

The Role of Information and Communications Technologies in Hate Crimes: An Update to the 1993 Report

U.S. DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

TABLE OF CONTENTS

INTRODUCTION.....	3
HATE CRIMES IN THE UNITED STATES	5
HATE CRIME DATA	8
HATE CRIMES IN MODERN INFORMATION AND COMMUNICATION	
TECHNOLOGIES.....	10
SOCIAL MEDIA.....	10
BOTS.....	15
VIDEO GAMES.....	17
CHAT SERVICES	17
FUNDING MECHANISMS	17
ONLINE HARASSMENT	18
CONSTITUTIONALLY PROTECTED SPEECH AND OTHER PROTECTIONS	19
RECOMMENDATIONS.....	23
CONCLUSION	24

Introduction

Hate crime,” a relatively new term in American jurisprudence, refers to crimes specifically motivated by an animus against a particular characteristic as enumerated by statute. This report focuses on a matter related to hate crimes: the use of electronic communications media to advocate or encourage the commission of hate crimes.

Because electronic communications by their nature involve expression that often combines images, sound, and text, government’s response to these concerns must be tempered against other cherished rights, particularly those guaranteed by the First Amendment. In 1992, Congress directed the National Telecommunications and Information Administration (NTIA) to undertake an examination of the use of telecommunications, including broadcast radio and television, cable television, public access television, and computer bulletin boards, to advocate or encourage violent acts, and the commission of crimes of hate against designated persons or groups.

In 1993, responding to a congressional mandate, NTIA published *The Role of Telecommunications in Hate Crimes*.¹ (1993 Report). This report, written under the direction of Clinton Administration Commerce Secretary Ronald Brown, surveyed the nature and frequency of instances in which telecommunication has been used to advocate or encourage the commission of hate crimes.

The report concluded that no rigorous data linked the problem of hate crimes to use of telecommunications services. Rather, while troubling, the links between hate crimes and telecommunications use were found to be for the most part anecdotal. NTIA, in that report, endorsed the belief that the best remedy for hateful communications is not government restrictions, but more speech to disseminate views that challenge notions of hate and bigotry. Following the tradition in English and American political theory of viewing free expression as the keystone of democratic society, NTIA endorsed the use of discussion, reason, and a wide and diverse public square to counter hateful word and deed and build a stronger, more just, America.²

The world has undergone significant changes since the publication of the 1993 Report, with perhaps one of the most dramatic and impactful developments being the explosion of information communications technologies and their varied uses, including the emergence of the modern Internet, social media, texting, and smart phones. These technologies and their uses have paid incredible economic and social dividends, from enabling remote learning and work during the COVID-19 pandemic, to empowering individuals to find or found communities and connections that would otherwise be impossible. Congress reasoned that these changes warrant a revisiting of the 1993 Report.

¹ The Role of Telecommunications in Hate Crimes, NTIA Report to Congress (Dec. 1993) *available at* <https://www.ntia.doc.gov/legacy/reports/1993/TelecomHateCrimes1993.pdf>.

² *Id.* at 46.

In 2019, in the accompanying report (H. Rept. 116-101) to the Commerce, Justice, Science, and Related Agencies Appropriations bill,³ Congress instructed NTIA to “provide an update to its prior report,” which “should analyze the use of new forms of electronic media in advocating and encouraging the commission of hate crimes and include any recommendations to address such use of telecommunications, consistent with the First Amendment.”⁴ This report has been drafted in response to this request.

We arrive at conclusions similar to those in the 1993 Report. We find no evidence that electronic communications, including the internet, cause hate crimes. Further, we found no evidence that hate criminals use electronic communications, including the Internet, more than any other type of criminals or other types of communication. We caution that efforts to control or monitor online speech, even for the worthy goal of reducing crime, present serious First Amendment concerns and runs counter to our nation’s dedication to free expression. To quote President Barack Obama, “The strongest weapon against hateful speech is not repression; it is more speech.”⁵

At the same time, NTIA recognizes that certain criminal groups, many of which are terrorist organizations that forward hateful ideologies, use social media and other electronic communications. They, like all criminals, are further empowered through speech that solicits, conspires, and aids and abets hate crimes. We urge further vigilance against individuals who use electronic media to solicit, conspire, or aid and abet hate crimes and recommend policies to strengthen our efforts to improve our abilities to counter such acts.

To that end, we urge reconsideration of section 230,⁶ either by Congress or the Federal Communications Commission. This provision provides that “[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.” 5 U.S.C. § 230(c)(1) It thus provides broad immunity for platforms that publish unlawful speech of third parties. Although hate speech is legal, it is unlawful to solicit a hate crime, such as an assault against an individual because of a protected characteristic, or to conspire to commit hate crimes. But, platforms that re-publish criminal speech that solicits, conspires, or aids and abets hate crimes face no criminal liability. Serious enforcement of hate crimes requires reform of section 230.⁷

Congress instructed NTIA to “analyze the use of new forms of electronic media in advocating and encouraging the commission of hate crimes.” The report, therefore, sets forth

³ H. Rept. 116-101, Commerce, Justice, Science, and Related Agencies Appropriations Bill (2020) available at <https://www.congress.gov/congressional-report/116th-congress/house-report/101/1>.

⁴ See *id.*

⁵ Remarks by the President to the UN General Assembly, United Nations Headquarters, New York, New York (Sept. 25, 2012).

⁶ 47 U.S.C. Section 230.

⁷ An important guide in advancing useful answers to this difficult legislative challenge can be found in the Department of Justice’s recent proposals for revising section 230. See <https://www.justice.gov/ag/department-justice-s-review-section-230-communications-decency-act-1996>

(1) a discussion of some “hate crime” statutes and data concerning the prevalence of hate crimes; (2) an analysis of the Supreme Court’s First Amendment precedent regarding threatening communications and its relationship to hate crimes committed online; (3) a survey of the literature describing instances of advocating and encouraging hate crimes; and (4) an analysis of any causal relationship between the advocacy and encouragement of hate crimes and the commission of such hate crimes. Finally, the report will examine efforts by dominant social media platforms to ban advocacy and encouragement of hate crimes by their users, which is often done pursuant to platforms’ so-called “hate speech” policies. The report recommends continued vigilance in this area, combined with a recognition that excessive desires to stamp out hate may lead to diminished freedoms and impoverished public discourse.

Hate Crimes in the United States

*Prosecuting Federal Hate Crimes*⁸ lists the four main federal hate-crime statutes:

- Title 18, U.S.C. § 249, the Hate Crime Prevention Act, which prohibits willfully causing bodily injury—or attempting to cause bodily injury with a dangerous weapon—if the defendant is motivated by the actual or perceived race, color, religion, national origin, gender, gender identity, sexual orientation, or disability of any person. However, it does not go as far as to prohibit vandalism or mere threats.
- Title 42, U.S.C. § 3631, which prohibits using or threatening to use force to willfully injure, intimidate, or interfere with an individual’s housing rights as set forth in the statute, or attempt to do so, an individual’s housing rights as set forth in the statute because of the victim’s race, color, religion, sex, handicap, familial status, or national origin.
- Title 18, U.S.C. § 245(b)(2), which prohibits using force or the threat of force to willfully injure, intimidate, or interfere with a person, or attempt to do so, because of that person’s race, color, religion, or national origin; and because that person was enjoying one of the rights protected by the statute, such as the right to attend a public school or college, the right to employment, the right to public accommodations, or the right to enjoy a benefit, service, program, or facility provided by a state or local government.
- Title 18 U.S.C. § 247, which prohibits intentionally defacing, damaging, or destroying religious real property and which also prohibits using force or threats of force to obstruct someone in the free exercise of religion or to attempt to do so.

In addition to these statutes, prosecutors may also charge other federal statutes in hate-crime prosecutions, including general criminal statutes, as well as the federal civil rights conspiracy

⁸ Barbara Kay Bosserman; Angela M. Miller, “Prosecuting Federal Hate Crimes,” UNITED STATES ATTORNEYS’ BULLETIN 66, no. 1 at 191-236. (Jan. 2018), <https://heinonline.org/HOL/Page?handle=hein.journals/usab66&id=193&collection=journals&index=>

statute, 18 U.S.C. § 241, which prohibits two or more individuals from infringing on another's free exercise or enjoyment of any right or privilege secured by the constitution or federal law.⁹ Furthermore, as explained by the United States Sentencing Commission's Sentencing Guidelines Manual provides this three-level enhancement when a finder of fact or the court at sentencing (in the case of a nolo contendere or guilty plea) finds that the offender was motivated by bias in choosing his victim. In addition, a general conspiracy statute may be used to federally prosecute hate crimes.¹⁰ Title 18, Section 241, titled *Conspiracy Against Rights*, prohibits two or more individuals from infringing on another's free exercise or enjoyment of any constitutional privilege or right and can punish conspirators with imprisonment for life or even the death penalty (if the acts result in death of the victim or if they include kidnapping/attempt to kidnap, aggravated sexual abuse/attempt to commit aggravated sexual abuse, or attempt to kill).¹¹

In addition to the above federal laws, each state has its own penal code which results in varied hate crime laws across the United States. Alison Smith from The Congressional Research Service issued a report, *State Statutes Governing Hate Crimes*,¹² which describes the differences in each state's approach. The report divides hate-crime laws into four categories: crimes and penalty enhancements, institutional vandalism, data collection, and law enforcement training.

While almost all states and many localities have some kind of penalty enhancement for crimes motivated by bias, they vary considerably as to what motivations and biases they cover. For example, California defines a hate crime to be a criminal act committed in whole or in part because of one of the following actual or perceived characters of the victim: Race, color, religion, national origin, gender, sexual orientation, gender identity, disability, ethnicity, association with a person or group with one or more of these actual or perceived characteristics."¹³ Michigan requires local police to provide information about crimes motivated by prejudice or bias based on race, religion, gender, sexual orientation, ethnic origin."¹⁴ The City of Seattle has a "malicious harassment" statute that prohibits a defendant from causing injury to another, threatening another, or destroying another's property because of his or her perception of another person's in turns looks to an even wider array of biases, beyond racial or religious animus, and includes crimes motivated by homelessness, marital status, political ideology or party, age, and parental status."¹⁵

⁹ 18 U.S.C. § 241.

¹⁰ See Barbara Kay Bosserman; Angela M. Miller, "Prosecuting Federal Hate Crimes," UNITED STATES ATTORNEYS' BULLETIN 66, no. 1 at 192 (January 2018), <https://heinonline.org/HOL/Page?handle=hein.journals/usab66&id=193&collection=journals&index=>

¹¹ 18 U.S.C. § 241.

¹² Alison Smith, "State Statutes Governing Hate Crimes," U.S. Congressional Research Service, RL 33099 (Sept. 28, 2010) available at <https://fas.org/sgp/crs/misc/RL33099.pdf>.

¹³ Cal. Penal Code Tit. 11.6 §§ 422.55 – 422.57.

¹⁴ Mich. Comp. Laws § 28.257A.

¹⁵ Seattle City Code, §12A.06.115 - Malicious harassment, available at

In *Wisconsin v. Mitchell*,¹⁶ the Supreme Court ruled that enhanced sentencing based on biased motivation does not violate the First Amendment. While the Supreme Court did uphold statutes enhancing punishments for bias crimes against constitutional challenges in *Mitchell*, many commentators have concluded that hate crimes present unique jurisprudential challenges.¹⁷ They argue that the justifications for hate crimes fail to provide the necessary theoretical legitimacy for this politically popular form of criminal legislation,¹⁸ as their foundations are empirically, morally, or conceptually suspect.¹⁹

Beyond theoretical concerns, hate crimes can present evidentiary challenges as well. These concerns relate to juries' ability to establish beyond a reasonable doubt whether a defendant committed a particular crime with the covered bias motivation that the hate crime statute prohibits. Because most crimes require juries to infer defendants' mental states from observable facts, general intent crimes that prohibit simple acts typically do not overtax juries' abilities. As Justice Oliver Wendell Holmes famously remarked, "Even a dog distinguishes between being stumbled over and being kicked."²⁰

In contrast, hate crimes "have as elements a particular reason for acting, a need or desire that causes the person to act."²¹ These crimes require the finding of both the required mental state and the required motivation. As criminal researchers James B. Jacobs and Kimberly A. Potter point out, mixed motives complicate mental state issues in hate crimes.²²

These conceptual problems have led to challenges for researchers to determine the prevalence of hate crimes as well as to determine their causal drivers; these conceptual problems also render government policymakers' decisions difficult. Lamenting the imprecision in terminology and lack of unity in practice, researchers comment that while "[m]ost agree that a hate crime is a crime committed due to bias; the controversy is usually centered on the reasons causing the bias and the question of whether other elements are required. However, this basic premise may not be enough to bridge between theory and practice. The term bias is, in itself,

https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT12ACRCO_SUBTITLE_ICR_CO_CH12A.06OFAGPE_12A.06.115MAHA.

¹⁶ *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

¹⁷ James B. Jacobs & Kimberly Potter, "Hate Crimes: Criminal Law And Identity Politics," OXFORD UNIVERSITY PRESS (1998); Steven G. Gey, "What if *Wisconsin v. Mitchell* Had Involved Martin Luther King Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes," 65 GEO. WASH. L. REV. 1014, 1070 (1997) (explaining that "the Court blinked" in *Mitchell*, despite its good record for using "liberal principles on behalf of an illiberal and reviled defendant.").

¹⁸ Heidi M. Hurd & Michael S. Moore, "Punishing Hatred and Prejudice," 56 STAN. L. REV. at 1081, 1146 (2004).

¹⁹ *Id.*

²⁰ Oliver Wendell Holmes, Jr., "The Common Law," at 3 (1881).

²¹ Paul H. Robinson, "Hate Crimes: Crimes of Motive, Character, or Group Terror?," ANN. SURV. AM. L. at 605, 606 (1993).

²² "Hate Crimes: A Critical Perspective," 22 CRIME & JUST. 1, at 5 (1997).

highly problematic. . . . [r]esearch in all disciplines lacks a valid methodological basis, due to the absence of official data gathering based on common criteria . . . creating incoherent and discriminative enforcement.”²³

These theoretical concerns affect how we analyze, as Congress tasked us, the use of new forms of electronic media in advocating and encouraging the commission of hate crimes.” To advocate or encourage hate crimes, one must not simply express disdain or even hatred for a particular group. In other words, merely expressing hatred for a particular group cannot be said to advocat[e] or encourag[e]” hate crimes. Therefore, so-called hate speech,” a term that has no consistent or well-accepted definition, cannot constitute advocacy or encouragement of hate crimes without explicitly calling for particular acts to be performed with specific motivations. Rather, to advocate for or encourage hate crimes requires advocacy of particular criminal acts as well as advocacy or encouragement that the criminal act of each of such crimes have a particular motivation.

Hate Crime Data

There are two main sources of federal data related to hate crimes in the United States. Neither source, due in part to collection limitations, provide evidence that electronic media play a significant role in encouraging or advocating hate crimes.

First, the Justice Department s Uniform Crime Reporting (UCR) program includes data collection on reported incidents of possible hate crimes (among other types of crimes) reported by thousands of law enforcement agencies around the country. This is an updated version of the same data collection NTIA noted in its 1993 Report on the role of telecommunications in hate crimes. Since 2016, participating enforcement agencies have had the option of specifying cyberspace” as the location of a hate crime,²⁴ which is defined as a virtual or internet-based network of two or more computers in separate locations which communicate either through wireless or wire connections.”²⁵ In 2019, 36 out of the 7,314 hate crime incidents submitted to the UCR program reportedly occurred in cyberspace.²⁶

Table 1²⁷

²³ Hitman, Gadi & Harel, Dror, “Hate Crimes—Methodological, Theoretical & Empirical Difficulties—A Pragmatic & Legal Overview,” JOURNAL OF CULTURAL AND RELIGIOUS STUDIES, at 4 (2016).

²⁴ 2018 Hate Crime Statistics, Criminal Justice Information Services Division, *available at* <https://ucr.fbi.gov/hate-crime/2018/resource-pages/methodology>.

²⁵ 2019.2 National Incident-Based Reporting System User Manual at 87, *available at* <https://www.fbi.gov/file-repository/ucr/ucr-2019-1-nibrs-user-manual.pdf/view>.

²⁶ 2018 Hate Crime Statistics, Criminal Justice Information Services Division, Table 10, *available at* <https://ucr.fbi.gov/hate-crime/2018/tables/table-10.xls>.

²⁷ FBI UCR Program’s Hate Crime Statistics Publication, *available at* <https://ucr.fbi.gov/hate-crime>.

Year	Number of law enforcement agencies reporting data	Number of law enforcement agencies participated in the Hate Crime Statistics Program	Number of hate crime incidents reported ²⁸
2008	2,145	13,690	7,783
2009	2,034	14,422	6,604
2010	1,949	14,977	6,628
2011	1,944	14,575	6,222
2012	1,730	13,022	5,796
2013	1,826	15,016	5,928
2014	1,666	15,494	5,479
2015	1,742	14,997	5,850
2016	1,776	15,254	6,121
2017	2,040	16,149	7,175
2018	2,026	16,039	7,120
2019	2,172	15,588	7,314

Second, the other major national source of government hate crimes statistics is the National Crime Victimization Survey (NCVS). The NCVS is commissioned by the Bureau of Justice Statistics (BJS) and administered by the U.S. Census Bureau. In contrast to the UCR program, which is based on incident reports summarized by participating law enforcement agencies and submitted to the Justice Department, the NCVS is an annual survey of approximately 95,000 households around the country. Furthermore, respondents are asked about all incidents of criminal victimization they may have experienced, not just those ultimately reported to police. Among other topics, respondents are asked whether they believe reported incidents were hate crimes or otherwise motivated by prejudice or bigotry, and if so, they are asked for various related details. However, those details do not include any connection between the incident and telecommunications systems.²⁹ From 2013 to 2017, the NCVS reported an average of 204,600 hate crime victimizations, of which approximately half were reported to the police.³⁰

²⁸ These are reported crime. Data is not collected on convictions.

²⁹ National Crime Victimization Survey, NCVS-2 Crime Incident Report, *available at* https://www.bjs.gov/content/pub/pdf/ncvs18_cir.pdf.

³⁰ *Ibid.*

Table 2³¹

Year	Total	Estimates	
		Reported	Not Reported
2009	287,700	115,300	172,400
2010	261,800	90,500	171,400
2011	255,300	77,000	177,000
2012	268,000	80,500	175,400
2013	254,900	88,400	154,300
2014	266,000	106,500	146,700
2015	197,600	100,300	95,300
2016	200,100	104,400	92,100
2017	197,700	107,900	86,900

Again, we do not see dramatic increases in hate crimes in the NCVS data. The evidence does not show that during last decade, a time of expansive growth of electronic communications, particularly on the Internet and mobile devices as well as social media, there has been a rise in hate crime incidents.

Hate Crimes in Modern Information and Communication Technologies

The following section is a review of the literature regarding the commission, advocacy, and promotion of hate crimes in a variety of contexts that have developed since the publication of the 1993 Report, specifically social media, bots, video games, chat services, and funding mechanisms.

Social Media

The advent of social media has drastically increased ease of access and reach of individuals in their communications. Through early Internet innovations such as email,

³¹ Barbara Oudekerk, Hate Crime Statistics Briefing prepared for the Virginia Advisory Committee, U.S. Commission on Civil Rights, U.S. Department of Justice (March 29, 2019) *available at* <https://www.bjs.gov/content/pub/pdf/hcs1317pp.pdf>.

discussion boards, and instant messaging systems, to modern social media platforms, the Internet facilitates the creation of networks of like-minded persons. Some academics have mused that increased communications increases polarization³² and even the tendency for violence.³³ These theories lack any definitive, or even much suggestive, empirical backing.

No doubt people who commit hate crimes use social media. For instance, Evanna Hu and Hugh Brooks describe the way in which the Charlottesville rally organizers used content-specific websites, chat rooms, and mainstream social media platforms to plan the event, recruit attendees, and distribute propaganda.³⁴ The authors specifically note that over the course of the rally, approximately 35,000 vitriolic messages were circulated on the 44 channels of the Charlottesville 2.0 server on the gaming platform Discord.

But this research, and much like it, fails to demonstrate any causal relationship between increased social media use and increased violence. This research does not present even comprehensive descriptive data correlating increased hate speech on social media with increased hate crimes.

Similarly, Matthew Williams, et al. write that the far right was quick to realize the value of the internet, largely unhindered by law enforcement due to the U.S.'s vast constitutional protections of speech.³⁵ The authors describe the outcome as the existence of extreme spaces that provide a collective virtual identity to previously fragmented and hateful individuals. Again, this research—and much like it—lacks empirical support. Further, without examining how the internet affects political polarization on all levels, the left and the right, including,³⁶ no conclusions can be made about the effect on the internet on political polarization, let alone hate crimes.

³² Lauren Beausoleil, “Free, Hateful, and Posted: Rethinking First Amendment Protection of Hate Speech in a Social Media World,” *BOSTON COLL. L. REV.* 60, no. 7, at 2107 (2019).

³³ Lyrisa Lidsky, “Fifth Annual Criminal Law Symposium: Criminal Law & the First Amendment: the First Amendment, the Internet, and the Criminal Law: Incendiary Speech and Social Media,” *TEX. TECH L. REV.* 44, no. 1, at 149-150 (2011).

³⁴ Evanna Hu and Hugh Brooks, “When Radical Online Political Speech Transitions to Physical Violence,” *Pacific Standard*, (last modified August 24, 2018) <https://psmag.com/social-justice/when-radical-speech-gets-physical>.

³⁵ Matthew Williams, Pete Burnap, Amir Javed, Han Liu, and Sefa Ozalp, “Hate in the Machine: Anti-Black and Anti-Muslim Social Media Posts as Predictors of Offline Racially and Religiously Aggravated Crime,” *BRITISH JOURNAL OF CRIMINOLOGY* 60, no. 1, at 95 (2020) available at <https://doi.org/10.1093/bjc/azz049>.

³⁶ Brock Simmons, “Seven Antifa Terrorists Arrested On Federal Charges After Weekend Of Carnage In Portland,” *Gateway Pundit* (July 7, 2020) available at <https://www.thegatewaypundit.com/2020/07/seven-antifa-terrorists-arrested-federal-charges-weekend-carnage-portland/>; Chuck Goudie, Barb Markoff, Christine Tressel & Ross Weidner, “1,500 rioters arrested in Chicago; most not facing serious charges,” *ABC7 Chicago* (June 3, 2020) <https://abc7chicago.com/chicago-news-riots-protests-looting/6228227/>; Jake Gibson, Michael Ruiz, More than 6 dozen alleged rioters face federal charges in weeks of unrest across US,” *Fox News* (June 24, 2020) available at <https://www.foxnews.com/politics/dozens-alleged-rioters-face-federal-charges-unrest>.

There is some descriptive data on the prevalence of so-called “hate speech,” but the inability of the platforms or researchers to arrive at any meaningful, let alone consistent, definition of hate speech undermines this research’s usefulness for policy purposes. Again, this term has no legal meaning or definition under United States law. As the Supreme Court repeatedly reminds us, the Constitution in general protects speech that some of us might find hateful.³⁷

The confusion about the meaning of “hate speech” is revealed by even the most cursory review of the social media platforms’ policies and practices. While most platforms utilize community guidelines that strictly prohibit hate speech, researchers have noted persistent inconsistencies relating to the intractable problem in defining hate speech. For example, according to Caitlin Carlson, reporting the term “wetback” on Facebook has been found to not yield removal, causing confusion over what qualifies as hate speech.³⁸ Moreover, Carlson notes that community standards do not always match across platforms. While Facebook prohibits “organizations and people dedicated to promoting hatred...”³⁹ Twitter only removes specific threats and abuse; Twitter’s policy is to not remove inflammatory content as long as it does not pose direct harm to an individual. Finally, Carlson states that even a cursory search of Instagram reveals multiple publicly visible posts containing the N-word and other derogatory terms.⁴⁰

Sharing confusion with the dominant social media platforms, researchers cannot arrive at meaningful or consistent definitions of hate speech. A recent review article, though quite friendly to the concept of hate speech, recognizes, “For the great depth of discussion about the harms of it, how it is spread, the appropriate public and private responses to it, and how it should be reconciled with theories of free expression, surprisingly little work appears to have been done to define the term ‘hate speech’ itself. Without a clear definition, how will scholars, analysts, and regulators know what speech should be targeted?”⁴¹

For instance, Hawdon, Atte Oksanen, and Pekka Räsänen state that approximately 43% of respondents from the United States, the United Kingdom, Germany, and Finland, between the ages of 15 and 30, have encountered hate speech online. The number for the United States alone has been reported at 53%.⁴² They define hate speech in the following way: “Those expressing

³⁷ *United States v. Schwimmer*, 279 U.S. 644 (1929) (“if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”).

³⁸ Caitlin Carlson, “Censoring Hate Speech in U.S. Social Media Content: Understanding the User’s Perspective,” *COMM. L. REV.* 17, no. 1, at 31 (2017).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Sellars, Andrew F., “Defining Hate Speech,” BERKMAN KLEIN CENTER RESEARCH PUBLICATION NO. 2016-20 (Dec. 8, 2016). available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2882244.

⁴² James Hawdon, Atte Oksanen & Pekka Räsänen, “Exposure to Online Hate in Four Nations: A Cross-National Consideration,” *DEVIANT BEHAVIOR* 38, no. 3, at 260 (2017).

hate—be they members of a group or a lone individual—profess attitudes that devalue others because of their religion, race, ethnicity, gender, sexual orientation, national origin, or some other characteristic that defines a group.”⁴³

In contrast, some define hate speech more narrowly. Richard Delgado defines racist hate speech more narrowly as “[l]anguage was addressed to him or her by the defendant that was intended to demean through reference to race;” (2) that the plaintiff understood as intended to demean through reference to race; and” (3) that a reasonable person would recognize as a racial insult.”⁴⁴ Others use more broad definitions. Calvin Massey states hate speech is any form of speech that produces the harms which advocates for suppression ascribe to hate speech: loss of self-esteem, economic and social subordination, physical and mental stress, silencing of the victim, and effective exclusion from the political arena.”⁴⁵

We hesitate, therefore, to generalize from research that attempts to measure hate speech or connect hate speech to hate crimes simply because we have no confidence that this corpus of research is measuring the same thing. Lord Kelvin tells us that to measure is to know. Conversely, to measure imprecisely is to know little.

On the other hand, no one doubts that hate criminals use telecommunications. Notorious examples include the live stream of the Christchurch attack on Facebook, which stayed live for 17 minutes and was later spread and re-uploaded over 2 million times on various other platforms, as well as the Twitch stream of the recent attack on a synagogue in Germany, which according to Forbes reporting, was viewed 2,200 times before being completely removed.⁴⁶

But, rigorous social scientific empirical research connecting hate speech in social media to hate crimes remains scant. In a recent study from the United Kingdom, *Williams, et al.* have claimed to confirm a general temporal and spatial association between online hate speech targeting race and religion and offline racially and religiously aggravated crimes independent of correlations with offline “trigger” events.⁴⁷ On the other hand, the data from the 2018 regression-model study attempting to examine the effect of social media on bias among its users,

⁴³ *Id.* at 166.

⁴⁴ Richard Delgado, “Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling,” 17 HARV. C.R.–C.L. L. REV. 133 (1982).

⁴⁵ Calvin R. Massey, “Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression,” 40 UCLA L. REV. 103, n.2., at 105 (1992).

⁴⁶ Rachel Sandler, “Twitch Says 2,200 Users Viewed Video of Shooting Outside German Synagogue Before it was Removed,” Forbes (last modified October 9, 2019)

<https://www.forbes.com/sites/rachelsandler/2019/10/09/twitch-says-2200-users-viewed-video-of-shooting-outside-german-synagogue-before-it-was-removed/#34f0c5fb7ca3>.

⁴⁷ Matthew I. Williams, Pete Burnap, Amir Javed, Han Liu and Sefa Ozalp, “Hate in the Machine: Anti-Black and Anti-Muslim Social Media Posts as Predictors of Offline Racially and Religiously Aggravated Crime,” THE BRITISH JOURNAL OF CRIMINOLOGY 60, no. 1, at 94 (2020).

specifically focusing on religious bias and racist behavior, did not verify a positive correlation.⁴⁸ Both studies concluded with the need for further research. There is, however, significant and relatively long-studied multidisciplinary bodies of literature on the effects of media consumption on individuals. Most of the literature in this area currently rejects the so-called “hypodermic needle theory” or “technological determinism” arguments that ascribe direct relationships between media consumption and individual thought or action in favor of theories that take into account the contextualization of use and co-constructive nature of communications.⁴⁹

Clay Neff reported that tech leaders have recognized that relying on human teams alone to review content will not be enough and that artificial intelligence will have to play a significant role.⁵⁰ That said, there are, of course, significant policy and practical limitations to reliance on automated content moderation.⁵¹ Interestingly, much of this technology is being developed from approaches pioneered by the Chinese Communist Party to stifle political discussion and dissent.⁵²

Given that all the major social media platforms have rules against hate speech and, in fact, employ sophisticated algorithmic artificial intelligence (AI) approaches to enforce these often vague and contradictory rules in a manner also used by tyrannous regimes, it is appropriate to ask what they gain from it. Certainly, as this Report shows, the platforms have no reasonable expectation that their censorship will end hate crimes or even diminish it, as no empirical evidence exists linking increased hate speech with hate crimes.

Further, this censorship poses real dangers to our political system. Under the hate speech prohibitions and other censorship rules, the platforms have removed content that many consider seriously engaged with pressing political and social issues.⁵³ As with most matters involving

⁴⁸ Abdallah Alsaad, Abdallah Taamneh, and Mohamad Noor Al-Jedaiah, “Does Social Media Increase Racist Behavior? An Examination of Confirmation Bias Theory,” *TECHNOLOGY IN SOCIETY* 55, at 43 (2018).

⁴⁹ See, e.g., Patti M. Valkenburg, Jochen Peter, & Joseph B. Walther, “Media Effects: Theory and Research,” *AMSTERDAM SCHOOL OF COMMUNICATION RESEARCH*, available at https://pdfs.semanticscholar.org/95b4/9d164512a0bba6033fc51a466de58480a613.pdf?_ga=2.83026582.1245738972.1601573190-705737628.1601573190.

⁵⁰ Clay Neff, “Call in the Robocops,” *THE HUMANIST* 78, no. 1, at 20-21 (2018).

⁵¹ “Mixed Messages? The Limits of Automated Social Media Content Analysis,” Center for Democracy & Technology (Nov. 2017) available at: <https://cdt.org/wp-content/uploads/2017/11/Mixed-Messages-Paper.pdf>.

⁵² “WeChat: Bringing CCP Censorship to the Global Stage,” *Vision Times* (August 27, 2020) available at <https://visiontimes.com/2020/08/27/wechat-bringing-ccp-censorship-to-the-global-stage.html> (Explaining that the Chinese app WeChat uses “real-time, automated censorship of images in a chat depending on the text that is associated with the pictures.”); Bill Gertz, “‘Social credit score’: China set to roll out ‘Orwellian’ mass surveillance tool,” *The Washington Times* (Dec. 9, 2019) available at <https://www.washingtontimes.com/news/2019/dec/9/social-credit-system-china-mass-surveillance-tool/>.

⁵³ Jon Levine, “YouTube censors epidemiologist Knut Wittkowski for opposing lockdown,” *New York Post* (May 16, 2020) available at <https://nypost.com/2020/05/16/youtube-censors-epidemiologist-knut-wittkowski-for-opposing-lockdown/>; Jordan Davidson, “Jack Dorsey Claims Twitter’s Censorship Policies Encourage ‘More Speech,’” *The Federalist* (Nov. 17, 2020) available at

social media censorship, there is little data beyond anecdote because the social media platforms do not disclose data on their censorship practices. Nonetheless, many of the censorship stories are quite compelling.⁵⁴

At the same time, given that some hate criminals use social media, it would seem reasonable to hold the internet platforms accountable that publish these criminals' solicitations, conspiratorial communications, and efforts at aiding and abetting. But, Section 230 of the Communications Decency Act⁵⁵ eliminates liability for platforms' republications of speech that violates most state criminal law.⁵⁶ As discussed above, most hate crimes are state laws. Revisiting Section 230, either through legislative or regulatory processes, to limit these protections would no doubt provide greater protections against hate crimes.

What is particularly egregious about the Section 230 immunity is its blanket nature. Under some influential court decisions, such as *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), internet platforms have immunity even if they *know* about the unlawful or even criminal content on their websites. Any other entity publishing statements that solicit, conspire to commit, or aid and abet hate crimes, would face punishment. But, Section 230 shields social media platforms from rules everyone else must follow. Reforming Section 230 would greatly combat the problem of soliciting, aiding, and abetting hate crimes online.

Bots

Bots, which in this context we are limiting to automated programs used to communicate preset messages or messages created through machine learning, can be used for many beneficial purposes such as customer relations, streamlining communications between individuals, or even art. Bots can also be used to foment political strife, skew online discourse, and manipulate marketplaces.

<https://thefederalist.com/2020/11/17/jack-dorsey-claims-twitters-censorship-policies-encourage-more-speech/>.

⁵⁴ Jordan Davidson, "Twitter Suspends New York Post Account Over Bombshell Hunter Biden Story," *The Federalist* (Oct. 13, 2020) available at <https://thefederalist.com/2020/10/14/twitter-suspends-new-york-post-account-over-bombshell-hunter-biden-story/>; Adi Robertson, "Facebook fact-checking is becoming a political cudgel," *The Verge* (March 3 2020) available at <https://www.theverge.com/2020/3/3/21163388/facebook-fact-checking-trump-coronavirus-hoax-comment-politico-daily-caller>; Adam Shaw, "Twitter's Jack Dorsey says it was 'mistake' to censor CBP chief over border wall tweet," *Fox News* (Nov. 17, 2020) available at <https://www.foxnews.com/politics/twitter-jack-dorsey-censorship-border-wall-tweet>.

⁵⁵ 47 U.S.C. § 230.

⁵⁶ 47 U.S.C. § 230(e)(3) ("no liability may be imposed under any State or local law that is inconsistent with this section"); see also *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1275 (W.D. Wash. 2012) ("If Congress did not want the CDA to apply in state criminal actions, it would have said so"); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 823 (M.D. Tenn. 2013) ("section 39–13–315 [a state criminal law] is likely expressly preempted by CDA section 230(e)(3)"); *Voicenet Commc'ns, Inc. v. Corbett*, 2006 WL 2506318, at *4 (E.D.Pa. Aug. 30, 2006) ("[T]he plain language of the CDA provides internet service providers immunity from inconsistent state criminal laws."); see also Michal Lavi, "The Good, the Bad, and the Ugly Behavior," 40 *CARDOZO L. REV.* 2597, 2683 (2019).

Matthew Hines writes that bots are problematic for the same reason that they are useful — they amplify the power and efficiency of a single person. Bots can be programmed to perform computer-based tasks more quickly and reliably than a human without access to technology.⁵⁷ Hines also notes that Internet communities are productive environments for building consensus, and bots can be used to manipulate that effect. Because it is possible for a single independent producer to widely distribute content based on shares and trending tags, bots programmed to share specific content can be used "to create a bandwagon effect, to build fake social media trends ... and even to suppress opinions of the opposition."⁵⁸

A single bot's increased efficiency relative to a group of human users makes bot use lucrative and ripe for abuse. According to Madeline Lamo and Ryan Calo, bots can potentially engage in online harassment at an unprecedented scale.⁵⁹ By automating "trolling," the practice of criticizing or threatening certain speakers in response to their views, bots can exacerbate highly problematic trends of online hate speech and abuse.⁶⁰ Bots can harass or "troll" at scale. Jack Balkin also points out that actors could engage in online harassment and threats through the use of coordinated armies of trolls consisting of combinations of humans and bots posing as humans.⁶¹

Our research, however, at this time, does not suggest that bots are being systemically used to proliferate hate speech or to commit hate crimes.⁶² So far, bot campaigns have been used predominantly for commercial and political purposes. Hines describes how this took place during the FCC's period for public comments on net neutrality rulemaking, wherein online bots contributed hundreds of thousands of comments in support of one particular political position.⁶³ Bots do, however, possess the potential of being used for offensive speech. For instance, Sara Suárez-Gonzalo, studied the example of Tay, Microsoft's chatbox that after launching turned into a racist and homophobic robotic hate speaker.⁶⁴

⁵⁷ Matthew Hines, "I Smell a Bot: California's S.B. 1001, Free Speech, and the Future of Bot Regulation," *HOUSTON L. REV.* 57, no. 2, at 410-411 (2019).

⁵⁸ *Id.* at 411.

⁵⁹ Madeline Lamo and Ryan Calo, "Regulating Bot Speech," *UCLA L. REV.* 66, no. 4, at 999 (2019).

⁶⁰ *Id.*

⁶¹ Jack M. Balkin, "Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation," *U.C. DAVIS L. REV.* 51, no. 3, at 1191 (2018).

⁶² Botnet Road Map Status Update Prepared by the Departments of Commerce and Homeland Security (July 28, 2020), *available at* https://www.ntia.doc.gov/files/ntia/blogimages/botnet_road_map_status_update.pdf.

⁶³ Matthew Hines, "I Smell a Bot: California's S.B. 1001, Free Speech, and the Future of Bot Regulation," *HOUSTON L. REV.* 57, no. 2, at 410-411 (2019).

⁶⁴ Sara Suárez-Gonzalo, Lluís Mas-Manchón, Frederic Guerrero-Solé, "Tay is you. The attribution of responsibility in the algorithmic culture," *OBSERVATION* 13, no. 2, at 1-14 (2019).

Video Games

The rise in popularity of videogames has created another new avenue for hate speech. Online videogames are social experiences where game cultures and communities can develop. Over half of the players who reported experiencing harassment believe it was because of their race or gender, and some others, offering impressionistic and anecdotal data, suggests that people playing video games are hateful.⁶⁵ Again, the significance of these activities and hate crimes is obscure, as we have found no causal, or even good descriptive correlative data, showing a relationship between video game usage and hate crimes.

Chat Services

The Internet allows for much more direct communication among members of hate groups and between criminals and victims. This connection has led to new forms of hate crimes through messaging and chat services. Citron discusses how hate crimes can be committed through direct messages to victims.⁶⁶ Lavi describes how some chat and messaging services are not used to communicate hate to victims, but for recruitment, communication, and organization of hate groups.⁶⁷ Again, the relationship between chat services and hate crimes is obscure, we have found no causal, or even good descriptive correlative data, showing a relationship between hate crimes and chat services. Indeed, one might expect that limiting chat services would simply direct people to older communications technologies such as telephones.

Funding Mechanisms

Information and communication technologies can further be used to fundraise in support of groups that promote or commit hate crimes. Beach describes terrorists using Paypal, GoFundMe, or other online funding platforms to raise money for themselves or for the legal defense of those being prosecuted for hate crimes.⁶⁸ Beach notes that Paypal is quietly cracking down on purported white supremacist accounts and describes how the platform is intentionally shutting down funding mechanisms for purported white supremacists and other racist hate groups. Private banking and financial firms are, of course, free, within certain legal constraints, such as the obligation not to discriminate against certain groups such as women, or racial minorities, to do business with whomever they chose. On the other hand, accomplice and conspirator liability in criminal law already covers financial institutions that knowingly assist or plan the performance of hate crimes.

⁶⁵ ADL, “Two-Thirds of U.S. Online Gamers Have Experienced Severe Harassment, New ADL Study Finds,” (July, 2019) available at: <https://www.adl.org/news/press-releases/two-thirds-of-us-online-gamers-have-experienced-severe-harassment-new-adl-study>; John T. Holden; Thomas A. Baker II., Marc Edelman, “The #E-Too Movement: Fighting Back against Sexual Harassment in Electronic Sports,” ARIZONA STATE L. J. 52, no. 1, at 1-48 (Spring 2020); Citron, Danielle Keats, “Hate crimes in cyberspace,” HARVARD UNIVERSITY PRESS (2014).

⁶⁶ *Id.*

⁶⁷ Michael Lavi, “The Good, the Bad, and the Ugly Behavior,” 40 CARDOZO L. REV. 2597, 2683 (2019).

⁶⁸ Stephanie Beach, “Hashtag Hate: The Need for Regulating Malignant Rhetoric Online,” VT. L. REV. 44, no. 3, at 141-144 (2019).

Online Harassment

Online blogs, message boards, social media and other websites unfortunately often provide the conditions and environment for new modes of harassment, colloquially called online harassment. The term encompasses a wide range of behavior which is motivated by bias towards another person. There is no consistent definition in law, but it is often defined in state and federal law as behavior that is offensive and repetitious. Harassment only in the most extreme forms can, under certain statutes, be considered criminal.

Another new type of harassment that has grown from the Internet is “swatting.” Elizabeth M. Jaffe defines “swatting” as when someone calls 911 and falsely reports a crime or emergency. Then a SWAT team is sent to the victim, who usually is live streaming online, to investigate the call. The team comes into the house armed and terrifies the victim.⁶⁹

Blanch and Hsu outline laws that can be used to combat online harassment.⁷⁰ The stalking provision of the Violence Against Women Act creates a felony offense for “any course of conduct or series of acts taken by the perpetrator on the Internet that place the victim in reasonable fear of death or serious bodily injury, or causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to the victim or the victim’s immediate family.”⁷¹ 18 U.S.C. § 2261A (2015). Further, Section 223 of the Communications Act’s prohibition against threatening communications can also be used to prosecute harassment. This law defines threatening communication as “[t]he communication in interstate commerce of threats to harm a person or property, to kidnap a person, or to damage a person’s reputation, is a violation of federal law pursuant to 18 U.S.C. § 875.”⁷² Violations of this law are treated as a misdemeanor.⁷³ The Supreme Court, in *Elonis*, ruled that it is not enough under this section to show that a reasonable person would have viewed the statements to be threatening, but that the perpetrator must possess the sufficient *state of mind*.⁷⁴ Even though the statute did not explicitly state a mens rea requirement, the Court decided that one must exist.⁷⁵ The court left open the question of whether recklessness would be sufficient to meet the mens rea requirement as it was not briefed in the case.⁷⁶

⁶⁹ Elizabeth M. Jaffe, “Swatting: The New Cyberbullying Frontier After *Elonis* V. United States,” 64 DRAKE L. REV., at 455, 456 (2016).

⁷⁰ Joey L. Blanch; Wesley L. Hsu, “An Introduction to Violent Crime on the Internet,” UNITED STATES ATTORNEYS’ BULLETIN 64, no. 3, at 2-12 (May 2016) *available at* <https://www.justice.gov/usao/file/851856/download>

⁷¹ *Id.* at 5.

⁷² *Id.* at 4.

⁷³ *Id.* at 8.

⁷⁴ *Elonis v. United States*, 575 U.S. 723 (2015).

⁷⁵ *Id.*

⁷⁶ *Id.*

Constitutionally Protected Speech and other Protections

The 1993 Report detailed the crucial role that the First Amendment plays in this area, given that telecommunications involves speech and expression.⁷⁷ The First Amendment serves as an important limitation to government action on private speech and expression, and thus “furnishes a critical starting point for discussion of potential government responses to the use of telecommunications to advocate and encourage hate crimes.”⁷⁸

While First Amendment protections are generally broad, the First Amendment does not bar government action on hate *crimes*, the central subject of the Report and this update. But, the First Amendment does bar all efforts for the government to regulate hate *speech*. The Supreme Court could not be clearer: “Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express “the thought that we hate.”⁷⁹

The most important evolution in communications technology since the 1993 Report has been the rise of the commercial Internet. While the 1993 Report highlighted the relationship between the First Amendment and some of the latest networked technology at the time (e.g., Bulletin Board Systems), the Report did not discuss the Internet. Therefore, this update provides the following observations on First Amendment limitations to government action on speech on the Internet, including speech which may advocate or encourage hate crimes.. These observations can serve as a starting point to conceptualize possible government approaches, but they are not intended to be all-inclusive or to evaluate the merits of particular laws or current legislative efforts.

The Supreme Court has explicitly considered – and rejected – the argument that under the First Amendment, government content-based regulation of speech on the Internet should be evaluated under the more deferential standard given to government regulation of speech on broadcast television and radio.

In *Reno v. ACLU*, the Supreme Court struck down on First Amendment grounds a federal law that criminalized indecent transmissions via telecommunications done with knowledge that the recipient would be a minor (the indecent transmissions provision), as well as the knowingly sending or displaying of depictions of sexual or excretory activities or organs in a manner that would be available to minors and in a way that would be patently offensive to contemporary community standards (the patently offensive display provision).⁸⁰ Congress had passed these provisions as part of the Communications Decency Act, with the explicit intent of

⁷⁷ U.S. Dept. of Commerce, Nat’l Telecomm. and Info. Admin., *The Role of Telecommunications in Hate Crimes* (1993) (Although analyzing the constitutionality of laws and regulations related to hate crimes and hate speech can sweep in other constitutional provisions, including the Fifth, Thirteenth, and Fourteenth Amendments, this Update focuses on the First Amendment because of its particular impact on speech on the Internet.).

⁷⁸ *Id.* at 32.

⁷⁹ *United States v. Schwimmer*, 279 U.S. 644 (1929) (“if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”).

⁸⁰ *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 859-60; 883 (1997) (The Supreme Court did uphold as constitutional the part of the law that prohibited obscene transmissions).

protecting minors online.⁸¹ The Court held these provisions unconstitutional as a violation of the First Amendment.⁸² Specifically, the Court noted that the statute “unquestionably silence some speakers whose messages would be entitled to constitutional protection.”⁸³ The Court also concluded that the provisions would curtail a significant amount of protected speech between adults;⁸⁴ the provisions defined neither “indecent” nor “patently offensive,” thus including “non-pornographic material with serious educational or other value.”⁸⁵ The Court also rejected the provisions’ reliance on contemporary community standards to define regulated speech, noting that “the community standards criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message.”⁸⁶

In evaluating the constitutionality of the law, the Court contended for the first time with government regulation of speech on the Internet. The Court recognized that there is a government interest “in protecting the physical and psychological well-being of minors.”⁸⁷ However, the Court determined that speech on the Internet was not subject to the lesser degree of protection from government regulation that the Court in earlier cases had determined was appropriate in regulating broadcast television and radio.⁸⁸ The Court cited the extensive history of broadcast regulation,⁸⁹ the scarcity of available frequencies,⁹⁰ and the invasive nature of broadcast⁹¹ as reasons for differentiation. Instead, a government content-based restriction on speech online has to survive strict scrutiny, which means that the government has to demonstrate that a law or regulation is narrowly tailored to achieve a compelling government interest and uses the least restrictive means to achieve the purpose.⁹² Thus, as the Court would later note

⁸¹ *Id.* at 858.

⁸² *Id.* at 866-870 (1997) (The Supreme Court did not decide whether the statute was so vague as to also violate the Fifth Amendment, but the Court noted that “the many ambiguities concerning the scope of [the statute’s] coverage render it problematic for purposes of the First Amendment.”).

⁸³ *Id.* at 874.

⁸⁴ *Id.* at 874-79.

⁸⁵ *Id.* at 877.

⁸⁶ *Id.* at 877-78 *but see Ashcroft v. ACLU*, 535 U.S. 564, 585 (2002) (A statute’s “reliance on community standards to identify material that is harmful to minors does not by itself render the statute substantially overbroad for purposes of the First Amendment.”).

⁸⁷ *Reno*, 521 U.S. at 869 (*quoting Sable Comm. of CA, Inc. v. FCC* 492 U.S. 115, 126 (1989)).

⁸⁸ *Id.* at 870 (The Court noted that “our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet.”]); *see also FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

⁸⁹ *Reno*, 521 U.S. at 870 (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 398 (1969)).

⁹⁰ *Id.* (citing *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 637-638 (1994)).

⁹¹ *Id.* (citing *Sable Comm. of CA, Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

⁹² *Id.* at 874; *see also PSINet, Inc. v. Chapman*, 362 F.3d 227, 233 (4th Cir. 2004) (noting that the Supreme Court in *Reno* applied strict scrutiny to regulation of Internet speech); *ACLU v. Johnson*, 194 F.3d 1149, 1156 (10th Cir. 1999) (same); *see also U.S. v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000) (describing the strict scrutiny standard) (Thus, even when a law or regulation specifically targets unprotected speech or expression, a court may find a First Amendment violation when the actions taken to comply with the law or regulation suppress a significant amount of protected speech.); *see, e.g., U.S. v. Playboy Ent. Grp., Inc.*, 529 U.S. 803 (2000) (This is not suggest that a statute that criminalizes any form speech or expression on the Internet would violate the First Amendment.); *see, e.g., U.S. v. Dinghra*, 371 F.3d 557 (9th Cir. 2004) (Moreover, not all speech regulation per se is subject to strict scrutiny; an important exception to a private entity’s exemption from First Amendment restriction is commercial

regarding *Reno*, “the mere possibility that user-based Internet screening software would soon be widely available was relevant to [the Court’s] rejection of an overbroad restriction of indecent cyber speech.”⁹³

A speaker’s decision to remain anonymous is protected under the First Amendment.

Anonymity is an important aspect of the online environment, and anonymity as a way to protect the speaker’s identity can be used for legitimate or illegitimate purposes. In *McIntyre v. Ohio Elections Com’n*, the Supreme Court noted that “an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of freedom of speech and protected by the First Amendment” and that “[t]he freedom to publish anonymously extends beyond the literary realm.”⁹⁴ Anonymity, the Court reasoned, “exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.”⁹⁵ While the right to remain anonymous is not absolute,⁹⁶ in the context of online speech, the Sixth Circuit has determined that even a plaintiff who prevails in a lawsuit is not automatically entitled to unmask the defendant’s identity to the plaintiff, although there is a presumption in favor of unmasking.⁹⁷ The Sixth Circuit noted that “courts must consider both the public interest in open records and the plaintiff’s need to learn the anonymous defendant’s identity in order to enforce its remedy. . . [f]urther, where a Doe defendant’s speech is found to be beyond the protection of the First Amendment, countering the presumption will require a showing that the Doe defendant participates in a significant amount of other, non-infringing anonymous speech that would be chilled if his identity were revealed.”⁹⁸

speech, which historically has held the government to lower level of judicial scrutiny.); *see generally* Valarie Brannon, “Assessing Commercial Disclosure Requirements Under the First Amendment,” Cong. Research Serv., R45700 (2019).

⁹³ *U.S. v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 814 (2000) (referencing *Reno*); *see also Ashcroft*, 542 U.S. 656, 670 (2004) (“Absent a showing that the proposed less restrictive alternative would not be as effective, [. . .] the more restrictive option preferred by Congress could not survive strict scrutiny.”) (internal citations omitted).

⁹⁴ *McIntyre v. Ohio Elections Com’n*, 514 U.S. 334, 342 (1995).

⁹⁵ *Id.* at 357.

⁹⁶ *See, e.g., In re Anonymous Online Speakers*, 661 F.3d 1168 (9th Cir. 2011) (“[N]ature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes.”) (citing *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160-61 (9th Cir. 2010); *Doe v. Reed*, 561 U.S. 186 (2010)).

⁹⁷ *Signature Mgmt. Team, LLC v. Doe*, 876 F.3d 831 (6th Cir. 2017) (In earlier proceedings, a district court had granted plaintiff’s motion for summary judgment to hold defendant liable for copyright infringement of plaintiff’s work by posting the work on defendant’s blog, and the district court had ordered that the defendant destroy all copies in the defendant’s possession.); *id.* at 835 (In determining whether the plaintiff could unmask the defendant’s identity at the discovery stage, the district court applied a test designed “to balance the magnitude of the harms that would be caused to the competing interests by a ruling in favor of plaintiff and by a ruling in favor of defendant.”); *id.* at 834 (internal quotation marks and citations omitted); *see also Signature Mgmt. Team, LLC v. Doe*, No. 13-cv-14005, 2015 WL 13036681, *5 (E.D. Mich. 2015) (providing a longer discussion about balancing tests that courts have applied pre-judgment and during the discovery process).

⁹⁸ *Signature Mgmt. Team, LLC v. Doe*, 876 F.3d 831, 837 (6th Cir.2017).

Government generally may not restrict access to online services in a manner so broad as to prevent users from exercising their First Amendment rights.

The Supreme Court in *Packingham v. North Carolina* held unconstitutional a statute that made it a felony for registered sex offenders to access commercial social networking sites, where the sex offender knows that the sites permit minors to be members.⁹⁹ The Court held that the statute was an impermissible restriction on lawful speech – even assuming that the statute was content neutral and thus subject to lesser (intermediate) scrutiny.¹⁰⁰ The Court concluded that the statute “burden[ed] substantially more speech than [was] necessary to further the government’s legitimate interests”¹⁰¹ and noted that “to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.”¹⁰² The Court also stated that “this opinion should not be interpreted as barring a State from enacting more specific laws than the one at issue. [. . .] [I]t can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor.”¹⁰³ In the context of online service access restrictions as part of a judicial sentence, courts have differentiated from *Packingham* by noting the Supreme Court there “invalidated only a *post*-custodial restriction and expressed concern that the statute applied even to persons who have already served their sentence.”¹⁰⁴

Government regulation of a private entity may transform that private entity into a state actor or public forum subject to the First Amendment.

Ordinarily, the First Amendment does not apply to private actors.¹⁰⁵ However, the state-action doctrine provides that a private entity can be held to the standard of a state actor when the private entity exercises a function traditionally exclusively reserved to the state.¹⁰⁶ In *Manhattan Community Access Corporation v. Halleck*, the Supreme Court determined that a private entity’s “operation of public access channels on a cable system” did not transform the entity into a state actor, and therefore, was not subject to the constraints of the First Amendment, despite New York State’s extensive regulation of the entity.¹⁰⁷

⁹⁹ *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017).

¹⁰⁰ *Id.* at 1736.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1737.

¹⁰³ *Id.*

¹⁰⁴ *U.S. v. Carson*, 924 F.3d 467, 473 (8th Cir. 2019) (italics in original) (The Eight Circuit also highlights decisions from other courts of appeal that “have rejected a similar argument [as that in *Packingham*] in challenges to supervised released conditions forbidding access to the Internet.”); *id.* (citing cases) (Most of these cases involved a review for plain error of the respective lower courts’ decisions.).

¹⁰⁵ *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1926 (2019).

¹⁰⁶ *Id.* (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974)) (internal quotation marks omitted).

¹⁰⁷ *Id.* at 1931-32.

On the other hand, courts have also ruled that social media can be considered public forum subject to the First Amendment. *Knight First Amendment Inst. at Columbia Univ. v. Trump* ruled that President Trump's Twitter account was a public forum to which the First Amendment applies. The court ruled that the President and Scavino [the White House social media director] exert governmental control over certain aspects of the @realDonaldTrump account, including the interactive space of the tweets sent from the account. That interactive space is susceptible to analysis under the Supreme Court's forum doctrines, and is properly characterized as a designated public forum."¹⁰⁸ Similarly, *Robinson v. Hunt County*¹⁰⁹ involved a governmental social media account, in particular, a sheriff office's Facebook page. The court ruled that public fora First Amendment rules applied.

Recommendations

Pursuant to Congress's request, and in line with the findings of this report, the following are a series of recommendations as to how the U.S. Government could better combat the use of electronic communications technologies in advocating and encouraging hate crimes.

- Respect the First Amendment

As the Supreme Court has recognized, the social media platforms have become our Nation's public square, and their power to track users and gather and analyze their data exceeds that of the most enthusiastic small town gossip.¹¹⁰ Too close government collaboration, even in the worthy goal of fighting crime, particularly hate crime, may result in government censorship via corporate proxy.¹¹¹ Overly compliant private internet firms will marry De Tocqueville's nightmare of an unbridled democratic tyranny desirous of stamping out nonconformity and minority views to Orwell's dystopia of an all-seeing state. With that caveat, we make the following, additional recommendations.

- Strengthen Collaboration Among State, Local And Federal Officials

It is critical that local and state law enforcement work together because of multijurisdictional nature of online hate crimes. The problems that occur online may require one jurisdiction to investigate and another to prosecute with the assistance of the Federal Government which has unique resources and experience to lend to the problem.

¹⁰⁸ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F.Supp.3d 541, 580 (2018).

¹⁰⁹ 921 F.3d 440, 447-448 (5th Cir. 2019) ("Because Robinson alleges viewpoint discrimination, it is immaterial whether the Facebook page is analyzed as a limited or designated public forum. The First Amendment 'forbid[s] the State to exercise viewpoint discrimination' in either setting, even when the limited public forum is one of its own creation," *quoting* *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

¹¹⁰ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

¹¹¹ See Seth F. Kreimer, "Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link," 155 U. PA. L. REV. 11, 14 (2006).

- Develop Technologies to Help *Users* Screen and Control Content

The U.S. Government should continue to “encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services.”¹¹²

Empowering users to take charge of their online experiences by giving them the tools to control what they see and with whom they interact could help foster a healthier digital ecosystem. More research is needed into how technology can be leveraged to best facilitate a greater degree of user control in today’s Internet, and whether and how any proposed models promote speech online.¹¹³

- Improve platform transparency and disclosure

As NTIA’s recent petition to the Federal Communications Commission (FCC) argued,¹¹⁴ very little is publicly known about social media content monitoring and usage. Public disclosure of content moderation practices would allow policymakers—and citizens—to better understand the role electronic media play in hate crimes.

Conclusion

The preceding report provided an update to the findings of the 1993 Report with respect to developments in information and communications technologies. This update was, of necessity, limited in scope relative to the 1993 Report due in large part to the explosive expansion of these technologies, their uses, and their centrality to many aspects of modern society, both noble and odious. But, our conclusions remain the same—and are consistent with leading scholars and researchers of free speech. We found no evidence linking electronic communications to hate crimes. As Erwin Chemerinsky states, there is “no reason to believe that censoring hate speech will make hate crimes less likely.”¹¹⁵ Rather, regulating hate speech on

¹¹² 47 U.S.C. § 230(b)(3); *see also* 47 U.S.C. § 230(c)(2)(B); 47 U.S.C. § 230(d).

¹¹³ National Telecommunications and Information Administration, Petition for Rulemaking, Docket No. RM- 11862 at 27-31 (Filed July 27, 2020); Mike Masnick, “Protocols, Not Platforms: A Technological Approach to Free Speech,” KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY (For example, one commentator has recommended the creation of “open protocols” in for online communications, arguing that such a shift “would allow end users to determine their own tolerances for different types of speech but make it much easier for most people to avoid the most problematic speech, without silencing anyone entirely or having the platforms themselves make the decisions about who is allowed to speak.”) *available at* <https://knightcolumbia.org/content/protocols-not-platforms-a-technological-approach-to-free-speech>.

¹¹⁴ National Telecommunications and Information Administration, Petition for Rulemaking, Docket No. RM- 11862 at 27-31 (Filed July 27, 2020).

¹¹⁵ “Hate speech is infecting America, but trying to ban it is not the answer,” Chicago Tribune (Oct. 31, 2018), *available at* <https://www.chicagotribune.com/opinion/commentary/ct-perspec-hate-speech-censor-first-amendment-1101-20181031-story.html>.

electronic communications platforms, as experts such as Nadine Strossen have concluded, is “at best ineffective and at worst counterproductive” in combating hate crimes.¹¹⁶

On the other hand, electronic media, particularly the large social media platforms, currently used to publish criminal threats, solicitations, and other criminal speech that aides and abets hate crimes. In contrast “hate speech,” this speech is illegal. Nonetheless the companies who control that media have immunity pursuant to 47 U.S.C. § 230(e)(3) and have no liability for hosting this criminal speech. To the degree Congress wishes to counteract the role of electronic media in the encouragement of hate crimes, revisiting these immunities might be considered. As mentioned above, the Department of Justice’s recent proposals for revising section 230 offer an excellent guide for this much needed reform.¹¹⁷

¹¹⁶ Laura E. Adkins, “Former ACLU president says censoring hate speech can backfire – just like it did in Nazi Germany,” Sept. 3, 2020, *available at* <https://www.jta.org/2020/09/03/opinion/former-aclu-president-says-censoring-hate-speech-can-backfire-just-like-it-did-in-nazi-germany>.