

# Can Web Sites Incite?: Extending Physical Standards into the Virtual World

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CAN WEB SITES INCITE?  
EXTENDING PHYSICAL STANDARDS INTO THE VIRTUAL WORLD

by  
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An honors thesis submitted to the  
Department of Communication  
of Boston College

Thesis Adviser: Dr. Dale A. Herbeck

May 2010

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To my mother and father, who have always supported me in everything that I do.  
I would also like to thank Dr. Dale Herbeck, who has provided endless encouragement  
and guidance throughout the course of my undergraduate career.

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CHAPTER ONE:  
THE LAW OF HARM-FACILITATING SPEECH

Imagine commuting to work in a bulletproof vest every day. Your very existence has been severely threatened by an organization of people that fundamentally opposes the profession to which you have devoted your life's work. You are a target for murder. Your pursuer's identity is unknown. You could be next.

This constant state of terror is a reality for hundreds of abortion providers throughout the nation, including doctors, clinic employees and clinic owners, law enforcement officials responsible for securing access to abortion services, judges, politicians, and abortion rights supporters. Their names and personal information have been published on a hit list, featured on the Nuremberg Files web site. The Nuremberg Files web site is affiliated with the American Coalition of Life Activists (ACLA), and radically opposes abortion, or what the site calls, "the wonton slaughter of God's children."<sup>1</sup>

The Nuremberg Files web site is the evolution of a project initiated by the American Coalition of Life Activists (ACLA) in the mid-nineties. The files originally took the form of index cards, stored in manila file folders, and physically passed around among members of the ACLA. In 1993, three abortion doctors were murdered after their names were published on "Wanted" posters displayed in the *Life Advocate*, an anti-abortion magazine published by Advocates for Life Ministry (ALM). In January of 1997,

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<sup>1</sup> The Nuremberg Files, "Why This Must Be Done." Available at <http://www.Christiangallery.com/atrocitiy> (accessed on April 1, 2010).

Paul de Parrie, a member of the ACLA, called upon Otis O’Neal (Neal) Horsley, a middle- aged computer programmer, to facilitate the technological advancement and expansion of the project.

In the Nuremberg Files web site overview, it describes the ACLA as “a coalition of concerned citizens throughout the USA...cooperating in collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity.”<sup>2</sup> The site’s name is a blatant allusion to the post-World War II Nuremberg Trials, in which Nazis were tried for their war crimes. On the web site’s homepage, it reads:

One of the great tragedies of the Nuremberg trials of Nazis after WWII was that complete information and documented evidence had not been collected so many war criminals went free or were only found guilty of minor crimes. We do not want the same thing to happen when the day comes to charge abortionists with their crimes. We anticipate the day when these people will be charged in PERFECTLY LEGAL COURTS once the tide of this nation’s opinion turns against the wanton slaughter of God’s children (as it surely will).<sup>3</sup>

The web site lists information that would be helpful to submit to the ACLA, and legitimizes their soliciting of information by claiming that it will someday be useful in a court of law. There is also a call for action, which encourages visitors to: “Call Your Local Abortion Mill and Ask For Names, etc., Visit The Baby Butcher Shop and Take

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<sup>2</sup> The Nuremberg Files, “Why This Must Be Done.”

<sup>3</sup> The Nuremberg Files, “Why This Must Be Done.”

Pictures. (See the Live Web Cam Project.), Visit the Court House and ask for Legal Documents pertaining to Abortion providers and personnel. Send Us the Things You Discover!”<sup>4</sup> An early version of the web site bore the statement, “Everybody faces a payday someday, a day when what is sown is reaped.”<sup>5</sup> The bottom of the homepage requests donations to stop the “Abortion War.”<sup>6</sup>

The original web site listed the personal information of approximately four hundred individuals. The list included two hundred doctors who regularly performed abortions (referred to as “shooters”), various clinic staff members (“their weapons bearers”), law enforcement officers (“their bloodhounds”), judges (“their shysters”), and politicians (“their mouthpieces”).<sup>7</sup> With respect to the “shooters,” the web site revealed full names, home and work addresses, pictures, license plate numbers, and, in some cases, the names of their spouses and children. Each individual was then coded according to his or her “status”: black font indicated working; a grayed-out name indicated wounded; and a stricken-through name indicated fatality.

The up-to-date recording of the doctor’s statuses has led to the contention that it is indeed a hit list. Horsley, the creator of the web site, has defended himself by claiming that only after he heard of the deaths through popular media outlets, did he strike out the names. However, he was also quoted admitting that, “when I scratch out a name, I’m

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<sup>4</sup> The Nuremberg Files.

<sup>5</sup> *Planned Parenthood of the Columbia/Williamette v. American Coalition of Life Activists*, 23 F. Supp. 2d 1187 (D. Or. 1998).

<sup>6</sup> The Nuremberg Files.

<sup>7</sup> Prana A. Topper, “The Threatening Internet: *Planned Parenthood v. ACLA* and a Context-Based Approach to Internet Threats,” *Columbia Human Rights Law Review* 33 (Fall 2001), 194.

saying “I told you so”<sup>8</sup> Horsley also contended that the only motivation behind the site is to catalogue a file on “every doctor providing abortions in the United States, so that they eventually can be tried for “crimes against humanity.”<sup>9</sup>

In October 1998, a New York abortion provider, Dr. Barnett Slepian, was brutally murdered. His name was promptly crossed off on the Nuremberg Files web site. At that point in time, Slepian’s murder marked the fifth sniper attack against abortion providers in the United States and Canada since 1994.<sup>10</sup>

That same year, four Oregon abortion doctors became targets for murder when their names and personal information were added to the Nuremberg Files web site. Refusing to live in unremitting fear, the four doctors filed a civil suit against the ACLA to remove the Nuremberg Files web site from the Internet, and stop the publication and distribution of “Wanted” posters published by the ACLA, which contained similar content to that of the web site. The plaintiffs argued that the web site was a “hit list” and that they were being targeted by the ACLA and the Advocates for Life Ministry (ALM). Their case invoked the Freedom of Access Clinic Entrances (FACE) and Racketeer Influenced and Corrupt Organizations (RICO) statutes. The plaintiffs claimed that the Nuremberg Files web site constituted a true threat. While not part of the plaintiff’s case, there was also speculation as to whether the web site incited illegal action as defined by

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<sup>8</sup> Topper, 196.

<sup>9</sup> Topper, 197.

<sup>10</sup> Jason Schlosberg, “Judgment on Nuremberg: An Analysis of Free Speech and Anti-Abortion Threats Made on the Internet,” *Boston University Journal of Science and Technology Law* 7 (Winter 2001), 64.

the standard established in *Brandenburg v. Ohio*. The following Chapter will address these claims in further detail.

*Planned Parenthood of the Columbia/Willamette v. ACLA*, known informally as the “Nuremberg Files” case, generated extensive media coverage. Although there has been a shortage of publicized cases dealing with similarly threatening web sites, it is imperative to recognize that this is not an isolated issue. Hate groups across the nation have created web sites to be used as essential hubs of information, through which members can communicate without the real-world limitations of time and space.

### Web Sites and Violence

The Nuremberg Files web site is not especially unique, as illustrated by hundreds of similarly threatening web sites. Examples include, JusticeFiles.org, Target of Opportunity, and the Animal Liberation Front web sites. These sites use the Internet as a means to disseminate information encouraging illegal behavior. The content posted on radical sites such as these may be considered threatening, and therefore unprotected speech. The issue at hand is whether these web sites, regardless of their threatening or offensive nature, have the ability to incite illegal action under the current incitement standard.

JusticeFiles.org, dually named the “Nitty Gritty Files,” is a web site containing information bearing resemblance to that of the Nuremberg Files—except this web site targets law enforcement officials. In 2000, William Sheehan, a computer network engineer of Mill Creek, Washington, and Aaron Rosenstein, 27, of Seattle—both

convicted felons—published a web site that listed personal information, including names, addresses, salaries, birthdates, telephone numbers, Social Security numbers, and other personal information concerning law enforcement officials and their relatives in 16 municipalities around metropolitan Seattle. The web site insists the information is provided not “as a tool for harassment” but as a means to “provide accountability in government on a scale never before seen in this country (or for that matter, the world).”<sup>11</sup> The site contains information, which has been lawfully obtained.

In March of 2001, the City of Kirkland, Washington, filed suit in King County Superior Court against William Sheehan. Kirkland City Attorney Bill Evans argued that the web site, JusticeFiles.org, was an “abuse” of free speech that threatened the police officials’ privacy and safety.<sup>12</sup> Similar to the Nuremberg Files, the Justice Files web site’s content is lawfully obtained, publicly available information. As in the Nuremberg Files case, the plaintiffs did not argue that the Justice Files web site incited illegal action. Still, the nature of the case poses the question of whether the Justice Files ever *could* incite.

Target of Opportunity is a similarly threatening web site dedicated to quashing radical liberal efforts in the United States. According to their mission statement, they are “devoted to fighting Terrorism and the forced integration of Marxist oriented ideals and values into the American mainstream.”<sup>13</sup> The site’s homepage features a bull’s eye intended for the left wing, juxtaposed with an American flag bearing the slogan, “Proud

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<sup>11</sup> The Nitty Gritty Files/ Justice Files.org. Available at <http://nittygrittyfiles.org/> (accessed on April 11, 2010).

<sup>12</sup> Jeremy Lott, “Policing the Net - Suit Filed Against William Sheehan over Web site,” *Reason* 33 (July 2001), 13.

<sup>13</sup> Target of Opportunity, “Mission Statement.” Available at <http://www.targetofopportunity.com/> (accessed on March 17, 2010).

to be an American.” The top bar reads “Target of Opportunity-Eliminating the planet of liberals one at a time.” In the mission statement, the site suggests that every member of the left wing should be considered “A Target of Opportunity.”<sup>14</sup>

This is a call to action! These anti-American Liberals are dangerous people that can no longer be ignored! One person can make a big difference! There are those that read about history. There are those that make history. Which one do you want to be? It is time to get involved... These people and organizations are Enemies of Freedom, the American people, and the American way of life!!! Each and every one should be considered a “Target of Opportunity.”<sup>15</sup>

Extremists on any side of the political spectrum can be disconcerting, as their efforts often lack legality, or passivity. Rosenblum concedes that, “Extremism then, is despotic. For antiextremists, it represents a morally reprehensible, undemocratic, superiority.”<sup>16</sup> Ironically, the members of Target of Opportunity are technically as “extreme” as the radical liberals whom they oppose and target. According to Rosenblum, there are countless antiliberal political and social groups, nonparty organizations like hate groups and private militia, who resort to the same violent tactics employed by their political adversaries.<sup>17</sup>

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<sup>14</sup> Target of Opportunity, “Mission Statement.”

<sup>15</sup> Target of Opportunity. “Mission Statement.”

<sup>16</sup> Nancy L. Rosenblum, “Liberalism and Illiberalism: Extremism and Anti-Extremism in American Party Politics,” *University of San Diego School of Law Journal of Contemporary Legal Issues* 12 (2002), 879.

<sup>17</sup> Rosenblum, 854.

The Target of Opportunity web site is chock-full of accusations condemning radical groups such as the Animal Liberation Front, CodePINK, Earth Liberation Front, and various individuals. Information on over forty groups and individuals is updated daily, and is available on the site's "Hit List" page. Each entry contains addresses, phone numbers, and current whereabouts. An eerie parallel can be drawn between this list and the Nuremberg Files' list of "Aborted and Nearly Aborted Abortionists."<sup>18</sup> While the web site is careful to avoid language or graphical devices which could constitute "true threats," the implications of the web site's stated objectives are more than questionable.

The Target of Opportunity's Hit List of "Enemy Targets" identifies groups and individuals who, according to the web site, deserve to be "eliminated." By labeling these people as targets of opportunity, one may argue that the web site is inciting violence against them. Unsurprisingly, many of the groups targeted by this web site, do extensive targeting of their own via the Internet.

The Animal Liberation Front (ALF) is an international resistance group, which engages in illegal direct action in order to end animal suffering. In January 2005, the United States Department of Homeland Security listed the ALF in a draft-planning document as a domestic terrorist threat.<sup>19</sup> Members of the ALF wear black masks when engaging in illegal activity, and maintain a leaderless, decentralized, organization so as to

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<sup>18</sup> The Nuremberg Files.

<sup>19</sup> Justin Rood, "Animal Rights Groups and Ecology Militants Make DHS Terrorist List, Right-Wing Vigilantes Omitted," *GQ Homeland Security*. Available at [http://www.cq.com/public/20050325\\_homeland.html](http://www.cq.com/public/20050325_homeland.html) (accessed April 11, 2010).

evade legal responsibility. Given the ALF's unofficial membership base, their web site is an invaluable tool by which to disseminate information.

The Animal Liberation Front's web site clearly describes the proclaimed identity and mission of ALF members:

Members of the Animal Liberation Front act directly to stop animal suffering, at the risk of losing their own freedom. Direct action refers to illegal actions performed to bring about animal liberation. These are usually one of two things: rescuing animals from laboratories or other places of abuse, or inflicting economic damage on animal abusers. Due to the illegal nature of ALF activities, activists work anonymously, and there is no formal organization to the ALF. There is no office, no leaders, no newsletter, and no official membership. Anyone who carries out direct action according to ALF guidelines is a member of the ALF.<sup>20</sup>

The web site includes links to thousands of pages of advice for ALF activists. This inexhaustible resource is full of practical information, such as the addresses of businesses and organizations thought to contribute to animal suffering (their targets), and various recommendations for action. These guides and tips are extensive, and cover a broad range of illegal activity, such as destroying facilities. At first glance, the mission statement, combined with the detailed supplemental material provided on the web site, almost appears as an invitation to engage in illegal action. It seems as if the ALF is

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<sup>20</sup> The Animal Liberation Front. Available at <http://www.animalliberationfront.com> (accessed April 11, 2010).

recruiting members and simultaneously inciting them to commit crimes, as specified by the mission statement.

In actuality, similar to the Nuremberg Files web site and the sites of innumerable other groups, JusticeFiles.org, Target of Opportunity, and the ALF web site, are legally incapable of inciting illegal activity and/or violence under the current legal standard. The question that arises is whether this type of web-based speech is protected by the First Amendment. Furthermore, we ask—Is there a limit as to how far speech can go before it becomes criminal? In order to address these questions, it is important to understand how interpretations of the First Amendment have evolved over the last century.

#### Development of First Amendment Incitement Jurisprudence

Over time, we have given progressively greater protection of speech under the First Amendment. This is graphically illustrated by the incitement line of cases. Earlier in history, we are confronted with a Supreme Court very willing to suppress speech. Over time, we observe a marked shift to an environment in which speech is afforded greater First Amendment protection. This shift can be attributed to a host of factors, the most notable being America's fluctuating political circumstances.

World War I created an environment unfriendly to those seeking to exercise their freedom of speech under the First Amendment. In 1917, two months following America's declaration of war with Germany, the Espionage Act was enacted as federal law. Congress amended Section three of the Espionage Act in 1918. The amended act prohibited the actions of:

Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, or shall wilfully make or convey false reports, or false statements...or whoever, when the United States is at war, shall wilfully cause... or incite... insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct... the recruiting or enlistment service of the United States, and whoever, when the United States is at war, shall wilfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag...<sup>21</sup>

Section four of the Espionage Act, which was an important player in the 1919 wartime trilogy, punished conspiracies to obstruct as well as actual obstruction. If the act (speaking, or circulating a paper), its tendency, and the intent with which it was done were the same, there was no ground for saying that success alone warrant[ed] making the act a crime.<sup>22</sup> The detail with which the stipulations of the Espionage Act were written represents the stressful political climate of the time. The war effort was the American government's priority. Consequently, United States' citizens' First Amendment rights, specifically the freedom of speech, took a backseat to the government's determination to

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<sup>21</sup> First World War.com (2009). Primary Documents: U.S Espionage Act, 7 May 1918. Available at <http://www.firstworldwar.com/source/espionageact1918.htm> (accessed on April 12, 2010).

<sup>22</sup> *Abrams v. United States*, 250 U.S at 630-631 (1919)

preserve American patriotism. The Espionage Act was the government's legal safeguard against treason, and attempts to interfere with the country's wartime agenda. The framework of First Amendment jurisprudence from 1919 to present day certainly reflects shifts in the American political and social climates. As such, historical interpretations of the First Amendment must be considered within their appropriate contexts.

### The Espionage Act Trilogy

Justice Holmes's "clear and present danger" test emerged from a wartime trilogy of cases, including *Schenck*, *Frohwerk*, and *Debs*, decided by the United States Supreme Court in 1919. All three cases involved violations of the Espionage Act, and were decided within mere weeks of each other. This series of opinions denoted the Supreme Court's first significant examination of the scope of First Amendment protection for speech advocating unlawful activity.

The first and naturally most significant case, in which Justice Holmes established the "clear and present danger" test, was *Schenck v. United States*. The case involved Charles T. Schenck, the General Secretary of the Socialist Party. Schenck was prosecuted for violating the Espionage Act of 1917 after his party attempted to mail 15,000 leaflets urging resistance to the draft. The key provisions of the 1917 Espionage Act violated by Schenck prohibited obstruction of military recruiting, causing insubordination within the military forces, use of the mails to send materials declared non-mailable by the Act, and for unlawfully using the mails to send such materials.<sup>23</sup> Justice Holmes, for the majority

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<sup>23</sup> *Schenck v. United States*, 249 US. 47, 52 (1919).

in *Schenck*, emphasized the importance of circumstance when determining the First Amendment protection of speech. Justice Holmes reiterated *Aikens v. Wisconsin* when he reasoned, “But the character of every act depends upon the circumstances in which it is done.”<sup>24</sup> The leniency with which the court approached cases of treason varied according to the country’s political stability. World War I was a time of great uncertainty and chaos. The Court exhibited control by relying strictly on the developed legislation.

To illustrate this concept more vividly, Holmes famously employed the metaphor of a man falsely shouting ‘fire’ in a crowded theater. He contended that had Schenck attempted to circulate his leaflets during times of peace, his speech would have been undoubtedly protected. However, obstruction during a national war effort could not be tolerated:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so

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<sup>24</sup> 249 US. 47, 52 (1919).

long as men fight and that no Court could regard them as protected by any constitutional right.<sup>25</sup>

In this landmark passage, Holmes addressed the importance of the speaker's intent, the speech's ability to bring about proximal danger, and the surrounding circumstances.

Circumstance as a measure of due First Amendment protection was demonstrated again but one week later in *Frohwerk v. United States*. Jacob Frohwerk, publisher of the *Missouri Staats Zeitung*, like Schenck, was convicted of conspiracy to violate the Espionage Act of 1917. The newspaper, while limited in circulation, fervently condemned the United States' involvement in the war against Germany.

Unlike Schenck, who had attempted to circulate leaflets to an unsuspecting, particular group of people, Frohwerk sent the newspapers to those who had willfully and knowledgably subscribed. Frohwerk was not targeting a new audience to sway their opinions, but was catering to a group of subscribers who presumably shared similar views to those expressed in the newspaper. Nevertheless, Frohwerk was convicted of publishing twelve anti-war articles, which the government perceived as intentionally causing, "disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States."<sup>26</sup> The Court unanimously upheld Frohwerk's conviction.

Justice Holmes cited *Schenck* in his opinion, and applied language from the bad-tendency doctrine to illustrate the need to put out the spark capable of kindling a flame:

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<sup>25</sup> 249 US. 47, 52 (1919).

<sup>26</sup> *Frohwerk v. United States*, 249 U.S. 205 (1919).

But we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out.<sup>27</sup>

In other words, Holmes foresaw a clear and present danger in the newspaper articles' ability to stir up trouble, and accompanying unlawful activity. In this passage, Holmes indicated a vast broadening of the criteria necessary to criminalize speech. Frohwerk's upheld conviction demonstrated the ability of almost any political speech to be construed as potentially harmful. The increased vagueness of the clear and present danger test was not coincidental, as it granted the government the power to be as stringent as possible in the delicate and unstable wartime environment.

The trilogy was concluded on the same day with yet another conviction regarding violation of the Espionage Act of 1917. Eugene V. Debs, a leader in the Socialist movement, was convicted for delivering an antiwar speech in Canton, Ohio, denouncing the war and the American government. Debs's speech was distinguishable from that of *Schenck* and *Frohwerk* in three major ways. First, Debs had run for presidential office four times prior to his conviction on the Socialist party ticket, and was a more recognized figure than his wartime trilogy counterparts. Second, his speech, while it challenged the policies of the American government, did not encourage resistance to the draft. Third, Debs's speech was made at a Socialist convention, and was not directed towards soldiers, or those subject to the draft. Still, Debs's conviction was upheld. The danger of Debs's

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<sup>27</sup> 249 U.S. 205, 209 (1919).

speech lain in its threat to the American government if his socialist views were to be fully realized. The wartime circumstances magnified the probability and scope of the threatened harm of Debs's speech.

The succession of these decisions in 1919 reflected the protections afforded by the First Amendment at the time. Contemporary liberal notions of First Amendment freedoms gathered popularity later. As Holmes eloquently articulated in *Schenck*, the character of every act depends upon the circumstances in which it is done.<sup>28</sup> The importance of circumstance in the wartime trilogy of cases was manifested in the government's determination to punish the expression of ideas that were incongruent with the war effort. Expression of these unpopular ideas were persecuted under the "clear and present danger test" to "bypass the protection normally afforded such speech under different, non-wartime, circumstances"<sup>29</sup>

In other words, the scope of constitutional protection was adjusted according to the nation's political circumstances. In his review of Rabban's *Free Speech in its Forgotten Years*, Finkelman informs us that the World War I era was one of reform—"Progressives sought to suppress tainted meat, dangerous drugs, exploitative labor practices, and 'bad' speech. For them, speech represented just one more commodity that needed to be reformed."<sup>30</sup> Progressives included Oliver Wendell Holmes, Jr., Zechariah

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<sup>28</sup> 249 US. 47, 52 (1919).

<sup>29</sup> Thomas E. Crocco, "Comment: Inciting Terrorism on the Internet: An Application of Brandenburg to Terrorist Websites," *St. Louis University Public Law Review* 23 (2004), 464.

<sup>30</sup> Paul Finkelman, "Book Review: Cultural Speech in Historical Perspective," *Boston University Law Review* 79 (1999), 735.

Chafee, Jr., and Louis Brandeis, who had a hand in suppressing speech until after the war, when the value of free speech was officially discovered and integrated into government policy.<sup>31</sup> In the decades following World War I, the Supreme Court gradually expanded the protection implied by the Free Speech Clause to include radicals and reformers similar to Schenck and Debs, as well as critics of government policy, like Frohwerk.

#### An Alternative View: *Masses v. Patten*

All did not support the politically charged restriction on First Amendment protection via Holmes's clear and present danger test. In Finkelman's review of Rabban's *Free Speech in its Forgotten Years*, he reminds us that,

Classic legal theorists as Roscoe Pound, Ernst Freund, and Thomas M. Cooley began to develop a rather modern free speech ideology nearly a half century before Justices Holmes and Brandeis articulated what the first well-reasoned and powerful theory of freedom of speech by a United States Supreme Court justice in their famous dissent in *Abrams v. United States* and concurrence in *Whitney v. California*.<sup>32</sup>

This modern free speech ideology did not gain legal visibility until after the wartime trilogy of cases. Justice Holmes received an abundance of criticism after the *Debs* case, from various Progressive intellectuals. For example, Ernst Freund criticized Holmes's opinion in *Debs* in the May, 1919 issue of *The New Republic*. Freund criticized

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<sup>31</sup> Finkelman, 736.

<sup>32</sup> Finkelman, 721.

the case as being subject to the “jury’s guessing at motive, tendency and possible effect.” Freund thought Holmes’s “fire in a crowded theatre” analogy unsuited to “political offenses” and suggested that Holmes’s view of free speech was an “unsafe doctrine” if “it has to be made plausible by a parallel so manifestly inappropriate.”<sup>33</sup>

Holmes received additional criticism through exchanging of letters with friends such as Harold Laski, a political theorist, and Herbert Croly, a progressive-liberal writer and co-founder of *The New Republic*. Holmes was defensive in these letters, but expressed sympathy for his peers’ free speech arguments.<sup>34</sup> Perhaps the most notable letter exchange occurred between Holmes and his dear friend Billings Learned Hand, a progressive intellectual, and judicial philosopher. The two men had an encounter on a train in June of 1918, and had a conversation about the First Amendment. It is speculated that the discussion was prompted by Hand’s opinion in the case of *Masses Publishing Co. v. Patten* (1917), in which he had advanced his libertarian interpretation of the First Amendment.<sup>35</sup>

In *Masses*, the New York Postmaster General sought to prevent circulation of *The Masses* magazine under the Espionage Act of 1917. Hand granted an injunction against the Postmaster General, using what is traditionally referred to as the Hand’s Test. Hand’s evaluation of potentially unconstitutional speech focused on “direct incitement to violent resistance,”<sup>36</sup> rather than the perceived likelihood of danger articulated in the clear and present danger test. Under Hand’s test, speech was required to directly advocate

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<sup>33</sup> G. Edward White, “Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension,” *California Law Review* 80 (2002), 420.

<sup>34</sup> White, 423.

<sup>35</sup> White, 424.

<sup>36</sup> *Masses Publishing Co. v. Patten*, 244 F. 535, 540 (S.D. N.Y. 1917).

resistance the draft in order to violate the Espionage Act. Hand's direct incitement proposal was refused, on appeal, by the U.S Court of Appeals for the Second Circuit: "Indeed, the court does not hesitate to say that, considering the natural and reasonable effect of the publication, it was intended willfully to obstruct recruiting."<sup>37</sup>

Hand showed little regard for political circumstance when assessing a citizen's right to first amendment protection. He prosecuted only for direct advocacy of illegal activity. If the Hand's Test had been applied to the wartime trilogy of Espionage Act cases, the dilemma would not have been whether "the indirect result of the language might be to arouse a seditious disposition," but whether "the language directly advocated resistance to the draft."<sup>38</sup> Hand's direct-incitement test was rejected by the Court of Appeals in *Masses*, but he continued to defend it in his frequent letter exchange with Holmes regarding free speech theory.

In February of 1919, after the Espionage Act decisions were announced, Hand wrote Holmes a letter prefaced, "this is positively my last appearance in the role of liberator."<sup>39</sup> Hand warned Holmes about assuming a causal relationship between words and their future impact, and reiterated his opinion in *Masses* that "the responsibility only began when the words were directly an incitement."<sup>40</sup> Holmes's reply suggests unresponsiveness to Hand's criticism, and a lack of understanding of the difference between Hand's direct-incitement test, and his own "clear and present danger test." The difference, was that Hand's Test disregarded the speaker's assumed intent, or whether the speech merely "tended" to incite illegal action if the uttered speech failed to directly

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<sup>37</sup> *Masses Publishing Co. v. Patten*, 246 F. 24 (2d Cir. 1917).

<sup>38</sup> White, 424.

<sup>39</sup> White, 425.

<sup>40</sup> White, 425.

advocate the illegal action. Comparatively, the clear and present danger test measured speech's proximity to illegal activity in order to determine the speaker's intentions.

While Hand's libertarian interpretation of the First Amendment was rejected in *Masses*, and subsequently eclipsed during the wartime trilogy, it influenced Holmes's dissent in *Abrams v. United States* eight months later. More importantly, it foreshadowed later First Amendment jurisprudence in *Brandenburg v. Ohio*, which established the standard for incitement.

#### Broadening the Clear and Present Danger Test: *Abrams v. United States*

Holmes's issued dissent in *Abrams v. United States* in November of 1919 represented the commencement of the Court's conversion to more protective free speech environment. Holmes expressed a newly adapted liberalism—a shift in consciousness—which was likely influenced by his recurrent communication with Hand, and other Progressive friends.

The case involved Jacob Abrams, the leader of a marginal group of anti-war Russian Jewish émigrés. Abrams was convicted of violating the Espionage Act for printing and distributing leaflets, decreeing the hypocrisy of the United States for its attack on Russia. The opinion was written by Justice Clarke, who attempted to add Abrams to the *Schenck* progeny through employment of the clear and present danger test. Interestingly, the facts presented in *Abrams* made the defendants' advocacy more of a "clear and present danger" to the war effort than any of the speeches delivered by Schenck, Frohwerk, or Debs. While Schenck delivered circulars to draftees, the circulars

only spoke abstractly of the evils of conscription; Frohwerk's newspaper was not directed specifically at draftees; and Debs never specifically mentioned draft resistance to World War I. The defendants in *Abrams* had tossed printed leaflets out the window of a factory, knowing that they'd be scattered at the feet of munitions workers upon landing. The leaflets urged a general strike, which would subsequently have hindered the war effort.

Surprisingly, Holmes, joined by Brandeis, did not deliver the concurring opinion that one would have expected. Rather, Holmes delivered an emotionally charged dissent. He took *Abrams* as an opportunity to suggest substantial limitations on government power (in this case, restricting the Espionage Act), in the name of free speech, a First Amendment right. He broadened the scope of the clear and present danger test, by suggesting that the speech in question must directly provoke, rather than merely advocate, imminent danger, in order to be restricted. Holmes specified the importance of imminence when determining the First Amendment protection of uttered speech. This idea, strikingly similar to that of his dear friend Hand, was determinative of future First Amendment case law. *Abrams* was also the case in which Holmes's "marketplace of ideas" theory debuted. He carved out an exception for speech that provoked imminent danger, but nonetheless demonstrated a higher tolerance for unpopular speech. Immediately after associating "the ultimate good" with a "free trade in ideas" designed to search for truth,<sup>41</sup> Holmes declared:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free

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<sup>41</sup> White, 440.

trade in ideas...that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. That at any rate is the theory of our Constitution...Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, “Congress shall make no law . . . abridging the freedom of speech.”<sup>42</sup>

In this passage, Holmes endorsed the competition of ideas in public discourse, which would hypothetically result in “truth,” or the best policy. He recognized this open discourse as an invaluable part of democratic society. He likened the “experimental” character of the constitutional scheme of government to the “experimental” process by which ideas were tested and discarded in the marketplace. Since “the ultimate good” was reached by supporting this experimental process, only those ideas that directly threatened the existence of the nation should be suppressed. This concept transformed the function of the “clear and present danger” test, and set a new First Amendment precedent—all ideas, no matter how radical, were consented to compete in the marketplace unless they directly threatened the country.

Holmes’s revision of the test is representative of an attempt “to reconcile the conflict between government restriction of loathsome opinions and the ideal of a free exchange of ideas of all types.”<sup>43</sup> Clarke’s majority opinion had indeed been faithful to the standard established by the preceding wartime trilogy. *Abrams* illustrated an active

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<sup>42</sup> *Abrams v. United States*, 250 U.S. 630-631 (1919).

<sup>43</sup> Crocco, 466.

shift in Holmes's posture in free speech cases, one, which White suggests, "could not have been anticipated by his progressive friends on the basis of their correspondence with him in the few months after the Espionage Act trilogy."<sup>44</sup>

#### Justice Brandeis's Concurrence (Dissent?) in *Whitney v. California*

*Whitney v. California*, was an opportunity for Justice Brandeis to underhandedly promote a revival of civilized public discourse, which Holmes had suggested in his dissenting opinion in *Abrams*.

Anita Whitney, a sixty year old Wellesley graduate and niece of former Supreme Court Justice Stephen J. Field, was convicted of violating the California Criminal Syndicalism Act for her active membership and participation in the Communist Labor Party (CLP). The California Criminal Syndicalism Act prohibited the membership or assembly with any group organized to advocate, teach, or aid and abet criminal syndicalism, which was defined as:

...Any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.<sup>45</sup>

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<sup>44</sup> White, 427.

<sup>45</sup> *Whitney v. California*, 274 U.S. 357, 373 (1927).

The CLP had recently approved a platform encouraging the takeover of the United States government by means of “revolutionary class struggle.”<sup>46</sup> Although not a supporter of this particular platform, Whitney was still convicted for her mere involvement in the Party. She had attended a convention held in Oakland to organize the California branch of the Communist Labor Party, and actively participated in the convention’s proceedings as a delegate. Additionally, Whitney was elected a chairman of the Credentials Committee, and was also appointed a member of the Resolutions Committee. As such, she signed a resolution proclaiming the CLP of California’s desire to take political action in spreading communist propaganda, and capturing power to gain freedom and justice impossible under officials elected by parties owned and controlled by the capitalist class.”<sup>47</sup> Whitney’s CLP membership represented disloyalty to the United States, and a serious threat to its treasured democratic system. America was experiencing the aftermath of its emotionally charged First Red Scare after World War I. Although the United States was technically at peace, Communism was still unwelcome, and not tolerated.

Justice Sanford, who had authored the majority opinion upholding Gitlow’s conviction two years prior, articulated the section of the criminal syndicalism statute, which clearly labeled membership in any organization advocating criminal syndicalism, a crime. The Court was unable to adequately take First Amendment issues into consideration, due to Whitney’s attorney’s failure to raise them on appeal. Nonetheless, Sanford contended that Whitney’s free speech rights had not been violated: “Nor is the Syndicalism Act as applied in this case repugnant to the due process clause as a restraint

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<sup>46</sup> 274 U.S 357, 363-364 (1927).

<sup>47</sup> 274 U.S 357, 363-364 (1927).

of the rights of free speech, assembly, and association.”<sup>48</sup> To further demonstrate this, Sanford quoted from *Gitlow v. New York*, the case in which Benjamin Gitlow’s conviction for writing and distributing “The Left Wing Manifesto” was upheld under the New York criminal anarchy statute. Sanford reaffirmed his opinion that the free speech clause of the First Amendment applied to the states through the due-process clause of the Fourteenth Amendment:

That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question.<sup>49</sup>

Sanford’s majority implied that Whitney’s Communist Labor Party membership was a direct danger to the public peace and the security of the State. This was a step in the opposite direction of Holmes’s proposed “marketplace of ideas” philosophy.

While Justice Brandeis and Holmes were inclined to concur with the majority, they used their concurrence as a platform to illustrate their discontent with the court’s decision based on our forefathers intended First Amendment Rights for Whitney. In his opinion, Brandeis, joined by Holmes, openly questioned the legitimacy of a legislature

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<sup>48</sup> 274 U.S 357, 371 (1927).

<sup>49</sup> *Gitlow v. New York*, 268 U.S. 652, 666-668 (1925).

which assumed one's membership to a group as constituting a clear and present danger great enough to suppress free speech. He argued that the mere fear of potential danger was not enough to suppress one's freedom of speech and assembly:

But even advocacy of violation, however, reprehensible morally, is not a justification for denying free speech where the advocacy falls sort of incitement and there is nothing to indicate that the advocacy would be immediately acted on... In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.<sup>50</sup>

This passage reinforces the progressive liberalism revealed in Holmes's dissenting opinion in *Abrams*. Brandeis and Holmes were promoting a more liberal application of the clear and present danger test by suggesting that the speech in question must directly provoke, rather than merely advocate, imminent danger, in order to be restricted. The opinion goes on to suggest that "more speech" is the remedy for "averting evil by the processes of education," rather than "enforced silence."<sup>51</sup> While Whitney's conviction was upheld, this dissent, masked as a technical concurrence, showed the desire for a more protective free speech environment, and foreshadowed the standard for incitement outlined in *Brandenburg v. Ohio*. Brandeis and Holmes recognized the Founders' intention to insure our fundamental freedoms as American citizens, including the freedom of public discourse. Political discussion is necessary to safeguard against injurious doctrine. Speech loses its ability to harm when it is within the context of a

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<sup>50</sup> 274 U.S. 357, 376 (1927).

<sup>51</sup> 274 U.S. 357, 377 (1927).

larger debate, and fails to illicit imminent action. In other words, the circumstances surrounding uttered speech are important and often determine its legality.

#### More War and Less Free Speech: *Dennis v. United States*

The time period including World War II and the beginnings of the Cold War marked a halt in the development of First Amendment jurisprudence. Despite the common contention among Supreme Court Justices that First Amendment freedoms are absolute, times of war tend to limit those freedoms. As we saw in the wartime trilogy, measures of censorship are implemented to protect national security interests, and to prevent the crumbling of our democratic system. Therefore, during World War II, and the subsequent Cold War, there was little advancement on the free speech front. The “clear and present danger” test was used primarily as a means to censor speech, rather than a way to encourage participation in the “marketplace of ideas.” Additionally, in contrast to the World War I period, there was very little anti-war dissent among American citizens from 1941, after the bombing of Pearl Harbor, to 1945.

Almost immediately after World War II ended in 1945, began the Cold War. The potential of nuclear warfare penetrated the American consciousness, and produced a widespread fear. This fear was only amplified by influential public figures such as Senator McCarthy, who piloted the Red Scare. Russia’s successful testing of a nuclear device heightened America’s fear of the rapidly growing Communist regime. Anti-

communist sentiments were a very real part of this time period—radical views advocating violent overthrow of the government were not taken lightly.

In response to the initial hysteria of Soviet communism, Congress passed the Alien Registration Act in 1940. This act is commonly referred to as the Smith Act because the antisedition section was written by Representative Howard W. Smith of Virginia. The Smith Act was intended as the legal basis upon which communist-oriented speech could be suppressed. The act imposed drastic restrictions on speech, especially considering America was technically experiencing a time of peace. While passed in 1940, the Smith Act was not invoked until the onset of the Cold War. *Dennis v. United States* illustrated the frantic period of national intolerance that was the Cold War. Eugene Dennis, general secretary of the Communist Party- U.S.A., was convicted for violations of the Smith Act, which entailed:

Willingly and knowingly conspiring (1) to organize as the Communist Party of the United States of America as a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and willfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence.<sup>52</sup>

In its application of the “clear and present danger test,” the Court recognized the direction of First Amendment jurisprudence proposed by Holmes and Brandeis in *Gitlow*,

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<sup>52</sup> *Dennis v. United States*, 341 U.S. 494, 497 (1951).

and *Whitney* respectively, but was inclined to distinguish *Dennis* from these cases due to the gravity of the situation. Dennis was the general secretary of the highly organized Communist Party, whose ultimate objective was to overthrow the American government. The Court eventually turned to Hand's interpretation of the "clear and present danger" test in a lower court decision for guidance: "In each case, the [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."<sup>53</sup> Using this test—a somewhat modified "clear and present danger" test—the Court decided that Dennis was unworthy of First Amendment protection due to the sufficient danger present in his activities in the Communist Party-U.S.A. The Red Scare-fueled tensions infiltrating America certainly contributed to the outcome of *Dennis*, and similar cases. The United States government was in "self-preservation" mode, and prioritized its security over its citizen's First Amendment Rights. The progress toward more First Amendment protection initiated by Holmes before World War II was eventually resumed.

#### Advocating Abstract Doctrine: *Yates v. United States*

Political debate was once again protected by the outcome of *Yates v. United States*, which drew a distinction between advocacy of abstract doctrine, and advocacy of illegal action.

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<sup>53</sup> 341 U.S. 494, 510 (1951).

*Yates v. United States*<sup>54</sup> concerned the indictment of Oleta Yates, and thirteen others members of the Communist Party for seditious expression under the Smith Act. Interestingly, the Supreme Court remanded the convictions of Yates and her fellow members on the grounds that the trial judge had given misleading instructions to the jury. The jury had not been properly informed of the difference between advocating mere ideas, and advocating action. Justice Harlan, referencing *Dennis*, concluded that the convictions could not stand due to insufficient evidence that Yates and her counterparts advocated illegal action. They had only engaged in passive actions, advocating their beliefs.

Due to the prosecutors' inability to provide such proof, the charges were ultimately dropped, and the case dismissed. While Harlan's decision was a victory for free speech, Justice Black and Douglas took it a step further. They argued that the Smith Act was fundamentally unconstitutional, and violated the First Amendment. Because *Yates* negotiated a strict standard of evidence, government attorneys stopped prosecuting under the Smith Act. *Yates* was a notable victory for free speech, and represented a break with the "clear and present danger" test, as the government was now required to provide evidence beyond mere political discourse to convict citizens with unfavorable viewpoints.

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<sup>54</sup> *Yates v. United States*, 354 U.S. 298 (1957).

## Imminent Lawless Action: The *Brandenburg* Standard

*Brandenburg v. Ohio*, a First Amendment case decided by the Supreme Court in 1969, has since become the standard for determining incitement. The case was centered on Clarence Brandenburg, a Ku Klux Klan leader from Ohio. In anticipation of a KKK rally in rural Hamilton County, Brandenburg invited a Cincinnati television news reporter to cover the event. The rally featured a large burning cross and a plethora of various firearms. Portions of the rally were taped, and included KKK members making hateful speeches. The speeches included statements such as, “bury the niggers,” “the niggers should be returned to Africa,” and “send the Jews back to Israel.” An excerpt from Brandenburg’s speech reads:

We’re not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance [sic] taken...We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to March into Mississippi. Thank you.<sup>55</sup>

Portions of the referenced speeches were later broadcast on the local station and on a national network.

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<sup>55</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969).

Brandenburg was consequently convicted in an Ohio State Court under Ohio's criminal syndicalism statute, both for "advocating the duty, necessity, or propriety of a crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform, "and for "voluntarily assembling with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."<sup>56</sup> He was fined \$1000 and sentenced one to ten years in prison.

Brandenburg attempted to challenge the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments, but the intermediate appellate court of Ohio affirmed his conviction without opinion, and the Supreme Court of Ohio followed suit by dismissing his appeal.

On appeal, the United States Supreme Court ruled in favor of Brandenburg. The Court challenged the constitutionality of the criminal syndicalism statute on the grounds that it violated the First and Fourteenth Amendments and overruled *Whitney v.*

*California*. In a *per curiam* opinion, the court ruled that:

The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.<sup>57</sup>

In the decision, the Court articulated the "imminent lawless action" test, which is comprised of four main components: advocacy, intent, imminence, and likelihood. The

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<sup>56</sup> 395 U.S. 444 (1969).

<sup>57</sup> 395 U.S. 444 (1969).

test has become the core standard for incitement. Its narrow scope has afforded a wide breadth of speech protection under the First Amendment since its inception. The test has four requirements that must be satisfied for speech to constitute incitement:

1. There must be advocacy of violent action; words that inform an audience about the speaker's hopes and beliefs and might include the "mere abstract teaching" of political reform are protected.<sup>58</sup>
2. Speech must go beyond mere advocacy. If the defendant is only aware that his words will incite illegal action but does not have the incitement in mind as his purpose, his speech is protected. If the speaker knows his words will likely trigger an illegal action, then the speech is not protected.<sup>59</sup>
3. The speech must be likely to produce imminent violence. This is at the heart of *Brandenburg*. It means only a very short time may pass between the advocacy and the resulting violence.<sup>60</sup>
4. "There must be a likelihood of illegal action. When the illegal action takes place in the form of violence, it loses any First Amendment protection. If speech leads to violence, then it is the direct result from the third part of the test, imminence."<sup>61</sup>

The imminence requirement is a modified and more defined version of the "clear and present danger" test articulated in *Schenck v. United States*. The *Brandenburg*

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<sup>58</sup> 395 U.S. 444, 447 (1969).

<sup>59</sup> 395 U.S. 444, 449 (1969).

<sup>60</sup> 395 U.S. 444, 454 (1969).

<sup>61</sup> 395 U.S. 444, 454 (1969).

standard has remained largely unchallenged since its creation in 1969. However, its relevance with respect to cyberspace is questionable, and has received an increasing amount of attention over the past few years. Can a standard created pre-Internet be applied to a medium so elusive? This paper will be dealing exclusively with the question of incitement as it relates to web sites.

### Application of First Amendment Law to Web Sites

The Nuremberg Files, Justice Files, Target of Opportunity, and The Animal Liberation Front web sites all target specific individuals and groups.

The threatening nature of these web sites operated by radical groups such as the ACLA has prompted those individuals and groups, such as Planned Parenthood of Columbia/Willamette, to take legal action. The quandary arising out of these lawsuits is whether laws designed to assess incitement in the real world, can be extended to reach web sites in the virtual world.

Chapter Two addresses the outcomes of the various legal actions taken against these threatening web sites, and will then make an argument as to why web sites are incapable of inciting “imminent lawless action” as defined by *Brandenburg*. Chapter Two details the features of cyberspace that distinguish it from the physical world as an environment of communication. These inherent characteristics of cyberspace are what bar it from speech limitations that have been crafted for the real world. Chapter Three also considers this issue in a broader context, and conveys the difficulty in applying real world standards to the virtual world. Chapter Three concludes by suggesting how it is possible

to foster a more tolerant society by permitting the speech of extremists and other unpopular groups.

## CHAPTER TWO:

### *BRANDENBURG* IN CYBERSPACE: WEB SITES CANNOT INCITE

Neal Horsley (and the American Coalition of Life Activists) and William Sheehan have been tried in court for their posted content on the Nuremberg Files and the Justice Files web sites respectively. The outcomes of these cases suggest that while the questionable content may pose a threat to certain individuals, it does not incite violence. These cases provide a foundation from which to build the central argument of this thesis—web sites cannot incite.

#### Distinguishing True Threats from Incitement

It is critical to make the distinction between true threats, and incitement to illegal action, when discussing web site-oriented litigation. While they bear contextual similarities, the two offenses are indeed different. To prove incitement, speech must satisfy the four-pronged test as outlined in *Brandenburg v. Ohio*. There is a high burden of proof, as the plaintiff must prove advocacy, intent, imminence, and likelihood. True threats, on the other hand, lack a uniform standard. The criteria necessary for speech to constitute a true threat is rather vague, and subject to the interpretation of the court.

The Supreme Court first deliberated what constituted a “true threat” in *Watts v. United States*.<sup>1</sup> During a political rally on the grounds of the Washington Monument, Watts expressed his disapproval of America’s involvement in Vietnam. In response to

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<sup>1</sup> *Watts v. United States*, 394 U.S. 705 (1969).

receiving his draft card, Watts declared, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.”<sup>2</sup> A trial court convicted Watts of “knowingly and willfully” making a threat against the life of the President of the United States.<sup>3</sup> In determining whether Watt’s speech constituted a “true threat.” they considered three major factors. First, they considered the context in which he uttered the questionable speech.<sup>4</sup> Political speech made in the context of a rally, such as that of Watts, typically enjoys a high level of constitutional protection. To illustrate this sentiment, the Court cited *New York Times v. Sullivan*, and recognized our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open,” even when speech results in unpleasant and offensive attacks on government officials.<sup>5</sup> Second, the Court took note of the threat’s conditional nature. Watts had conditioned his threat to the president upon receiving his draft card and vowing his refusal to be inducted into the Armed Forces.<sup>6</sup> His statement was a conditioned response, rather than a calculated threat. Third, the Court measured the reaction to Watts’s statement by the surrounding crowd. Both Watts and his audience laughed and applauded in response to his statement, which suggested a lack of legitimacy in his threat.<sup>7</sup> The Supreme Court reversed Watts’s conviction on the grounds that his statement was demonstrative of political hyperbole rather than an actionable threat.

The Supreme Court did not articulate a clear “true threats” standard, but did reference Judge Skelly Wright’s dissent in the Court of Appeals decision to illustrate that

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<sup>2</sup> 394 U.S 705, 706 (1969).

<sup>3</sup> 394 U.S 705, 706 (1969).

<sup>4</sup> 394 U.S 705, 708 (1969).

<sup>5</sup> 394 U.S 705, 708 (1969).

<sup>6</sup> 394 U.S 705, 706-707 (1969).

<sup>7</sup> 394 U.S 705, 707-708 (1969).

true threats do not enjoy First Amendment protection.<sup>8</sup> Judge Wright’s dissent presented the subjective/objective debate.<sup>9</sup> Judge Wright argued that a statement is a threat if: (1) the defendant makes an alleged threat with specific intent to execute it; and (2) in the context and circumstances, the statement unambiguously constitutes a threat.<sup>10</sup> By stipulating that a speaker should have a subjective intent to threaten in order for his words to be considered a threat, Judge Wright was explicitly extending First Amendment protection to exaggerated claims made during passionate political debate.

Due to the Supreme Court’s failure to establish a clear “true threats” test, there have been conflicting applications of true threats criteria among District Courts. This discrepancy was demonstrated in *Planned Parenthood of the Columbia/Willamette v. American. Coalition of Life Activists*.<sup>11</sup> The plaintiffs encouraged the judge to adapt an objective based test, as articulated in *Roy v. United States*.<sup>12</sup> An objective based test relies on the perceptions of a reasonable person hearing the alleged threat. This approach focuses on the context within which the speech is uttered, rather than the intent of the speaker. The defendants urged a more demanding application of true threats as outlined in *United States v. Kelner*.<sup>13</sup> In *Kelner*, the Second Circuit stated that it is “the utterance” of the threat that “the statute makes criminal, not the specific intent to carry out the threat.”<sup>14</sup> Due to the narrow requirements of this test, including strong language, and accompanying imminence requirement, application of this true threats test would have

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<sup>8</sup> 394 U.S. 705, 707-708 (1969).

<sup>9</sup> *Watts v. United States*, 402 F.2d 676, 686 (D.C. Cir. 1968).

<sup>10</sup> 402 F.2d 676, 691 (D.C. Cir. 1968).

<sup>11</sup> *Planned Parenthood of the Columbia/Willamette v. American. Coalition of Life Activists*, 945 F. Supp. 1355, 1371 (D. Or. 1996).

<sup>12</sup> *Roy v. United States*, 416 F.2d 874 (9th Cir. 1969).

<sup>13</sup> *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976).

<sup>14</sup> 534 F.2d 1020, 1025 (2d Cir. 1976).

likely resulted in the dismissal of the *Planned Parenthood v. ACLA* case. The demanding criteria of this true threats test are similar to that of the *Brandenburg* incitement test. Neither of these stringent tests was applied in *Planned Parenthood v. ACLA*. The District Court applied a broader objective standard, which focused on the context of the uttered speech, and the targeted party's perception of the speech. Judge Jones affirmed the true threats conviction of the ACLA:

[A] true threat exists if the target of the speaker reasonably believes that the speaker has the ability to act him or herself or to influence others to act at a level less than incitement—it is the perception of a reasonable person that is dispositive, not the actual intent of the speaker.<sup>15</sup>

Judge Jones's broad application of true threats in this case highlights the difficulty in applying a stringent true threats test to web sites. Furthermore, it suggests the inability of a prosecutor to ever demonstrate incitement, which comes with a greater burden of proof. The lack of a clear true threats standard affords the courts great flexibility in determining what criteria to apply on a case-by-case basis. In contrast, the incitement standard, as articulated in *Brandenburg*, has specific criteria which speech must meet in order to be denied First Amendment protection. Given the elusive online environment of web sites, it is impossible for those criteria to ever be met. In summary, while a web site may be found to constitute a true threat, proving incitement is impossible.

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<sup>15</sup> 945 F. Supp. 1355, 1372 (D. Or. 1996).

## Exploring the Outcomes of the Nuremberg Files and the Justice Files Cases

### The Nuremberg Files Case: *Planned Parenthood v. ACLA*

In the Nuremberg Files civil suit, the plaintiffs argued that the web site was a “hit list” and that the American Coalition of Life Activists (ACLA) and the Advocates for Life Ministry (ALM) were targeting them. Their case invoked the federal Freedom of Access to Clinic Entrances Act of 1994 (FACE), the federal Racketeer Influenced and Corrupt Organizations Act (RICO), and the Oregon RICO (ORICO) statute. In the district court case, *Planned Parenthood of the Columbia/Willamette v. ACLA*, a jury ruled in favor of the plaintiffs, and awarded \$1.9 million dollars in damages.<sup>16</sup>

In their appeal in *Planned Parenthood v. ACLA*, defendants argued that the trial judge should have applied the jurisprudence of incitement to the speech in question. This strategic request, although never granted, is still significant. Hypothetically, if the plaintiffs had been saddled with the burden of proof to show incitement, they most likely would have failed to satisfy all of the standard’s requirements. This hypothetical situation illustrates the inadequacy of the current incitement standard to be applied to web sites on the Internet. In response to the plaintiff’s request, Judge Jones stated that, “contrary to defendants’ assertions, plaintiffs are not pursuing an incitement to violence theory.”<sup>17</sup> Jones rejected the plaintiff’s concern with the rationale that an objective threats test was sufficient. Judge Jones’s swift dismissal of the possibility for incitement in this district

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<sup>16</sup> Prana A. Topper, “The Threatening Internet: *Planned Parenthood v. ACLA* and a Context-Based Approach to Internet Threats,” *Columbia Human Rights Law Review* 33 (Fall 2001), 190.

<sup>17</sup> 945 F. Supp. 1355, 1371 (D. Or. 1996).

court case poses an interesting hypothetical situation—one that has been under-theorized by the courts. Can a web site ever incite?

The ACLA appealed to the United States Court of Appeals for the Ninth Circuit in 2001. In March of 2001, a panel of the Ninth Circuit reversed the district court's judgment, stating that that while ACLA's posters and web site may have brought significant attention to the doctors, it was an unknown, unaffiliated third party who was actually threatening them. Following that ruling, in October 2001, the Ninth Circuit reheard the case and determined the posters and web site did in fact constitute a threat against the lives of the Oregon doctors. Still, ACLA maintained that the information on their web site was political speech, thus protected under the First Amendment. They also contended that the posters' and web site's content did not constitute imminent lawless action, and could not be considered a true threat.

In 2002, after a series of appeals, the United States Court of Appeals for the Ninth Circuit, meeting *en banc*, ruled that the Nuremberg Files web site constituted a direct threat to the doctors listed on the web site. The court referred to the Supreme Court's ruling in *Brandenburg*. The opinion was handed down on an 8-3 vote, and ultimately confirmed that certain "wanted" posters and "guilty" posters identifying specific abortion doctors, in conjunction with dead and injured doctors listed on the web site "scorecard," constituted true threats under the FACE act. The court ruled that the ACLA had crossed the line by cataloguing specific doctors on the site, rather than vaguely endorsing violence committed by others against abortion providers; and that threats are unprotected by the First Amendment regardless of whether they are communicated in public or private. The court defined threatening speech as: "a statement which, in the entire context

and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person.”<sup>18</sup> Nevertheless, the court held that the majority of the Nuremberg Files web site was protected speech.

While the court’s ruling did not explicitly prohibit the web site’s presence on the Internet, MindSpring Enterprises, an Atlanta-based Internet Service Provider (ISP), promptly shut down the Nuremberg Files site.<sup>19</sup> The web site resurfaced under a new name, the “RU 486 Registry,” and had added information of not only abortion providers, but also doctors who had prescribed RU-486, a drug used to terminate early-stage pregnancy in females. This web site was first shut down by Media3, a large Massachusetts ISP, and then by the Christian Web Host at ILOVEJESUS.COM. By 2005, over ten ISPs in the United States had refused to carry either the Nuremberg Files Web site or the RU 486 Registry Web site.<sup>20</sup>

The Web site is currently up and running at its original location: <http://www.christiangallery.com/atrocity>. In fact, the ACLA has just embarked on a new “Live Web Cam Project,” which is being documented on the web site. The project involves ACLA members filming individuals coming in and out of abortion clinics, which the site refers to as “baby butcher businesses.”<sup>21</sup> The list of “Alleged Abortionists and Their Accomplices” remains the same with a few format changes. The list is prefaced with the disclaimer, “Due To The Recent Ninth Circuit Court of Appeals Decision We

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<sup>18</sup> *Planned Parenthood of the Columbia/Willamette v. American. Coalition of Life Activists*, 290 F.3d 1077 (9th Cir. 2002).

<sup>19</sup> Topper, 197.

<sup>20</sup> Topper, 197.

<sup>21</sup> The Nuremberg Files (2010). Available at: <http://www.christiangallery.com/atrocity> (accessed May 4, 2010).

Have Reverted To A Version Of The Nuremberg Files Published Without The Strike Through Lines Defined By A Hysterical Ninth Circuit Court of Appeals As A “True Threat.”<sup>22</sup>

While the Ninth Circuit Court recognized the Nuremberg Files web site as a “true threat” to abortion providers, it did not rule that the web site constituted incitement. Due to the controversial and threatening nature of the web site, this case has accumulated an impressive amount of attention over the past ten years. While the case has set a somewhat famous precedent for future cases involving threatening web sites, it has done nothing to address the question of incitement.

The Justice Files Case: *City of Kirkland v. Sheehan*

This trend of First Amendment protection of web site content was continued in the brief, but significant case surrounding JusticeFiles.org. In March of 2001, while the *Planned Parenthood v. ACLA* case was being decided in United States Court of Appeals for the Ninth Circuit, the city of Kirkland Washington filed a suit in King County Superior Court against William Sheehan. Attorney Bill Evans argued for the plaintiffs that the web site, JusticeFiles.org, was an “abuse” of free speech that threatened the police officials’ privacy and safety.<sup>23</sup> Was the availability of lawfully obtained

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<sup>22</sup> The Nuremberg Files Homepage, “Alleged Abortionists and Their Accomplices.” Available at: <http://www.christiangallery.com/atrocity/aborts.html> (accessed May 4, 2010).

<sup>23</sup> Jeremy Lott, “Policing the Net – Suit Filed Against William Sheehan over Web Site,” *Reason* 33 (July 2001), 13.

information on the Justice Files web site inciting adversaries of the police force to do justice by harming the listed officials?

The Court ordered Sheehan to remove officers' Social Security numbers from the web site, which were a clear invasion of privacy laws. However, with regard to the rest of the posted information, Superior Court Judge Robert Alsdorf cited *Brandenburg v. Ohio* and claimed:

Injunctions are rarely granted to stop the exercise of free speech except in those rare circumstances where it poses an immediate danger to others, such as uttering direct and credible threats to kill or injure. ... Speech generally cannot be enjoined, however repugnant, offensive or distasteful it may otherwise be.<sup>24</sup>

Judge Alsdorf then explained that “reprehensible though some may find defendants’ proposed bargain to be (trading privacy for policy changes), it is clear that defendants’ utterances are indeed political speech.”<sup>25</sup> Due to the absence of a credible specific threat of harm, the court found that the Justice Files web site content (excluding social security numbers) was protected by the First Amendment. In reaching this conclusion, Alsdorf drew on the then recent ruling of the Court of Appeals for the Ninth Circuit for *Planned Parenthood v. ACLA*, which found that “political speech may not be punished just because it makes it more likely that someone will be harmed at some

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<sup>24</sup> Frank James, “Critics Use Internet to Broadcast Police Officers’ Personal Information,” *Chicago Tribune Knight Ridder / Tribune Business News*, June 5, 2001, 2264.

<sup>25</sup> See *City of Kirkland v. Sheehan*. Available at: <http://www.citmedialaw.org/threats/city-kirkland-v-sheehan> (accessed on May 16, 2010).

unknown time in the future by an unrelated third party.<sup>26</sup> This rationale demonstrates the inability of content on threatening web sites such as the Nuremberg Files and the Justice Files, to incite.

Sheehan went to court the following year to successfully challenge the constitutionality of the Engrossed Substitute Senate Bill, which created “a cause of action against any person who ‘with the intent to harm or intimidate’ releases certain information about law enforcement or court-related employees or volunteers and categorizes them as such.”<sup>27</sup> Sheehan’s injunction was granted on the grounds that the act was an unconstitutional content-based regulation of speech. Sheehan’s free speech victory highlights the afforded protection of web site content under current First Amendment legislation. Sheehan was never actually charged with incitement, which is not surprising. What if he had been? Theoretically, one would have to assume that the plaintiff would have failed to satisfy the burden of proof necessary to demonstrate incitement in court.

When discussing the cases surrounding the Nuremberg Files, or the Justice Files, it is important to keep in mind that they are web sites. Content posted on web sites is a different category of speech than interpersonal online communication. The characteristics of web site-mediated speech differentiate it from online speech occurring in real-time among Internet users.

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<sup>26</sup> *Planned Parenthood of the Columbia/Willamette v. American Coalition of Life Activists*, 244 F.3d 1007, 1015 (9<sup>th</sup> Cir. 2001).

<sup>27</sup> Susan W. Brenner, “Complicit Publication: When Should the Dissemination of Ideas and Data be Criminalized?” *Albany Law Journal of Science and Technology* 13 (2003), 390.

## Different Forms of Online Communication

Online communication as a medium is heterogeneous in several respects. Communication in cyberspace takes two distinct forms: web site-mediated and interpersonal. Interpersonal Internet communication is often conducted in real-time, such as chat rooms, email, and instant messaging—it is a different animal than communication via web sites. Internet communication in real-time, conducted between specific individuals differs greatly from that of a web site, in which content is created and consumed anonymously.

Real-time communication implies an element of immediacy, and consequently a possibility for imminence—given that the person committing the lawless act is physically near the target—which is highly unlikely given the astronomical scope of the Internet.<sup>28</sup> Additionally, the communication is presumably occurring between two or more identifiable users. The content of real-time communication has many of the characteristics of a face-to-face conversation. Still, the online environment creates a veil of secrecy, which often masks malicious or illegal activity. Interpersonal online communication conducted in real-time can be equally as powerful as real life communication. This power was illustrated in the 2008 cyber-bullying case of Lori Drew.<sup>29</sup>

The Drew case neatly demonstrates the difference between content posted on web sites, and purposeful communication directed at a specific person (s). This situation deals

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<sup>28</sup> Joshua Azriel, “The Internet and Hate Speech: An Examination of the Nuremberg Files Case,” *Communication Law and Policy* 10 (Autumn 2005), 495.

<sup>29</sup> *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009).

with interpersonal messaging via MySpace, a popular social networking site. This unfortunate case arose from the suicide of Megan Meier, a sixteen-year-old girl from Missouri. Soon after Meier opened an account on MySpace, she received messages from Lori Drew, the mother of a girl who lived down the street. Drew communicated with Meier through MySpace using the fabricated identity of “Josh Evans,” a sixteen-year-old boy who supposedly lived in the next town over. Once Meier had developed an online relationship with “Josh,” Drew changed the tone of the messages.

Knowing of Meier’s psychological disorders, Drew went on to write hurtful things both in messages to Meier, and about Meier on public bulletins. According to Meier’s father, Ronald Meier, and a neighbor who had discussed the hoax with Drew, the last email sent to Meier from “Josh” read: “Everybody in O’Fallon knows how you are. You are a bad person and everybody hates you. Have a shitty rest of your life. The world would be a better place without you.”<sup>30</sup> The last communication between Meier and Drew was via AOL Instant Messenger. Meier was found twenty minutes later in her bedroom closet. She had hanged herself. Should Drew bear some responsibility of Meier’s suicide after cyber bullying and harassing her, knowing of her unstable mental condition? Absolutely. Situations such as this one, and many others, typically arise from interpersonal communication among Internet users.

On May 15, 2008, in *United States v. Drew*, a federal grand jury indicted Drew on one count of conspiracy and three counts of accessing protected computers without authorization to obtain information to inflict emotional distress, under the Computer

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<sup>30</sup> “MySpace Hoax Ends With Suicide of Dardenne Prairie Teen,” *St. Louis Post-Dispatch*. Available at [http://suburbanjournals.stltoday.com/articles/2007/11/11/news/sj2tn20071110-1111stc\\_pokin\\_1.ii1.txt](http://suburbanjournals.stltoday.com/articles/2007/11/11/news/sj2tn20071110-1111stc_pokin_1.ii1.txt) (accessed December 14, 2008).

Fraud and Abuse Act.<sup>31</sup> The jury was deadlocked on Count One for Conspiracy and unanimously found Drew not guilty of Counts Two through Four. The jury did find Drew guilty of a misdemeanor violation of the CFAA. However, on November 23, 2008, Drew was granted a motion for acquittal. Her misdemeanor conviction was overturned.<sup>32</sup>

This case shows the distinction between online interpersonal communication, and web site-posted content. There was an identifiable speaker and an audience: Lori Drew and Megan Meier. Even though Drew's identity was fabricated, the communication occurred between two identifiable sources. Also, there was a dialogue, which occurred in real-time. That is much different than web site content, which is arbitrarily posted and updated at any given time. The concrete time frame within which Drew and Meier were communicating created the potential to determine imminence. The two communicators were within four houses of each other. Drew knew with whom she was communicating, and had an intent. Her intent was to impose mental distress upon Meier. Drew knew Meier's mental condition, and therefore knew that suicide was a possible, even likely option for Meier.

Given the significant differences between real-time interpersonal communication and communication via web sites, it would be inappropriate to address them as a single entity, or even simultaneously. As such, this thesis will address the prospect of incitement in relation to web sites alone. In review, according to *Brandenburg*:

The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation

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<sup>31</sup> MSNBC, "Mom Indicted in MySpace Suicide Case." Available at: <http://www.msnbc.msn.com/id/24652422> (accessed December 14, 2008).

<sup>32</sup>259 F.R.D. 449 (C.D. Cal. 2009).

except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>33</sup>

In order for a web site to incite, it must satisfy the *Brandenburg* standard’s requirements, including advocacy, intent, imminence, and likelihood. Given the inherent characteristics of web sites, it is impossible for their content to do so. There are a multitude of contextual factors, which prevent web sites like the Nuremberg Files from being able to incite illegal action.

This chapter will argue the incapacity of a web site to incite, given its cyberspace locality, and communicative limitations. The *Brandenburg* standard of “imminent lawless action” was created in 1969, a time in which only the physical world existed. With the emergence of the Internet, however, we are now operating within a virtual world as well. Given the vast differences between these worlds, it is inappropriate that they should be governed by the same rules. While a landmark decision of its time, *Brandenburg* is simply outdated. The framework in which *Brandenburg* and accompanying jurisprudence was formed is irrelevant in this Information Age, as it was intended to encompass much simpler forms of expression.

In assessing speech that incites in cyberspace, courts would be bound to apply the *Brandenburg* test from the physical world. Unfortunately, the *Brandenburg* standard does not extend neatly to the virtual world. The Internet’s elusive nature raises multiple concerns with regard to such an extension. The Internet is extraordinarily multifaceted and accommodates endless forms of communication. Hence, this thesis will exclusively deal with web sites.

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<sup>33</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

## Web Sites Cannot Incite

There are many features of web sites, which render them unsuitable for incitement as defined by *Brandenburg*. Firstly, there is no identifiable audience or speaker of web-based speech. Users operate under primarily anonymous identities. Secondly, the communication does not occur in real-time. Content may be posted on a web site at any time of the day. Thirdly, given the lack of temporal context, it is impossible to determine imminence. There is no way to know whether the illegal action in question was the direct and immediate result of content viewed on a web site. Fourthly, the effortlessness in accessing online material tailored to one's personal views and interests makes it extremely difficult to isolate the impact of any given web sites. Web site users often possess predispositions, which have caused them to search for and access specific sites. This is even more noteworthy when talking about web sites dedicated to particular radical or fundamentalist groups. Finally, due to the multifaceted nature of web sites, developing a measured response is not viable. It would be impossible to develop one uniform standard to be applied in all cases dealing with web sites.

### Neither the Audience nor Speaker Can Be Identified

Individuals in the virtual world often operate under anonymous identities. Web site-posted content is available to a global network of billions of people. It raises the question: to whom is published content directed? Identifying the sender and receiver of a

particular message is technically impossible within the context of a web site. The Internet provides a revolutionary way to communicate. As Braun notes:

Quickly fading are the days in which a person's main venue for expressing her revolutionary views included standing on a soapbox or distributing leaflets. Instead, the Internet provides any person with any opinion the ability to reach a virtually unlimited audience without the formidable barriers previously posed by costly and inaccessible mainstream visual or print media.<sup>34</sup>

In *Brandenburg v. Ohio*, Clarence Brandenburg, a Ku Klux Klan leader from Ohio, was delivering his speech to a particular audience—his fellow Klansmen. There was a physical relationship by which to identify the creators and receivers of the questionable messages. Web sites' anonymous nature prevents the existence of this speaker-audience relationship, which is necessary in the application of the *Brandenburg* standard.

Even in *Abrams*, in which case the defendants had freely tossed printed leaflets out the window of a factory, they knew the leaflets would be scattered at the feet of munitions workers upon landing.<sup>35</sup> They may not have been mailing the leaflets to particular people, as in *Schenck*, but their audience was determined by mere locality. Web sites are unique in that they have the potential to disseminate information to billions of people simultaneously. Web site members range globally; they can be accessing content from anywhere in the world. Web site-published content is not directed toward anyone in

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<sup>34</sup> Bruce Braun, "WWW.Commercial--Terrorism.com: A Proposed Federal Criminal Statute Addressing the Solicitation of Commercial Terrorism Through the Internet," *Harvard Journal on Legislation* 37 (2000), 159.

<sup>35</sup> *Abrams v. United States*, 250 U.S. 616, 630-631 (1919).

particular—it is simply made available for an audience to view. We have no way of knowing all of the individuals who comprise that audience.

Identifying the speaker in web site-mediated speech is equally challenging. The same anonymous users who make up the audience, act as the creators of content. Even on a web site like the Nuremburg Files, on which Neal Horsley posts the majority of the information, users are continuously submitting content to be published. If a site were to publish content resembling instructions or commands to act unlawfully (which the Nuremburg Files web site does not) it would still lack the ability to “incite” given the potential for its viewers to be almost anywhere in the world.

#### Impossible to Assess Imminence

Because web sites lack the temporal context of real life, there is practically no possibility of imminence with respect to a lawless action that one may commit after viewing a site’s contents. Once content is published on a web site, it is unknown when a user will access and view it. There is a time delay between when speech is “spoken,” and “heard.” In the physical world, speech is generally heard as it is being spoken. This is not the case on web sites.

Without knowledge of when information is accessed, it is impossible to apply *Brandenburg’s* imminence requirement. In *Brandenburg*, it would have been obvious if the Klansmen had engaged in illegal action directly after Brandenburg’s speech. Brandenburg’s audience heard his speech at a specific time, and was theoretically granted a time frame immediately following the speech during which illegal action would have

been considered imminent. In contrast, web site users may access speech at any time. The pertinence of temporal immediacy between speech and subsequent lawless action was demonstrated in the two incitement cases reviewed by the Supreme Court since *Brandenburg*: *Hess v. Indiana*<sup>36</sup> and *NAACP v. Claiborne Hardware*.<sup>37</sup>

In *Hess v. Indiana*, Gregory Hess was convicted of violating Indiana's disorderly conduct statute during a student antiwar demonstration. While police officials took measures to clear the streets, Hess declared, "We'll take the fucking streets later."<sup>38</sup> The Supreme Court cited *Brandenburg* in its decision to reverse Hess's conviction. The Court ruled that Hess had not incited "imminent lawless action." Had Hess expressed intentions of taking the streets "now," rather than later, the Court may have decided differently.

*National Association for the Advancement of Colored People v. Claiborne Hardware* was connected with an economic boycott in Claiborne, Mississippi. In 1966, the NAACP initiated an economic boycott of white merchants in the area to protest the refusal of white elected officials to comply with their demands of racial equality and integration. Three years later, seventeen white merchants in Hinds County, Mississippi, filed a suit against the NAACP, its field secretary Charles Evers, and several other individuals for the common law tort of malicious interference with the merchants' businesses. The Mississippi trial court ruled in favor of the plaintiffs and awarded damages. The Mississippi Supreme Court agreed with the lower court's decision.

In 1982, the Supreme Court considered the NAACP's First Amendment arguments that the Mississippi Courts had refused to thirteen years prior. The Court

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<sup>36</sup> *Hess v. Indiana*, 414 U.S. 105 (1973).

<sup>37</sup> *National Association for the Advancement of Colored People v. Claiborne Hardware*, 458 U.S. 886 (1982).

<sup>38</sup> 414 U.S. 105 (1973).

unanimously reversed the decision. In the opinion, Justice Stevens cited *Brandenburg* and stated that the statements were entitled to First Amendment protection because they did not “incite or produce imminent lawless action.”<sup>39</sup> The connected violence had not ensued until weeks after the speech’s delivery.<sup>40</sup> Stevens’ opinion then asserted: “The emotionally charged rhetoric of Charles Evers’ speeches did not transcend the bounds of protected speech set forth in *Brandenburg*.”<sup>41</sup>

As demonstrated by *Hess v. Indiana* and *NAACP v. Claiborne Hardware*, the immediacy with which illegal action is committed after delivered speech is significant when applying *Brandenburg*. Imminence is often difficult to discern in the physical world. When dealing in cyberspace, the temporal connection between speech and action is even more abstract, as there is no sure way to know when content was viewed. Content on web sites can be posted and accessed at any time of day. Furthermore, the physical locations of a web sites’ members range globally. As such, demonstrating imminence is not viable.

#### Cannot Isolate the Impact of Web Site Content

Another barrier to establishing imminence with regard to web sites is our inability to determine what exactly triggered the violent act. In the physical world, it takes time and effort to attend meetings, rallies, in support of a cause. In *Brandenburg v. Ohio*, the Klansmen traveled to a disclosed location to hear *Brandenburg* deliver his speech. On the

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<sup>39</sup> 458 U.S. 886, 928 (1982).

<sup>40</sup> 458 U.S. 886, 928 (1982).

<sup>41</sup> 458 U.S. 886, 928 (1982).

Internet, users can access multiple sites at once with the click of a mouse. They needn't move from their chairs. The effortlessness in accessing online material tailored to one's personal views and interests makes it extremely difficult to isolate the impact of any given web site.

Jeremy Lipschultz, a professor of Communications at the University of Nebraska, characterizes the majority of web site readers as part of "loosely knit social networks," like-minded people who may live anywhere around the world: "Under such conditions, we would expect free expression to be more open because the threat of retaliation is limited by the homogeneity of the group, as well as by geographic distance between its members and the perceived anonymity."<sup>42</sup> Lipschultz's reference to the homogeneity of web site members is important in understanding the difficulty in isolating the impact of one particular web site.

Individuals typically surf the Web for content of interest to them. Web site users often possess predispositions, which have caused them to search for and access specific sites. This is even more noteworthy when talking about web sites dedicated to particular radical or fundamentalist groups. It is unlikely that a person with moderate views would be seeking information on a white supremacist web site, or a web site dedicated to eliminating Liberals from the planet. Web site content may "fuel the fire," but it is hard to label it as the sole actor in causing illegal action. This point was illustrated in the recent assassination of Dr. George Tiller, a prominent abortion provider.

On May 31, 2009, Dr. Tiller was shot to death in the foyer of his church in

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<sup>42</sup> Jeremy Lipschultz, *Free Expression in the Age of the Internet: Social and Legal Boundaries* (Boulder, CO: Westview, 2000), 16.

Wichita, Kansas, by abortion opponent Scott Roeder.<sup>43</sup> George Tiller was known as one of the few doctors in the nation who performed late-term abortions, and was a focus for those around the country who opposed it. An abortion doctor for over three decades, Tiller had experienced protests outside his clinic, his house and his church; and he had seen his clinic bombed. Dr. Tiller had been a target of the ACLA since 1993, when he was shot in both arms and wounded by an abortion opponent a year and a half before appearing on the ACLA's Deadly Dozen poster.<sup>44</sup>

On April 1, 2010, Scott Roeder, 52, was convicted of murdering Dr. Tiller in a Sedgwick County District Court, and sentenced to life in prison without the possibility of parole for 50 years. Roeder displayed his anti-abortion fanaticism throughout the trial, often quoting the Bible, and attempting to justify his actions with the gritty details of an abortion procedure. Roeder's ex-wife said the outbursts were characteristic of the man she knew. Lindsey Roeder said she and their son, Nicholas, were relieved by the sentence. This testimony painted Roeder as a dangerous fanatic, whose inspiration was deep-rooted in obsessive hate. Roeder's friends testified that he was motivated by a strong believe that abortion is wrong.<sup>45</sup> As he was being escorted from the courtroom after his sentencing, Roeder said, "The blood of babies is in your hands," referring to the

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<sup>43</sup> Joe Stumpe and Monica Davey, "Abortion Doctor Shot to Death in Kansas Church," *The New York Times*, June 1, 2009, A1.

<sup>44</sup> *Planned Parenthood of the Columbia/Willamette v. American Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1131-1132, 1135 (1999).

<sup>45</sup> Roxanna Hegeman, "Scott Roeder Sentenced to Life in Prison: George Tiller's Murderer Describes Abortion in Court," *Huffington Post*. Available at: [http://www.huffingtonpost.com/2010/04/01/scott-roeder-sentenced-to\\_n\\_522654.html](http://www.huffingtonpost.com/2010/04/01/scott-roeder-sentenced-to_n_522654.html) (accessed on May 16, 2010).

district attorney who prosecuted him.<sup>46</sup> Roeder was a dedicated activist. It is impossible to isolate one source as the root of his extreme anti-abortion actions. This is true of many radical extremists. This case demonstrates the difficulty of assigning “blame” to a source like a web site. Roeder’s motivations were convoluted, and could not be traced to something as simple as a web site page.

An Internet user has access to billions of pages of speech. Isolating one particular web site, especially given users’ predispositions, is unreasonable. This feature is exacerbated by our inability to devise a measured response to the viewing of web site content as we would in the real world. In the real world, common sense provides us with the means to devise a measured response to a particular situation. Law enforcement officials are equipped with the foresight to gauge whether certain situations will escalate, or remain calm. As human beings, experience tells us whether an event is likely to become out of control. In cyberspace, we lose that foresight. In fact, we lose all sight.

At a staged rally like in *Brandenburg v. Ohio*, or a demonstration, policemen can monitor the event, and assess what needs to be done. If everything seems under control, they may decide to linger, and watch. If things begin to escalate, they may encourage people to move on, or to quiet down. The reaction can be calibrated to fit the situation. Conversely, there is no means for such a measured response on the Internet. We have no way of knowing who is viewing any particular web site at a given time. Furthermore, we do not have the power to limit their intake of content, or ask them to move on.

This feature amplifies the difficulty of isolating the impact of a web site. Without

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<sup>46</sup> CNN Wire Staff. “Doctor’s Killer Sentenced to Life in Prison,” *CNN Justice*. Available at <http://www.cnn.com/2010/CRIME/04/01/kansas.abortion.roeder.sentence/index.html> (accessed May 15, 2010).

visibility of how frequently or in what manner someone is viewing a web site, it is impossible to determine the web content's role in any illegal action that may have been committed.

Reaching Beyond Incitement:  
The Need for a New Approach in Cyberspace

As demonstrated in this chapter, web sites are rendered incapable of inciting illegal action by the characteristics that differentiate them from the physical world. Without the ability to identify a speaker and an audience, assess imminence, isolate the impact of web site content, or develop a measured response, it is impossible to extend the physical world standard of imminence to the virtual world. Chapter Three will reach beyond the act of incitement, identify certain limitations of speech in the physical and virtual world, and argue for the development of a more tolerant society through encouraged free speech on the Internet.

## CHAPTER THREE:

### MAINTAINING A COMMITMENT TO THE FREEDOM OF EXPRESSION

The narrow scope of *Brandenburg* has ensured a wide breadth of speech protection under the First Amendment over the past forty years or so. Many scholars argue that a new incitement test must be devised given *Brandenburg's* irrelevance to web sites such as the Nuremberg Files. According to John Cronan, "In short, the new standard must continue to safeguard against any chilling effect on free speech, while preventing imminent and likely incitement to illegal activity."<sup>1</sup> Unfortunately, there is no way to maintain the spirit of *Brandenburg* while modifying it so that it may be applicable to web sites. Web sites are too characteristically different for the application of standards created in the physical world. The core of *Brandenburg* is the act of incitement. For all of the reasons identified in Chapter Two, web sites cannot incite.

In a humorous explanation of the distinction between advocacy and action, Arnold Loewy, a distinguished professor of law, explains:

Merely advocating any form of illegality cannot be punished. Thus, a person who tells another that the government should be violently overthrown, the President should be assassinated, the local jewelry store should be robbed, Uncle Ezra should be horsewhipped, or the lady down the street should be raped cannot be convicted of any crime. The difficulty

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<sup>1</sup> John P. Cronan, "The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard," *Catholic University Law Review* 51 (Winter 2002), 455.

comes in separating abstract advocacy from criminal involvement in the illegal enterprise.<sup>2</sup>

Given the variety and anonymity of web site users, the difficulty of distinguishing advocacy from criminal involvement is increased within the context of the Internet. It is this resulting confusion that prevents a web site's capability to incite. Still, there is a concern with respect to extremist, whose beliefs often translate into action. Some scholars feel that the ever-threatening presence of terrorism in the world warrants an exception to the imminence requirement. Thomas Crocco contends that, "Until terrorism is removed from the world, there exists a "threshold of imminence" such that the potential for additional terrorist acts is so great that they must be considered imminent. Under these circumstances, terrorist web sites advocating acts intended to destroy our society do not warrant the protection of the First Amendment."<sup>3</sup>

The quandary arising from Crocco's argument is this: Will terrorism *ever* be removed from the world? Radical extremists have, and always will, demand a presence within our society. Terrorism is a byproduct of this radicalism, and thus, will never cease to exist. The Internet has provided terrorist organizations such as the Earth Liberation Front, the World Islamic Front, and subsidiaries of the American Coalition of Life Activists, with alternate forms of dissemination of their radical ideas. However, violent acts initiated by these organizations preceded the formation of their web sites. Terrorist

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<sup>2</sup> Arnold H. Loewy, "Distinguishing Speech from Conduct," *Mercer Law Review* 45 (1994), 623.

<sup>3</sup> Thomas E. Crocco, "Comment: Inciting Terrorism on the Internet: An Application of Brandenburg to Terrorist Websites," *St Louis University Public Law Review* 23 (2004), 482.

organizations were just as real before their Internet exposure. An individual who harbors views so extreme as to be willing to commit violence in their name, was likely aware of these major organizations before he or she became an avid web user.

As discussed in Chapter Two, there are many features of web sites that blur the identities and intents of the communicators, the temporal context in which the communication is taking place, and the impact of a web site's content. Without knowledge of these facts, it is unreasonable to place the blame of a crime on a web site. The magic bullet theory, while a persuasive perspective in the 1930's, is practically obsolete today.<sup>4</sup> It is illogical to assume that any message is going to be received and accepted by the receiver exactly as intended by the sender. This concept loses complete credibility when applied to the Internet, in which case it is difficult to discern the mere identities of those sending and receiving messages. Web sites cannot incite due to inherent features of cyberspace, which differ immensely from the physical world. The Internet is a boundless source of information. In an environment where users have access to an inexhaustible amount of knowledge, isolating the impact of a single web site becomes technically unfeasible.

It is the illegal action committed that should be punished, not the speech that may or may not have influenced the behavior. As human beings, we possess human agency. We are constantly seeking and gathering information from various sources—yet when push comes to shove, we ultimately exercise our own judgment when determining how to

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<sup>4</sup> Clay Calvert, "Framing and Blaming in the Culture Wars: Marketing Murder or Selling Speech?" *Vanderbilt Journal of Entertainment Law and Practice* 3 (Spring 2001), 138.

behave. We are not robots; we make decisions and should be held accountable for our actions. As reprehensible and offensive as some web sites may be; it is unjust to use them as scapegoats to avoid responsibility. Still, the First Amendment does not protect *all* speech.

### Free Speech Has Its Limitations

The inability of a web site to incite does not bar it from any legal limitations. In the case of the Nuremburg Files, while the web site's content did not constitute incitement, it was found to constitute true threats to the abortion doctors. Web sites are entitled to a full measure of constitutional protection. While The First Amendment protects a wide range of speech, some types of speech are not protected, including defamation, "fighting words," child pornography, and obscenity. These limitations apply to speech both in the physical, and in the virtual world.

#### Restrictions on Speech in the Physical World: *Chaplinsky v. New Hampshire*

Walter Chaplinsky, a minister of the Jehovah's Witnesses sect, was convicted of violating Section 2 of Chapter 378 of the Public Laws of New Hampshire, which stipulated:

No person shall address any offensive, derisive, or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.<sup>5</sup>

Chaplinsky had been distributing literature on the streets of Rochester, New Hampshire, which referred to organized religion as “a racket.”<sup>6</sup> A hostile crowd complained to City Marshall Bowering, who encouraged Chaplinsky to move on. Chaplinsky continued to preach and hand out magazines containing the messages of God’s Kingdom despite verbal, and physical assaults. One member of the crowd, Bowman, even punched Chaplinsky, and later returned with a flagstaff meant to spear him. Bowering and the deputy sheriff remained complicit as Chaplinsky was accosted. Bowering later referred to Chaplinsky as an “unpatriotic dog.”

Marshall Bowering finally escorted Chaplinsky to the police station. Throughout the incident, Chaplinsky had been requesting police protection, and asking Bowering to arrest the angry crowd members who had started the fight. Angered by Marshall Bowering’s nasty responses and the police’s refusal to protect his constitutional right to speak, or himself when he was being physically attacked, Chaplinsky shouted, “You are a God damned racketeer” and “a damned Fascist and the whole government of Rochester

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<sup>5</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942).

<sup>6</sup> 315 U.S. 568, 570 (1942).

are Fascists or agents of Fascists.”<sup>7</sup> Chaplinsky was subsequently indicted for violating the aforementioned New Hampshire statute.

The New Hampshire Courts ruled against Chaplinsky and sentenced him to six months in prison. The United State Supreme Court upheld Chaplinsky’s conviction. In a rather unfortunate dicta, Justice Frank Murphy articulated certain limitations on uttered speech. Instead of simply dismissing the case on the narrow basis that, under the clear and present danger test, the language “was likely to provoke physical retaliation,” Murphy devised the fighting words doctrine, which has equipped the courts with a tool to suppress speech for almost seventy years. While ultimately a barrier to the freedom of expression, Murphy’s dicta identified several forms of punishable speech consistent with the First Amendment:

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition

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<sup>7</sup> 315 U.S. 568, 569 (1942).

of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. “<sup>8</sup>

The combination of a two-part fighting words definition—”those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace” with other speech of “slight social value”—is what causes this doctrine to be substantially limiting. Firstly, Murphy’s definition is considerably broad, as it covers both corrupt speech in general, as well as fight-provoking words. Secondly, the ability to frame speech as low value has provided the Court with a convenient rhetorical device for restricting First Amendment protection. Analyzing the implications of this doctrine with respect to web sites like the Nuremberg Files is interesting. The speech posted on web sites of radical groups such as the ACLA, while repugnant to some, is not devoid of meaning. While many people may disagree with its ideology, the speech is unquestionably a form of political commentary, and therefore possesses social value.

Justice Murphy did not mention true threats in this list of exemplary categories, but later recognized threats as another exception in *Watts v. United States*. In *Watts*, the Court held that, similar to libel and obscenity, true threats may be punished without violating the First Amendment.<sup>9</sup> It is with this exception that Planned Parenthood of Columbia/Willamette was able to prevail in a civil suit against Neal Horsley and the ACLA. These outlined exceptions demonstrate that there are limitations on free speech.

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<sup>8</sup> 315 U.S. 568, 572 (1942).

<sup>9</sup> *Watts v. United States*, 394 U.S. 705, 707 (1969).

However, it is imperative to note that Murphy's dicta was intended for speech in the physical world. While this is true of most First Amendment jurisprudence, there *have* been some limitations set specifically for the Internet as well. Thankfully, imposing speech restrictions on the Internet has not been as welcomed by the courts as one might have expected.

#### Restrictions on Speech in the Virtual World: *Reno v. ACLU*

Development of Internet-specific jurisprudence is surely going to be an intensive process. So far, the courts have at least recognized the difference between speech uttered in the physical world, and content published in cyberspace. For example, In *Reno v. ACLU*, the American Civil Liberties Union rendered the Communications Decency Act of 1996 unconstitutional. The Communications Decency Act was an amendment to the Telecommunications Act passed by Congress in 1996 to encourage development and reduce regulation of new telecommunications technologies.<sup>10</sup> The Communications Decency Act (CDA) was an amendment proposed by Senator James Exon with the purpose of shielding children from indecent material on the Internet.

On the same day that President Clinton signed the Communications Decency Act in 1996, the ACLU, joined by additional plaintiffs, filed an action against the Department of Justice in the United States District Court for the Eastern District of Pennsylvania. The

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<sup>10</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151-641 (Supp. 1996)).

plaintiffs argued that the Internet deserved an extensive amount of protection because of its unique characteristics:

First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.<sup>11</sup>

The three judges filed separate opinions, each declaring the “indecency” and “patently offensive” provisions of the CDA unconstitutional, and ruling in favor of the plaintiff.<sup>12</sup> All three opinions opinion rested on several facts. Firstly, it recognized that some material within the CDA’s reach could be considered socially valuable, albeit “indecent” material. For example, the Critical Path AIDS Project, Inc., which provides information on safe sex and the transmission of HIV and the treatment of AIDS.<sup>13</sup> It also recognized the lack of a practical method by which to verify a web user’s age (which the Internet continues to lack). Chief Judge Sloviter concluded that the CDA sweeps too broadly because it is “either technologically impossible or economically prohibitive for many of the plaintiffs to comply with the CDA without seriously impeding their posting

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<sup>11</sup> *American Civil Liberties Union v. Janet Reno*, 929 F. Supp. 824 (E.D. Pa. 1996).

<sup>12</sup> 929 F. Supp. 824, 827-857 (E.D. Pa. 1996).

<sup>13</sup> Coe William Ramsey, “Burning the Global Village to Roast a Pig: The Communications Decency Act of 1996 Is Not ‘Narrowly Tailored’ in *Reno v. ACLU*,” *Wake Forest Law Review* 32 (Winter 1997), 1297.

of online material which adults have a constitutional right to access.”<sup>14</sup> In other words, it is unjust to childproof indecent speech to the point that adults cannot rightfully access it.

Lastly, the district opinion acknowledged the difficulty in determining whether content originates from foreign or domestic sources:

No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web. From a user's perspective, it may appear to be a single, integrated system, but in reality it has no centralized control point.<sup>15</sup>

Therein lies a fundamental obstacle in developing First Amendment jurisprudence with respect to the Internet. The World Wide Web's global nature allows the creation of “mirror sites” originating from other countries. By operating from international ISP's, the web site falls outside of the U.S government's jurisdiction. For example, weeks after the District court's ruling of *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA*, various “mirror sites” to the Nuremberg Files were formed, including one operating through a browser in the Netherlands.<sup>16</sup> The Internet's capacity for international communication makes it difficult to monitor under any type of federal standard, especially *Brandenburg*, which relies on speaker-audience proximity.

The United States Supreme Court ultimately affirmed the decision of the district

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<sup>14</sup> 929 F. Supp. 824, 854 (E.D. Pa. 1996).

<sup>15</sup> 929 F. Supp. 824, 838 (E.D. Pa. 1996).

<sup>16</sup> Prana A. Topper, “The Threatening Internet: *Planned Parenthood v. ACLA* and a Context-Based Approach to Internet Threats,” *Columbia Human Rights Law Review* 33 (Fall 2001), 197.

court in *Reno v. ACLU*.<sup>17</sup> The Supreme Court decision was groundbreaking for Internet-specific speech for two reasons. Firstly, the Supreme Court established that speech in cyberspace was entitled to a full measure of constitutional protection. Secondly, the decision was practically unanimous. The government had argued that the Communications Decency Act was constitutional under *Ginsberg v. New York*,<sup>18</sup> *FCC v. Pacifica*,<sup>19</sup> and *Renton v. Playtime Theaters*<sup>20</sup>—all of which had upheld regulations on non-obscene speech. In his opinion of the Court, Justice Stevens claimed that while those previous cases had been correctly decided, they could not be appropriately extended to cyberspace. After explaining these precedents’ irrelevance to the case, he highlighted the uniqueness of the Internet as a medium of communication, and suggested the importance of free speech on the Internet:

This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, ‘the content on the Internet is as

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<sup>17</sup> *Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>18</sup> *Ginsberg v. New York*, 390 U.S. 629 (1968).

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

<sup>20</sup> *Renton v. Playtime Theatres*, 475 U.S. 41 (1986).

diverse as human thought.’<sup>21</sup>

Stevens also commented on the overbreadth of the CDA’s coverage, which he described as “wholly unprecedented.”<sup>22</sup> He reiterated the District Court’s decision and described the illegitimacy of suppressing the large amount of nonpornographic material covered by the CDA, which included educational material and other speech with serious social value. He concluded with the sweeping conviction that “The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”<sup>23</sup> In this decision, the Supreme Court demonstrated the unique features of the Internet, and its value as a vehicle by which to openly exchange ideas.

As the Internet becomes more pervasive in the lives of Americans, more cases similar to that of the Nuremberg Files will reach the steps of the Supreme Court. New standards with specific relevance to the Internet will likely follow. Unfortunately, by the time new standards are devised, technological advances will prompt immediate revision. Nonetheless, it is important that we acquire First Amendment jurisprudence that can be *appropriately* applied to the Internet, so that we may effectively distinguish between protected and unprotected speech to the best of our abilities.

As demonstrated by *Reno v. ACLU*, cyberspace is a unique environment, which demands significant First Amendment protection. Hence, there is a great challenge in attempting to impose limitations, originally intended for the physical world, on Internet

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<sup>21</sup> 521 U.S. 844, 871 (1997).

<sup>22</sup> 521 U.S. 844, 848 (1997).

<sup>23</sup> 521 U.S. 844, 885 (1997).

speech. As discussed in Chapter Two, standards created for the physical world do not extend neatly to the virtual world. In setting precedents for Internet communication, it is critical that we keep in mind the value of tolerating unpopular speech. While there exists certain limitations, all speech demands the same First Amendment protection, regardless of its attached ideology.

### Tolerating Unpopular Speech: *Collin v. Smith*

The Internet empowers individuals to freely disseminate ideas upon an ever-expanding audience. Some of these ideas may be considered morally sound, and others reprehensible. Nevertheless, they are all entitled to the same breadth of First Amendment protection. That reality can be hard to accept, especially with the growing emergence of web sites rooted in hate. It is important to appreciate the distinction between supporting speech and tolerating speech. Despite varying political views, a minority of Americans would advocate the murder of doctors who perform abortions, or the law enforcement officials who secure safe access to clinics. The extreme viewpoints of radical organizations like the ACLA are what set them apart from the mainstream. Although their beliefs are unpopular, it is our responsibility to tolerate their speech on principle, even if we do not agree with, or even approve of their moral stance. Although difficult, it is critical to appreciate this toleration as representative of a genuine commitment to the freedom of expression.

Lee C. Bollinger offers an interesting perspective on the theory of toleration in his book, *The Tolerant Society*.<sup>24</sup> Bollinger contends that requiring tolerance of extremist speech is a useful mechanism for producing harmony in a diverse and self-governing society. He views the First Amendment's protection of expression as a way to minimize conflict among individuals in a society by reducing the friction caused by diversity. Sherry characterizes Bollinger's endorsement of tolerance as a "pragmatic defense of liberal pluralism."<sup>25</sup>

Bollinger advocates an active role for the government in practicing tolerance. He suggests the government permit speech, without necessarily condoning it. His recommendations for society differ. Bollinger identifies a human need to be intolerant—people confronted with an idea they abhor, have a deep need to express their abhorrence.<sup>26</sup> He identifies intolerance as "communicative act" in and of itself; "a form of expression intended to avoid creating the wrong impression—either that we don't really believe what we claim to believe or that we don't have the courage of our convictions or the power to defend them."<sup>27</sup> He suggests that by allowing societal intolerance, individuals will actually develop more tolerant minds. Because extremist speech often reflects the attitudes of the intolerant mind—contempt for the views of others, and an "incapacity to cope with uncertainty in human affairs,"—exposure to such speech

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<sup>24</sup> Lee C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (New York: Oxford University Press, 1988).

<sup>25</sup> Suzanna Sherry, "An Essay Concerning Toleration," *Minnesota Law Review* 71 (April 1987), 985.

<sup>26</sup> David A Strauss, "Why Be Tolerant?" *University of Chicago Law Review* 53 (Fall 1986), 1488.

<sup>27</sup> Bollinger, 63.

encourages us to recognize those attitudes and decide not to entertain them ourselves.<sup>28</sup>

This idea highlights the educative function of tolerance. Bollinger contends that by tolerating extremist speech and publicizing accompanying litigation, society will become engaged in what he calls “the educative toleration ritual.”<sup>29</sup>

Bollinger draws a bold distinction between a tolerant mind and an obedient mind, by suggesting that through free speech, the tolerant mind is conditioned to “consider openly, to entertain seriously, the possibility of disobedience.”<sup>30</sup> In his praise of Bollinger’s philosophy, Straus contents that, “No other theory of free speech explains as effectively why we *celebrate* the fact that we allow all manner of revolting and untenable views to be expressed.”<sup>31</sup> Bollinger does not consider tolerance a necessary evil, but rather a positive force that has valuable educative effects and is “integral to the central functions of the principle of free speech”<sup>32</sup> The core purpose of allowing extremist speech is to celebrate, and thereby reaffirm, the value of tolerance and our commitment to it.<sup>33</sup>

Perhaps one of the most illustrative examples of Bollinger’s tolerance theory in practice, is *National Socialist Party v. Skokie*.<sup>34</sup> The case involved National Socialist Party of America (NSPA), a Chicago-based Neo-Nazi group. In 1977, Frank Collin, the Party’s founder, announced intentions of marching in the heavily Jewish Chicago suburb

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<sup>28</sup> Bollinger, 131-132.

<sup>29</sup> Bollinger, 195.

<sup>30</sup> Bollinger, 247.

<sup>31</sup> Straus, 1493.

<sup>32</sup> Bollinger, 84.

<sup>33</sup> Straus, 1493.

<sup>34</sup> *National Socialist Party v. Skokie*, 434 U.S. 1327 (1977).

of Skokie. In the late 1970's, approximately one out of every six Jewish citizens living in Skokie was a survivor, or was directly related to a survivor--of the Holocaust.<sup>35</sup> In 1974, 40,500 of the Village's 70,000 population were Jewish.<sup>36</sup> These circumstances contributed to the emotionally charged controversy surrounding this case, which was an exemplary display of litigation as an educative toleration ritual.<sup>37</sup>

On May 2, 1977, in response to Frank Collin's plan to demonstrate in Skokie, village officials devised a set of three ordinances meant to deter Collins from pursuing his plan. Village Ordinance 77-5-N-994 was a comprehensive permit system for all parades or public assemblies of more than 50 persons. It required permit applicants to obtain \$300,000 in public liability insurance and \$50,000 in property damage insurance. One of the prerequisites for a permit was a finding by the appropriate officials that the assembly would not portray criminality, depravity or lack of virtue in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation.<sup>38</sup> Ordinance 77-5-N-995 prohibited dissemination of any materials within the Village of Skokie, which promoted and incited hatred against persons by reason of their race, national origin, or religion, and was intended to do so.<sup>39</sup> The third ordinance, number 77-5-N-996, prohibited public

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<sup>35</sup> Philippa Strum, *When the Nazis Came to Skokie: Freedom for Speech We Hate* (Lawrence, KS: University Press of Kansas, 2007).

<sup>36</sup> *Collin v. Smith*, 578 F.2d 1197 (7<sup>th</sup> Cir. 1978).

<sup>37</sup> *Bollinger*, 195.

<sup>38</sup> 578 F.2d 1197,1199 (7<sup>th</sup> Cir. 1978).

<sup>39</sup> 578 F.2d 1197,1199 (7<sup>th</sup> Cir. 1978).

demonstrations by members of political parties while wearing “military-style” uniforms.<sup>40</sup>

Frank Collin and the NSPA applied for a permit to march on July 4, 1977 through the village of Skokie. Collin announced that he and his Party members intended to wear full Nazi uniforms complete with swastikas, and was denied his permit. With the support of the American Civil Liberties Union, Frank Collin sought relief in federal courts. The District Court found all three ordinances to be in violation of the First and Fourteenth Amendments of the Constitution. The ordinances were not content neutral—they were designed specifically to cover Nazi marches. In a lengthy opinion, District Judge Bernard M. Decker expressed that the ordinances’ unconstitutionality was rooted in their intended purpose, which was exclusively to suppress hated ideas. To conclude his decision, he poignantly said:

The ability of American society to tolerate the advocacy even of the hateful doctrines espoused by the plaintiffs without abandoning its commitment to freedom of speech and assembly is perhaps the best protection we have against the establishment of any Nazi-type regime in this country.<sup>41</sup>

The Court of Appeals affirmed Decker’s decision. In his opinion, Circuit Judge Pell expressed similar sentiments to that of Judge Decker. He confessed that while he thought the NSPA’s beliefs and goals to be “repugnant to the core values held generally

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<sup>40</sup> 578 F.2d 1197,1200 (7<sup>th</sup> Cir. 1978).

<sup>41</sup> *Collin v. Smith*, 447 F. Supp. 676, 702 (N.D. Ill. 1978).

by residents of this country, and, indeed, too much of what we cherish in civilization”—that was not a proper basis on which to decide the case. He warned of the dangers of “ideological tyranny, no matter how worthy its motivation,” and vowed his commitment to defending the Constitution.<sup>42</sup> Summarily, the judges simultaneously excoriated the Nazis for their views, and explained that “it is, after all, in part the fact that our constitutional system protects minorities unpopular at a particular time or place from governmental harassment and intimidation, that distinguishes life in this country from life under the Third Reich.”<sup>43</sup> Decker and Pell captured the dilemma with which we as a society are constantly confronted. They also teach us the importance of tolerating speech as a means to retain our civil rights as our forefathers intended. Their treatment of this case is illustrative of the toleration suggested by *Bollinger*—a toleration that demanded courts permit speech, without necessarily condoning it.

This perceived value of toleration is not lost on Internet-mediated speech. The same trials of legally permitting speech most find abhorrent in the name of the First Amendment exist. This concept is captured quite well in Cronan’s assessment of web-based speech:

Herein lies a major challenge to American society's commitment to the First Amendment, as the Constitution may protect Web sites and other

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<sup>42</sup> 578 F.2d 1197, 1200 (7<sup>th</sup> Cir. 1978).

<sup>43</sup> 578 F.2d 1197, 1201 (7<sup>th</sup> Cir. 1978).

cyberspace communications that most people find repulsive in the name of free speech.<sup>44</sup>

As posited by Bollinger, the solution to fostering a more tolerant and harmonious society is a combination of government tolerance, and an acceptance of the individuals need to express intolerance through free speech. By tolerating the speech of radical extremists like Neal Horsley, we build on the virtue of toleration and the speech we find odious loses its ability to threaten.

### More Speech

Brandeis and Holmes's opinion in *Whitney v. California* suggested moving beyond toleration. They addressed a need to answer bold speech with more speech in an open dialogue among members of society. They described the freedom of speech as a means to foster individual growth and happiness, to encourage the search for political truth, and to preserve democracy. The opinion touched on the fundamental principles of free speech and reinforced the progressive liberalism revealed in Holmes's dissenting opinion in *Abrams*. Brandeis and Holmes suggested that the remedy for evil speech is more speech:

If there be a time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.<sup>45</sup>

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<sup>44</sup> John P. Cronan, "The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard," *Catholic University Law Review* 51 (Winter 2002), 427.

The Internet is not a scarce environment; there is no shortage of diverse ideologies being expressed. Millions of web sites play host to over 1.5 billion users worldwide.<sup>46</sup> The unprecedented scope and breadth of the Internet renders it the ideal milieu in which to exchange ideas in the spirit of “more speech.” Brandeis and Holmes recognized the Founders’ intention to ensure our fundamental freedoms as American citizens, including the freedom of public discourse. Political discussion is necessary to safeguard against injurious doctrine. Speech in and of itself lacks the ability to harm when it is within the context of a larger debate, and fails to illicit imminent action. The Internet provides a boundless forum for speech; thereby generating the largest debate in which the world has ever taken part.

Brandeis and Holmes likely would have embraced this online open-ended debate as an opportunity for citizens to answer each other’s speech with more speech. They believed in the power of reason as applied through public discussion, rather than enforced silence by law. This theory goes beyond mere toleration of unpopular ideas, and encourages more speech in the form of political debate. More speech will lead to an educated, and more harmonious society.

Web sites like the Nuremberg Files, The Justice Files, and the American Liberation Front, are founded on radically unpopular ideologies. Although the views expressed on these web sites may be morally reprehensible to many, they are entitled to full measures of constitutional protection. While there are limitations on uttered speech, it

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<sup>45</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927).

<sup>46</sup> The International Telecommunication Union, as cited by The World Bank. “Data: Internet Users.” Available at [http://data.worldbank.org/indicator/IT.NET.USER?cid=GPD\\_58](http://data.worldbank.org/indicator/IT.NET.USER?cid=GPD_58) (retrieved on 10 May 2010)

is important to realize the distinction between speech uttered in the physical world, and in the virtual world. Standards that have been traditionally used to address speech have become outdated with the Internet revolution.

This thesis has specifically revealed the inability of a web site to incite. However, this argument is illustrative of a much larger issue. There is a great need for the judicial system to remain relevant. Development of pertinent case law will take time, but it should be viewed as a priority. The omnipresent nature of the Internet demands serious attention. Technology is constantly evolving, and appropriate First Amendment jurisprudence must follow suit. This should be done with particular attention to the unique features of the Internet, and should also demonstrate a firm commitment to the freedom of expression. Through the guarantees of free speech, we can foster a tolerant society. A tolerant society does not condition its members to tacitly agree with all viewpoints, but to engage in discussion and cultivate growth. The answer to coping with extremist speech posted on the Nuremberg Files, Justice Files, or The Animal Liberation Front is not the suppression of ideas, but toleration and more speech.