

**INTERNET ACCESS, HATE SPEECH AND THE FIRST  
AMENDMENT**

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**I. THE PROBLEM OF ACCESS AND HATE SPEECH ON THE  
INTERNET**

When I wrote *Access to the Press-A New First Amendment Right*,<sup>1</sup> I did not expect that it would attract the attention that it did. The idea of a right of access to the media was met with considerable interest and even some acceptance. I remember that Walter Cronkite mentioned the article on the CBS Evening News. To the young law professor that I then was, all of it was a great surprise, and a welcome one. A less welcome surprise was the reactions I received from some racists across the country. They reasoned that if access to the media became a right, then their bigoted notions on race and religion would at last secure entry to the mass media. In short, a right of access would give hate speech a way to enter the mass media.

The problem of how to deal with hate speech has become an even more difficult problem with the advent of the Internet. We know the recent shootings in Charleston, Pittsburgh and El Paso were perpetrated by young men who had been incited by hate speech posts and websites.

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<sup>1</sup> 80 HARV. L. REV. 1641 (1967).

The connection of those shooters with hate speech messages on social media platforms merits our attention. It is, therefore, worth exploring these tragedies from the perspective of their connection with the Internet. On June 16, 2015, a 21-year-old white supremacist entered a historic African American church in Charleston, South Carolina. He prayed with the parishioners, then pulled out his handgun. He shot and killed 9 people, including the pastor of the church, and injured many others.<sup>2</sup> Reflecting three years later on the mass shooting in Charleston, a Washington Post journalist, Rachel Hatzipanagos, observed that social media is used by white supremacists in order to more widely disseminate their message of hate online. She points out that when the message “reaches certain people, the online message can turn into real life violence.”<sup>3</sup> She expresses what happens quite succinctly: “[W]hen online hate goes offline, it can be deadly.”<sup>4</sup>

A middle-aged white supremacist entered a synagogue in Pittsburgh, Pennsylvania in October 2018 and killed 11

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<sup>2</sup> See Jason Horowitz, Nick Corasanti & Ashley Southall, *Nine Killed in Shooting at Black Church in Charleston*, N.Y. TIMES, (June 17, 2015), <https://www.nytimes.com/2015/06/18/us/church-attacked-in-charleston-south-carolina.html>.

<sup>3</sup> Rachel Hatzipanagos, *How online hate turns into real life violence*, WASH. POST, (Nov. 30, 2018, 2:31 AM EST), <https://www.washingtonpost.com/nation/2018/11/30/how-online-hate-speech-is-fueling-real-life-violence/>.

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

members of the congregation. But before he did so, “he posted one last message online.”<sup>5</sup> He did not file his message on Facebook or Twitter but on Gab, “a social media network that has become a forum for racist extremists.”<sup>6</sup> After the shooting at the synagogue, Gab went offline because its “service providers suspended accounts and threatened to shut the website down.”<sup>7</sup> A message on Gab.com indicated that the website would not be accessible for a while “as the site shifts to a new hosting service provider.”<sup>8</sup> The hosting provider gave Gab “24 hours to [switch providers]” and stated that Gab had “violated its terms of service.”<sup>9</sup> It is hard to suppress the thought that it would have been better for all if the host provider had acted sooner.

This year, on an August Saturday, a young white male in his twenties entered a Walmart in El Paso, crowded with Hispanic shoppers, and fired an AK-47 style rifle. Twenty-two people were killed and others were injured. According to an arrest warrant affidavit, the suspect told the police: “I’m the

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<sup>5</sup> Kevin Roose, *On Gab, An Extremist Friendly Site, Pittsburgh Shooting Suspect Aired His Hatred in Full*, N.Y. TIMES (Oct. 28, 2018), <https://www.nytimes.com/2018/10/28/us/gab-robert-bowers-pittsburgh-synagogue-shootings.html>.

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

<sup>7</sup> Brett Molina, *What is Gab, the fringe social network used by Pittsburgh shooting suspect?*, USA TODAY (Oct. 29, 2018), <https://www.usatoday.com/story/tech/nation-now/2018/10/28/pittsburgh-synagogue-shooting-what-gab-fringe-site-used-suspect/1798862002/>.

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

<sup>9</sup> Roose, *supra* note 5.

shooter.” He “admitted targeting Mexicans in the attack.”<sup>10</sup> Just before firing the shooter posted a four-page, anti-immigrant manifesto on the Internet. The manifesto declared his support for the man who killed fifty-one people in a Mosque in Christchurch, New Zealand. The manifesto also expressed “his fear about Hispanic people gaining power in the United States.”<sup>11</sup> It should be noted that the Christchurch, New Zealand shooter had announced his attack on the same website used by the Charleston shooter. National security expert Juliette Kayyem, at Harvard University’s Kennedy School of Government, has written concerning the El Paso Walmart massacre that “white supremacist terrorism has what amounts to a dating app online,” which brings “like-minded individuals together through social media platforms and more remote venues.”<sup>12</sup> These platforms “exist to foster rage.” This paper seeks to examine how First Amendment law wrestles with this problem.

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<sup>10</sup> Rebecca Falconer, *El Paso suspect confessed to targeting Mexicans in mass shooting*, AXIOS (Aug. 9, 2019), <https://www.axios.com/el-paso-shooting-what-know-far-d9fa3faf-76b7-4c4b-95ef-7e1d5c97359a.html>.

<sup>11</sup> Simon Romero, Manny Fernandez & Mariel Padilla, *Day at a Shopping Center in Texas Turns Deadly*, N.Y. TIMES (Aug. 3, 2019), <https://www.nytimes.com/2019/08/03/us/el-paso-walmart-shooting.html>.

<sup>12</sup> Juliette Kayyem, *There are no lone wolves*, WASH. POST (Aug. 4, 2019), <https://www.washingtonpost.com/opinions/2019/08/04/there-are-no-lone-wolves/>.

When I argued for a right of access to the media, entry for speech could in the main only be accomplished at the sufferance of the gatekeepers to what were then the dominant vehicles for the transmission of ideas—local radio and television stations, radio and tv networks, and the daily newspapers. All these media had one thing in common: they had editors. Access was a matter of editorial discretion. Technology accomplished what I had hoped law would be able to do—give each individual access to the media. Elsewhere I have described what the Internet has done for access.<sup>13</sup>

Technology has done for access what law had refused to do. Today, individual access is possible on a scale that was unfathomable forty years ago. The Internet, whose very mode is access, has transformed our world. The Internet has transformed our lives and I would say mostly for the better. But one of the negatives is that the universal access which it affords has confronted us with the problem of hate speech.

The power that the Internet has given to hate speech can be seen if we measure the number of people affected by hate

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<sup>13</sup> Jerome A. Barron, *Access to the Media—A Contemporary Appraisal*, 35 HOFSTRA L. REV. 937, 950 (2007).

speech in the Age of the Internet. Professor David Hudson has called attention to the contemporary scale of hate speech:<sup>14</sup>

The Anti-Defamation League reported that from August 1, 2015, through July 31, 2016, there were more than 2.6 million tweets it considered anti-semitic, with nearly 20,000 of them aimed at journalists. And after the 2016 election, the Southern Poverty Law Center compiled data from more than 1,800 extremist Twitter accounts and noted a rise in anti-Muslim images and memes between November 8 and December 8. Twitter later suspended some of those accounts.

47 U.S.C § 230.

Unlike the publishers of traditional media, internet service providers are freed from liability for the content they transmit. A federal statute, 47 U.S.C. § 230(c), makes this possible.<sup>15</sup> The theme of § 230 is to free online providers from liability from whatever harmful effects that flow from the

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<sup>14</sup> See David Hudson, *Social Clashes—Digital Free Speech is a Hot Legal Battleground*, A.B.A. JOURNAL, (Apr. 1, 2019, 12:05 AM CDT), <http://www.abajournal.com/magazine/article/social-clashes-digital-free-speech>.

<sup>15</sup> (c) Protection for “Good Samaritan” blocking and Screening of Offensive Material

- (1) Treatment of Publisher or Speaker  
No 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.
- (2) Civil Liability  
No provider or user of an interactive computer service shall be held liable on account of--
  - (A) any action voluntarily taken in good faith to restrict access to or availability of material that they provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
  - (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (2).

content published by the entities they host. Section 230 has been interpreted broadly by the courts. In *Force v. Facebook*,<sup>16</sup> U.S. citizens who were victims of a Hamas attack in Israel, relying on federal anti-terrorism law, brought suit against Facebook for facilitating the attack. They alleged that Facebook was liable for providing a platform to advance terrorist objectives of Hamas. Relying on Sec. 230, the federal district court dismissed the suit and a divided panel of the United States Court of Appeals for the Second Circuit, relying entirely on § 230, rejected the appeal. Judge Katzmann, speaking for the Second Circuit panel, stated “In light of Congress’s objectives, the Circuits are in general agreement that the text of Sec. 230(c)(1) should be broadly construed in favor of immunity.”<sup>17</sup>

Generally, under § 230 the harmful effects of content that appear on the Internet do not subject the internet service provider to liability. 47 U.S.C. § 230 has some exceptions. The provision states it has no effect on criminal law, intellectual property law, communications privacy law, or sex trafficking law. Suppose, however, an additional exception for hate speech

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<sup>16</sup> 304 F. Supp. 315 (E.D.N.Y. 2018).

<sup>17</sup> *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019).

were added to 47 U.S.C. § 230.<sup>18</sup> This exception would be for online hate speech likely to incite violence against individuals or groups because of their race, religion or ethnicity. Would inclusion of such an exception be consistent with the First Amendment?

## II. THE SUPREME COURT AND HATE SPEECH

I suppose it could be asked at this point: Instead of adding another exemption to § 230, why not deal with the matter directly? Why not enact a federal law that prohibits the dissemination of hate speech on the Internet? The Supreme Court has dealt with the problem of hate speech in a number of cases. But, there is not much encouragement in Supreme Court case law for those who are interested in drafting hate speech laws. The demands of the First Amendment law in this area are rigorous. However, the true threat doctrine of *Virginia v. Black*<sup>19</sup> might be helpful in drafting such legislation.

### *A. The True Threat Doctrine*

In *Virginia v. Black*, Justice O'Connor declared for the Court that there were some "categories of expression" which government could regulate "consistent with the Constitution."<sup>20</sup> Such a category is expression which constitutes a "true threat."

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<sup>18</sup> 47 U.S.C. § 230(2)(e) (2018).

<sup>19</sup> 538 U.S. 343 (2003).

<sup>20</sup> *Id.* at 358.

Justice O'Connor then set forth a definition of a true threat.<sup>21</sup> “[S]tatements where the speaker means to communicate a serious expression of an intent to commit [an] act of unlawful violence to [a] particular individual or [a] group of individuals . . . . Intimidation in the constitutionally proscribable sense of the word is a type of true threat.”

I have emphasized the word “group” here because at common law group defamation was not actionable. Of course, *Virginia v. Black* was not a defamation case but a criminal case. However, defamation of libel of a racial or religious group in American law has long been deemed not actionable because racial or religious groups were too large and too amorphous. But if the circumstances are such that intimidation of a racial or religious group can meet the definition of a true threat, then perhaps it is possible to fashion a hate speech law which passes First Amendment muster.

Speech critical of racial and religious groups is deemed protected under our First Amendment law.<sup>22</sup> The Supreme Court decision in *Virginia v. Black*<sup>23</sup> doesn't change this. But the “true threat” doctrine does create an exception to this principle

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<sup>21</sup> *Id.* at 359–60 (emphasis added).

<sup>22</sup> See generally *id.*

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

in our First Amendment law.<sup>24</sup> Justice O'Connor observed that the rationale for the "true threat" doctrine can be found in some of the language from *R.A.V. v. City of St. Paul*.<sup>25</sup> The rationale is to protect "*individuals* from the fear of violence" and "from the disruption that fear engenders" as well as from the possibility of the threatened violence.<sup>26</sup>

Is the "true threat" doctrine a sufficient basis for the enactment of a state or federal hate speech law? Perhaps it could be. However, Justice O'Connor's opinion focuses on the KKK and its use of a burning cross as a symbol of intimidation. Indeed, *Virginia v. Black* may be viewed as applying just to symbols such as cross burnings and swastikas, which come with a history of violence and intimidation.

Hate speech on the Internet is a relatively recent phenomenon in the history of free speech in the United States. However, hate speech or group defamation, as it was called earlier, has been with us for a long time. Earlier Supreme Court cases that dealt with group defamation reaching

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

<sup>25</sup> 505 U.S. 377, 388 (1992).

<sup>26</sup> *Black*, 538 U.S. at 360 (emphasis added).

essentially opposite holdings are *Terminiello v. City of Chicago*,<sup>27</sup> and *Beauharnais v. Illinois*.<sup>28</sup>

*B. Terminiello v. City of Chicago*

In *Terminiello*, a Catholic priest under suspension from his Bishop, gave a violently anti-semitic speech in a Chicago auditorium to the Christian Veterans of America. Furthermore, Terminiello attacked President Roosevelt and Eleanor Roosevelt. There were 800 people in the auditorium and 1,000 angry protesters outside. Police were unable to keep order and arrested Terminiello for violating a city ordinance that provided that “misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm.”<sup>29</sup> The Illinois state courts upheld the conviction, but the Supreme Court, 5-4, per Justice Douglas, reversed. Justice Douglas used the very words of the ordinance to define the grand purpose of the First Amendment.

Justice Douglas acknowledged that Terminiello in his speech inside the auditorium “condemned the conduct of the crowd outside and vigorously, if not viciously, criticized

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<sup>27</sup> 337 U.S. 1 (1949).

<sup>28</sup> 343 U.S. 250 (1952).

<sup>29</sup> *Terminiello*, 337 U.S. at 3.

various political and racial groups.”<sup>30</sup> Terminiello’s speech “stirred people to anger, invited public dispute, or brought about a condition of unrest.”<sup>31</sup> But that, Justice Douglas said, was exactly what the First Amendment was supposed to invite and protect. A conviction based upon such grounds was inconsistent with the First Amendment and, therefore, the conviction must be set aside.

Justice Jackson, dissenting, said that “in the abstract”<sup>32</sup> no one would disagree with the First Amendment principles set forth in Douglas’s majority opinion. But Justice Jackson observed that there is only a “passing reference to the circumstances of Terminiello’s speech”<sup>33</sup> in Douglas’s opinion. He complained that the matter was adjudicated as if Terminiello was “a modern Demosthenes practicing his Phillipics on a lonely seashore.”<sup>34</sup> But that was not the case. Terminiello gave a speech “that provoked a hostile mob and incited a friendly one, and threatened violence between the two.” He complained that Douglas had “a conception of freedom of speech so rigid as to tolerate no concession to

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

<sup>31</sup> *Id.* at 5.

<sup>32</sup> *Id.* at 13 (Jackson, J., dissenting).

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

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

society's need for public order.<sup>35</sup> In *Terminiello*, Justice Jackson made some comments which are applicable in the Age of the Internet:<sup>36</sup>

In the long run, maintenance of free speech will be more endangered if the population can have no protection from the abuses which lead to violence. No liberty is made more secure by holding that its abuses are inseparable from its enjoyment . . . [I]f the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

In the space of just a few years hate speech on the Internet has been associated with mass shootings in places as different and far apart as a church in Charleston, a synagogue in Pittsburgh and a Walmart in El Paso. In each situation, the perpetrator was influenced, motivated, or incited by hate speech on the Internet.

### C. *Beauharnais v. Illinois*

In the United States, our respect for the First Amendment makes it difficult to deal with speech which vilifies particular racial, religious, and ethnic groups. A consideration of what we call today hate speech is *Beauharnais v. Illinois*.<sup>37</sup> The Supreme Court, 5-4, per Justice Frankfurter, upheld a 1949

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

<sup>36</sup> *Id.* at 36–37.

<sup>37</sup> 343 U.S. 250 (1952).

Illinois criminal libel law which made it a crime to exhibit in a public place a publication which

portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots [.]<sup>38</sup>

Joseph Beauharnais was convicted under the statute for distributing a racist leaflet. Beauharnais was President of an organization called the White Circle League which distributed lithograph leaflets and publications defaming and denigrating Negroes, and advocating for segregation. In addition, the leaflet distributed by Beauharnais contained hateful anti-Negro sentiments. The leaflet set forth a petition to the Mayor and City Council of Chicago “to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro[.]”<sup>39</sup> Beauharnais distributed the leaflets on the streets of Chicago.

Joseph Beauharnais unsuccessfully contended that the Illinois law under which he was convicted violated his constitutionally protected right of freedom of speech. Justice Frankfurter, speaking for the Court, upheld the constitutionality

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<sup>38</sup> *Id.* at 251 (quoting § 224a of Division 1 of the Illinois Criminal Code, Ill. Rev. Stat. 1949, c. 38, § 471).

<sup>39</sup> *Id.* at 252.

of the Illinois statute on the basis of several theories, one of which I have called elsewhere the human dignity theory.<sup>40</sup> Justice Frankfurter said that it was beyond judicial competence<sup>41</sup> “to confirm or deny claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community.”

Justice Frankfurter used the human dignity theory in *Beauharnais* when he declared that the Illinois legislature could<sup>42</sup> “warrantably believe that a man’s job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits.” In light of this, the Court could not deny “that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved.”<sup>43</sup>

Justice Black, joined by Justice Douglas, dissented. Reaching back into British history, Justice Black pointed out that the Bill of Rights of 1689 had proclaimed “the Right of the

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<sup>40</sup> See JEROME A. BARRON & C. BARRON DIENES, *FIRST AMENDMENT LAW IN A NUTSHELL* (5th ed. 2018).

<sup>41</sup> *Beauharnais*, 343 U.S. at 263.

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

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

Subjects to petition the King, and all Commitments and Prosecutions for such petitioning [for the same] are illegal.”<sup>44</sup> Beauharnais and his group were similarly trying to petition the elected representatives.

Justice Black said that labeling the Illinois law at issue a “group libel law” may make the law “more palatable for those who sustain it” but such “sugar-coating does not make the censorship less deadly.”<sup>45</sup> The law of criminal libel provided “for punishment of false, malicious, scurrilous charges against individuals, not against huge groups.”<sup>46</sup> The dissenters said the Illinois law, established a system of state censorship “which is at war with the kind of free government envisioned by those who forced the adoption of our Bill of Rights.”<sup>47</sup>

Time has not been kind to the *Beauharnais* decision. Fourteen years after that decision, in *Garrison v. Louisiana*,<sup>48</sup> Justice Douglas, concurring, took the position the *Beauharnais* should be treated as a discredited decision which should be overruled. He described it as a case which was “decided by the narrowest of margins.” Furthermore, he argued that the case

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<sup>44</sup> *Id.* at 267–68 (Black, J., dissenting).

<sup>45</sup> *Id.* at 271.

<sup>46</sup> *Id.* at 272.

<sup>47</sup> *Id.* at 274.

<sup>48</sup> 379 U.S. 64 (1964).

“should be overruled as a misfit in our constitutional system and as out of line with the dictates of the First Amendment.”<sup>49</sup>

*D. Hate Speech—A Protected Speech Category?*

Cases like *Terminiello* and *Beauharnais* show us that the question of how law should treat racist speech is not a new problem. What is interesting about looking at these two cases is that they yielded conflicting results. Today the views of Justices Black and Douglas would likely prevail in the Supreme Court, but not those of Justices Frankfurter and Jackson. Basically, Justice Frankfurter in *Beauharnais* had ruled that the states could experiment and enact a statute to prohibit group libel or hate speech. Justice Black spoke with great passion against the idea:<sup>50</sup>

[N]o legislature is charged with the duty or vested with the power to decide what public issues Americans can discuss. In a free country that is the individual's choice, not the state's. State experimentation in curbing freedom of expression is startling and frightening doctrine in a country dedicated to self-government by its people.

Indeed, in recent years, the Supreme Court has been very clear that it is averse to creating new categories of unprotected speech. In three cases it has rejected legislation which would have prohibited or punished the following: (1)

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<sup>49</sup> *Id.* at 82 (Douglas, J., concurring).

<sup>50</sup> *Beauharnais*, 343 U.S. at 270 (Black, J. dissenting).

depiction of cruelty to animals for commercial purposes, *U.S. v. Stevens*;<sup>51</sup> (2) the sale or rental of violent video games to minors, *Brown v. Entertainment Merchants Association*;<sup>52</sup> and (3) making false representations that an individual has been awarded U.S. military decorations or medals. *U.S. v. Alvarez*.<sup>53</sup>

As I consider the problem of hate speech, I do so under the backdrop of these cases. Yet I also think back to the facts in *Terminiello*. The scenario there involved a speech with an audience of 800 inside an auditorium in Chicago and a crowd of 1,000 protesters outside. What is the reach of a hate speech website today? Its geographic reach is staggering. A hate speech website whose operators live in the United States can reach individuals everywhere in the nation and, as the shooting in the Mosque in Christchurch, New Zealand illustrates, anywhere in the world.<sup>54</sup>

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<sup>51</sup> 559 U.S. 460 (2010).

<sup>52</sup> 564 U.S. 786 (2011).

<sup>53</sup> 567 U.S. 709 (2012).

<sup>54</sup> Not all hate speech on the Internet is directed at racial and religious groups. In *Dumpson v. Ade*, Judge Rosemary M. Collyer awarded over \$700,000 in compensatory and punitive damages and attorneys fees to Taylor Dumpson, the first African-American student government President at American University for injury suffered because of online hate speech. *Dumpson v. Ade*, 2019 WL 3767171 (D.D.C. Aug. 9, 2019). The suit was brought by her against three defendants, Bryan Ade, Andrew Anglen, and Moonbase Holdings, Inc., who operated a white supremacist website. *Id.* at \*1. One of the defendants urged his online followers on the website to “troll storm” Ms. Dumpson. *Id.* After receiving a barrage of vicious racist messages, “Ms. Dumpson began fearing for her life and suffering physically and mentally.” *Id.* at \*4. The Court concluded that Ms. Dumpson asserted well-pleaded claims against the defendants for interference with places of public accommodation and an educational institution under the D.C. Human Rights Act and for intentional infliction of emotional distress under D.C. law. *Id.* at \*4–5.

### III. TOWARDS A REMEDY

I am not proposing that hate speech as a category should be deemed an unprotected category of speech. I am proposing instead that those who control the Internet platforms on which hate speech websites and postings are published should have to take responsibility for allowing these messages to appear on their platforms. I am asking that the protection from liability, and therefore, the escape from responsibility, that they are now afforded by § 230 should be removed.

#### A. R.A.V. and Fighting Words

In the event that the amendment to § 230 that I propose is enacted, a question arises whether it would survive a First Amendment-based challenge. Certainly, the Supreme Court's decision in *R.A.V. v. St. Paul*<sup>55</sup> would be relied on in such a challenge to support the unconstitutionality of such an amendment. *R.A.V.* dealt with a St. Paul, Minnesota ordinance which criminalized placing certain symbols such as a burning

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The defendants failed to file an answer to plaintiff's complaint or, indeed, to otherwise respond to it in any way. *Id.* at \*4. Therefore, the Court entered a default judgment against the defendants for both damages and injunctive relief. *Id.* at \*9. The legal claims asserted by the plaintiff for the online hate speech engaged in by the defendants are illustrative of remedies that may be sought by individuals, or groups, for Internet "troll storms" directed against them. However, since the defendants did not respond to the complaint, the Court did not deal with defenses that otherwise would have been made such as reliance on 47 U.S.C. § 230 and the First Amendment. Whether her suit would have been successful if these defenses had been made is an open question. Since the defendants did not file an answer to the complaint the Court had no occasion to discuss them.

<sup>55</sup> 505 U.S. 377 (1992).

cross or a swastika on public or private property. The defendant had been convicted under the ordinance for placing a burning cross on a black family's yard. The ordinance had been given a savings construction by the Minnesota Supreme Court limiting it to fighting words, an unprotected protected category of expression.<sup>56</sup> The ordinance was limited to fighting words that provoke violence "on the basis of race, color, creed, religion or gender[.]"<sup>57</sup>

The *R.A.V.* Court held, 5-4, per Justice Scalia, that the ordinance was facially unconstitutional because it discriminated against speech content and was fatally under-inclusive. In Justice Scalia's view, the fact that it involved an unprotected category of speech—fighting words—did not save the ordinance. Unprotected categories of speech such as fighting words were not "entirely invisible to the [First Amendment]." The problem the ordinance presented was that it was too selective. The St. Paul ordinance singled out only fighting words which were based on race, color, creed, religion, or gender. The ordinance did not reach fighting words directed to one's political views, union activity, or sexual orientation.

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<sup>56</sup> *Id.* at 381 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

<sup>57</sup> *Id.* at 380.

St. Paul argued the ordinance was necessary to avoid discord and division among its citizens. Therefore, using the strict scrutiny standard to evaluate the ordinance, it served a compelling governmental interest, *i.e.* harmony among its people. However, the Court rejected this argument because there was a content-neutral alternative to St. Paul—that was to proscribe all fighting words.

The four dissenters relying on the overbreadth doctrine concurred with the judgment of the Court that the St. Paul ordinance was invalid. But they sharply disagreed with the Court's rationale. Justice White, concurring, rightly objected that the result obtained by Justice Scalia's analysis would be to reduce the total volume of speech and would do so unnecessarily. To meet the analysis put forth by Justice Scalia the ordinance would have to be broadened to include fighting words about union affiliation, party membership and sexual orientation. But these issues were not the problems St. Paul was confronting. The problem St. Paul was confronting involved a single problem—about race.

Justice Stevens, concurring, noted that the Court objected to “the ‘all-or-nothing-at-all’ nature of the categorical

approach[.]”<sup>58</sup> By this he meant that Justice Scalia objected to the notion that all fighting words are immune from First Amendment. Yet at the same time, Justice Scalia “promptly embraces an absolutism of its own: Within a particular ‘proscribable’ category of expression, the Court holds, a government must either proscribe *all* speech or no speech at all.”<sup>59</sup>

*B. Wisconsin v. Mitchell*

*R.A.V.* was significantly distinguished in *Wisconsin v. Mitchell*.<sup>60</sup> In that case a Wisconsin statute provided for enhanced criminal penalties when the victim of a crime was chosen because of his race. The victim was a white boy who was severely beaten by a group of black men and boys. Pursuant to Wisconsin’s law imposing enhanced criminal penalties for racial bias, a crime which would have merited a two-year sentence was expanded to seven years because the victim was selected because of his race. The Wisconsin Supreme Court held that the enhanced penalty law was overbroad and that it punished “offensive thought.”<sup>61</sup>

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<sup>58</sup> *Id.* at 419.

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

<sup>60</sup> 508 U.S. 476 (1993).

<sup>61</sup> *Id.* at 482.

The Supreme Court, per Justice Rehnquist, reversed the Wisconsin Supreme Court and upheld the Wisconsin enhanced penalties law. Justice Rehnquist ruled that *R.A.V.* was not on point. The Wisconsin law went beyond punishing expression and punished the underlying conduct. The defense, however, had contended that the rationale behind the law for enhancing the criminal penalties was the perpetrator's motive in selecting the victim which was racial bias.

The Court agreed that a person could not be punished for his abstract beliefs but then observed that motive was, after all, an important factor in determining penalties for criminal conduct. The crime the defendant was being punished for was criminal physical assault and the penalty for that is two years. Yet, when the motive for the crime, racial bias, is considered then the penalty is enhanced to seven years. Furthermore, it is also apparent that the defendant had a racist viewpoint. It seems pretty clear from *R.A.V.* that Justice Scalia believed that racial bias is a viewpoint and as such it receives First Amendment protection. Yet it is at least arguable that the defendant in *Wisconsin* was punished for his racially biased viewpoint.

Hate speech in the form of a burning cross in a black family's backyard is terrifying. But hate speech on a social media platform can be even more terrifying. The interactivity of a social media platform, the camaraderie that it engenders, and the rage that it fosters, provide a means of radicalization unknown to the more traditional media. This proposal removes operators of Internet platforms from the immunity from harms flowing from hate speech which would otherwise be provided by § 230. It does not criminalize anything. The result of this amendment to § 230 would place responsibility on the operators of Internet platforms for the hate speech that appears on those platforms. Hopefully, the result will be to diminish the volume of hate speech on the Internet.