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## Missing Links: The First Amendment's Place in an Ever-Changing Web

Erin M. Holliday

### Abstract

Legal questions remain surrounding hateful rhetoric online, including when the government should or can legally step in and do something to prevent acts of terror or hate crimes. This Article explores the current legal landscape surrounding access to publishing online, and its benefits and costs for everyday users and private companies. Through a First Amendment lens, as well as other relevant case law, legislation, and regulation, this Article seeks to provide an understanding of the civil liberty implications of how a change in the law or policy would affect the rights of private companies and publishers and users, both readers and writers of content. This analysis focuses specifically on legal ramifications, protections, and liabilities of major social media outlets and news sites, as well as easily accessible online forums and public-facing websites of hate groups.



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# Missing Links: The First Amendment's Place in an Ever-Changing Web

Erin M. Holliday\*

## INTRODUCTION

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As loud conspiracy theorists or self-proclaimed citizen journalists using profane language and images find themselves reported, blocked, and banned from social media platforms, and as online publications find themselves weighing the benefits and costs of keeping comments and user interaction thriving, the legal implications and responsibilities put upon each stakeholder, from tech giants to everyday users, bring curious questions. Social media and the anonymity of various online forums have led to the proliferation of hate and extremist groups at home and abroad.<sup>1</sup> One estimate suggests more than 11,000 hate sites in existence.<sup>2</sup> But hate speech and the growth of hate groups in digital spaces has also led to action in the real world with sometimes dreadful consequences, such as the rise of ISIS membership or the organization of off-line events like the one that took place in Charlottesville, VA in 2017.<sup>3</sup> An action occurred in the University of Pittsburgh's backyard in October 2018, when a man opened fire on a Jewish Congregation, killing 11 community members, fueled by rage and antisemitism the perpetrator had expressed online in the months leading up to and just hours before the horrific event took place.<sup>4</sup> In addition, the gunman created an account on a social media website

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<sup>1</sup> Richard Delgado & Jean Stefancic, *Hate Speech in Cyberspace*, 49 WAKE FOREST L. REV. 319, 329 (2014).

<sup>2</sup> James Banks, *Regulating Hate Speech Online*, 24 INT'L REV. L. COMPUTERS & TECH. 233, 233–34 (2010).

<sup>3</sup> Majid Alfifi, Parisa Kaghazgaran, James Caverlee & Fred Morstatter, *Measuring the Impact of ISIS Social Media Strategy*, MIS2 (2018).

<sup>4</sup> Campbell Robertson, Christopher Mele & Sabrina Tavernise, *11 Killed in Synagogue Massacre; Suspect Charged With 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html>.

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J o u r n a l o f T e c h n o l o g y L a w & P o l i c y

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called Gab, which has made a name for itself as a digital free-speech hub for alt-right and conservative voices.<sup>5</sup> Gab confirmed the gunman’s name on his verified account and took it offline after archiving the account to cooperate with law enforcement, disavowing acts of terror.<sup>6</sup> The gunman was charged with 29 counts of federal violence and firearms offenses, including obstructing the free exercise of religious beliefs, a hate crime.<sup>7</sup>

Legal questions remain surrounding hate speech online, including when the government should *or can* legally step in and do something to prevent acts of terror or hate crimes. This Article explores the current legal landscape surrounding access to publishing online, and its benefits and costs for everyday users and private companies. Through a First Amendment lens, as well as other relevant case law, legislation, and regulation, this Article seeks to provide an understanding of the civil liberty implications of how a change in the law or policy would affect the rights of private companies and publishers (such as Facebook, Google, Twitter, or even Gab); and users, both readers and writers of content. This analysis focuses specifically on legal ramifications, protections, and liabilities of major social media outlets and news sites, as well as easily accessible online forums and public-facing websites of hate groups.

Rather than addressing threatening rhetoric, this Article exclusively addresses hate speech. In addition, the emergence of dark web and deep web platforms and communities for hate groups is a separate question within itself. The question of hidden, hate-centered communities comes with deeper legal issues regarding Internet Service Providers (ISPs) among other stakeholders outside the scope of this Article. There are a number of other questions worth asking when analyzing hate speech online, such as the scope of jurisdiction when it comes to a far-reaching Internet, or the privacy of hate speech in non-public and dark or deep web forums—topics that go beyond the scope of the present analysis and warrant further investigation. The First Amendment’s protection of online hate speech directly contrasts with the laws of many other nations in the world, and of international organizations throughout the world, who seek to limit hate speech on the Internet.<sup>8</sup>

Finally, given the discussed missing links in the law, as well as private company policies, the question of what is at stake must be asked. What are the civil liberties

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

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

<sup>7</sup> Complaint at 1, *United States v. Bowers*, No. 18-1396 (W.D. Pa. 2018), <https://www.justice.gov/usao-wdpa/press-release/file/1105371/download>.

<sup>8</sup> *Banks*, *supra* note 2, at 236.

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at stake if we seek to limit one’s ability to speak openly online? It is a difficult, not always precise, three-way balance between protections of political speech, privacy, and safety, and finding this balance is necessary.

## IMMUNITY OF INTERNET COMPANIES AND ONLINE PUBLISHERS

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The Communications Decency Act of 1996 (CDA) was the first notable attempt by Congress to regulate offensive material on the Internet.<sup>9</sup> The Act’s decency provisions were enacted, as it stated, to protect minors from “indecent” and “patently offensive” communications on the Internet.<sup>10</sup> In the 1997 case of *Reno v. ACLU*, the Supreme Court struck down the anti-indecency provisions of the Act.<sup>11</sup> The Court held that content-based blanket restrictions on speech that were overly broad and could not properly be analyzed as regulations of the time, place, and manner of speech are a violation of the First Amendment.<sup>12</sup>

Despite this, Section 230 of the Act was not struck down.<sup>13</sup> This section immunizes a website from liability for the comments of its users and remains a robust mechanism for protecting companies like Facebook, Craigslist, Reddit, and other platforms that rely on comments of its users for its very function.<sup>14</sup> Section 230 states that operators of Internet services are not to be construed as publishers, and thus are not legally liable for the words of third parties who use their services.<sup>15</sup> Critics of Section 230 argue that it has led to Internet companies escaping liability for heinous acts performed by users online such as child exploitation and trafficking.<sup>16</sup> This is a valid concern, and one worth recognizing when exploring unintended consequences of this immunity, however it is beyond the scope of this Article.

Additionally, and importantly for Internet companies, the Act includes a good Samaritan provision that allows a curator or editor of a website or online publication to attempt to edit or limit what is published by other users without destroying their

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<sup>9</sup> Communications Decency Act of 1996, 47 U.S.C.S. § 223(a) (1996) (current version at 47 U.S.C. § 223 (2018)).

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

<sup>11</sup> *Reno v. ACLU*, 521 U.S. 844, 882 (1997).

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

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

<sup>14</sup> Communications Decency Act of 1996, *supra* note 9.

<sup>15</sup> *Id.*

<sup>16</sup> Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J. L. & PUB. POL’Y 553, 553–65 (2018) (arguing that Section 230 was never intended to provide a form of absolute immunity for any and all actions taken by ISPs).

immunity.<sup>17</sup> For example, Facebook employs tens of thousands of content modifiers who review thousands of images each day.<sup>18</sup> Facebook is not going to be held liable if an offensive image somehow pushes its way through the woodwork of thousands of content modifiers and bots, nor will they be held liable if they remove a photo that is *not* actually offensive but still triggers the provocative content machine. Nonetheless, Facebook does have an incentive to make the network a place where people can expect there will not be graphic images while scrolling through their feeds; if it was not a safe place, people would not be on there in mass—1.49 billion daily active users and 2.27 billion monthly active users as of September 2018.<sup>19</sup>

It is this argument that Internet companies and users must rely on, that even though they do not have to remove users, they can. And if they do, they are free from liability for doing so. Section 230 defines Internet culture and how websites can “offer platforms for critical and controversial speech without constantly worrying” about liability.<sup>20</sup> The vast majority of courts have honored Section 230’s immunity, yet sometimes courts are “tempted to hold ‘distasteful’ websites responsible for the speech of their users.”<sup>21</sup>

Without the CDA, online publishers could be held liable in the ways that newspapers hold distributor liability. This means they are responsible for the content of everything they publish, even advertisements, letters to the editor, and wanted ads. In the landmark case of *New York Times v. Sullivan*, the New York Times faced a libel suit for a full-page advertisement carried in a March 1960 edition related to nonviolent civil rights demonstrations in the South.<sup>22</sup> While the New York Times was not found liable under the actual malice test established in this very case, the fact that the New York Times was not the author of the advertisement it had published did not preclude them from possible liability.<sup>23</sup> “If the allegedly libelous statements would otherwise be constitutionally protected from the present judgment,

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<sup>17</sup> *Id.* at 562.

<sup>18</sup> Simon Adler, *Radiolab, Post No Evil*, WNYC STUDIOS (Aug. 17, 2018), <https://www.wnycstudios.org/story/post-no-evil>.

<sup>19</sup> *Facebook Company Information and Data*, FACEBOOK, <https://newsroom.fb.com/company-info> (last visited Dec. 28, 2018).

<sup>20</sup> *Communications Decency Act Section 230*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/free-speech/internet-speech/communications-decency-act-section-230> (last visited Mar. 12, 2018).

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

<sup>22</sup> *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>23</sup> *Id.* at 266 (“That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.”).

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they do not forfeit that protection because they were published in the form of a paid advertisement.”<sup>24</sup> Content that is not written by the publication but published on the publication’s website is immune from liability when compared to content not written by a publication or its staff but published in print. Making practical sense because of the method of curation, the reasoning behind holding a newspaper or print publication liable, but an Internet company not, is that a newspaper is able to thoroughly edit and contemplate what they are publishing. Comments, blogs, user-generated content is not curated in the same way, if at all. Wordpress.com, for example, hosts more than one-third of the world’s websites, hosting 20 billion pages, and 70 million blogposts per month.<sup>25</sup> Wordpress does not author nor make editorial decisions regarding the content of those blogs.<sup>26</sup>

Section 230 of the CDA has been tested over the years as social media has grown. In one profound case, *Zeran v. AOL*, Seattle resident Zeran’s phone number was published next to an offensive advertisement for gimmick T-shirts that made light of the 1995 Oklahoma City Bombing.<sup>27</sup> As one may expect, people called the number on their screens to let Zeran know just how offensive the T-shirts were and just what they thought of him for selling them.<sup>28</sup> The only problem was that Zeran was not the creator of the shirts, nor did he have any idea where the ads came from.<sup>29</sup> He immediately asked AOL to take them down, who attempted to do so, but the ads were re-introduced.<sup>30</sup> This time, a radio show picked up the ads and published Zeran’s number, and then the calls got worse.<sup>31</sup> The Fourth Circuit held in favor of AOL citing Section 230 of the CDA, which states “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>32</sup> The court reasoned:

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

<sup>25</sup> *A Live Look at Activity*, WORDPRESS.COM, <https://wordpress.com/activity/> (last visited Feb. 10, 2019).

<sup>26</sup> *Terms of Service*, WORDPRESS.COM, <https://en.wordpress.com/tos/> (last visited Feb. 10, 2019) (quoting “you are entirely responsible for the content of, and any harm resulting from, that Content or your conduct”).

<sup>27</sup> *Zeran v. AOL*, 129 F.3d 327 (4th Cir. 1997).

<sup>28</sup> *Id.*

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

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

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

<sup>32</sup> Communications Decency Act, *supra* note 9.

[Without the immunity,] computer services would essentially have two choices: (1) employ an army of highly trained monitors to patrol (in real time) each chatroom, message board, and blog to screen any message that one could label defamatory, or (2) simply avoid such a massive headache and shut down these fora. Either option would profoundly chill Internet speech.<sup>33</sup>

In the long run, this protects users because if sites faced heavy burdens of content moderation or liability, they would likely simply shut down and there would be no place to voice important opinions or perspectives, thus lowering the free speech of all.

#### WHEN INTERNET COMPANIES *DO* DECIDE TO TAKE DOWN USERS OR CONTENT

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In September 2018, Twitter joined Facebook and YouTube in banning Alex Jones, right-wing creator of conspiracy theorist website, Infowars.<sup>34</sup> Private online companies such as Facebook, Twitter, Reddit, YouTube, and other curators of content who release users for any reason do so well within their rights.<sup>35</sup> First, most of these platforms, upon account sign-up and consent to terms of service, reserve the right to remove any users.<sup>36</sup> The Twitter User Agreement, for example, states “We reserve the right at all times (but will not have an obligation) to remove or refuse to distribute any Content on the Services, to suspend or terminate users, and to reclaim usernames without liability to you.”<sup>37</sup> But more than simply having contractually consented to rights of removal, the First Amendment only protects citizens against restrictions on their speech *by the government* and government actors.<sup>38</sup> Because “platforms like Facebook or Google are not government actors, the First Amendment simply doesn’t speak to their conduct.”<sup>39</sup> Similarly, users are within their rights to

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<sup>33</sup> *Zeran*, 129 F.3d at 333.

<sup>34</sup> Kate Conger & Jack Nicas, *Twitter Bars Alex Jones and Infowars, Citing Harassing Messages*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/technology/twitter-alex-jones-infowars.html>.

<sup>35</sup> PBS News Hour, *Why kicking Alex Jones off social media is not legally censorship* (PBS Broadcast Aug. 8, 2018) (transcript at <https://www.pbs.org/newshour/show/why-kicking-alex-jones-off-social-media-is-not-legally-censorship>).

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

<sup>37</sup> *Twitter Terms of Service*, TWITTER, [https://cdn.cms-twdigitalassets.com/content/dam/legal-twitter/asset-download-files/TheTwitterUserAgreement\\_1.pdf](https://cdn.cms-twdigitalassets.com/content/dam/legal-twitter/asset-download-files/TheTwitterUserAgreement_1.pdf) (last visited Nov. 18, 2018).

<sup>38</sup> PBS News Hour, *supra* note 35.

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

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put pressure on Twitter and other platforms to remove users, and they often use this power (via Tweets or by reporting offensive, graphic, or hateful content).<sup>40</sup>

“Today, we permanently suspended @realalexjones and @infowars from Twitter and Periscope,” the company posted on its Twitter Safety account.<sup>41</sup> “We took this action based on new reports of Tweets and videos posted yesterday that violate our abusive behavior policy, in addition to the accounts’ past violations.”<sup>42</sup> Twitter was among the last of Jones’ social media outlets to make this decision.<sup>43</sup> Twitter CEO Jack Dorsey said through the platform that the reason he had not been suspended at first was that he had not violated their rules.<sup>44</sup> “We’ll enforce if he does,” Dorsey said.<sup>45</sup> “And we’ll continue to promote a healthy conversational environment by ensuring tweets aren’t artificially amplified.”<sup>46</sup> Dorsey also called on journalists to “document, validate, and refute such [false] information directly so people can form their own opinions. This is what serves the public conversation best.”<sup>47</sup> Eventually however, the platform said he had violated their rules.

As Twitter cited in its announcement of removing Jones, web-based companies have behavior policies which serve as guidelines to making content curation decisions.<sup>48</sup> Similar to the common law, which establishes answers to legal questions of first impression as they are brought up through the courts, guidelines and policies of these websites can often only be modified as situations come up. Facebook, for example, has spent years on perfecting the standards for images related to breastfeeding—definitions and modifications that only arise as unique situations arise as well—and they are still nowhere near perfect.<sup>49</sup> In addition, like many other

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

<sup>41</sup> Twitter Safety (@TwitterSafety), TWITTER (Sept. 6, 2018, 4:47 PM), [https://twitter.com/TwitterSafety/status/1037804427992686593?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Cterm%5E1037804427992686593&ref\\_url=https%3A%2F%2F](https://twitter.com/TwitterSafety/status/1037804427992686593?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Cterm%5E1037804427992686593&ref_url=https%3A%2F%2F)

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

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

<sup>44</sup> Jack Dorsey (@jack), TWITTER (Aug. 7, 2018, 8:11 PM), [https://twitter.com/jack/status/1026984242893357056?ref\\_src=twsrc%5Etfw](https://twitter.com/jack/status/1026984242893357056?ref_src=twsrc%5Etfw).

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

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

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

<sup>48</sup> *Help Center, General Guidelines and Policies, Abusive Behavior*, TWITTER, <https://help.twitter.com/en/rules-and-policies/abusive-behavior> (last visited Mar. 14, 2019).

<sup>49</sup> Adler, *supra* note 18.



platforms, Facebook has policies regarding hate speech.<sup>50</sup> Facebook’s hate speech policies have become more detailed over time, but their main policy is that you cannot attack a person based on a protected characteristic, similar to U.S. discrimination laws.<sup>51</sup> These policies were only recently made public, a subject of previous controversy.<sup>52</sup> Facebook’s Community Standards in regards to hate speech state:

We do not allow hate speech on Facebook because it creates an environment of intimidation and exclusion and in some cases may promote real-world violence. We define hate speech as a direct attack on people based on what we call protected characteristics—race, ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity, and serious disease or disability.<sup>53</sup>

Facebook and similar platforms have these kinds of policies not because they are legally obligated to, but because they want their platforms to be places their 2.2 billion people want to spend their time. If a site like Facebook, which touts community and friendship, is riddled with hateful rhetoric, users may start to drop off. Some argue that the use of hateful rhetoric, divisive content or factually inaccurate posts, have caused many to leave the site. However, Facebook reports growth in users consistently (although it is challenging to say whether the number of *users* reflects numbers actually *using*).<sup>54</sup> The social news aggregation and content sharing site Reddit has proliferated not in spite of its more relaxed content policies on hate speech, but *because of* it. Reddit’s “Unwelcome Content” policy states: “While Reddit generally provides a lot of leeway in what content is acceptable, here are some guidelines for content that is not. Please keep in mind the spirit in which these were written, and know that looking for loopholes is a waste of time.”<sup>55</sup>

The ways in which content may be removed are if it is illegal, “encourages or incites violence,” “threatens, harasses, or bullies or encourages others to do so,” among

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<sup>50</sup> *Community Standards, Objectionable Content, 12: Hate Speech*, FACEBOOK, [https://www.facebook.com/communitystandards/objectionable\\_content](https://www.facebook.com/communitystandards/objectionable_content) (last visited Mar. 14, 2019).

<sup>51</sup> Adler, *supra* note 18.

<sup>52</sup> Josh Constine, *Facebook reveals 25 pages of takedown rules for hate speech and more*, TECH CRUNCH (Apr. 24, 2018), <https://techcrunch.com/2018/04/24/facebook-content-rules/>.

<sup>53</sup> FACEBOOK, *supra* note 50.

<sup>54</sup> *Facebook Company Info and Stats*, FACEBOOK, <https://newsroom.fb.com/company-info> (last visited Dec. 28, 2018).

<sup>55</sup> *Reddit Content Policy*, REDDIT, <https://www.redditinc.com/policies/content-policy>.

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others, not explicitly including hate speech.<sup>56</sup> Sections of Reddit known as Subreddits serve as small communities where conversations are specific to that Subreddit's topic. The alt-right's Subreddit, among other online forums of anonymity and open dialogue, have arguably led to the growth of hate groups in the United States in the last few years.<sup>57</sup> It was not until the display of violence at Charlottesville in August 2017 that Reddit co-founder and chief executive, Steve Huffman, who coincidentally created Reddit from his University of Virginia dorm, began to realize the manifestation of hateful online conversations creating violent and deadly, real-world damage.<sup>58</sup> Despite the pseudonymous usernames of Reddit, the team began working through each forum “espousing white nationalist, racist, xenophobic, misogynistic, and hate speech of other stripes,” while grappling with its own founding free-speech ideology that had in the past made doing so fraught.<sup>59</sup>

While major private companies are free from liability for the content of its users, there are still websites created for the sole purpose of rallying around hate, and the discussion of, motivation to commit, and planning of violent hate crimes. While platforms with massive audiences such as Reddit and Facebook go to great lengths to develop policies surrounding hate speech and hold the authority to take provocative, offensive, or hateful content down, websites focused on strictly hate and the communities surrounding it let hate speech thrive—and they gain respect and greater interaction from its users from letting it do so. In one study, 266 people evaluated 11 white supremacist web pages, and determined that while communicative value of the expression was low, people more commonly perceived the speech as an “indirect, insidious threat rather than ‘imminent’ lawless action.”<sup>60</sup> Study author Laura Leets argues that while short-term messaging seems to fall within First Amendment protections, indirect and long-term effects are questionable.<sup>61</sup> The aggregate of messaging over time could lead to another, greater threat of inciting imminent, lawless action.

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

<sup>57</sup> Keegan Hanks & Alex Amend, *The Alt-Right is Killing People*, S. POVERTY L. CTR. (Feb. 5, 2018), <https://www.splcenter.org/20180205/alt-right-killing-people> (Establishing a connection between posting online in places like Reddit and carrying out violent acts in the real world.).

<sup>58</sup> Christine Lagorio-Chafkin, *How Charlottesville forced Reddit to clean up its act*, THE GUARDIAN (Sept. 23, 2018, 6:00 EDT), <https://www.theguardian.com/technology/2018/sep/23/reddit-charlottesville-we-are-the-nerds-book-extract-christine-lagorio-chafkin>.

<sup>59</sup> *Id.*

<sup>60</sup> Laura Leets, *Responses to Internet Hate Sites: Is Speech Too Free in Cyberspace?*, 6 COMM. L. & POL'Y 287, 287–317 (2010).

<sup>61</sup> *Id.*

One source of trouble is the development of echo-chambers, groups of like-minded people who tend to reinforce one another's views, creating a group polarization that can motivate people to have a false sense of agreement.<sup>62</sup> Where hateful ideas may be kept to oneself historically, online groups pat a person on the back for outrageously hateful ideas. While society tends to join different people of different ideas together, the Internet tends to build communities of the like-minded.<sup>63</sup> The Internet "heightens one's sense of separation from the momentary target of one's venom and, by immersing the user in a community of the like-minded, increases the feeling that the world comes divided into two groups—us and them."<sup>64</sup> In other words, where in reality any dislike may be disproved after confrontation or challenges to one's beliefs, the Internet provides an echo chamber where dislike proliferates.<sup>65</sup> Disdain becomes vitriol, hostility, and hatred.<sup>66</sup> For example, right-wing anti-refugee sentiment on Facebook in Germany was able to predict violent crimes against refugees in municipalities with higher social media usage.<sup>67</sup> One study found that social media can act as a "propagation mechanism between online hate speech and real-life violent crime."<sup>68</sup>

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#### GOVERNMENT INTERVENTION

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When can the government step in? Or, more appropriately, when *should* it step in? There is great tension around the governance of hate speech between those who push for greater government oversight and advocates of letting the Internet regulate itself. There is a delicate balance between privacy, protection, and the importance of free speech, particularly when the concern is that of public interest.

As the current law stands, unless online hate speech crosses that line into the "incitement of imminent lawless action," the speech is protected from government interference by the First Amendment.<sup>69</sup> This standard was laid out in *Brandenburg v. Ohio*, where the Supreme Court held that "the constitutional guarantees of free

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<sup>62</sup> William Fisher, *Freedom of Expression on the Internet*, THE BERKMAN CTR. FOR INTERNET & SOC'Y, HARV. L. SCH., <https://cyber.harvard.edu/ilaw/Speech/> (last updated June 14, 2001).

<sup>63</sup> Delgado & Stefancic, *supra* note 1, at 336.

<sup>64</sup> *Id.* at 337.

<sup>65</sup> *Id.* at 338.

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

<sup>67</sup> Karsten Müller & Carlo Schwarz, *Fanning the Flames of Hate: Social Media and Hate Crime* (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3082972](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082972).

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

<sup>69</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

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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>70</sup> The Court has further held that speech that contains a “true threat” of imminent harm to an identifiable victim is not protected by the First Amendment.<sup>71</sup> Lower courts have been reluctant to prohibit hate speech completely unless the speech resembles a First Amendment exception like the “true threat” exception already in place, or another such as libel and defamation, intentional infliction of emotional distress, among others.<sup>72</sup> The problem with this standard, in an online context, is that the “line” for inciting such action is unclear. Every online comment is different and comes from a different position in a planning process, or may not even be there at all, but simply seeks to strike an offensive chord. A bright line test for whether or not speech is inciting or producing imminent lawless action online is difficult. The hyperbole of one may be the plans of another. While the court has held that an imminence requirement is clear in the real-world, what qualifies as immanency online, what constitutes a true threat, and who is responsible for following it through is unclear.

Web companies are establishing mechanisms for dealing with hate speech, as well as places for users who feel threatened or victimized to report instances for further review. They would not be able to exist without Good Samaritan provisions of the Communications Decency Act Section 230. The provision allows websites to avoid liability that would otherwise cripple them. Users can access websites that do not have offensive or disturbing content because companies have been able to work toward cleaning up their content, employing thousands to help them get there, without fear of liability. These companies are not without fault. People have criticized them in painful ways, for example, the phrase “Indian Savages” in the Declaration of Independence flagged hate speech on Facebook (which was corrected, and apologized for the next day).<sup>73</sup> The whole process of the development of these protocols, parameters, and community standards has been, much like the common law, one of trial, error, success, rinse, and repeat.

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

<sup>71</sup> *Watts v. United States*, 394 U.S. 705 (1969).

<sup>72</sup> Delgado & Stefancic, *supra* note 1, at 340–41.

<sup>73</sup> Eli Rosenberg, *Facebook censored a post for ‘hate speech.’ It was the Declaration of Independence*, WASH. POST (July 5, 2018), [https://www.washingtonpost.com/news/the-intersect/wp/2018/07/05/facebook-censored-a-post-for-hate-speech-it-was-the-declaration-of-independence/?utm\\_term=.ea40670deaba](https://www.washingtonpost.com/news/the-intersect/wp/2018/07/05/facebook-censored-a-post-for-hate-speech-it-was-the-declaration-of-independence/?utm_term=.ea40670deaba).

Advocates of stricter hate speech laws online may think this would help limit the proliferation of hate speech online, and their points are fair. Actual, horrific consequences are happening across the world. But the existence of places where these conversations are taking place—fueled by little logic and flamed by hate without cause—are only fueled by a chilling of speech, they are only given *actual cause* for their rhetoric. As ACLU attorney Lee Rowland put it, people can get “more attention for being silenced than they [do] for trying to peddle actual substantive views.”<sup>74</sup>

In the Per Curiam Opinion of *Watts v. United States*, the Court together referred to the “language of the political arena” as one that is “often vituperative, abusive, and inexact,” but nonetheless protected.<sup>75</sup> Political speech needs to be protected if the argument is one necessary for the public discourse. Hate speech that incites imminent lawless action, even when simply telling others to do so, does not need to, and should not be protected.

At the same time, privacy concerns of users have grown louder. This year, Facebook testified in front of Congress in which they took responsibility for its actions in exposing users’ information and data to Cambridge Analytica.<sup>76</sup> Anonymity online has also held meaningful purpose. There are a number of places that privacy and anonymity online have been powerful tools for users. Websites aimed at addressing mental illness or victims of assault, for example, have helped people come forward, express themselves, and seek help in a way that is saving lives. Anonymity can make this happen. There is also the marketplace of ideas argument—that the option of anonymity was necessary even during the American Revolution, for political discourse to be at its best. On the other hand, the veil of a computer has led to others’ ability to hide behind their anonymity for spreading hateful rhetoric and speak directly to others without showing their faces. Many websites seek to remove anonymity in order for access to its services. The New York Times, for example, publishes the comments of readers who use their real names *first*, calling them Verified, pushing anonymous and pseudonymous comments to the end of the

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<sup>74</sup> Lee Rowland, *Free Speech Can Be Messy, but We Need It*, AM. CIV. LIBERTIES UNION BLOG: SPEAK FREELY (Mar. 9, 2018, 3:15 PM), <https://www.aclu.org/blog/free-speech/free-speech-can-be-messy-we-need-it>.

<sup>75</sup> *Watts*, 394 U.S. at 708.

<sup>76</sup> *Mark Zuckerberg Testimony: Senators Question Facebook’s Commitment to Privacy*, N.Y. TIMES (Apr. 10, 2018), <https://www.nytimes.com/2018/04/10/us/politics/mark-zuckerberg-testimony.html>.

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#### MISSING LINKS

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line.<sup>77</sup> However, the New York Times will be ending its “Verified Commenter” program at the end of 2018.<sup>78</sup>

These two concerns—privacy and political speech—must be balanced with society’s compelling interest in limiting and eliminating violence due to both its axiomatic harm, as well as the “subtle harm created by engendering fear, suspicion, distrust, and alienation.”<sup>79</sup>

Lee Rowland argues that trying to silence or censor political enemies is not strategic and strengthens the force of opponents and hateful people.<sup>80</sup> Rowland writes: “I believe in the First Amendment because it is our most powerful tool to keep the government from regulating the conversations that spark change in the world. If you want to keep having conversations that can change the world, you should embrace the First Amendment too—messiness and all.”<sup>81</sup>

The balance is a challenge to scholars, First Amendment advocates, prosecutors and law enforcement, but is necessary to ensure liberty—and safety. It is this chilling of speech, in fact, that may motivate one to make that final decision to act.

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<sup>77</sup> *Policy on Comments*, N.Y. TIMES, <https://help.nytimes.com/hc/en-us/articles/115014792387-Comments> (last visited Nov. 19, 2018).

<sup>78</sup> *Id.*

<sup>79</sup> John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539, 546 (2006).

<sup>80</sup> Rowland, *supra* note 74.

<sup>81</sup> *Id.*