposed by scholars, activists and others working in the field.<sup>48</sup> Far from a revolutionary approach, the solution proposed here seeks to work within the current business and regulatory framework to identify immediate actions that can be taken by activists, scholars, social media companies' content-removal team leaders and FCC staff people to try to limit the amount of hate speech in social media.

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<sup>48</sup> *E.g.*, Julian Baumrin; Edgar Burch; Richard Delgado; Paul Przybylski; Michael Siegal; Yulia Timofeeva; Alexander Tsesis.

## Chapter VII

### Conclusion

#### Introduction:

In order to answer the question, “How should hate speech be regulated on social media Web sites?,” this project began by providing an overview of the scope and nature of the problem of hate speech on these sites. Next, in Chapter II, arguments for and against regulating hate speech online were examined. Then, in Chapter III, the relevant jurisprudence was evaluated in order to identify those statutes that may provide a potential outlet for regulation. In Chapter IV, Internet regulation, by social media companies and the government, was discussed. Chapter V presented several viable solutions to addressing this issue, looking at the potential benefits and drawbacks of each.

Then, using the insights gathered throughout that process, Chapter VI recommended a two-pronged approach to addressing hate speech on social media Web sites. This solution calls for enforcing existing regulations, like those against true threats,<sup>1</sup> and encouraging the FCC to work with social media companies’ content “deciders” on a move to “.social.” Joining this new generic top-level domain would require adherence to a revised, unified hate speech policy drafted by the social media companies themselves.

In order to bring closure to this effort, this chapter will identify and examine the limitations of this project and discuss recommendations for future research.

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<sup>1</sup> 18 U.S.C. § 875(c).

## **Section I: Project Limitations**

The research this inquiry relied on was primarily that of legal and communication scholars, but it is possible that research generated in other disciplines, such as social movement studies, management studies, computer science or psychology may also yield valuable insights regarding the issue of hate speech on social media Web sites. In addition, it would be beneficial to expand the scope of this research beyond YouTube and other social media sites to focus on hate speech on the Internet more generally. Finally, as with any work regarding digital media, the status quo changes on an almost daily basis. It seems each week new information emerges in the popular media about how social media companies are regulating content on their sites. Thus, this project is limited by the fact that as soon as it is completed, it is already outdated. The way different social media companies identify hate speech and determine whether or not it will be removed is constantly evolving and as a result, any efforts to study this process must remain, to whatever extent possible, evergreen.<sup>2</sup>

## **Section II: Recommendations for Future Research**

If time and money were no obstacle to expanding on this project, the ideal next step in this research would be to conduct interviews or focus groups with the managers and employees at Google and Facebook responsible for content removal. Individuals, such as Jud Hoffman, the Global Policy Manager at Facebook, and Dave Willmer, who is the head of Facebook's content policy team, have spoken to journalists in some detail

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<sup>2</sup> Steve Henn, *Facebook's Online Speech Rules Keep Users on a Tight Leash*, NPR.COM, Apr. 29, 2013, available at <http://www.npr.org/blogs/alltechconsidered/2013/04/03/176147408/facebooks-online-speech-rules-keep-users-on-a-tight-leash>.

about this process.<sup>3</sup> It would be very valuable to talk with these people to find out how, exactly, the process of content removal works at each of the major social media companies, including Google, Facebook and Twitter. Learning about the decision-making process these individuals engage in when determining whether controversial content will be flagged or removed, or whether only comments will be deleted, would be beneficial.<sup>4</sup> In addition, these interviews or focus groups would provide an opportunity to see whether or not there is a willingness to create an industry-wide hate speech policy or whether the current views of each organization are too disparate.<sup>5</sup> It would also be interesting to learn what these individuals' views are regarding the challenges associated with the current situation. By identifying those problems, perhaps industry leaders would recognize that working together on a cohesive approach or policy would be beneficial for all interested parties.

Next steps for this research may also include outreach out to the FCC to determine their interest in hosting an online civility forum and dedicating a staff person or team of people to act as a facilitator in this process. Moreover, it may also be useful to interview or conduct focus groups with the journalists and scholars most closely covering this issue. For example, Jeffery Rosen with *The New Republic* attended the meetings of content policy team leaders at Stanford. His insights would be valuable, as would those of

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<sup>3</sup> Jeffery Rosen, *The Delete Squad: Google, Twitter, Facebook and the New Global Battle Over the Future of Free Speech*, NEW REPUBLIC, Apr. 29, 2013, available at <http://www.newrepublic.com/article/113045/free-speech-internet-silicon-valley-making-rules#>.

<sup>4</sup> Alexandra Cheney, *General Mills Blocks Racist Comments on YouTube Cheerio Ads*, WALL ST. J., June 3, 2013, available at <http://blogs.wsj.com/speakeasy/2013/06/03/general-mills-blocks-racist-comments-on-youtube-cheerios-ad/>.

<sup>5</sup> Rosen, *supra* note 3.



Tim Wu, the Columbia professor who called for a community-based approach to filtering hate speech on YouTube and other social media sites.<sup>6</sup>

In addition, finding or generating additional information regarding the relationship between hate speech on social media sites and racial / gendered violence or discrimination, may make the call for change that much stronger. By providing policymakers, at social media companies and the FCC with convincing empirical data, perhaps a more convincing case can be made for the recommended approach.

Finally, it may be worthwhile to look more closely at the role consumers and advertisers play in guiding social media companies' decisions regarding content removal. For example, in May of 2013, Facebook moved to further restrict hate speech that glorified violence against women after an organized social media campaign caused the automaker Nissan to withhold advertising from the site.<sup>7</sup> A spokesperson for Facebook said the company acted after they became aware that the Nissan ads might have appeared next to the offensive content. Thus, it seems social pressure from consumers and advertisers may be a powerful tool for minimizing the amount of hate speech on social media Web sites.

### **Conclusion:**

While there are limitations to this project, such as the narrow focus on legal scholarship and concentration on YouTube as an exemplar, overall the information

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<sup>6</sup> Tim Wu, *When Censorship Makes Sense: How YouTube Should Police Hate Speech*, NEW REPUBLIC, Sept. 18, 2012, available at <http://www.newrepublic.com/blog/plank/107404/when-censorship-makes-sense-how-youtube-should-police-hate-speech>.

<sup>7</sup> Editorial Board, *Hate Speech on Facebook*, N.Y. TIMES, May 31, 2013, at A20.

examined here has yielded a solution that seems both logical and viable. Moving forward, there are several exciting opportunities to expand upon the work done here in order to delve deeper into how the process of hate speech regulation operates on social media sites and whether those in decision-making positions at those organizations are open to opportunities for changing the way they deal with hate speech on their sites. In addition, the approach offered here provides for an alternative path forward – the effort to secure increased funding to enforce existing regulations – should social media organizations be unwilling to work a move to “.social” and the development of a new, unified hate speech policy.

Perhaps most importantly, this work has demonstrated that there are a number of scholars, social media company employees, activists and social media users interested in minimizing the amount of hateful rhetoric – in the form of videos, images, comments and text – on these sites. The fact that a dialogue has begun is a positive sign and bodes well for a future in which women, minorities, members of the LGBT community and other protected classes can feel safe and welcome when they use social media.

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