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THREATS, HARASSMENT, AND HATE ON-LINE: RECENT DEVELOPMENTS

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I. INTRODUCTION

The Internet, probably the most powerful communication tool in the world, has gone mainstream and is growing at a rapid pace. As a medium, it has created many new and exciting possibilities for both business and individual; indeed, it already has revolutionized the way in which we communicate. The Internet allows people to connect with others around the world to exchange ideas and information for very little cost. For many, the advantage of having access to the tremendous volume of information that the Internet offers easily outweighs the cost of going on-line. The Internet allows people to connect with others around the world to exchange ideas and information for very little cost.

Reputable businesses and individuals, however, are not the only groups taking advantage of the Internet. The Net's characteristics make it the ideal tool for harassment, threats, and the dissemination of hateful messages. The Net attracts these individuals because of its ability to distribute massive amounts of information quickly and anonymously. As traditional misdemeanor offenses occur on-line they can have a serious impact, raising new First Amendment issues. This article explores some specific uses of the Net, some criminal and some not, that have emerged in recent years.

II. HARASSMENT

Cyberspace offers previously unavailable harassment possibilities. The potential for instantaneous, inexpensive, worldwide communication can magnify what would otherwise be simply irresponsible behavior. Prior to the advent of this technology, acts of harassment could reach only a limited number of people. Word of mouth, mail, and even publication in a newspaper pale in comparison to the potential numbers of people one can reach through cyberspace.

William White, an eighteen-year-old student at the University of Maryland, summed up the philosophy of many Internet users when he stated, "You should be able to write what you want on the Internet, whether it's true or not."¹ White had heard that a fellow student was being mistreated at home. Although he re-

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¹ Todd Shields & Scott Bowles, *Over the Line On-Line: Family Put Under Siege; Student Message Elicits Angry Calls to Md. Home*, WASH. POST, Feb. 14, 1996, at A01.

ceived the information from someone who had attended a confidential support group with the girl, he felt compelled to act.² He posted the family's name and telephone number on eleven newsgroups dedicated to civil liberties, child welfare, and left-wing politics, accusing the girl's mother of mistreating her daughter. White claimed that the girl was not allowed to leave her house except for school and work, not allowed to have any friends, and was fed only peanut butter and jelly sandwiches.³ The message urged readers to "[call the mother] at home and tell her you are disgusted and you demand that she stop."⁴ The resulting deluge of calls shocked family members who were unaware that their private difficulties had been made public.⁵

Internet users routinely publish comments on-line with little concern for laws that regulate libel, slander, and harassment, exemplified by White's nonchalant reaction to his message. Eventually, White posted two follow-up messages that asked readers to stop calling the house.⁶ He boasted that the girl's mother "had a nervous breakdown, characterized by extreme paranoia, fear and shock," and thanked the Internet community for responding so quickly.⁷

III. SEXUAL HARASSMENT

One of the most common occurrences on the Internet is sexual harassment⁸ of

² See *id.*

³ See Todd Shields & Scott Bowles, *Family Harassed After Internet "Child Abuse" Posting*, CHI. SUN TIMES, Feb. 14, 1996, at 30.

⁴ Scott Bowles & Todd Shields, *Internet Posting Draws Calls, Threats*, THE SEATTLE TIMES, Feb. 14, 1996, at A1.

⁵ See *id.*

⁶ See Shields and Bowles, *supra* note 1.

⁷ *Id.*

⁸ See *Meritor v. Vinson*, 477 U.S. 57 (1986). In this landmark case the United States Supreme Court found that in an employment context, unwelcome sexual advances that create an offensive or hostile environment constitute sex discrimination and violate Title VII of the Civil Rights Act of 1964. See *id.* at 26-30. The Court in *Meritor* confirmed that a violation of Title VII may be predicated on either of two types of sexual harassment: (1) harassment that involves the conditioning of employment benefits on sexual favors; and (2) harassment that, while not affecting economic benefits, creates a hostile or offensive working environment. See *id.* See also *Harris v. Forklift*, 510 U.S. 17 (1993), for a further refinement of the doctrine of workplace sexual harassment. *Harris* held that "to be actionable as 'abusive work environment' harassment, conduct need not 'seriously affect [an employee's] psychological well-being' or lead plaintiff to 'suffer injury.'" *Id.* This affects on-line communications in two ways. First, in an employment context, pornographic materials which an employee downloads in the workplace that are found to create a "hostile environment" could render the employer liable on a charge of sexual harassment. Second, extrapolating from the doctrine of sexual harassment elucidated in *Meritor* and *Harris*, the principle that is most appropriately applied to the harassment of individuals on-line, i.e., that they are experiencing *unwanted sexual advances*, also applies in cyberspace sexual harassment situations. There is, however, no employer-employee relationship in the on-line context and the factor of not being able to escape the unwanted

women, perhaps because women are disproportionately underrepresented in cyberspace. There are estimates that sixty to eighty-five percent of Internet users are male.⁹ The reported instances of sexual harassment have increased, however, with the growing numbers of women on-line.¹⁰ Some compare cyberspace to a "high-tech dating scene" with a "locker room" mentality.¹¹ This "boy's club" atmosphere has led to the posting of offensive and threatening commentary.¹² Consequently, women who enter chatrooms¹³ may find themselves bombarded by derogatory comments, propositions, and questions relating to sex.¹⁴

The Internet allows an individual to create an on-line persona with little relationship to his or her real-life identity. The facelessness of cyberspace lends itself to extreme forms of expression and allows people to say things that they might never say face-to-face. Susan Herring, an associate professor at the University of Texas, Arlington, has studied the way men and women communicate electronically. She concludes that men are more belligerent on-line and are more likely to use angry and abusive language.¹⁵ She derives such conclusions from the different socialization of men and women. Men tend to behave more aggressively and women more politely.¹⁶

The case of a Houston woman is not unusual. As a novice Net user who experimented in chatrooms, she received e-mail asking if she was interested in "cybersex."¹⁷ She responded with an angry message and as a result her mailbox was filled with pornographic e-mail.¹⁸

advantages is missing in the on-line situation. Thus, the remedy for anyone experiencing sexual harassment, or more specifically, *repeated, unwanted sexual advances* on-line should replicate the relief sought by those harassed by mail or by telephone, which take the form of criminal statutes prohibiting harassment. See 47 U.S.C.A. § 223 (West 1991 & Supp. 1996); ALA. CODE § 13A-11-8 (1994 & Supp. 1996); CONN. GEN. STAT. ANN. § 53a-183 (West 1994 & Supp. 1996); GA. CODE ANN. § 16-11-39.1 (1996); 720 ILL. CPMP. STAT. ANN. 135/1-1 (West 1993); LA. REV. STAT. ANN. § 14:285 (West 1996); N.Y. PENAL LAW § 240.30 (McKinney 1989 & Supp 1996-97); OR. REV. STAT. § 166.090 (1995); and WASH. REV. CODE ANN. § 9.62.230 (West 1988 & Supp. 1997).

⁹ See Heather Harrelel, *Perhaps, a Friendly Highway*, TRIANGLE BUS. J., Mar. 24, 1995, at n.29, § 1.

¹⁰ See Pradnya Joshi, "Flamers" Make for Unease on Net, MILWAUKEE J. & SENT., Apr. 15, 1996, at 9.

¹¹ *Id.*

¹² See Andrew Morse, *Campus Correspondent: University E-Mail a Test of Internet Free Speech*, L.A. TIMES, Dec. 10, 1995, at 2.

¹³ Chatrooms are places on the Internet where groups of individuals can have a conversation by typing messages that instantly appear on the screens of all those in the "room."

¹⁴ See Morse, *supra* note 12.

¹⁵ See Dwight Silverman, *Personal Technology*, HOUS. CHRON., MAR. 24, 1996, AT 5 (CITATION OMITTED).

¹⁶ See Morse, *supra* note 12.

¹⁷ See Silverman, *supra* note 15.

¹⁸ See *id.*

Experts offer suggestions to women who have experienced harassment or fear harassment "cybercreeps." These suggestions include choosing a gender-neutral name and limiting the information that is placed in their member profiles.¹⁹ This is similar to listing a telephone number with an initial rather than a first name to avoid harassing calls. Additionally, Internet companies suggest avoiding chatrooms and discussion groups that have led to offensive comments in the past.²⁰ They also suggest avoiding on-line romance areas and recommend reporting to the system provider anyone who sends offensive e-mail.²¹ Apparently, for women, surfing the Net is like walking down the street: they will most likely be left alone but occasionally may suffer catcalls and unwanted sexual attention. The remedies for on-line harassment are similar to those in real life; women can ask the harassers to stop, avoid chatrooms or e-mail discussions that have resulted in past harassment, report the harassment as violations of federal or state law, or simply ignore them.²²

A. *The Internet and Employer's Liability For Internet Harassment*

An additional facet of sexual harassment is of particular concern to the business community. Statistics have shown that the average employee spends a disturbing amount of time "surfing the Web" during working hours. A survey released in April by Nielsen Media Research showed that employees at I.B.M., Apple Computer, AT&T, NASA, and Hewlett Packard call up the on-line edition of Penthouse Magazine thousands of times a month.²³ Some employees download obscene material onto employer systems or allow pornographic materials to appear on their PC's, thereby making the company vulnerable to sexual harassment charges.²⁴ While the existence of harassment laws has led some critics to conclude that no effort is made to balance First Amendment concerns with an employer's right to control the workplace,²⁵ the laws have given employers wide latitude to dictate what employees may say, read and write at work.²⁶ Furthermore, employers worry about being sued for sexual harassment by employees who argue that these pictures create a "hostile environment."²⁷ Understandably, some companies fear that a lewd image on a computer screen or downloaded onto hard copies and posted in a workplace, is the on-line equivalent to posting a centerfold calendar. These pornographic images could

¹⁹ See Joan O' Brien, *Cybercreeps: Female Users Take Measures to Avoid On-Line Harassment*, SALT LAKE TRIB., May 13, 1996, at B1.

²⁰ See *id.*

²¹ See *id.*

²² See *id.* See also statutes cited *supra* note 8.

²³ See Trip Gabriel, *New Issue at Work: On-Line Sex Sites*, N.Y. TIMES, June 27, 1996, at C1.

²⁴ See *id.*

²⁵ See Walter Olson, *The Long Arm of Harassment Law*, N.Y. TIMES, July 7, 1996, at E9 (noting that harassment law can ban "almost anything the employee finds offensive").

²⁶ See Gabriel, *supra* note 23.

²⁷ See *Meritor*, 477 U.S. at 26-30.

render a company liable if women who find the images offensive file sexual harassment charges. Openly viewing sexually explicit Web sites can fall within the definition of intimidation that can create a "hostile working environment," which the Supreme Court has ruled is a form of sexual discrimination.²⁸

While most employees know that employers have access to their e-mail, many do not realize that Net surfing leaves a digital trail. For example, at Compaq, computer activity logs automatically record every individual's use of Web sites, news groups, and e-mail. Many companies are drafting cyberspace policies that delineate acceptable on-line behavior.²⁹ The companies typically own the computers their employees use. Thus, employers are well within their rights to forbid using computers for nonbusiness purposes. Some companies have terminated employees for violating such policies. Pursuant to a company-wide monitoring effort, Compaq Computer recently dismissed nearly twenty employees, each of whom logged more than 1,000 hits³⁰ on sexually explicit Web sites, for misusing company resources.³¹ Companies concerned with this problem should consider purchasing software that denies access to any sites containing potentially offensive images.

As the following cases illustrate, Internet harassment is a widespread problem that raises many troubling questions.

Stephany Willman, a forty-one year old New Jersey woman, could not understand why she was receiving letters from men offering sex. She later learned that her ex-boyfriend had scanned her nude Polaroid photographs and uploaded them to a sexually explicit newsgroup, along with her address.³²

A California professor went on-line offering \$200 to anyone who could provide him with nude pictures of a Wisconsin professor who had slighted him. He successfully obtained the photographs and posted them on the Internet.³³ Both Willman and the Wisconsin professor went to the police, but learned they had little recourse for such violations of privacy. Because of the time required to investigate cases of computer harassment, law enforcement agents are reluctant to invest the necessary resources to do so.

Victims of Internet harassment face several other problems in bringing their attackers to justice. Many people post harassing messages anonymously, which makes learning their true identities difficult. These cases also raise novel conflict-of-law issues because the offenders and victims are often in different states, requiring authorities to extradite offenders before charging them with a crime.³⁴

²⁸ *Id.*

²⁹ See Associated Press, *The X-rated Files: Cyberporn Forays Targeted*, ST. LOUIS POST-DISPATCH, Feb. 7, 1996, at 1C (noting Texaco Co.'s "Acceptable Internet Usage Policy" which tells employees that they are being watched via computer activity logs).

³⁰ A "hit" is a click of the mouse to request a file from a site.

³¹ See Gabriel, *supra* note 23.

³² See James W. Roberts, *Punishment Doesn't Yet Fit Computer Crimes*, THE RECORD (New Jersey), Feb. 26, 1996, at A06.

³³ See *id.*

³⁴ See *id.*

Unfortunately for victims of harassment, once information appears on the Internet, removing it is nearly impossible. Victims can best combat their harassers by contacting the service provider and requesting both that the provider help to remove the offensive material and revoke the perpetrator's account. The offender, however, can always obtain an account with another provider and repost the offensive material.³⁵

B. *The Difficulty With E-Mail*

In a controversial case, the California Institute of Technology expelled twenty-six year old Jinsong Hu for allegedly sexually harassing his ex-girlfriend via e-mail.³⁶ Hu denied writing much of the e-mail in question. Authorities determined that a friend of the girl's new boyfriend had sent at least one of the messages. Hu was held on \$150,000 bail and tried before the Los Angeles Superior Court on charges of verbal, written, and electronic harassment, as well as threats. After spending six months in jail because he could not make bail, a jury acquitted Hu of stalking in three hours.³⁷

Authentication of an e-mail transmission is nearly impossible if the sender wishes to hide his or her identity.³⁸ Even if one could determine a message's origin, proving that the password owner actually wrote the message is difficult if he or she denies doing so. Many universities try to limit students' use of other people's passwords for harassment purposes by prohibiting a student from revealing his or her password to another student.³⁹ Also, received e-mail is notoriously easy to alter.⁴⁰ The recipient can change names or add information that never appeared in the original transmission.⁴¹ As students become more knowledgeable about computers, particularly on campuses like Cal Tech where students are technologically sophisticated, definitively tracing such transmissions to a specific person is unlikely.

An additional problem has arisen due to the growth of anonymous remailers, the transmissions of which further complicate tracing. Anonymous remailers are relay stations on the Internet that cloak the identity of every user who sends a message through them.⁴² They are the computer equivalent of a Swiss bank account.

A Finnish man named Johan Helsingius ran one of the most popular of these services.⁴³ To disguise one's identity, an individual user sent an e-mail or a post-

³⁵ See *id.*

³⁶ See Amy Harmon, *Expulsion in E-Mail Stalking Case Stirs Controversy at California Campus*, COM. APPEAL (Memphis, TN), Nov. 16, 1995, at A4.

³⁷ See *id.*

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See Michael D'Antonio, *Our New Faceless Monsters*, L.A. TIMES, Aug. 27, 1995, at 24.

⁴³ See John Schwartz, *With E-mail in Jeopardy, "Remailer" Closes Up Shop*, WASH.

ing to a Usenet newsgroup, "newsgroup@aon.penet.fi."⁴⁴ Helsingius' computer then stripped the name and return address off the posting and replaced them with "anon.penet.fi."⁴⁵ The system also added a pseudonym, making responding to the message impossible. E-mail sent through the system was virtually untraceable. The system further complicated tracking, by holding messages for forty-eight hours and sending them out in a different order than that in which they came.⁴⁶ E-mail sent through the system was virtually untraceable. However, Helsingius' computer contained a database with actual users ID's so that it could provide return mail.

The system's anonymity was violated in February of 1995, when, at the request of California Police, Finnish authorities armed with a search warrant, called upon Helsingius to reveal the identity of one of his clients whom California police suspected had stolen intellectual property from the Church of Scientology. Helsingius initially refused, but yielded when the police threatened to confiscate his computer containing the names of over 200,000 users.⁴⁷ This incident violated the system's anonymity and shook the cyberspace community. The Finnish police said that they would not take such action again. Detective Kaj Malmberg stated that they believed that a crime was occurring in Finland, but that they now believe that the computer was just merely a passive conduit for the crime.⁴⁸ In August 1996, however, fearing that a court would require him to reveal the identities of the service's users, Helsingius shut down his remailer.⁴⁹ Many more anonymous remailers still exist.⁵⁰

By chaining together several remailers, anyone who wished to remain anonymous could create a trail so complex it would be impossible to follow.⁵¹ Remailers provide a valuable service for these users who wish to say something but do not want to reveal their identities.⁵² The major criticism of such services is that they allow individuals people to make threats without risk of identification.⁵³

POST, Sept. 16, 1996, at F19.

⁴⁴ Joshua Quittner, *Requiem for a Go-Between*, TIME, Sept. 16, 1996, at 74.

⁴⁵ Douglas Lavin, *Anonymous Server-An Internet Loophole*, WALL ST. J., Feb. 17, 1995, at A7.

⁴⁶ See Thom Stark, *A Fine and Private Net*, L.A. TIMES, Apr. 1, 1996, at 104.

⁴⁷ See *id.*

⁴⁸ See Lavin, *supra* note 45.

⁴⁹ See Schwartz, *supra* note 43.

⁵⁰ See *id.*

⁵¹ Other anonymous remailers can be reached at www.anonymizer.com and www.cs.berkeley.edu/raph/remailer-list.html (providing a listing of remailers). Additionally, there are two newsgroups, alt.privacy.anon-server and alt.anonymous, that provide information and guidance to new users.

⁵² See Quittner, *supra* note 44.

⁵³ See Schwartz, *supra* note 43.

IV. THREATS

Harassment is an area of concern among Internet providers. Threats of physical violence, however, pose a more serious problem. In the early 1930's, laws regarding threats began to change from dealing exclusively with face-to-face confrontation to encompassing threats sent through the mail. The kidnapping of the Lindbergh baby prompted this change. The baby's kidnappers primarily used the mail to communicate their demands and threats.⁵⁴ As time passed, Congress passed additional modifications to deal with threats by telegraph and telephone.⁵⁵ Once again, the crime of threatening another individual has evolved as subscribers began to use the Internet to reach their intended victims.

The law must determine which transmissions are "true threats," rather than protected speech. *United States v. Baker*⁵⁶ established standards to determine what actions are "true threats." The federal district court held that a transmission, or series of transmissions, in order to constitute a "true threat," must, on its face, be "so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution"⁵⁷ A statement may express a desire to kidnap, injure or muse on "what if such a crime were committed?" yet lack sufficient language construable as a serious intention to carry out an injurious act.⁵⁸

Threatening another constitutes a general intent crime. The standard for a "true threat" evaluates the defendant's behavior in relation to the circumstances, rather than looking at the defendant's subjective state of mind. Whether the actor had any intention of acting on the threat is irrelevant. The standard also looks at the reactions of foreseeable recipients of the communication.⁵⁹ If the recipient can reasonably interpret the communication as a serious expression of an intention to perform the threatened act, it is a "true threat." While traditional analysis deals with coercive or extortive threats, the government can regulate a non-coercive threat in accordance with the First Amendment "in order to protect . . . individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."⁶⁰

A. *The Baker Case*

*United States v. Baker*⁶¹ illustrated the reluctance of courts to punish all but the most egregious of threats under this "true threat" standard. Jake Baker was

⁵⁴ See H.R. REP. NO. 73-1457 (1934).

⁵⁵ See S. REP. NO. 73-534 (1934).

⁵⁶ 890 F. Supp. 1375 (1995).

⁵⁷ *United States v. Baker*, 890 F. Supp. 1375, 1385 (1995) (quoting *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir.), *cert denied*, 429 U.S. 1022 (1976)).

⁵⁸ *Id.* at 1386.

⁵⁹ See *id.* at 1384.

⁶⁰ See *id.* at 1385 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)) (alteration in original) (citations omitted).

⁶¹ 890 F. Supp. 1375 (1995).

a University of Michigan student who posted a "story" to a newsgroup, "alt.sex.stories," in which he described the rape, torture, and murder of a woman.⁶² Baker used a classmate's name for the victim of this attack.⁶³ In response to his "story," Baker received several e-mail messages from readers. Baker's correspondence with an Arthur Gonda became the subject of this widely publicized litigation.⁶⁴

From November 29, 1994 to January 25, 1995, the two men exchanged stories of their mutual desire to inflict violence upon women and girls.⁶⁵ Baker conveyed these statements through private e-mail messages to Gonda; they were not available in any publicly accessible areas of the Internet.⁶⁶ The court's inquiry was focused on how a reasonable person would expect Gonda to interpret the messages.⁶⁷ In one exchange Baker said:

I've been trying to think of secluded spots. but my knowledge of Ann Arbor is mostly limited to the campus. I don't want any blood in my room, though I have come upon an excellent method to abduct a bitch. As I said before, my room is right across from the girl's bathroom. Wait until late at night. grab her when she goes to unlock the dorr. Knock her unconscious. and put her into one of those portable lockers (forget the word for it). or even a duffle bag. Then hurry her out to the car and take her. . . What do you think?⁶⁸

Baker was charged with the federal crime of transmitting in interstate or foreign commerce threats to kidnap or injure another.⁶⁹ The government contended that the transmission referred to female college students living in Baker's dormitory at the University of Michigan in Ann Arbor.⁷⁰ While the court acknowledged that the transmission had an identifiable target, it noted that the transmission lacked a statement of the intent to act.⁷¹ "Discussing the commission of a crime is not tantamount to declaring an intention to commit the crime."⁷² Therefore, the Court determined that since there was no specific language in the message indicating that Baker and Gonda intended to follow through with their

⁶² See *id.* at 1379.

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *id.* at 1379.

⁶⁶ See *id.* at 1386.

⁶⁷ See *id.* at 1386 (a statement charged under 18 U.S.C. § 875(c) is evaluated "in light of its foreseeable recipient" and whether the recipient will take the threat seriously).

⁶⁸ See *id.* at 1388 (reproduced from the original).

⁶⁹ See *id.* at 1389. See also 18 U.S.C. §875(c) (1995) "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." *Id.*

⁷⁰ See Baker, 890 F. Supp. at 1388.

⁷¹ See *id.* at 1388-89.

⁷² *Id.* at 1389

threats, Baker's statement was protected by the First Amendment.⁷³

Baker stated in another message to Gonda:

I highly agree with the type of woman you like to hurt . . . Also, I've been thinking. I want to do it to a really young girl first. !3 or 14. There innocence makes them so much more fun-and they'll be easier to control Likely to be nice and tight. Oh. they'd scream nicely too!⁷⁴

The government contended that the specific targets of this transmission were thirteen- or fourteen-year old girls living in Baker's neighborhood in Ann Arbor.⁷⁵ While a transmission need not identify a specific individual to constitute a "true threat," it must refer to some discrete, identifiable group.⁷⁶ The court rejected the government's argument because Baker's statement was too indeterminate and unspecific about the person or persons threatened.⁷⁷ In addition, in light of prior communications the court concluded that it was not reasonable to believe that the message caused the intended recipient, Gonda, to fear violence or caused him any disturbance over fear of violence.⁷⁸ The discussion of desires and fantasies, even those that are perverse, is not the equivalent of threatening to act on those desires.⁷⁹ The court concluded that the First Amendment protected Baker's transmissions as merely expressing a desire to injure women generally; thus each count lacked a specific expression of intent, or a specific target.⁸⁰ As a result, the court dismissed Baker's indictment.⁸¹

B. *The Sause Case*

Some of the most disturbing Internet cases deal with threats of violence, often sexual violence. William Sause, a nineteen-year-old student at St. Johns University in New York, was charged with "aggravated harassment" for terrorizing an Indianapolis family.⁸² He allegedly sent the family threatening e-mail that promised "to hunt them down, rape their 12-year old girl, and kill them."⁸³ Sause had previously broken into an on-line conversation that the girl was having with another child, and obtained her log-on name from an on-line list.⁸⁴ Sause asked her about her age, told her he wanted to sodomize her and that he would infect

⁷³ See *id.*

⁷⁴ Baker, 890 F. Supp. at 1387 (1995) (reproduced from the original).

⁷⁵ See *id.* at 1387-88.

⁷⁶ See *id.* at 1388.

⁷⁷ See *id.*

⁷⁸ See *id.* at 1386.

⁷⁹ See *id.* at 1388.

⁸⁰ See *id.* at 1388-90.

⁸¹ See *id.*

⁸² See *College Student Charged With Internet Harassment*, ATLANTA J. & CONST., NOV. 17, 1995, AT B07.

⁸³ See *id.*

⁸⁴ See *id.*

her with the HIV virus.⁸⁵ "Here I come for the rape," stated one message.⁸⁶ "Let me inform you of my career. I hunt down little kids and stalk them."⁸⁷ The girl informed her parents of the threats.⁸⁸ The girl's stepfather answered the messages and told Sause of his intention to call the authorities. Sause replied, "Where are the authorities going to be when I rape your kid after school this week?"⁸⁹ The family then shut down the computer but logged on several hours later, only to find numerous additional threatening e-mail messages.⁹⁰ The girl's stepfather called the police and the service provider, Long Island Internet, to assist in determining the identity of the sender.⁹¹ The company identified Sause as the sender of the messages.⁹² Because there were other complaints about him, the company notified federal authorities who charged Sause with aggravated harassment.⁹³ Because Sause was a juvenile at the time of his trial, the court sealed the proceedings in his case.⁹⁴ Therefore, we do not know whether he was punished for the crime of aggravated harassment.

A court would likely analyze Sause's situation under the Baker standard were it not for Sause's juvenile status. A court reviewing Sause's threats would have asked whether the threats were "so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution."⁹⁵ This objective standard would also have depended on the Indianapolis family's reactions the foreseeable recipients. A court could have found Sause guilty under the Baker standard if it found his threats to have sufficient specificity, and if such of threats would have caused a reasonable person to fear imminent danger.⁹⁶

C. An Anti-Semitic Threat

A fourteen-year-old boy in Gloucester, Massachusetts was charged with threats to commit murder and civil rights violations for making anti-Semitic death threats to his teacher, via the Internet.⁹⁷ On May 30, 1996 the Gloucester,

⁸⁵ See *id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See *id.*

⁸⁹ R. Joseph Gelarden, *Indy Pair Help Track Electronic Harasser*, INDIANAPOLIS STAR, Nov. 17, 1995, at A01.

⁹⁰ See *College Student Charged With Internet Harassment*, *supra* note 82.

⁹¹ See Gelarden, *supra* note 89.

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See Telephone interview with Public Relations Department, Nassau County District Attorney's Office (July 2, 1996).

⁹⁵ Baker, 890 F. Supp. at 1382 (quoting *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976)) (In *Kelner*, the court discussed "the constitutional dimension of the 'true threat' requirement" with regard to § 875 (c)).

⁹⁶ See Baker, 890 F. Supp. at 1379.

⁹⁷ See Beth Daley, *Boy Charged With Making Anti-Semitic Threats Via Internet*, BOS-

MA science teacher received transmissions that said in part:

4:36 P.M.

. . . U WILL DIE YOU F[***]IN JEW
YOUR JEWISH LUNGS SHOULD BE
RIPPED OUT AND THROWN IN THE
GAS CHAMBER THEN YOUR BODY
SHOULD BE SHOT FULL OF HOLES.
BEWARE DEATH IS APON U I AM
FROM THE SCIENCE CLASS
LIGHTNING SEE IF U CAN POINT
ME OUT. BETTER HURRY U HAVE
UNTIL NEXT FRIDAY NIGHT . . .

5:34 P.M.

U WILL DIE TRUST ME U F[***]IN
JEWISH LUSH IM GOING TO KILL U
WITH MY BARE HANDS SQUEESE
YOUR NECK UNTIL YOUR HEAD
POPPS LIKE A BOUBLE AND SMASH
ALL YOUR BONES LIKE TWIGS.

5:35 P.M.

DEATH IS APON U⁹⁸

The police discovered the identity of the youth by subpoenaing America On-Line, one of the major Internet service providers. He had opened his account under the name of a woman in Virginia, but had listed as the woman's mailing address his home in Gloucester. This arrest was the boy's second in three weeks for anti-Semitic acts. Prior to this incident, the same boy had dismantled the fence of a Jewish couple by arranging the boards in the shape of a swastika, and had spray painted the anarchy symbol alongside the Star of David on the couple's fence.⁹⁹

V. VICTIM REACTIONS

The anonymity of the Internet allows individuals to create an on-line "character" who may appear menacing or angry.¹⁰⁰ On-line subscribers may express desires that they have no intention of acting on simply to draw attention to themselves.¹⁰¹ Because of the tendency of some on-line users to engage in

TON GLOBE, June 7, 1996, at 27.

⁹⁸ Facsimile from victim to author (May 31, 1996) (on file with Anti-Defamation League). The typographical, spelling, and grammatical errors are reproduced from the original.

⁹⁹ See Daley, *supra* note 97.

¹⁰⁰ See Gary Chapman, *Flamers: Cranks, Fetishists, and Monomaniacs*, NEW REPUBLIC, Apr. 10, 1995, at 13.

¹⁰¹ See *id.* at 5 (explaining that "[c]omputer communication seems to bring out the id screaming for attention.").

“flaming,”¹⁰² many Internet advocates say that people should take harassing, threatening messages, or e-mail less seriously than similar behavior occurring in a different medium.¹⁰³ Certainly some “flamers” are dangerous, but most are pranksters who engage in such behavior because they can usually do so with impunity.¹⁰⁴

The recipients of these messages, however, cannot distinguish real threats from those which are not. Threats are frightening, whether delivered in person or over the computer. The Massachusetts science teacher who received e-mailed threats from her student was too terrified to go to work until the perpetrator was caught.¹⁰⁵ Barrie Winette, whose family was threatened by William Sause, stated, “We were pretty shaken. We didn’t know what this person was capable of carrying out.”¹⁰⁶ His wife explained, “It gave me cold chills . . . I couldn’t take this guy for a joke. It was terrifying.”¹⁰⁷ Even those who receive no actual threats but are victims of harassment express fears that such hostile behavior may lead to physical violence.¹⁰⁸

As noted previously, the First Amendment, does not protect “true threats.”¹⁰⁹ The cases of William Sause and the Gloucester, MA youth differ from the *Baker* case in that both perpetrators threatened violence against specific individuals. Moreover, both stated their clear intent to act on those threats. A court is more likely to find that such threats meet the “true threat” standard. In contrast, threats made in a private e-mail, to an individual who is not the target of the threats, and made about an amorphous, undefined group will not likely meet the “true threat” standard.

VI. HATE GROUPS AND EXTREMISTS ON THE WEB

Although the World Wide Web is just one component of the Internet, it is responsible for catapulting the “Net” into mainstream culture.¹¹⁰ The Web is a

¹⁰² “Flaming” is the on-line practice of sending repeated, nasty messages to or about an individual. People who engage in “flaming” are known as “flamers.”

¹⁰³ See *How Women Should Use the Internet*, U.S. NEWS & WORLD REPORT, July 1, 1996, at 60 (“Online harassment is a fiction.”).

¹⁰⁴ See Pradnya Joshi, ‘Flamers’ Make For Unease On Net — Online Harassment is Common to Some Electronic Bulletin Boards, MILWAUKEE J. & SENTINEL, Apr. 15, 1996, at 9.

¹⁰⁵ See Telephone Interview with victim (May 1996).

¹⁰⁶ Jennifer Pinkerton, *Culture, Et Cetera*, WASH. TIMES (D.C.), Nov. 20, 1995, at A2. See also *College Student Charged With Internet Harassment*, *supra* note 75.

¹⁰⁷ Pinkerton, *supra* note 106.

¹⁰⁸ See *id.*

¹⁰⁹ See *United States v. Baker*, 890 F. Supp. 1375, 1381 (E.D. Mich. 1995).

¹¹⁰ See DAVID S. HOFFMAN, ANTI-DEFAMATION LEAGUE OF B’NAI B’RITH, WEB OF HATE: EXTREMISTS EXPLOIT THE INTERNET, at 3 (1996) (This report, published in 1996, is a comprehensive analysis of the growth of the Internet as a propaganda tool for hate and extremist groups. The written work is supplemented by reproductions of computer graphics from “hate sites” on the Web).

multimedia hyperlinked database found on the Internet.¹¹¹ Hyperlinks create the "hot spots" found on Web pages, and permit the user to jump from page to page by pointing to that spot and clicking a mouse.¹¹² Anyone with access to a computer and a modem can set up a Web page.¹¹³ Such ease of access has encouraged right wing extremists to flock to the Web.¹¹⁴ "Hate sites" began appearing on the World Wide Web in May 1995, when Don Black established his "Stormfront" web site.¹¹⁵ Black is a former associate of David Duke and a former KKK member.¹¹⁶ He is an active on-line supporter of neo-Nazi and White Nationalist causes.¹¹⁷ Black's site contains a library of neo-Nazi graphics that is available for downloading, and provides "hot links" to other racist pages.¹¹⁸ Many major racist extremist groups, including the Knights of the Ku Klux Klan, Tom Metzger of the White Aryan Resistance, and the neo-Nazi National Alliance, have Web pages.¹¹⁹ These traditional "haters" are not alone; a group of Holocaust deniers and a growing number of individuals, often college students, have created Web pages promoting anti-Semitic, racist, and extremist causes.¹²⁰

The Internet allows hate groups to reach impressionable audiences with an ease they have not previously enjoyed, effectively creating a whole new market for their propaganda. In this new medium extremist groups can glamorize their messages. The hate group's message appears on slick, sophisticated pages, invoking images of "pride" and a "duty to act."¹²¹ As the Anti-Defamation League has observed, "[o]n the Web, they preach on an easy-to-use, powerful and far-reaching platform that confers superficial legitimacy and filters out opponents."¹²²

The paranoia that characterizes the extreme right has sometimes caused adherents to adopt as fact stories intended as political satire. For example, right wing extremists reproduced and published on-line a satiric document describing a government conspiracy to keep America at war. Because of the extensive reach of on-line publications, thousands of people have access to the document. Many of these readers will believe it is authentic.¹²³ Among the extremists that have pro-

¹¹¹ See *id.* at 6.

¹¹² See *id.*

¹¹³ A Web page is a unit of information similar to a word processing document. Hyperlinks allow the user to navigate through the document in a non-sequential order. For example, one may note a topic of interest on the Welcome page of a Web site and then click directly to that topic without reading the entire document. See *id.*

¹¹⁴ See *id.* at 46.

¹¹⁵ See *id.* at 10.

¹¹⁶ See *id.* at 9.

¹¹⁷ See *id.* at 53, n.3.

¹¹⁸ See *id.* at 10.

¹¹⁹ See *id.*

¹²⁰ See *id.* at 22.

¹²¹ See *id.*

¹²² *Id.* at 34.

¹²³ See Doreen Carvajal, *Onetime Political Satire Becomes a Right-Wing Rage and a Hot Internet Item*, N.Y. TIMES, July 1, 1996, at D7. Relying on a tip from an anonymous

moted their ideology on the Web, none has been more successful than the Holocaust denial movement. Holocaust denial is an anti-Semitic movement dedicated to rehabilitating Nazi leaders by characterizing Jews as liars and schemers who propagate a "hoax" by keeping the memory of the holocaust alive.¹²⁴ They also attack the basis for the founding of the State of Israel.¹²⁵ One denier's web page explains that "[r]evisionists . . . maintain that the figure of 6 million Jewish deaths is an irresponsible exaggeration, and that no execution gas chambers existed in any camp in Europe which was under German control."¹²⁶ The Internet facilitates Holocaust deniers' attempts to appear as legitimate historians who are simply presenting one version of history; the net provides them a slick format that enhances their credibility.

The Institute for Historical Review ("IHR") is the most renowned and seasoned of the holocaust deniers.¹²⁷ IHR promotes the idea that the Nazis are innocent victims of a spiteful lie started by the Jews to "drum up world sympathy and political and financial support for Jewish causes, especially for the formation of the State of Israel."¹²⁸ Their Web sites present "facts," claims that they are not anti-Semitic, and offers to engage in "open debate" about the Holocaust.¹²⁹

The First Amendment¹³⁰ forbids silencing speech because of its content,¹³¹ and protects the materials published in these "hate" sites just as it would protect the same information spoken or published in a book or newspaper. Making derogatory comments is not illegal. One cannot prohibit another from uttering hateful racist and anti-Semitic statements if those statements are not personally libelous

source, Simon and Schuster, Inc., discovered that more than seven right-wing and extremist Internet sites had posted the text from a 1967 political satire, re-released in 1996, called "Report From Iron Mountain." Ironically, the book, written by men who call themselves "left-liberal Democrats," has been adopted by militia groups, who believe that it is a *real* government report. The satire proposes that "war is necessary for society to flourish." Militia groups offer it as evidence of a government conspiracy against the American people. The hardcover version of "Iron Mountain" states that the book is a satire, but the pirated versions posted on the Internet do not. Simon and Schuster has enforced its copyright, and most of the sites have removed the text after receiving warning letters from the publisher's attorneys.

¹²⁴ See HOFFMAN, *supra* note 110, at 18.

¹²⁵ See *id.*

¹²⁶ *Id.* at 22 (quoting Bradley Smith, *Internet Journal*, Nov. 1995).

¹²⁷ IHR was founded by longtime extremist Willis Carto, based in California. It was once described by the Anti-Defamation League in an 1982 publication, "Extremists on the Right," as the "most professional anti-Semitic organization in the country."

¹²⁸ *Id.*

¹²⁹ HOFFMAN, *supra* note 110, at xxx.

¹³⁰ U.S. CONST. amend. I. "Congress shall make no law . . . abridging the freedom of speech . . ."

¹³¹ See *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied* 439 U.S. 916 (1978). "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.* at 1203.

or do not rise to the level of a threat.¹³² Nevertheless, organizations trying to combat racism and prejudice understand that these sites enable hate groups to reach out to a new, vastly larger market.¹³³ Groups once restricted to spreading their messages by word of mouth or through the mail can now enter a person's living room with a few keystrokes. In addition, any stigma associated with having one's name on an extremist organization's mailing list is absent in the on-line relationship. An Internet user with extremist sympathies can regularly access a hate group's web site confident that his or her name will not appear on a list in the future.

The Anti-Defamation League and other groups have expressed concern that young and impressionable people who otherwise would have sought out hateful propaganda, will "surf the net," and uncover these glossy, colorful sites. Some fear that such propaganda will indoctrinate a new generation of racists and may consequently inspire criminal behavior by encouraging racial hatred and bigotry.¹³⁴ Accepting this possibility as the price we pay for living in a society that protects even hateful speech, the ADL has established its own Web page on the theory that one fights bad speech with "more speech."¹³⁵

VII. UNIVERSITIES

Universities may serve as the testing ground for Internet regulation. College students often have unlimited access to the Internet from their dorm rooms, and

¹³² See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (overturning state statute punishing persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform."). The state had used the statute to prosecute a Ku Klux Klan group that advocated violence against African Americans and Jews. The Court noted that neither the indictment nor the trial judge's instructions to the jury in any way distinguished between mere advocacy and the incitement to imminent lawless action.

[We are confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments.]

Id. See also *Terminiello v. Chicago*, 337 U.S. 1 (1949) (invalidating breach of peace ordinance used against rabble-rousing speaker who had criticized political and racial groups and called his adversaries "slimy scum," "snakes," and "bedbugs"). Justice William O. Douglas wrote for the majority: "[that] is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce clear or present danger or a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Id.* See also *Cohen v. California*, 403 U. S. 15 (1971).

¹³³ See HOFFMAN, *supra* note 110, at 33.

¹³⁴ See Keith W. Watters, *On-Line Racism*, NAT'L B. ASS'N MAG., Feb. 10, 1996, at 1.

¹³⁵ See Thomas Maier, *New Web Page to Fight Hate*, NEWSDAY, Feb. 29, 1996, at A17 (describing ADL Web page and monitoring unit which will provide information on groups promoting hate speech).

many use the Internet as an essential information pipeline.¹³⁶ The number of legal cases arising from college campuses makes it clear that students are particularly vulnerable to the temptations of misusing computer resources.¹³⁷

Cornell University had to address such a problem. Four freshmen at the University sent an e-mail to 20 friends which was then forwarded to thousands of mailboxes. The e-mail contained a sexist diatribe against women entitled, "75 Reasons Why Women (Bitches) Should Not Have Free Speech" and included quotations such as "If they can't speak, they can't cry rape," and "Of course, if they can't speak, they can't say 'no.'" ¹³⁸ The University charged the four men with sexual harassment and misuse of computer resources.¹³⁹ They were ultimately exonerated when none of the original recipients filed charges as University guidelines required.¹⁴⁰

The problem of regulating what is published on line within a public university's computer system funded by tax dollars has emerged in several recent cases. Many public universities that provide students with access to university computer systems are debating whether they have the right to censor what students post. This depends on whether Internet access is a right or a privilege.

As entire student bodies now have access to the Internet, the number of individuals reporting harassment has sharply risen at some such schools.¹⁴¹ At Georgia State University, a disclaimer is posted on all personal Web sites that originate from the school's system.¹⁴² The use of the disclaimer is a response to complaints about one particular student's anti-Semitic Web pages. These Web pages boast an extensive catalog of hate material as well as an e-zine¹⁴³ called "White Flame."¹⁴⁴ Some universities are unwilling to tolerate such "hate" pages. When Lewis McCarthy, a graduate student at the University of Massachusetts ("U-Mass"), used the school's World Wide Web page to post pro-Nazi material questioning whether the Holocaust had occurred, the school ordered him to shut it down.¹⁴⁵ U-Mass argued that this was not an issue of free speech but

¹³⁶ See Morse, *supra* note 12.

¹³⁷ See Shield & Bowles, *supra* note 3.

¹³⁸ *No Discipline for E-Mail Disparaging Women*, S.F. CHRON., Nov. 17, 1995, at A12.

¹³⁹ See *id.*

¹⁴⁰ See Maier, *supra* note 135.

¹⁴¹ See O'Brien, *supra* note 19.

¹⁴² See HOFFMAN, *supra* note 110, at 28 (The disclaimer offers the statement, "This is not a Georgia State University homepage!" as well as a link to the school's computer-use policy).

¹⁴³ An "e-zine" is a magazine that is only published on-line.

¹⁴⁴ HOFFMAN, *supra* note 110, at 28. Joe Bunkley's page has since been removed by Georgia State University. Bunkley failed to register for two semesters and, according to a revised computer policy, his Internet access was terminated. Bunkley has not since resurfaced on the Web.

¹⁴⁵ See *infra* notes 96-97 and accompanying text. McCarthy's page was a mirror site for Ernst Zündel's Web page and he removed the information when asked to do so. The page was intended as a free speech protest and did not represent McCarthy's personal beliefs.

rather a question of whether a university's computer system is the proper place to promote a political agenda.¹⁴⁶ In ordering the removal of this Web site, U-Mass determined that there were limited computer resources at the University; thus posting Holocaust denial materials amounted to improper use of these limited resources. The student apparently did not mount a legal challenge to U-Mass's action.¹⁴⁷

Whether a public university may block a student's right to publish certain kinds of materials remains an open question. The U-Mass student's actions on-line are no different than if he had circulated a holocaust denial flyer around campus, or advocated a racist rally or ideology, all things he would have the right to do.¹⁴⁸ By contrast, the right of authorities to block access to any student engaging in one-on-one harassment is one that would legitimately allow punitive measures.¹⁴⁹ At the University of Utah, for example, the university will disconnect a student's account if he uses it to harass another individual.¹⁵⁰

Additionally, many private universities have extended their speech codes prohibiting racist and sexist language to their computer networks.¹⁵¹ All of these incidents have compelled universities to review their policies on Internet use.¹⁵² Federal law forces these institutions to balance the user's free speech rights with the on-line community's right to be free from harassment, and, in some cases, from right-wing extremist material.¹⁵³

VIII. LEGISLATIVE SOLUTIONS

Lawmakers have recently attempted to regulate this "new frontier" in order to confront problems growing as fast as the Internet itself. In June 1995, Connecticut became one of the first states to enact a law making it illegal to harass someone by computer.¹⁵⁴ The legislation expanded the state's harassment law to

¹⁴⁶ Anna-Maria Goossens, *UMass Closes Internet Site*, THE GAZETTE, Feb. 2, 1996, at 1.

¹⁴⁷ See Nathaniel Sheppard, Jr., *Academia Wrestles With On-Line Rights*, CHI. TRIB., Mar. 20, 1996, at 12.

¹⁴⁸ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁴⁹ See, e.g., 42 U.S.C.A. § 1982-3 (West 1997); CAL. GOV'T CODE § 12940 (West 1997); CAL. CIV. CODE § 3294 (West 1997).

¹⁵⁰ O'Brien, *supra* note 19.

¹⁵¹ See *E-Mail Mischief Gets Cornell In Instant Trouble*, SAN FRAN. CHRON., Nov. 15, 1996, at A5.

¹⁵² See, e.g., Amy Strahan, *Constitution May Save Free Speech on Internet*, DAILY TEXAN, Feb. 6, 1996, at 1.

¹⁵³ See *supra* notes 147-48 and accompanying text.

¹⁵⁴ See Conn. Gen. Stat. Ann. § 53a-182b (1997). "A person is guilty of harassment in the first degree when, with the intent to harass, annoy, alarm, or terrorize another person, he threatens to kill or physically injure that person or any other person, and communicates such threat by telephone, or by telegraph, mail, *computer network* . . . or any other form of written communication, in a manner likely to cause annoyance or alarm" (emphasis added).

include using a "computer network" with "the intent to harass, annoy, alarm, or terrorize another person."¹⁵⁵ Groups that sponsored this and similar initiatives explain that such laws simply extend the protections that already exist to deal with conventional forms of harassment.¹⁵⁶ Some critics vociferously object to the expansion of such laws, arguing that they violate free speech.¹⁵⁷ Thus, the Connecticut law is likely to raise some serious constitutional questions that will undoubtedly be tested in the courts.

Other areas of law are also expanding.¹⁵⁸ Michigan recently became the first state to charge someone with on-line stalking.¹⁵⁹ Andrew Archambeau and a school teacher met on a chat group through a video dating service in early 1994.¹⁶⁰ The two met in person twice. After the second date the woman informed Archambeau, via e-mail, that she did not want to pursue a relationship.¹⁶¹ Over the next five weeks, Archambeau, who lived within sight of the school where she taught, sent her twenty e-mails and left a message on her answering machine stating: "I stalked you for the first time today."¹⁶² Archambeau claimed that this was an attempt to apologize and not a threat.¹⁶³ In some of the e-mail, he threatened to share details of their relationship with all America On-Line users, her family and her ex-boyfriends.¹⁶⁴ The much-anticipated trial, testing the

¹⁵⁵ *Id.*

¹⁵⁶ See Jonathan Rabinovitz, *Connecticut Outlaws Cyberspace Harassing*, DENVER POST, June 13, 1995, at A08. *But see* Mark Eckenwiler, *Net.Law*, NETGUIDE, Issue 302, Feb. 1, 1996, at 35. Eugene Volakh, UCLA law professor and First Amendment scholar, notes that while probably not intended to have such a broad interpretation, the Connecticut statute could potentially apply not only to one-on-one communications, but to one-on-many communications as well. Taken literally, this would apply to annoying Usenet articles and mail list submissions as well as to private e-mail.

¹⁵⁷ See Walter Olson, *supra* note 14 (stating that "[h]arassment law goes well beyond the Communications Decency Act because it suppresses controversial opinions even when couched in chaste language.").

¹⁵⁸ Child pornography statutes increasingly refer specifically to the use of computers. *E.g.*, Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. §2252 (1995). Under this federal statute it is a crime knowingly to transport in interstate commerce, including by computer, visual depictions of minors engaging in sexually explicit conduct. See also, 720 ILL. COMP. STAT. ANN. 5/11-20.1 (West 1995) (Illinois' amended statute prohibits the creation, distribution, and sale of child pornography using a computer).

¹⁵⁹ See M.C.L.A. 750.411h(1)(e)(vi) This Michigan stalking statute includes "sending mail or electronic communication" as a method of establishing "unconsented contact" that represents "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel . . . threatened, harassed, or molested." *Id.*

¹⁶⁰ See Eckenwiler, *supra* note 156, at 35.

¹⁶¹ See *id.*

¹⁶² Scott Leibs, *Should Electronic Harassment Carry The Same Penalties As Real Life Threats?*, NETGUIDE, Issue 206, June 1, 1995, at 71.

¹⁶³ See Eckenweiler, *supra* note 156, at 35.

¹⁶⁴ See *id.*

limits of free speech in cyberspace, never happened because Archambeau decided to plead "no contest" to the charges.¹⁶⁵

IX. OPPOSITION TO REGULATIONS ON THE INTERNET

Civil libertarians have fought attempts to regulate speech on the Internet.¹⁶⁶ The Internet is regarded by civil libertarians as a distinct, separate mode of communication.¹⁶⁷ It is distinguishable from television in that "[t]he receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial," thereby making it unlikely that children could be accidentally exposed to "offensive" material.¹⁶⁸ As a result, advocates argue that the Internet deserves the broadest possible protection from government-imposed, content-based regulation.¹⁶⁹

The Internet has been described as an unrestrained flow of ideas, bordering on the anarchical.¹⁷⁰ Efforts to limit pure speech implicate, and are limited by, the First Amendment.¹⁷¹ Any statute that attempts to regulate the content of speech must overcome the presumption that it violates the First Amendment.¹⁷² The civil liberties advocates contend that legislation limiting what goes on-line on

¹⁶⁵ See *Crime Report*, DETROIT NEWS, Feb. 1, 1996, at D5.

¹⁶⁶ See *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 1996 WL 311865 (E.D. Pa.) (granting a preliminary injunction against the enforcement of the Communications Decency Act).

¹⁶⁷ See Hiawatha Bray, *Ban on Indecency on Internet Blocked*, BOSTON GLOBE, July 13, 1996, at 1 (quoting Boston civil liberties attorney Harvey Silvergate); Pamela Mendels, *Internet Lobbying Group Tries to Guard Cyber Rights*, N.Y. TIMES, March 25, 1997, at B1. Among the groups devoted to protecting electronic communication from censorship are the American Civil Liberties Union; the Electronic Frontier Foundation; Voters Telecommunications Watch, a New York group; and the Center for Democracy and Technology, a lobbying group based in Washington, D.C.

¹⁶⁸ Hiawatha Bray, *Ban On 'Indecency' On Internet Blocked*, BOSTON GLOBE, June 13, 1996, at A1.

¹⁶⁹ See *id.*

¹⁷⁰ See Jonathan Rabinovitz, *supra* note 83 (paraphrasing William Olds, Connecticut Civil Liberties Union).

¹⁷¹ See *United States v. Baker*, 890 F. Supp. 1375, 1380 (E.D. Mich. 1995).

¹⁷² See *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 381 (1992). *R.A.V.* invalidated a city ordinance providing:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 380-81. The Court found this ordinance "facially unconstitutional" because "it prohibits otherwise permitted speech solely on the basis of the subjects of the speech addresses." *Id.* at 381. See also *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991); and *Police Dep't of Chicago v. Mosely*, 408 U.S. 92, 95 (1972) (supporting presumption of invalidity of content-based regulations).

the Internet starts us down the slippery slope of regulating speech.¹⁷³ Additionally, they charge that any attempts to censor on-line expression will hinder the growth and potential of the Internet as an ever-developing medium of communication.¹⁷⁴ After all, each of us has the choice of whether to "log on." If we are going to be offended by something, we can turn it off. If we fear we will be offended by something, we can choose not to seek it out.

Attempts to control the contents of what goes on line are often counterproductive. In April of 1996, for example, at the request of the German government, Germany's telephone service, Deutsche Telekom, began denying its customers access to "Zündelsite," a web page created by Ernst Zündel, a renown holocaust denier and anti-Semite living in Canada. Zundel's web page claimed that the Holocaust never happened.¹⁷⁵ Holocaust denying, as well as the distribution of Nazi material, are illegal in Germany.¹⁷⁶ When word got out that the German government denied access to Zundel's Web page, users across the United States, principally at prominent American universities such as Stanford, Carnegie Mellon and the University of Texas, began creating "mirror sites."¹⁷⁷ These "mirror sites" create an exact copy of the material on Zündel's web page and make it available on pages of other access providers which the German government can-

¹⁷³ See *supra* note 156.

¹⁷⁴ See HOFFMAN, *supra* note 111 at 34.

¹⁷⁵ See *id.* at 18.

¹⁷⁶ Goossens, *supra* note 147. The notion of legal sanctions for racist speech in the United States has a strong, if minority, voice among American legal scholars. See Charles Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990) (proposing that in the United States, "[T]he regulation of racist fighting words should not be treated differently than the regulation of garden variety fighting words, and captive audiences deserve no less protection when they are held captive by racist speakers"). See also Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH L. REV. 2320 (1989) (arguing that the American law ought to punish certain kinds of racist speech as do several European countries with legal systems similar to ours. "[T]he threat of hate groups like the Ku Klux Klan and the neo-Nazi skinheads goes beyond their repeated acts of illegal violence. Their presence and the active dissemination of racist propaganda means that citizens are denied personal security and liberty as they go about their daily lives."). *Id.* See also Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 Harv. C.R.-C.L. Rev. 133 (1982) (recommending the availability of tort remedies for racist speech directed at individuals, by expanding that notion to include formal criminal and administrative sanctions). Matsuda also elaborates on Delgado's position. See Matsuda, *supra*, at 2321. But see Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?* 1990 DUKE L.J. 484, 492 (1990) (critique of Lawrence's arguments in favor of regulating racist speech: "The rationales that Professor Lawrence advances for the regulations he endorses are so open-ended that, if accepted, they would appear to warrant the prohibition of all racist speech, and thereby would cut to the core of our system of free expression.").

¹⁷⁷ See Chris Cobb, *Censoring Internet Can't Stop Zündel*, CALGARY HERALD, Feb. 2, 1996, at A13.

not censor.¹⁷⁸ The individuals who created these sites were not Nazi sympathizers. They were free speech advocates whose primary goal was to make the information available on so many pages that the German government would have to shut down the entire system to prevent access to Zündel's Web site.¹⁷⁹ These free speech proponents engaged in a "cyberspace protest" to make their point. Thus Zündel's small, rather obscure page, became the subject of worldwide publicity. His writings are now more accessible than ever.

Internet advocates stand behind the guarantees of the First Amendment in their opposition to any form of electronic censorship. While many may view racist and extremist web sites as unsavory, they are nonetheless expressions of free speech that the Constitution protects.¹⁸⁰ Protection of free speech ends, however, when it takes the form of direct threats to an individual and meets the "true threat" standard articulated in *United States v. Baker*.¹⁸¹ Lawmakers are presently debating whether they must write new laws, modify old ones, or whether current laws are sufficient to deal with Internet crime. But as this article illustrates, the courts have already begun to shape the direction of Internet regulation.¹⁸² Some say that the same principles that governed free speech in the past should govern these new technologies.¹⁸³ Others argue that this technology is so revolutionary that it calls for fundamental changes to the standard framework of First Amendment analysis.¹⁸⁴ The parameters of Internet regulation is an issue that the Supreme Court will likely decide.¹⁸⁵

If legislators cannot expand current law to address the problems posed by the Internet, should the government develop new laws addressed specifically to electronic communications? Some argue that any new laws should be sparse and very carefully drafted so as not to hinder the growth of this information marketplace.¹⁸⁶ Whatever one's philosophy, the Internet is in its infancy and lawmakers should exercise caution in attempting to regulate this new technology whose potential none of us can fully comprehend. As we gain a more complete understanding of the Internet's potential, the legislative and judicial branches will consider what regulatory steps they should take. As Lawrence Lissig, Associate

¹⁷⁸ See *id.* (noting that total censorship of the Internet is impossible).

¹⁷⁹ See *id.*

¹⁸⁰ Although the First Amendment generally protects all forms of speech there are exceptions for certain forms of sexually explicit material. *Compare* *N.Y. v. Ferber*, 458 U.S. 747, 764 (1982) (The dissemination of obscenity and child pornography may be completely prohibited) *with* *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (Indecent materials are protected by the First Amendment but are subject to some forms of regulation).

¹⁸¹ 890 F. Supp. 1375.

¹⁸² See *Baker*, 890 F. Supp. 1375; *Reno*, 929 F. Supp. 824 (1996).

¹⁸³ See Owen Fiss, *Symposium: Emerging Media Technology and the First Amendment*, 104 *YALE L.J.* 1613, 1615-16 (1995) (outlining different academic perspectives on changing existing First Amendment law in response to technology).

¹⁸⁴ See *id.* at 1616.

¹⁸⁵ See David Savage, *Supreme Court to Review Ban of Internet Indecency*, *L.A. TIMES*, Dec. 12, 1996, at A1.

¹⁸⁶ See Lawrence Lissig, *The Path of Law*, 104 *YALE L.J.* 1743 (1995).

Professor of Law at the University of Chicago, advises, "[t]o move too quickly might well be to constrict the as-yet unrealized expressive and associational potential of cyberspace."¹⁸⁷

One of the most effective means of combating offensive material on the Internet is one of the most traditional. Those whom the content of a Web page offends should counter the messages of hate with alternate information.¹⁸⁸ Perhaps the hard-core extremists will not bother reading the stuff that appears on Websites as antidotes to racism and anti-Semitism. But for the parent looking for alternative forums for her or his child, or the youngster who comes across the "hate" websites¹⁸⁹ and is not sure how to evaluate what he or she is reading, the ADL or Nizkor postings can provide the facts to rebut extremist materials. Meeting speech with more speech in the marketplace of ideas is the ideal that fostered the First Amendment.¹⁹⁰ Ken McVay, founder of the Nizkor (Hebrew for "we will remember") Project, devotes his time to countering the claims of neo-Nazis and Holocaust deniers. Nizkor includes historical documents on the Holocaust, human rights reports, and information related to skinhead and racist activities.¹⁹¹ These groups seek to ensure that information responding to racist rhetoric on the Internet is available on-line.¹⁹² These sites have drawn praise from civil libertarians and free speech advocates who note that attempts to censor the extremist sites is both impractical and more than likely impossible to do under the First Amendment.¹⁹³ As Abraham Foxman, National Director of the ADL, explained, "[t]he Web can, and should be monitored and messages of hate exposed and countered."¹⁹⁴

Hate and harassment existed long before the establishment of the Internet and would continue even if the Net was heavily censored. Many people have expressed dismay at the types of images that the Internet brings into their homes.¹⁹⁵ As the court in *ACLU v. Reno* points out, however, "[j]ust as the

¹⁸⁷ See *id.*

¹⁸⁸ HOFFMAN, *supra* note 111, at 35.

¹⁸⁹ See *id.*

¹⁹⁰ See John Schwartz, *Thinking about Hate Messages and Limits of Resistance*, WASH. POST, Mar. 4, 1996, at F17.

¹⁹¹ The website address of the ADL is www.adl.com; the address of the Nizkor Project is www.almanac.bc.ca/. The United States Holocaust Memorial Museum is beginning to put the information stored in museum archives on the Internet. The Museum's web site can be found at www.ushmm.org/ *Eye Weekly Names Nizkor #1 in Canada*, THE NIZKOR PROJECT, June 1996, at 4 (discussing the growth of sites that provide information that challenges revisionists).

¹⁹² See April Lindgren, *Activist Urges Caution in On-Line War of Hate: Censoring the Internet Risky*, OTTAWA CITIZEN, May 1, 1996, at A5.

¹⁹³ See Thomas Maier, *supra* note 136 (citing Jonah Sieger, policy analyst with the Center for Democracy and Technology, a civil liberties advocacy group specializing in Internet issues).

¹⁹⁴ *Id.*

¹⁹⁵ See *e.g.*, Elizabeth Corcoran, *Cybersensitivity? Did the Media Overreact to Pornography on the Internet?*, WASH. POST, June 28, 1995, at C1 (noting that the computer in-

strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects."¹⁹⁶ Given that the courts have extended First Amendment protection to the Internet, the best way for society to battle the evil of hate is not to censor it but to be active in meeting lies with truth.¹⁹⁷

dustry is offering parents "filters" which are computer programs to ensure that children do not have access to certain images and discussion groups on the Net).

¹⁹⁶ *ACLU v. Reno*, 929 F. Supp. 824 (1996).

¹⁹⁷ *See id.*