

Beyond free speech: novel approaches to hate on the Internet in the United States

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Hate on the Internet presents a unique problem in the United States. The First Amendment to the Constitution protects speech, even that which is hateful and offensive. Although the First Amendment is not without limitation and, indeed, although there have been a small number of successful prosecutions of individuals who disseminated hate speech over the Internet, web-based hate continues to receive broad First Amendment protections. Some non-governmental organizations in the United States, such as the Anti-Defamation League (ADL) and the Southern Poverty Law Center, have adopted innovative approaches to hate on the Internet. For instance, the ADL tracks and monitors hate-based websites, identifies hate trends, works cooperatively with law enforcement, notifies potentially impacted communities about relevant hate activities, and responds with training, educational curricula and counter-messages. It also has taken a novel, free-enterprise approach to encouraging ISP regulation of hate-speech on the Internet. The ADL has successfully worked with Internet Service Providers (ISPs) to enforce terms of service contracts (TOS) against hate-based website. While identifying originating ISPs is no small challenge, ISPs may voluntarily cease to provide Internet access when made aware of offensive hate content. This article first examines the evolving legal jurisprudence in the United States regarding prosecutions of hate speech on the Internet. It then analyzes the roles of NGOs in monitoring, tracking and regulating hate on the Internet. Finally, it examines the potential and limitations of these efforts.

Keywords: hate crime; hate speech; freedom of speech; Internet; online threat; First Amendment; Anti-Defamation League; Southern Poverty Law Center

Introduction

The Internet is a powerful communication medium that can be utilized by any individual with a computer and a modem anywhere in the world. While content on the Internet is overwhelmingly positive (or value neutral), it also contains messages of bias and bigotry. Due to the proliferation of the Internet and the breadth of its reach, bigoted messages can be communicated with ease and to a much larger audience than ever before.

In the United States, under the First Amendment to the Constitution, online hate speech enjoys the same protections as any other form of speech. These speech protections are much more robust than that of the international community. As a

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result, hate organizations have found a safe-haven in the United States from which to launch their hateful messages.

Moreover, because the First Amendment guarantees freedom of speech broadly, the United States government is limited in its ability to regulate online speech through existing civil and criminal law, and governmental attempts to pass new content-based laws regulating online speech by and large have been declared unconstitutional. Although hate speech is largely protected from governmental regulation, it can be effectively responded to by non-governmental organizations (NGOs). Two novel approaches to online bigotry have been developed by US-based NGOs, including the Southern Poverty Law Center and the Anti-Defamation League. The first approach utilizes the Internet affirmatively as a weapon in the battle against hate and hate groups. The second approach works cooperatively with Internet Service Providers (ISPs) to identify hate speech in the first instance and to encourage enforcement of terms of service contracts (TOS), with an eye to removing hateful content from the web. Because hate speech will continue to find a home in the United States, further study of organized responses to online hate may prove useful to scholars and governmental actors who seek to control the spread of hatred on the Internet.

First Amendment jurisprudence and governmental attempts to regulate online speech

The First Amendment to the United States Constitution provides broad protections to speech, including speech that is racist or otherwise offensive (US Const., amend. I). The principle underlying free speech is a marketplace of ideas, in which distasteful or offensive speech is answered by more speech (*Abrams v. United States*, 1919). Within the 'marketplace of ideas', citizens can sort through beliefs and ideals which best resonate with them, and discard those that do not. Once hate speech is displayed publically, it can be answered by speech that reveal its falsity and offensiveness, and also by counter-messages that promote positive values.

American legal jurisprudence leans heavily in favor of public discourse and away from speech regulation. The United States Supreme Court has ruled that the First Amendment applies in full measure to speech on the Internet (*Reno v. ACLU*, 1997, pp. 868–870). In other words, hateful and offensive online speech enjoys the same robust First Amendment protections as any other form of speech. As a result, the government cannot restrict online speech unless that speech falls within an unprotected category, such as speech that is obscene or that represents a 'true threat'. Indeed, the government can only regulate speech based on content where it can show that the regulation is necessary to serve a compelling state interest and where it is narrowly drawn to achieve that end. Courts will exercise 'great caution before silencing viewpoints with which [they] disagree' (Bunker, 2001, p. 8). As demonstrated below, attempts by the government to regulate online material have met with limited success. In addition, the government's utilization of legal challenges to prosecute online hate speech has been extremely rare.

Governmental efforts to regulate Internet speech

In recent years, the US Government twice has attempted to pass laws regulating the content of Internet speech. The results have been decidedly mixed. In the mid-1990s, Congress passed the Communications Decency Act of 1996 (CDA) in an effort to

protect minors from explicit material on the Internet (*CDA*, 1996). The CDA prohibited the 'knowing' transmission of 'obscene or indecent' messages to any recipient under 18. It also prohibited the transmission of content to any person under the age of 18 'that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs'. The American Civil Liberties Union sued, arguing that the anti-indecency provisions of the CDA were overly broad and violated the First Amendment. The Supreme Court unanimously agreed, and the anti-decency provisions of the CDA were struck down (*Reno v. ACLU*, 1997). Congress then passed in 1998 the Child Online Prevention Act (COPA), its second attempt to legislatively shield children from harmful material on the Internet (*COPA*, 1998). COPA was immediately challenged on First Amendment grounds. Through 10 years of litigation, the federal courts that reviewed COPA each held that the law violated the First Amendment. This ruling was again recently affirmed by the Court of Appeals for the Third Circuit (*American Civil Liberties Union v. Mukasey*, 2008).

Congress's attempts to regulate child pornography on the Internet also faced significant First Amendment challenges. In the Child Pornography Prevention Act of 1996 (CPPA), Congress prohibited 'any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image of picture' that 'is, or appears to be, of a minor engaging in sexually explicit conduct'. A second provision prohibited material that 'conveys the impression it depicts a minor engaging in sexually explicit conduct'. In 2002, the United States Supreme Court struck down the CPPA on First Amendment grounds, finding it to be overly broad because it banned material that was represented as child pornography, but did not depict actual children. As a result, the Court ruled, CPPA would ban material that did not harm actual children and that otherwise had scientific, literary, artistic, or political value (*Ashcroft v. Free Speech Coalition*, 2002).

In direct response to that decision, Congress passed a new law, the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003, which criminalized 'offers to provide or requests to obtain contraband, child obscenity and child pornography involving actual children' (*PROTECT*, 2003). In May 2008, a divided Supreme Court held that the rewritten statute did not violate the First Amendment (*United States v. Williams*, 2008). The Court ultimately upheld PROTECT because it criminalized 'offers or requests' for materials and not the content of the material itself. Two justices strongly dissented from the Court's majority ruling and would have declared the statute unconstitutional under the First Amendment (*United States v. Williams*, 2008, pp. 1848–1858).

Governmental application of civil and criminal law to regulate online threats

The government is also empowered to prosecute individuals who express a 'true threat' on the Internet. This is because speech that contains a threat of imminent harm to an identifiable victim is not protected by the First Amendment (*Watts v. United States*, 1969). There have, however, only been a small handful of cases in the United States involving the prosecution of hate on the Internet.

Perhaps the most significant case exploring the constitutional contours of online speech arose in the context of a civil challenge to an anti-abortion website known as 'The Nuremburg Files'. The Nuremburg Files site was run by Neal Horsley in connection with the American Coalition of Life Activists (ACLA). The ACLA

collected and posted personal information about abortion providers, including photographs and videotaped images, addresses and phone numbers, license plate numbers, social security numbers, and the names and birth dates of the providers and their families. The ACLA also identified abortion providers by their status: the names of providers who were 'working' appeared in plain black text, those who were 'wounded' appeared in gray, and those who had been murdered were crossed out and labeled a 'fatality'. The providers argued that the website represented a true threat to themselves and their families (*Planned Parenthood v. ACLA*, 1999). A trial jury found the ACLA website to be a true threat and awarded the plaintiffs over \$100 million dollars in damages. The trial court also issued a permanent injunction against the defendants (*Planned Parenthood v. ACLA*, 1999).

Reviewing courts struggled mightily with the question of whether the ACLA website represented a 'true threat' which was not protected by the First Amendment or whether it was protected speech. In a unanimous decision, the first appellate court to review the case reversed the trial court's decision. It held that the First Amendment protected the website in the absence of evidence that the defendants 'threatened that its members would themselves assault the doctors' (*Planned Parenthood v. ACLA*, 2001). Later, an *en banc* appellate court reheard the case. It decided that the website, in fact, constituted a 'true threat' that was outside the scope of protected speech under the First Amendment. The court confirmed that while 'advocating violence is protected, threatening a person with violence is not' (*Planned Parenthood v. ACLA*, 2002, p. 1072). The *en banc* court affirmed the trial court's initial ruling and ACLA was forced to shut its site.¹

ACLA, a civil suit, helped define a true threat in the context of online speech. There also have been a small number of successful criminal prosecutions of Internet hate based on the 'true threat' doctrine. In the first case of its kind, 21-year old college student Richard Machado was criminally prosecuted for hate-based email transmissions. In September 1996, Machado sent an email message to approximately sixty Asian students at the University of California, Irvine, entitled 'F*ck You Asian Sh*t'. In the email, Machado warned the email recipients that if they did not leave campus, he would, 'personally . . . make it my life career (sic) to find and kill everyone one [sic] of you personally. OK????? That's how determined I am . . . Get the f*ck out'. He signed the email, 'Mother F*cker (Asian Hater)'. Machado sent the email from an account that obscured his identity. Machado ultimately was charged with a federal civil rights violation, based on his interference with a federally protected activity, in this case, the right to attend a public university, because of race, color, religion or national origin (United States Code, Title 18, § 245). Machado's first trial resulted in a hung jury. At his second trial, in which the jury learned Machado previously was investigated for sending a threatening message to the campus newspaper, Machado was convicted and sentenced to one year in prison. (ADL, 2000, pp. 6-7).

In 1999, another college student who attended a different public university was charged under the same theory used against Machado. Kingman Quon sent anti-Hispanic emails to hundreds of people, including faculty members at the California State University at Los Angeles and students at the Massachusetts Institute of Technology. In the email messages, Quon voiced his hatred of Hispanics, his belief that they were 'too stupid' to have been admitted to college or to obtain employment without affirmative action policies, and threatened that he would 'come down and kill them'. Quon pled guilty and was sentenced to a two-year term in prison (ADL, 2000, p. 7).

In yet another case involving a college student, Casey Bellanger, a 19-year-old student, posted on the university's computer network his resume, which contained the statement that he 'dislike[d] fags'. Later that day, Belanger also sent the following email message to members of gay and lesbian student groups (expletives deleted):

I hope you dies [sic] screaming in hell ****. youd better watch your *** back you little *** ... I'm gonna shoot you in the back of the *** head *** die screaming [student name], burn in eternal *** hell. I hate gay/lesbian/bisexuals, so *** what. (Partners Against Hate, 2003, p. 8)

In 1997, a suit for injunctive relief was brought against Belanger under the Maine Civil Hate Crime Act, which required him to cease from threatening any person because of the person's sexual orientation, race, color, religion, ancestry, sex, national origin, or physical or mental disability. A permanent injunction was issued.

Finally, and in the first case of its kind, the federal government pursued charges against a website operator, Ryan Wilson, for using his website to intimidate, threaten and harass Bonnie Jouhari, a Fair Housing Specialist, and her teenage daughter, Pilar Horton. Wilson was the leader of ALPHA HQ, a white supremacist group with approximately 80 members who sought to further the goals of white supremacy. In 1998, Wilson used his website to target Jouhari. Jouhari's photograph was posted on the site, and was accompanied by the warning: 'Traitors like this should beware, for in our day, they will be hung by the neck from the nearest tree or lamp post'. The website also displayed a picture of her daughter, who was labeled 'a mongrel'. In addition, the website included a bomb recipe, and a picture of Jouhari's office being blown-up by explosives (*HUD v. Wilson*, 2000).

Jouhari repeatedly sought assistance from the Federal Bureau of Investigation. The Department of Justice reportedly declined to pursue the matter due to First Amendment concerns (Holmes, 2000). Because Jouhari worked as a fair housing specialist, the Department of Housing and Urban Development (HUD) decided to pursue a novel legal strategy against Wilson (Clausing, 2000; Murphy, 2000). HUD alleged that Jouhari had been threatened by Wilson and ALPHA HQ to prevent her from enforcing the Fair Housing Act (FHA). The FHA prohibits the threatening, coercing, intimidating or interfering with an individual who is 'exercising a fair housing right or assisting others who exercise that right'. Jouhari ultimately won her case against Wilson and ALPHA HQ, and was awarded over one million dollars in damages² (*HUD v. Wilson*, 2000). Wilson and the ALPHA HQ were also permanently enjoined from mentioning Jouhari or her daughter on their website.

The sole reason that HUD became involved in this case was due to Jouhari's employment in housing enforcement. Had she worked in another field, HUD would have been unable to pursue the case and no other governmental agency was willing to do so. The reluctance of the Justice Department to take legal action, even when faced with documented harassment and intimidation, is striking.

The cases discussed above are among the only suits in the United States for hate on the Internet.³ The absence of criminal prosecutions, in particular, may reflect the complexities involved in such a suit. In the United States, the prosecution is required to prove its case 'beyond a reasonable doubt'. This standard of proof is difficult to

meet in a typical case, but is further complicated in the context of hate speech on the Internet. In most criminal cases, a defendant's action causes a direct harm; for example, a defendant punches a victim and that action causes pain or injury. Online hate speech, however, may result in indirect harm, making it more difficult for prosecutors to establish causation. For instance, if a website makes a general call to arms against all Jews, it cannot be held *criminally* liable when a reader of that website attacks an individual who is Jewish because the causative element is too removed from the message.

Further complicating criminal prosecution is the nature of the Internet itself. Hate crime offenders who utilize the Internet often create accounts which make the users' identity difficult to trace. Moreover, the medium of the Internet makes it relatively easy for offenders to strike and then 'virtually' disappear, simply by shutting down one website and starting another under a different name and web address. Thus, prosecutors may have great difficulty in establishing an offender's identity beyond a reasonable doubt. Practical difficulties aside, the First Amendment presents a challenge to any hate crime prosecution on the Internet. As demonstrated by the Justice Department's refusal to prosecute Wilson in the Jouhari case, the government is often unwilling or unable to pursue legal action unless the speech in question falls squarely within an unprotected category.

International hate speech laws: the United States as a safe haven

The First Amendment's protection of Internet hate speech directly contrasts with the laws of many other nations in the world, and of international organizations throughout the world, who seek to limit hate speech on the Internet. Recently, the Council of Europe included in the Cybercrime Treaty a provision against online hate speech, which prohibits 'any written material, any image or other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, color, descent or national or ethnic origin, as well as religion if used as pretext for any of these factors'. The treaty also prohibits sites that deny or minimize crimes against humanity, including the Holocaust. The United States is a signatory to the treaty, but did not sign the protocol relating to online hate speech because of First Amendment concerns. This means that any website operated from the United States can do exactly what is prohibited under the treaty without fear of recrimination (McCullagh and Broache, 2004).

Individual nations also have laws regulating hate speech. In Germany, for instance, inciting hatred of a minority is a criminal offense, which can lead to a term of up to five years imprisonment. Germany defines this crime broadly, and includes hate speech communicated in Germany, even if it originated *outside* Germany's borders. One such case is the German prosecution of Ernst Zundel, a German-born Holocaust denier, who lived in Canada for decades and then moved to the United States. Although Zundel was wanted by the German authorities to stand trial for his crimes, the United States deported him to Canada because Zundel violated US immigration laws. He was eventually extradited to Germany from Canada, and was tried, convicted and sentenced to the maximum five year term of imprisonment for disseminating Holocaust denial materials both in print format and on the Internet.

It is important to note that the United States is unlikely to extradite a US citizen for behavior that is legal in the US – even when those actions violate another nation's domestic laws. For instance, Gary Lauck, an American citizen, is wanted in Germany for disseminating hate literature, tapes and paraphernalia into Germany from his home state of Nebraska. The United States refuses to extradite him to Germany to face charges because his activities are legal in the United States (Southern Poverty Law Center, 2001). While this avoids unfairly subjecting citizens to double criminality, it may well thwart the laws of other nations abroad.

International efforts to regulate hate speech are limited by the open speech policies of the United States. A hate group banned from posting its message in one nation need only operate its site in the United States. Arranging for remote Internet hosting is relatively easy to do. And once a site is launched in the United States, it can be viewed throughout the world. This tension between the hate speech laws of other countries and that of the United States is exacerbated by the Internet itself. Unlike any other medium, the Internet is amorphous and transcends traditional jurisdictional boundaries. One leading member of the International Network Against Cyber-Hate (INACH) explained:

Given that the US with our First Amendment essentially is a safe-haven for virtually all Web content, shutting down a Web Site in Europe or Canada through legal channels is far from a guarantee that the contents have been censored for all time. The borderless nature of the Internet means that, like chasing cockroaches, squashing one does not solve the problem when there are many more waiting behind the walls – or across the border. Many see prosecution of Internet speech in one country as a futile gesture when the speech can re-appear on the Internet, almost instantaneously, hosted by an ISP in the United States. (Wolf, 2006)

Indeed, it is perhaps only in countries such as China, which significantly censors its Internet content, that citizens can be effectively prevented from viewing hate content hosted in the United States. Yet, government censorship often results in the over-exclusion of information, an outcome that is surely worse than the potential harm from any individual hate posting.

The United States is known the world over for its robust free speech protections. And that tradition of free speech has been extended to the Internet and hate speech. As such, the United States will likely continue to be a safe-haven for hate speech websites.

Although the government is constrained by the First Amendment, some non-governmental organizations (NGOs), including the Southern Poverty Law Center and the Anti-Defamation League, have begun to employ innovative responses to hate speech on the Internet.

Non-governmental organizations respond to online speech

Although hate speech is protected by the First Amendment, it need not be ignored. In fact, NGOs have developed novel approaches to bigoted online speech. The first approach, exemplified by the SPLC, utilizes the Internet affirmatively as a weapon in the battle against hate and hate groups. The second approach, applied by the ADL, is to work with Internet service providers (ISPs) to enforce terms of service contracts (TOS) against hate-based websites, and to identify and remove offensive messages from message boards and chat rooms. These two organizations are arguably the largest NGOs in the United States devoted to the issues of hate crime, extremism and intolerance.

Using the Internet as a weapon: the Southern Poverty Law Center

The Southern Poverty Law Center (SPLC) embraces the Internet as a source of information about, and a weapon against, hate groups. Based in Montgomery, Alabama, the SPLC was formed in 1971 as a small civil rights organization and has expanded to an organization with millions of fundraising dollars in its coffers and a staff of over 120 persons. The SPLC targets extremism through monitoring, investigating and reporting about hate groups, litigation against extremists and their leaders, and educational projects. This section first examines the SPLC's Intelligence Project ('the Project') and its use of the Internet as a weapon to 'destroy and incapacitate' hate groups (Beirich & Potok, 2009). It also briefly examines the SPLC's concomitant strategies of combating hate through lawsuits against hate groups and its web-based educational programming.

The Project seeks to attack extremist groups by providing information to the public about hate groups and their members. It does this in a number of mediums, many of which are based on the Internet. First, the Project produces an annual publication of all hate groups in America, including a map which displays their types, numbers and locations. This list is relied upon by law enforcement and scholars, as well as other interested parties. The Project also provides training to law enforcement agencies about hate crimes and domestic terrorism, and responds directly to requests for information by law enforcement officers in investigating and prosecuting criminal cases against hate group members. Finally, it investigates and reports on extremist groups, and disseminates its findings in a variety of Internet-based publications, including *Hatewatch*, a frequently updated blog, and two weekly electronic newsletters. A more significant publication is its *Intelligence Report*, available on-line and in print format, which the SPLC estimates has a readership of over 300,000.

One unexpected source of online readership is 'members of the radical right who have no other publication that so closely tracks their movement' (Beirich & Potok, 2009, p. 240). Because members of extremist groups now read online the *Intelligence Report*, the SPLC has a direct line of communication with individuals involved in extremist activities. As a result, the SPLC and the *Intelligence Report* can influence extremist activities through its reporting.

The staff at the *Intelligence Report* engages in investigative reporting with an eye to 'shame, disrupt and expose' hate groups (Potok, personal communication, December 16, 2008). It does so through two primary strategies: 'quick strikes' or 'campaigns' (Potok, personal communication, December 16, 2008). One example of a 'quick strike' came when the SPLC began investigating the Knights of Freedom, a neo-Nazi Internet-based organization run by a college student named David Wolfgang Hawke. The SPLC determined that Hawke had a Jewish father, named Hyman Greenbaum. The SPLC also learned that Hawke had been born Andrew Britt Greenbaum, and that he legally changed his name at the age of 18. The SPLC shared this information with local newspapers, including the *Boston Globe*, which published the story. Right-wing groups learned about Hawke's Jewish background and decried Hawke throughout the Internet as a 'Kosher Nazi'. Hawke ultimately disbanded the Knights of Freedom and his attempt to resurrect his group under another name was largely unsuccessful.

The SPLC implemented a more complex and lengthier 'campaign' against the National Alliance. The Alliance was a major neo-Nazi group in the United States,

run by a charismatic, former-physics professor named William Pierce. Under Pierce's leadership, the Alliance was financially successful, grossing over \$1 million in 2002, with funding streams from monthly membership dues, sales through the National Vanguard Books division and sales from Resistance Records, a white power music label. Shortly after Pierce died in 2002, the SPLC obtained a copy of one of Pierce's secret speeches. The speech called other extremist groups and their members 'freak[s] and weakling[s]' and 'human defectives'. The *Intelligence Report* provided details of the speech as its cover story. As extremists read the story online, they became 'furious' and started a boycott of Resistance Records (Potok, personal communication, December 16, 2008). The National Alliance membership, which had fallen in number since Pierce's death, declined further. The *Intelligence Report* continued to investigate the Alliance. It learned that Pierce's successor, Erich Glibe, was planning to publish a 2004 calendar entitled 'Women of the Movement,' as a tribute to the women of the resistance movement. The SPLC revealed in its *Intelligence Report* that the women on the calendar were actually employees of a strip-club frequented by Glibe. The Alliance membership declined from 1200 in 2002 to less than 100 in 2006.

The Alliance's decline can be attributed to many factors, including Pierce's death, Glibe's ineffectual leadership and in-fighting among regional leaders. The SPLC and its Intelligence Project would also claim credit for 'taking down the National Alliance' through its investigative reporting and reliance on the Internet to both gain and disseminate pertinent information.

In addition to its Internet-based reporting, the SPLC embraces the Internet as a tool in its arsenal against hate groups. It extensively monitors hate groups, including their websites, and shares that information with law enforcement and the public. The SPLC also uses the Internet as a tool in fighting hatred through its Teaching Tolerance program. Begun in 1991, the Teaching Tolerance program provides free web-based downloadable curricula, suggested classroom activities, teaching kits and an e-newsletter. The website contains lesson plans for students in kindergarten through high school. Behind Teaching Tolerance is the belief that children can be taught to embrace difference and to turn away from hate.

The SPLC also utilizes the legal system to attack hate groups. In one lawsuit, for instance, the SPLC sued the Aryan Nation and its leader, Richard Butler, over an incident in which security guards at the 20 acre-Aryan Nation compound shot at Victoria Keenan and her son after their car backfired nearby. In 2000, a jury found that the defendants were negligent in their supervision of the Aryan Nation compound, and awarded the plaintiffs \$6.5 million dollars. To satisfy that judgment, Butler was forced to turn over his Aryan Nation compound, which has since been turned into a community peace park. With the closure of the compound and the 2004 death of Butler, the Aryan Nation fell into disarray. Similarly, a South Carolina jury in 1996 ordered the Christian Knights of the KKK and four Klansmen to pay \$37.8 million (later reduced by a judge to \$21.2 million) for conspiring to burn a black church. The Klan was forced to give up its land and headquarters, rendering the group virtually obsolete. Because hate groups are often judgment proof, plaintiffs rarely are able to collect the damages awarded to them. Yet, lawsuits that strip hate groups of their assets can have a significant and adverse impact on their continued viability.

Working with Internet Service Providers (ISPs) to remove hate from the Internet: the Anti-Defamation League

The Anti-Defamation League has long been active in the hate crime arena. It drafted influential model hate crime legislation that has been adopted by nearly every state and federal government in the United States. It also publishes an annual report on hate crime incidents. In addition, the ADL has emerged as one of the leading NGOs on the issue of hate on the Internet.

One significant way that the ADL seeks to respond to hate on the Internet is by bringing attention to hateful content that may violate a particular ISP's terms of service (TOS) contract or code of conduct. It then requests that the ISP remove the offensive material. For instance, in 2003, the ADL learned of a website located at 'hoozajew.org'. The website claimed to be a legitimate listing of prominent American Jews. The ADL, however, countered that the website was misleading and anti-Semitic. The ADL contacted the host company, the Alabanza Corporation in Baltimore, Maryland, and requested that it remove 'Hoozajew' in accordance with its 'acceptable use' policies. Those policies prohibited the posting of objectionable material and permitted the company to remove sites at its discretion. Alabanza closed the offending website (ADL, 2003).

In 2004, the ADL contacted Google over a controversial website entitled 'Jew Watch'. 'Jew Watch' is one of the sites that appears when a user searches the word 'Jew' on Google's search engine. 'Jew Watch,' however, is not an informative site about the Jewish religion or people. Instead, it is anti-Semitic website, containing false, misleading and offensive information. Although Google declined to remove the website, it added a disclaimer about the website. Today, when a user types the term 'Jew' into the Google search engine, the 'Jew Watch' site will still appear among the first responses. On the right of the search screen, however, is a Google link about 'offensive search results'. Any user who clicks on that link will learn that the Google team finds the search results disturbing, gain an explanation as to why the 'Jew Watch' website receives a high search ranking, and be provided with an explanation that Google will not remove a website simply because its content is unpopular. (<http://www.google.com/explanation.html>). Google also included a post-script:

You may be interested in some additional information the Anti-Defamation League has posted about this issue at http://www.adl.org/rumors/google_search_rumors.asp. In addition, we call your attention to Google's search results on this topic (<http://www.google.com/explanation.html>).

Although the ADL's advocacy did not result in the removal of the website, its efforts resulted in the publication of additional information that enables the user to critically evaluate the search results and learn more about anti-Semitism.

More recently, in response to the 2008 financial crisis, the ADL reported an upsurge in anti-Semitic comments on popular message boards. The ADL worked with numerous ISPs to identify offensive postings and remove from the message boards. As Abe Foxman, national director of the ADL explained:

... [t]he good news is that providers of Internet services and moderators of message boards and even individual users are quick to react whenever anti-Semitism enters the discussion ... The service providers are responsive, and in most cases the offensive messages are quickly removed. But in many cases – especially with online discussions that occur in real time and are closely followed by large

groups of users – the damage is already done’ (Reuters News Service, October 2, 2008).

The ADL also works with ISPs to identify hate content in the first instance. On December 11, 2008, YouTube launched its Abuse and Safety Center. The ADL is a significant contributor to this effort. Indeed, a click on ‘hateful content’ directs you to eight ‘tips for confronting hate speech on YouTube from the Anti-Defamation League.’⁴

On this same page are several direct links to the ADL’s website, including its main homepage, its anti-Semitism web page and its confronting prejudice webpage. In this way, the ADL hopes to aid YouTube users in identifying, reporting and responding to hateful messages on YouTube. With regard to free speech concerns, YouTube added this disclaimer:

We encourage free speech and defend everyone’s right to express unpopular points of view, but we don’t permit hate speech. Keep in mind that not everything that is mean or insulting is considered hate speech – this term only applies to speech which attacks or demeans a group based on race or ethnic origin, religion, disability, gender, age, veteran status, and sexual orientation/gender identity. (<http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=126264>)

The partnership with YouTube is only one extension of the ADL’s earlier efforts to control bigoted online speech. At one time, the ADL developed a free downloadable filter, known as the ‘ADL Filter’, which was ‘designed to empower parents who want to restrict their children’s access to hate sites’. The ADL defined hate sites as those sites ‘on the Internet operated by individuals or groups that, in ADL’s judgment, promoted hatred or hostility toward groups – Jews and others – on the basis of race, ethnicity, sexual orientation or other immutable characteristics’. A user working on a computer where the ADL filter was activated would be denied access to any site that fell within the ADL’s definitions. Although the filter became defunct in the early 2000s, the ADL was an early advocate of voluntary hate speech filtering.

In addition, the ADL uses the Internet to work with law enforcement agencies. It developed an online website entitled the Law Enforcement Agency Resource Network (L.E.A.R.N.) which provides training and resources to law enforcement in fighting extremism and terrorism (<http://www.adl.org/learn/default.htm>). It has an online law enforcement newsletter, and provides training and materials on hate crimes, bias, extremism and terrorism. It also provides in-person training sessions to law enforcement about extremism and terrorism. In addition to its online training, the ADL works cooperatively with law enforcement. For instance, according to its website, the ADL was asked by the Bureau of Alcohol, Tobacco and Firearm (ATF) to provide information about two white supremacists accused of plotting to assassinate then-Presidential candidate Barak Obama, and to provide information about their associates and contacts, and on the Supreme White Alliance and its membership (ADL, 2008).

The ADL also offers a wide range of educational materials for teachers and administrators from kindergarten through college. It has established the World of Difference Institute, which provides anti-bias education and diversity training programs, including online professional development programs, for educators and administrators. Its education site offers free online curriculum for instructors of

students in kindergarten through high school, and provides free educational multimedia kits that discuss topics such as the Holocaust, genocide and racism.

Analysis and conclusions

The two approaches detailed above make a significant contribution to responding to hate on the Internet. Yet, each are not without limitation. The SPLC employs a great deal of time and resources in its investigative reporting. Smaller NGOs may be unable to devote the necessary time and resources to duplicating these efforts. Moreover, the SPLC is only able to target individual groups as issues arise. In that sense, their online work is reactive and not proactive.

Working with ISPs to remove offensive content also has significant limitations. Ultimately, the ISP itself has the final determination over whether it will cooperate, which is contingent on a number of variables. First, the ISP must have a policy in place that enables it to address hateful content. Verizon Wireless, for instance, has a broad Terms of Service Contract, which includes hate speech. Its TOS is violated when the service is used: 'in any fashion for the transmission or dissemination of images containing child pornography or in a manner that is obscene, sexually explicit, cruel or racist in nature or which espouses, promotes or incites bigotry, hatred or racism' (Verizon, 2008). Any website that posts hate speech is subject to Verizon's TOS, and can have its service terminated.

AT&T's policy on hate content is less broad. A senior executive at AT&T explained that the company is actively committed to an open Internet and that they strive to be content neutral in relation to the sites it hosts. In the context of hate speech, the company advocates education and awareness. To that end, AT&T is considering the expansion of its Internet Safety Education program, which is geared toward protecting children from predators and exploitation, to encompass online hate speech (Cicconi, 2008). AT&T's Acceptable Use Policy (AUP) states that, in addition to general prohibitions against illegal activity, service can be terminated for threatening material or content:

Services shall not be used to host, post, transmit, or re-transmit any content or material, or to create or operate from a domain name that harasses, frightens, or threatens the health or safety of other users. For those IP services AT&T hosts on its network, AT&T reserves the right to decline to host content that may be offensive or otherwise harmful to customers. (AT&T, 2008)

Whether hateful content falls within AT&T's AUP is an open question.

Still other ISPs actively embrace hate speech. Stormfront, for instance, affirmatively seeks to host extremist websites. Indeed, the hosting of white supremacist, anti-Semitic and racist messages is central to its mission. For obvious reasons, Stormfront would never work with NGOs to remove hate speech from its sites.

Even if an ISP has a TOS policy that enables it to remove hate speech, the ISP must be *voluntarily* willing to do so. An ISP who hosts hateful content is not liable for that content. Section 230 of the Communications Decency Act (unrelated portions of which were struck down as unconstitutional in *Reno v. ACLU*) insulates ISPs from liability for the content of its users websites. Specifically, Section 230 states that 'no provider or user of any interactive computer service shall be treated as the publisher or speaker of any information provided by another information

content provider' (United States Code, Title 47, Section 230). As one court noted in upholding the constitutionality of Section 230:

Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. (*Zeran v. America Online*, 1997)

Thus, while an ISP has the ability to remove content in accordance with its TOS contracts, it cannot be required to do so.

Although ISPs cannot be held liable for the content of speech located on their servers, they can voluntarily choose to regulate that speech. And, indeed, there are ISPs who have been willing to voluntarily regulate hate speech on their sites. America Online, for instance, adopted a term of service contract which users would violate if they 'transmit or facilitate distribution content that is racially or ethnically offensive'. It also expressly bans hate speech. Citing its TOS, AOL removed from its ISP the neo-Nazi website, the Nationalist Observer (ADL, 2000, p. 12).

Yet, even if an ISP is able and willing to regulate hate speech, it cannot monitor all content hosted on its servers. There are over 1.4 billion Internet users throughout the world (Internet World Statistics, 2008), with well over 100 million websites (Walton, 2006). This translates into millions – if not billions – of Internet postings that an ISP would have to sift through in order to effectively monitor content. Further complicating matters is the ease with which Internet content can be redirected. When a website is removed from one ISP, there is nothing to stop it from reappearing overnight elsewhere. Indeed, shortly after the Nationalist Observer website was taken down by AOL, it reappeared on Stormfront (ADL, 2000, p. 14). Thus, even with the assistance of NGOs, it is unlikely that all – or even most – hateful content will be removed from the web.

In addition, the policy of working with ISPs to remove content raises significant policy questions. Should ISPs determine what content is appropriate and what is offensive? Offensive to whom? And to what degree? Are they qualified to make those determinations? Is this censorship? Would ISPs favor commercial interests? Do users want private corporations to make these decisions for them? Do users have the right to know that access to content has been restricted?

Another potential response to online speech that addresses some of the above questions is the development of voluntary filtering software. These programs can be voluntarily installed on computers and prevent users from accessing specified online content. The ADL, for instance, developed its *HateFilter*, which blocked access to ADL designated hate sites. The ADL's *HateFilter*, however, is now defunct, in no small part because it could not keep up with the ever changing data available on the Internet. Other public and commercial companies have also developed software which can filter hate speech. Filters, however, limit access only to those materials that fall within the definitions of their filtering software. If a filter is too broad, it can filter useful and positive speech, while failing to capture offensive speech. An extensive study by the Kaiser Family Foundation, for instance, found that anti-pornography filters blocked access to sexual health websites, but failed to fully block access to pornography (Rideout, Richardson,

and Resnick, 2002). In the context of hate speech, it is conceivable that filters, ironically, could block information located on the SPLC and ADL websites.

Ultimately, efforts to remove or filter online speech face tremendous legal, technological and practical obstacles. Yet, if bigoted speech cannot be limited, it can certainly be answered. As Lee Bollinger, Columbia University President and long-time First Amendment advocate writes in the now-classic book *The tolerant society: Freedom of speech and extremist speech in America*:

In today's discourse about free speech, the dominant value associated with speech is its role in getting at the truth, or the advancement of knowledge. Speech is the means by which people convey information and ideas, by which they communicate viewpoints and propositions and hypotheses, which can then be tested against the speech of others. Through the process of open discussion we find out what we ourselves think and are then able to compare that with what others think on the same issues. The end result of this process, we hope, is that we will arrive at as close an approximation of the truth as we can. (Bollinger, 1986, p. 45)

Bollinger's vision of an open forum encompasses the Internet, in which bigoted speech is exposed by more speech that decries bigotry, and ultimately illuminates a larger more tolerant truth within society.

In a practical sense, Bollinger's vision is not far from reality. The presence of online hate speech is dwarfed by the volume of positive or content-neutral speech. The Simon Wiesenthal Center (SWC), in its 2008 *iReport*, identified over 8,000 problematic hate and terrorist websites and other Internet postings (SWC, 2008). This report is highly inclusive, and counts hate websites, blogs, newsgroups, YouTube, other video sites, terror groups, anti-gay groups and anti-abortion groups (Amster, 2009, p. 227). Even if this estimate is not severely inflated, 8,000 problematic Internet postings pale in comparison to the more than 100 million websites in existence (Walton, 2006). Although no study exists that measures the quantity of speech promoting tolerance, at least one scholar posits that hate sites simply cannot compete 'with the overwhelming majority of messages that . . . present their organizations as hate-based, ignorant, violent and the like (Schroer, 2001, p. 227). In other words, racist speech can be drowned out by positive messages.

Perhaps the most effective role that NGOs can play in the fight against online hate is to provide positive online messages that counter bigoted speech. Organizations such as the SPLC and the ADL have online educational tools and resources, raise public awareness about the scope of hate, and expose the falsities that underlie hateful messages. The innovative online strategies of NGOs make an important contribution to reducing the potency of online hate speech.

Notes

1. After the en banc decision in 2002, litigation continued solely with respect to the proper calculation of punitive damages and was not related to the true threats definition. The United States Supreme Court three times declined ACJA's to review the case, most recently in October 6, 2008. See *American Coalition of Life Activists v. Planned Parenthood of Columbia/Willamette, Inc.*, 129 S.Ct. 145 (2008). As such, the definition of 'true threats' provided in the en banc decision continues to be governing law.
2. Roy Frankenhouse, a Ku Klux Klan leader and host of a local television show entitled 'White Forum' also engaged in a campaign of harassment and intimidation against Jouhari. HUD also sued Frankenhouse in this action. His case settled separately. As part

- of his settlement, Frankenhouer agreed to publicly apologize to Jouhari and her daughter on his television show, perform community service, and pay a portion of his income to Jouhari.
3. There are also a small number of criminal cases in which the defendant's Internet visits to hate websites were used to prove bias motive in hate prosecutions. For instance, during trial of a defendant who was charged with burning a cross on an interracial couple's property, the prosecution successfully introduced testimony that the defendant spoke about accessing racist Internet sites to prove the defendant understood the racist significance of cross burning. *United States v. Magleby*, 241 F.3d 1306 (10th Cir. 2001). In another case involving a racist murder spree, the prosecution introduced evidence that the defendant visited racist and white supremacist websites. (ADL, Richard Baumhammers: Racist Murder & the Internet, available at http://www.adl.org/Internet/extremism_rw/inspiring.asp).
 4. See <http://help.youtube.com/support/youtube/bin/answer.py?page=&answer=126264&master=hatefulcontent>

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