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Free Speech and the Internet

"The Future of First Amendment Jurisprudence"

James Murphy

Introduction

The Internet has provided many societal benefits. It allows for instantaneous communication, the exchange of ideas, and even serves as a guide for people in emergency situations.[1] However, the Internet is far from a utopia.[2] This rapid transmission of information can lead to repugnant remarks, often without the benefit of time to mull over the potential effects. In the United States, we take for granted the broad range of freedom of speech given to us through the First Amendment. A rule of law that is local in nature, especially when it comes to the Internet.[3] However, as Judge Oliver Wendell Holmes famously stated, " [t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[4]

The combination of the emergence of the Internet and the ever-evolving area of First Amendment jurisprudence leads to an even blurrier line of what types of speech are protected. To begin, we must outline what types of speech have been carved out, by the Supreme Court, as protected by the First Amendment and which are subject to governmental regulation and civil liability. While causes of action for speech conducted outside protection have been available since the First Amendment's inception, the Internet has fostered the need to tailor causes of action for victims of online speech that falls outside the bounds of First Amendment protection. An analysis

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[1] Bruce Drake, Twitter served as a lifeline of information during Hurricane Sandy, Pew Research Center, October 28, 2013, http://www.pewresearch.org/fact-tank/2013/10/28/twitter-served-as-a-lifeline-of-information-during-hurricane-sandy/.
[2] Jess Coleman, Injustice at Rutgers, Huffington Post, May 16, 2012, http://www.huffingtonpost.com/jess-coleman/injustice-at-rutgers_b_1354236.html.
[3] Jeff John Roberts, Hard choices for Google as judges grow bold on censorship, Fortune, June 21, 2015, http://fortune.com/2015/06/21/google-censorship/.
[4] Schenck v. U.S., 249 U.S. 47, 52 (1919); Interestingly, this is a quote often misapplied as a legal standard. See Trevor Timm, It's Time to Stop Using the 'Fire in a Crowded Theater' Quote, The Atlantic, November 2, 2012, http://www.theatlantic.com/national/archive/2012/11/its-time-to-stop-using-the-fire-in-a-crowded-theater-quote/264449/.

of both types is necessary to determine whether traditional free speech remedies are sufficient or newly tailored Internet-centric regulations are more effective. Notwithstanding enforcement and public cooperation of prosecution of available causes of action, private technology companies, such as Google, play a major role in what speech is acceptable on their sites, irrespective of constraints placed on government censorship through the First Amendment. With that power comes the challenge of balancing free exchange of expression and pressure to limit speech well beyond the First Amendment. Due to the universal nature of the Internet, the question is whether private technology companies will take into account the local law that is the Constitution or whether they will follow the trends of the global scale as the United States only provides for a small fraction of their consumer base.

What is Protected Speech?

All speech that is not specifically excluded generally is afforded protection from government prohibition. The caveat, generally, is included because although the remainder of speech not subject to complete bar from protection falls under the umbrella of the First Amendment, government regulation can pass judicial muster. The following are categories of speech, which can be regulated, but with varying degrees of judicial scrutiny attached. These categories include, but are not limited to, content-based restrictions, prior restraint, time, place, and manner restrictions, incidental restrictions and the forum doctrine.

Content-based Restrictions

Content-based restrictions on speech occur when the government attempts to restrict speech based solely on the categorical message of the speech. "As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[5] When such restrictions are challenged, courts will apply "strict scrutiny." The Court has stated, "[t]he Government may … regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."[6] The reasoning behind this analysis is founded in the principle of free speech, to foster political and social discourse without government restriction based on any perceived criticism of government or other categories that government deems harmful to itself or its interests.[7]

Prior Restraint

The Supreme Court in Near v. Minnesota[8], established the concept of prior restraint. The Court stated the doctrine "forbids implementation of any pre-publication regulations that prevent the publication of speech, such as administrative licensing schemes and judicial injunctions against certain types of speech."[9] In essence, a system of prior restraint casts a requirement of permission to disseminate speech. As such the Court, similarly to content-based restrictions, has placed the highest burden on the government to establish constitutionality.[10]

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[5] Ashcroft v. ACLU, 535 U.S. 564, 573 (2002).
[6] Sable Commc'ns of Cal, Inc. v. FCC, 492 U.S. 115, 126 (1989).
[7] See Rosenberger v. Rector and Visitors of Univ. of Va, 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction).
[8] Near v. Minn., 283 U.S. 697 (1931).
[9] Ariel L. Bendor, Prior Restraint, Incommensurability, and the Constitutionalism of Means, 68 Fordham L. Rev. 289, 291 (1999).
[10] Bantam Brooks, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints comes to this Court bearing a heavy burden against its constitutional validity.").

Time, Place and Manner

The government may regulate speech based on "time, place, manner, if it shown that the regulation is content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[11] These types of restrictions on speech are promulgated for a multitude of reasons.[12] The general principle behind allowing government to restrict speech based on a seemingly an infinite amount of justifications is competing interests. There is a broad range of litigation in this sphere based on local[13] to state[14] ordinances that restrict speech that a few to a majority of citizens believe need to be altered in some way. However, placing the second highest scrutiny on such restrictions serves as a sufficient bar from overbreadth legislation.

Incidental Restrictions

An incidental restriction on speech occurs when a regulation is not directly aimed at quashing speech, however, as a consequence of the restricted action a right to speech is disturbed. The Supreme Court in United States v. O'Brien[15] outlined the test for a regulation that in effect or incidentally restricts speech. The Court stated that:

> "Government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free

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[11] Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983).
[12] See Frisby v. Schultz, 487 U.S. 474 (1988) (upholding a restriction on picketing outside a private residence); Ward v. Rock Against Racism, 491 U.S. 781 (1989) (upholding a restriction on music volume at certain hours).
[13] See Watchtower Bible & Tract Society v. Stratton, 536 U.S. 150 (1983) (striking down a local ordinance requiring a permit for door-to-door solicitation).
[14] See McCullen v. Coakley, 134 S. Ct. 2518 (2014).
[15] U.S. v. O'Brien, 391 U.S. 367 (1968).

expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[16]

In essence, this serves as a barrier from government addressing an issue, which could be legitimate in nature, with the underlying intention of limiting speech. The government must show that they are attempting to combat are true societal harm.[17]

Forum Doctrine

Like a real estate agent's mantra, the availability of regulating speech is based sometimes on location, location, location. The Supreme Court has identified three distinct types of fora to determine the level of scrutiny to apply to speech restrictions. These categories include, "traditional public forums," "designated public forums," and "closed public forums."

Traditional public forums consist of public places traditionally used for "assembly, communicating thoughts between citizens, and discussing public questions"[18], such as public parks or streets. If government attempts to exclude citizens from this type of forum based on content, the exclusion must be, "necessary to serve a compelling state interest that [] is narrowly drawn to achieve that end."[19] In this forum however, the government may regulate speech based on "time, place, manner, if it is shown that the regulation is content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[20] The rationale behind the less stringent standard for content-neutral regulations in public forums is founded in the potential for governmental intervention for public safety.

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[16] Id. at 377.
[17] See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 644 (1994) ("the government must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.").
[18] Perry Educ. Assn., 460 U.S. at 45.
[19] Id.
[20] Id.

Secondly, "designated public forums" "consist of public property which the State has opened for use by the public as a place for expressive activity."[21] The Court stated that such a forum "may be created for a limited purpose such as use by certain groups."[22] Due to the similarities between the former forum, in terms of area and purpose for allowance of discourse, the Court ruled that "[g]overnment restrictions on speech in a designated public forum are subject to the same scrutiny as restrictions in a traditional public forum."[23]

Lastly, "closed public forums" are "[p]ublic property which is not by tradition or designation a forum for public communication…."[24] As such, regulation of such a fora is not afforded the same scrutiny as the formers. Instead the Court stated that "[i]n such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint-neutral."[25] In this forum, the Court draws on similarities between public property, which would not be an effective place for public discourse, and the property interest of a private citizen.[26]

What is Unprotected Speech?

The First Amendment does not completely bar any restraint on speech. The Supreme Court has carved out certain categories of speech that are unprotected and subject to blanket prohibition by government. These categories include, but are not limited to, obscenity, child pornography[27], fighting words, and true threats. There are complexities and differing standards for each category and debates wage on as to whether there should be additional categories added to the list. However,

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[21] Id.
[22] Id. at 46 n.7.
[23] Pleasant Grove City v. Summons, 555 U.S. 460, 461 (2009).
[24] Perry Educ. Assn., 460 U.S. at 46.
[25] Pleasant Grove City, 555 U.S. at 470.
[26] See U.S. Postal Service v. Council of Greenburg Civic Ass'ns., 453 U.S. 114 (1981).
[27] This paper will focus on obscenity, fighting words, and true threats as categories of unprotected speech.

the Supreme Court has insinuated that there isn't a strong likelihood that categories of speech would be added, but did not completely quash the notion that there are other forms of unprotected speech.[28]

Obscenity

Obscene is defined as something "disgusting to the senses."[29] As the adage goes "beauty is in the eye of the beholder", so is obscenity in the literal sense. What someone may consider to be obscene can be perceived as something that takes on a completely different meaning for another. Now, from a First Amendment perspective the question became whether we should allow the perspective of the beholder to reign supreme and disallow absolute free speech. Additionally, a determination needed to be made as to whether an individual needed to be harmed in order for obscene material to escape the purview of First Amendment protection. In Roth v. United States[30], the Supreme Court stated "At the time of the adoption of the First Amendment, obscenity law was not fully as developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press."[31]

While quibbling about whether obscenity was never intended to be within the protections of the First Amendment or whether someone needed to be harmed in order for obscenity to be subject to legislative restriction, a definition of what constitutes obscenity needed to be determined.

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[28] U.S. v. Stevens, 559 U.S. 460, 472 (2010) ("Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in out case law. But if so, there is no evidence that "depictions of animal cruelty" is among them. We need not foreclose the future recognition of such additional categories to reject the Government's highly manipuable balancing test as a means of identifying them.").
[29] Merriam-Webster, Obscene, http://www.merriam-webster.com/dictionary/obscene.
[30] Roth v. U.S., 354 U.S. 476 (1957).
[31] Id. at 483.

In Miller v. California[32], the Court settled on specific three-part test to distinguish what constitutes obscenity. What is known as the Miller Test asks: (1) whether the "average person applying contemporary community standards" would find that the work taken as a whole, appeals to the prurient interest, (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[33]

Fighting Words and True Threats

Without sounding like a complete pessimist, even the purest optimist would agree that there are unkind people in the world. People are capable of doing and saying horrible things to each other. It is human nature for the person on the receiving end to react in a way that creates more disturbance and even violence. So, it had to be decided whether the First Amendment would put the onus on citizens to deal with inevitable confrontation and hope they react without violence or whether protection would not be afforded for every unkind statement. The Supreme Court in Chaplinsky v. New Hampshire[34] began to draw the line between the acceptability of impure statements with the "fighting words doctrine." The statute at issue in Chaplinsky prohibited a person from addressing "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place," calling "him by offensive or derisive name," or making "any noise or exclamation in his presence and hearing with the intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."[35] The Court upheld the statute and stated:

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[32] Miller v. Cal., 413 U.S. 15 (1973).
[33] Id. at 24.
[34] Chaplinsky v. N.H., 315 U.S. 568 (1942).
[35] Chaplinksy, 315 U.S. at 569.

> "There are certain well-defined and narrowly limited cases of speech, the prevention and punishment of which have never been thought to raise any Constitutional problems. They include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of idea, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[36]

In a series of decisions over the next decades, the Court would limit the extent to which the "fighting words" doctrine would cover.[37] The Court settled on a formulation of what constitutes "fighting words" in Brandenburg v. Ohio[38]. The Court held that states are not permitted "to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and likely to incite or produce such action."[39] This standard is especially difficult for any prosecution for online discourse as the global scale and unknown audience the Internet brings would likely sever the nexus between language and the likelihood of inciting imminent lawless action.

In a related vein, the First Amendment is also devoid of protection from "true threats." The Court in Virginia v. Black[40], stated that "'true threats' encompass those statements where the speaker means to communicate a serious expression on an intent to commit an act of unlawful violence to a particular individual or group of individuals."[41] The Court stated an important caveat

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[36] Id. at 571-72.
[37] See Terminiello v. Chi., 337 U.S. 1 (1949)(finding the defendant's constitutional right to freedom of speech was protected unless it was likely to produce and clear and present danger beyond public inconvenience, annoyance, or unrest).
[38] Brandenburg v. Ohio, 395 U.S. 444 (1969).
[39] Id. at 447; See also Cohen v. Cal., 403 U.S. 15, 20 (1971)(finding that words that contained an expletive were not directed at a person in particular and could not be said to incite an immediate breach of the peace), Lewis v. New Orleans, 415 U.S. 130, 133 (1974)(finding "at the least, the proscription of the use of 'opprobrious language' embraces words that do not 'by their very utterance inflict injury or tend to incite an immediate breach of the peace.'").
[40] Va. v. Black, 538 U.S. 343 (2003).
[41] Id. at 359.

as well, that the speaker need not actually intend to carry out the threat.[42] The Court stated that the rationale for insisting that "true threats" are proscribable is three-fold: "protecting individuals from fear of violence," "from the disruption that fear engenders," and "protecting people from the possibility that the threatened violence will occur."[43] Within the online sphere these rationales are particularly pertinent because of the anonymity that the Internet brings to the equation. A person may not know the individual who sends an aggressive or threatening statement, as studies have shown people don't most of the time[44] and the First Amendment cannot justify the anxiety and uncertainty that brings.[45] In 1939 Congress passed a statute making it a crime to "transmit in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another."[46]

Causes of Action

The Courts have developed what types of speech are within the bounds of the First Amendment and the others, which upon a showing of varying reasoning behind the ban, can be constitutionally regulated. The Internet has provided new challenges for First Amendment jurisprudence, including liability, accountability, and administrability of proscribed remedies for unprotected speech communicated through the Internet. However, another challenge presented is acceptance for speech, which at times can be disturbing when dissected, that is still protected by

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[42] Id. at 359-60.
[43] Id. at 360 (citing R.A.V. v. City of St. Paul, 505 U.S. 377 388 (1992)).
[44] Maeve Duggan, Online Harassment, Pew Research, October 22, 2014, http://www.pewinternet.org/files/2014/10/PI_OnlineHarassment_72815.pdf.
[45] See Sufficiency/Efficiency of Causes of Action for a discussion on the strengths and weaknesses of current statutory and prosecutorial formulations of addressing this issue.
[46] 18 U.S.C. § 875(c), See Causes of Action for a discussion on this statute.

the First Amendment. This discussion will focus on three remedies specifically tailored for Internet communication, 18 U.S.C. § 875(c), defamation[47], and cyberstalking/cyberharrassment statutes.

18 U.S.C. § 875(c)

"Whoever transmits in interstate or foreign commerce any communication containing any threats 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."[48] However, as pointed out in a recent Harvard Law Review article[49], a few questions remained unanswered with respect to enforcement of this statute, (1) "whether a defendant can be convicted under this statute absent proof that he subjectively intended to threaten anyone and (2) if the statute itself does not require this evidence, whether the First Amendment does."[50]

The controlling perspective, whether subjective or objective, plays a major role in the enforceability of 18 U.S.C. § 875(c) as well as the limits of the First Amendment. The standard by which lower courts had been operating permitted criminal liability where a "reasonable person" would understand the defendant's words as a threat.[51] In Elonis v. United States[52], the Court attempted to address these questions and "held that a conviction under [this statute] may not be solely based on a reasonable person's interpretation of the defendant's words.[53] However, the Court's guidance ended there as it was "left undecided the minimum mental state required for

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[47] While defamation legislation was not originally intended to address Internet communication, a discussion is particularly relevant because most communication is conducted online and the source of defamation lawsuits are now generally more applicable to Internet communication.
[48] 18 U.S.C. § 875(c).
[49] Federal Threats Statute – Mens Rea and the First Amendment – Elonis v. United States, 129 Harv. L. Rev. 331 (2015).
[50] Id.
[51] Id.
[52] Elonis v. U.S., 135 S. Ct. 2001 (2015).
[53] Federal Threats Statute, supra note 49, at 331.

criminal liability."[54] Chief Justice Roberts stated that a "reasonable person" standard is "inconsistent with 'the conventional requirement for criminal conduct – awareness of some wrongdoing."[55] Absent any indication of a mental state requirement in the statute, the Chief Justice took into account that the dictionary definition of "threat" implies "the notion of an intent to inflict harm," but the definitions "speak to what the statement conveys – not to the mental state of the author.,"[56] and added that "[W]rongdoing must be conscious to be criminal."[57] By including the standard of a "reasonable person", the Chief Justice stated, "reduces culpability on the all-important element of the crime to negligence"[58] and the Court has "long been reluctant to infer that a negligence standard was intended in criminal statutes."[59]

Defamation

Even if speech does not rise to the level designed to be prosecuted under 18 U.S.C. § 875(c), speech which communicates a false statement about a person can be remedied by defamation statutes. Defamation is a civil remedy and is specifically dealt with at the state level,[60] however while minor variations of the specific language of the statutes exist the tenor of all of them remain consistent. The Restatement (Second) of Torts states that to create liability for defamation there must be: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting the at least negligence on the part of

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[54] Id. at 331-32.
[55] Elonis, 135 S. Ct. at 2011, See also Federal Threats Statute, supra note 49 at 333.
[56] Elnois, 135 S. Ct. at 2008.
[57] Id. at 2009.
[58] Id. at 2011.
[59] Id. (quoting Rogers v. U.S., 422 U.S. 35, 47 (1975) (Marshall, J., concurring)).
[60] There are also criminal Defamation statutes.

the publisher; and (4) either accountability of the statement irrespective of special harm or the existence of special harm caused by the publication.[61] The Supreme Court carved out a limited qualified exception to the prohibition on the issuance of defamatory statements. In New York Times v. Sullivan[62], the Court stated:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[63]

Cyberstalking/Cyberharassment Statutes

Imagine making a decision as a family to begin the process of adopting a child, be it for medical reasons or a belief that a child is out there in need of a family. You complete all the paperwork and background checks, you're now ready to begin this new journey with a beautiful child. Just as you're getting into the swing of parenthood you begin seeing your families names, private details, and the adopted child's picture posted all over the Internet. That is exactly what happened to one New Jersey family after a grandmother of another women, who received an abortion years earlier, claimed that the adoptive child was stolen.[64] The adoptive mother's description of the situation is exactly why cyberstalking statues exist.

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[61] Restatement (Second) of Torts § 558.
[62] New York Times v. Sullivan, 376 U.S. 254 (1964).
[63] Id. at 279-80.
[64] Wendy Saltzman, Mother accused of stealing child says she is being stalked by 'fake' grandmother, 6 ABC Actions News, November 7, 2015 http://6abc.com/news/mother-says-shes-being-stalked-by-fake-grandmother/1072536/. The case is currently being reviewed by a grand jury.

Cyberstalking is described as "the use of the Internet, email or other electronic communications to stalk, and generally refers to a pattern of threatening or malicious behaviors."[65] There exists a cyberstalking statute in a majority of states[66] and a federal statute as well,[67] which recently survived a motion to dismiss in a District Court case based on First Amendment immunity.[68] Relatedly, a majority of states, including New Jersey,[69] have cyberharassment statutes.[70] "Cyberharassment differs from cyberstalking in that it may generally be defined as not involving a credible threat. Some states approach cyberharassment by including language addressing electronic communications in general harassment statutes, while others have created stand-along cyberharassment statutes." While cyberharassment statutes generally do not address the sort of immediate potential threat the cyberstalking statutes, both distinctions are important because both types of behavior are burdensome on victims and fall outside the bounds of First Amendment protection.

Sufficiency/Efficiency of Causes of Action

The Internet is a double-edged sword when it comes to ease-of-access to commentary. It can provide a platform for intellectual conversations between two or more willing participants or in most cases when remedial free speech measures are necessary, allow for anonymous venom to

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[65] National Conference of State Legislatures, State Cyberstalking and Cyberharassment Laws, NCSL.org 2015, http://www.ncsl.org/research/telecommunications-and-information-technology/cyberstalking-and-cyberharassment-laws.aspx.
[66] Id.
[67] 18 U.S.C. 2261A(2) ("with the intent to kill, injure, harass, intimidate or place under surveillance … [using] any interactive computer service or electronic communication service or electronic communication service … to engage in a course of conduct that places that person in reasonable fear of death of or serious bodily injury to a person … or causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person.")
[68] U.S. v. Sergentakis, 2015 U.S. Dist. LEXIS 77719.
[69] N.J.S.A. 2C:33-4.1.
[70] National Conference of State Legislatures, supra note 65.

be voiced. Congress considered the prevalence of anonymous posting online and the policy of holding a person responsible for his or her own actions and came up with Section 230 of the Communications Decency Act[71] ("CDA"). Section 230 (c)(1) states, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[72] The reasoning behind this legislation is to provide a shield of immunity for a person or entity for merely supplying a forum for commentary.[73]

There would not be a need to dwell on possible shortcomings in victim's remedies if every user's information is displayed on every Internet platform. Not only is that not the case, but in fact the Supreme Court has held that a person has a right to anonymous speech.[74] However, the right to anonymous speech does not extend past the limits of the First Amendment. Therefore, for example, a person cannot post a defamatory statement online anonymously and be protected from liability.

A tension is then created between the right to anonymity and the victim's right to seek a remedy. A victim can simply ask the defamer for their information, however there seems to be a trend of people not voluntarily exposing themselves to potential litigation. Next, a victim can ask the service provider to either remove a post or reveal the identity of a user. However, service providers are business entities that take into account the desire to assist in a victim seeking remedial measures for unlawful actions of another, but also the desire to remain a solvent business. If

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[71] 47 U.S.C. § 230.
[72] Id. at (c)(1).
[73] See Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 254 (4th Cir. 2009) ("Congress … established a general rule that providers of interactive computer services are liable only for speech that is properly attributable to them. State-law plaintiffs may hold liable the person who creates or develops unlawful content but not the interactive computer service provider who merely enables that content to be posted online.").
[74] McIntrye v. Ohio Elections Comm., 514 U.S. 334 (1995).

servicer providers were to regularly provide information about other users, their market would most likely lose trust and the provider would ultimately lose their business.

The most likely outcome of that interaction, barring a service provider's altruistic disposition, is enlisting counsel to issue a subpoena upon to reveal the identity of a user. From there a court must determine whether the action of a user outweighs the right of anonymity principle established in McIntrye.[75] Courts have not been unanimous as to what is a proper inquiry to determine whether an anonymous user should be revealed. There have been different approaches taken by various courts and it remains to be seen whether a universal strategy will be adopted. The following are two such approaches taken.

First, in Dendrite Intern, Inc. v. Doe[76], the New Jersey Appellate Division established a four-part test to determine whether a service provider should be required to unmask an anonymous user. First, the Court stated that trial courts "should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application."[77]

Secondly, "The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech."[78] Third, the court should "determine whether plaintiff has set forth a prima facie cause of

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[75] Dendrite Intern, Inc. v. Doe, 342 N.J. Super. 134, 141 (N.J. Super. Ct. App. Div. 2001) ("The trial court must consider … applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.").
[76] Id.
[77] Id.
[78] Id.

action against the fictitiously-named anonymous defendants."[79] Lastly, the court "must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.[80] This test establishes a high bar for a victim to reach in order to even begin to attempt to seek a remedy. Additionally, the test recognizes the right to anonymous speech, Section 230, and takes into consideration the potential for frivolous suits.

Second, the Delaware Supreme Court "retain[ed] the notification provision in the Dendrite test."[81] However, the Court found that "the second and fourth prongs of the Dendrite test are not necessary."[82] Instead the Court believed that the second prong is "subsumed"[83] in a summary judgment inquiry[84] and the fourth prong is "unnecessary" and " [t]he summary judgment is itself a balance."[85] Essentially, the Cahill Court required a victim to notify the anonymous person in accordance with Dendrite and also satisfy a summary judgment standard.[86] This test seemed to stream line an inquiry and provide clarity as to what is required to reveal an anonymous user. However, the Dendrite Court may argue that a more detailed approach would be necessary to protect the principles of a right to anonymous speech.[87]

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[79] Id.
[80] Id. at 142.
[81] Doe v. Cahill, 884 A.2d. 451, 460 (Del. 2005).
[82] Id. at 461.
[83] Id.
[84] Id.
[85] Id.
[86] In a summary judgment motion, a court must make reasonable inferences in a light most favorable to the nonmoving party and determine whether there is any dispute as to any material fact.
[87] Additionally, the Arizona Court of Appeals in Mobilisa, Inc. v. Doe 217 Ariz. 103 (Ariz. Ct. App. 2007), established a new test, which arguably provides an anonymous user more protection by adding to the Cahill standard whether balancing the parties competing interest in favored disclosure.

No matter the test established by trial courts in determining whether to require a service provider to reveal the identity of a user, the fact remains that victims are faced with an uphill battle to remedy any unlawful conduct. Now, the proper inquiry is whether a remedy comes in the form of chipping away at Section 230 and removing the broad blanket that covers service providers or whether these uneven standards are sufficient to victims.

The Sixth Circuit in Jones v. Dirty World Entertainment Recordings, LLC[88] answered any questions as to whether chipping away at Section 230 was an option. The case arose out anonymous posts aimed at a teacher and a member of the Cincinnati Bengals cheerleading team in which the administrator of the website made his own comments.[89] The District Court took into account the definition of an "information content provider"[90] and was asked to determine "whether a website operator may [be] held "responsible . . . for creation or development" of a defamatory statement posted by a third party if it encouraged such persons to post potentially defamatory content by titling its website "TheDirty.com" and also posted responsive comments that endorsed or ratified the defamatory statements.[91] The District Court in denying 230 immunity stated that, "it is clear … that [the website administrator] did far more than just allow postings by others or engage in editorial or self-regulatory functions. Rather, he played a significant role in 'developing'

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[88] Jones v. Dirty World Entm't Recordings, LLC, 755 F.3d 398 (6th Cir. 2014) ("Jones 6th Cir.").
[89] Jones v. Dirty World Entern't Recordings, LLC, 840 F. Supp. 2d 1008 (E.D. Ky. 2012) ("Jones E.D. Ky. 2012").
[90] 47 U.S.C. § 230(f)(3) ("The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.").
[91] Christine N. Walz , Robert L. Rogers III, Sixth Circuit's Decision in Jones v. Dirty World Entertainment Recordings LLC Repairs Damage to Communications Decency ActJourno-Drones: A Flight over the Legal Landscape, American Bar, September 2014, http://www.americanbar.org/publications/communications_lawyer/2014/september14/decency.html.

the offensive content such that he has no immunity under the CDA."[92] The Sixth Circuit, in reversing, rejected the "encouragement test of immunity under the CDA."[93] "Instead the Court adopted a different "material contribution" test for determining whether a website operator is "responsible, in whole or in part, for the creation or development of [allegedly tortious] information."[94] The Court stated, "[a] material contribution to the alleged illegality of the content does not mean merely taking action that is necessary to the display of the allegedly illegal content. Rather, it means being responsible for what makes that displayed content allegedly unlawful."[95] The Court firmly added a layer of Section 230 protection to service providers that was at stake with the District Court's decision. The decision enforces the principle behind Section 230 to hold the "speaker" alone responsible for the "speaker's" actions. The District Court's decision stripped immunity from service providers by analogizing that actions akin to encouragement of unlawful activity is sufficient to establish "development" of content and thus subjection to liability.

There are cases such as Jones, where a victim should clearly know a path to a remedy, and it is necessary to establish that clear path. However, there is evidence that there is a certain passivity and satisfaction among alleged victims, in the context of online harassment, such that courts should move cautiously in limiting First Amendment right's of alleged perpetrators and extending remedial measures. In a Pew Research study conducted on online harassment, it was found that, "[a] plurality of those who have experienced online harassment, 38%, said a stranger was responsible for their most recent incident and another 26% said they didn't know the real

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[92] Jones v. Dirty World Entern't Recordings, LLC, 965 F. Supp. 2d 818, 823 (E.D. Ky. 2013) (Jones E.D. Ky. 2013).
[93] Jones 6th Cir., 755 F.3d at 414.
[94] Walz and Roger, supra note 91.
[95] Jones 6th Cir., 755 F.3d at 410.

identity of the person or people involved."[96] More telling is that "[a]mong those who have experienced online harassment, 60% decided to ignore their most recent incident while 40% took steps to respond to it," however of that 40% who chose to respond, only 22% reported the person responsible to the website or online service and only 5% reported the problem to law enforcement.[97] The study concluded that "[r]egardless of whether a user chose to ignore or respond to the harassment, people were generally satisfied with their outcome. Some 83% of those who ignored it and 75% of those who responded thought their decision was effective at making the situation better.[98]

While these numbers do show that a large portion of people believe that their own individual methods of handling difficult online situations are an effective approach, that number is not one hundred percent. Therefore, there are victims that are left to initiate lawsuits and seek legal clarity to ameliorate unlawful action. It is because of that fact that courts and the legislature must continue to delicately balance the need to protect the First Amendment and service providers, but also the need to provide effective remedies to victims.

Private Technology Companies v. Government

While federal and state legislatures can prosecute unlawful speech and arm the citizenry with civil remedies there are also other entities which play a major role in what type of speech is communicated online, private technology companies ("PTC").[99] Notwithstanding the former

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[96] Duggan, supra note 44.
[97] Id.
[98] Id.
[99] There are a plethora of companies that have a great deal of influence in the area of free speech, including but certainly not limited to, Google, Facebook, and Twitter.

discussion on the interaction between potential victims and these companies, these companies have tremendous control over what they consider acceptable speech on their platforms.[100]

This influence is derived from the same source, which shields interest service providers from liability, Section 230.[101] Section 230(c)(2), "does not prohibit private censorship; instead, it affirmatively allows it."[102] The language within this provision specifically allows for censorship of speech that is protected by the First Amendment. However, an important caveat to remember is that the Constitution only restrains actions taken by the government. This fact allows for the government to shift the burden on PTC to regulate online speech within their specific websites.

PTC regulate through what are called "terms of service." These are rules and regulations, which a user must abide by in order to continue use of the service.[103] These are typically the voluminous pages of seemingly unbearable contractual language, which we blindly agree to or ignore all together.[104] PTC have a choice what to include in these agreements, either follow suit

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[100] Marvin Ammori, The "New" New York Times: Free Speech Lawyering in the Age of Google and Twitter, 127 Harv. L. Rev. 2259, 2261 (2014) ("Google's lawyers and executives "exercise far more power over speech than does the U.S. Supreme Court.); See also Marjorie Heins, The Brave New World of Social Media Censorship, 127 Harv. L. Rev. 325 (2014) ("Private companies that run social media sites and search engines are the main arbiters of what gets communicated in the brave new world of cyberspace.").

[101] See Heins, supra note 100 at 328 ("one major aim of section 230 is to discourage private-industry censorship, so that free speech can prevail on the Internet, and those actually responsible for criminal tortious speech, rather than the pipelines through which they communicate, can be prosecuted or sued.").

[102] Id.; 47 U.S.C. § 230(c)(2) ("No provider or user of an interactive computer service shall be held liable on account of – (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected . . . .").

[103] Dictionary, Terms of Service, Dictionary.com, http://dictionary.reference.com/browse/terms-of-service.

[104] Lizzie Plaugic, A cartoonist turned the iTunes Terms of Service into a 47-page graphic novel, The Verge, November 3, 2015, http://www.theverge.com/2015/11/3/9664956/itunes-terms-of-service-graphic-novel-r-sikoryak-tumblr.

with evolving legal precedents and exclude only language which is not afforded First Amendment protection or take advantage of Section 230(c)(2) and limit speech based on their own internal conclusion as to what to consider acceptable speech. It is in this context where it is important to remember that the United States Constitution is a local ordinance[105] and the Internet is the most globalized business. Therefore PTC have three options when constructing terms of service,

> "they may adopt: (1) a universal rule that can work even in the most speech restrictive nations … and therefore suppress more speech than necessary globally; (2) a universal rule that works in the most speech-protective nations … and therefore expect their sites to be blocked in many countries, making them unavailable as speech platforms to millions; or (3) differing rules based on the nation, pushing the outer limit of protection in each nation but necessarily making compromises on free expression that make the companies complicit in censorship."[106]

Additionally, as pointed out by Ammori, the lawyers that construct these policies "do not apply black letter law; rather they weight potential precedents, theory, norms, and administrability in developing the rules of speech."[107] The result is, for example, terms of service language that states: " … [y]ou will not bully, intimidate, or harass any user … [y]ou will not post content that: is hate speech, threatening, or pornographic; incites violence; or contains nudity or graphic or gratuitous violence."[108] While these policies do regulate speech normally protected by the First Amendment, there is a simply solution as a user, do not continue as a user of that service. However, we've become accustomed to these policies and even though this type of language is included in terms of service agreements, generally, that does "chill" or shield speech in a prior restraint sense. There continues to be a subset of people who violate terms of service. This is why PTC need a process

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[105] Ammori, supra note 100, at 2278.
[106] Id. at 2279.
[107] Id. at 2263.
[108] Statement of Rights and Responsbilities, FACEBOOK, https://www.facebook.com/legal/terms (last updated January 2015).

to enforce these bans on certain types of speech, much like causes of action supplied by the legislature.

While the result of these processes don't result in jail time or punitive damages, PTC can respond to violations by removing the speech, suspending, or removing the culprit user. This requires employees of PTC to make judgment calls on whether speech violates their terms of service. Much like the judicial process, "for consistency, companies must … translate … general terms into highly specific definitions to be operationalized by hundreds of employees and contractors around the world, responding to users' complaints twenty-four hours a day."[109] However, there is no question that no matter how exact these internal definitions are, speech is limitless and judgment calls will be made sometimes at the expense of speech that is in compliance with terms of service.

The parallels between judicial and PTC speech enforcement are unquestionable, however the main differences are one has the force of law behind it and is constrained by the First Amendment while the other is left with the power to render all those legal constructions null and void in the context of online speech. One has to wait for cause of action to be presented for interpretation, while the other is free to change policies at their discretion. That is not to say that it is in PTC best interest to actively chop away at the First Amendment, but Section 230(c)(2) will not hold them accountable if their business models need to be altered.[110]

Conclusion

[109] Ammori, supra note 100, at 2276.
[110] Id. at 2295 ("For [PTC lawyers], the practice of free expression law focuses far less on the U.S. Supreme Court and far more on statutory immunities, international law and culture, and privacy.").

The First Amendment of the Constitution is meant to inspire controversy, open discourse and everything in between. However, it is not meant to allow blanket protection for everything that the synapses in a person's brain drives through their mouth into the listener's ear. That is why throughout our nation's history is has been necessary to outline the parameters of what types of speech will be protected, unprotected, and protected but with some caveats. The emergence of the Internet is making this distinction even more difficult. The judicial branch had to and still needs to determine whether the uniqueness of the Internet and the instantaneous nature of communication will change our perception of what is protected by the First Amendment.

So far, the legislature has addressed the need to tailor causes of action to the uniqueness of the Internet through statutes such as 18 U.S.C., defamation statutes tailored toward online speech, and cyberstalking and cyberharassment statutes. The enactment of these types of statutes was necessary to protect people against unprotected speech being conveyed to them through this unique medium. The judiciary continues to work through construction issues and interpretation standards[111], but these statutes provide meaningful remedies to victims.

To foster conversation, extend the principle of personal liability, and "allow[] for modern Internet to exist[112]", Congress enacted Section 230 to provide immunity to Internet service providers for content posted on their platforms by users. However, it is that same piece of legislation that further limits First Amendment protections by allowing PTC to restrict speech even further than Congress is allowed. PTC have their own standards and procedures that govern speech. As previously stated, a user has the option to withdraw from using a certain platform if they feel that their speech rights are unfairly being limited. However, this is 2015, most

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[111] See <u>Causes of Action</u> and <u>Sufficiency/Efficiency of Causes of Action</u>.
[112] Ammori, supra note 100, at 2287.

communication is done through the Internet, which makes that sort of citizen rebellion much more difficult. Again, that is not to say that is it in the best interests of PTC to limit speech, nor was it Congress's intention to limit speech with Section 230(c)(2), but the fact remains that the possibility is there and the power is in the hands of PTC.

This is not to say we are heading for a doomsday scenario where PTC become Big Brother and limit speech to an Orwellian level. However, the world is ever-changing, social norms of yesterday are the subject of ridicule today. First Amendment understanding has changed, for example, a Pew Research study found that, "American Millennials are far more likely than other generations to say the government should be able to prevent people from saying offensive statements about minority groups."[113] This is not to say that a changing understanding spells the end of all established First Amendment jurisprudence, but with the combination of the Internet and Section 230(c)(2), it is clear online speech will be influenced much more by the private sector.

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[113] Jacob Poushter, 40% of Millennials OK with limiting speech offensive to minorities, Pew Research, November 20, 2015, http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/; See also Andres Martinez, I used to be a free speech absolutist. Charlie Hebdo changed that, Washington Post, January 26, 2015, https://www.washingtonpost.com/posteverything/wp/2015/01/26/i-used-to-be-a-free-speech-absolutist-charlie-hebdo-changed-that/.