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ASSESSING THE LEGITIMACY OF GOVERNMENTAL REGULATION OF MODERN SPEECH AIMED AT SOCIAL REFORM: THE IMPORTANCE OF HINDSIGHT AND CAUSATION

Kenneth J. Brown*

When governmental regulation or punishment of speech occurs subsequent to the speech itself, such regulation is conducted with the benefit of hindsight. This is important because hindsight enables us to discern whether the expression in question has caused any legally cognizable harm. When speech is responsible for such a harm, its punishment is justified by this causal connection. Yet conversely, when we know that speech is consequence-free, its ex post punishment is conceptually indefensible. In the first part of this article, Mr. Brown criticizes the imminent lawless action standard articulated in Brandenburg v. Ohio *for failing to embrace fully this straightforward proposition. Importantly, however, the emergence of the Internet has clouded the application of this concept. E-communication enables a speaker to reach audiences of previously unattainable size, and to do so with unprecedented instantaneousness. In the second Part of this Article, Mr. Brown argues that contemporary First Amendment jurisprudence — and specifically the opinion of the United States Court of Appeals for the Ninth Circuit in* Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists *—fails to incorporate a realistic view of causation in the Internet age. He concludes that although the ex post regulation of consequence-free speech is illegitimate, we should be reticent, in the context of Internet speech, to dismiss the causative role of such expression without first affording this connection close scrutiny.*

INTRODUCTION

Under the imminent lawless action standard, as articulated in *Brandenburg v. Ohio*,[1] the First Amendment's free speech guarantee yields where a particular expression is likely to produce immediate social harms. This limitation is rooted in a belief as to the essential importance of preserving an ordered forum for the free

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* Law clerk to the Honorable William H. Yohn, Jr., United States District Court for the Eastern District of Pennsylvania. My loving thanks to Ginger Briggs. I also would like to thank Professor Seth Kreimer and the members of his Spring 2001 First Amendment Seminar; their feedback has proved indispensable in bringing this article to fruition. Similarly, my thanks to the members of the *William & Mary Bill of Rights Journal* — and especially Jeff Boerger, Robert Davis, Shawn Alan Gobble, Michael Harris, Christina James, Michael Lacy, and Ada-Marie Walsh — for their editorial efforts. Finally, a most special thanks to Laura Karen Brown, for reaffirming my faith in the capacity of the human spirit to triumph over adversity. Laurie, you make me proud.

[1] 395 U.S. 444 (1969).

exchange of ideas. Although generally justifiable, however, its articulation in *Brandenburg* is flawed. Specifically, the doctrine is overbroad, as it permits the ex post punishment of speech that is known, by virtue of hindsight, not to have caused any harm.

In cases where governmental regulation or punishment of speech occurs subsequent to the speech itself, such regulation is conducted with the benefit of hindsight; we know whether the expression in question actually has caused a legally cognizable harm. When speech is responsible for such a harm, its punishment is justified by this causal connection. Yet when expression is consequence-free, this justification for its regulation vanishes. Nor can such punishment alternatively be legitimized on utilitarian grounds; though it is desirable and efficient for the state to prevent likely harms before they occur, this interest obviously cannot validate the post hoc punishment of expression.[2]

The class of speech that may be validly regulated under the imminent lawless action standard, however, is broader than this principle permits. *Brandenburg*, by its terms, allows the ex post punishment of expression that appeared likely to produce an immediate social harm at the time of the utterance, regardless of whether such harm actually resulted. To the extent that this is so, that decision, and the proposition it announces, fail the test of conceptual legitimacy.

Standing alone, this notion is of limited value. If it is to provide a workable basis for First Amendment doctrine, the theory necessarily must incorporate an understanding of the nature of modern expression. Thus, after setting forth these conceptual underpinnings, this article focuses on the potential implications of Internet expression, as that medium entails the most pronounced communicative potential of any currently widespread means of intellectual exchange. E-communication enables an individual to share her ideas with unprecedented instantaneousness, and simultaneously to reach audiences of previously unattainable size. Combined, these facets of the Internet render it a powerful communicative tool that, if misused, can produce profound social harms. A prime example of this malevolent potential is found in *Planned Parenthood v. American Coalition of Life Activists*,[3] which centers around the *Nuremberg Files* website.[4] On this site, anti-abortion advocates post the names of abortion providers, denote those who have

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[2] This is not to say that the efficiency of preventing harms ex ante, as compared with punishing them ex post, is the only utilitarian argument for regulating speech. Indeed, an argument could be made that it is desirable to punish even consequence-free speech where such regulation will deter future social harms. *See, e.g.*, *infra* note 57. Yet this variant on the utilitarian theme is similarly unavailing. *Id.*

[3] 244 F.3d 1007, *reh'g en banc granted*, 268 F.3d 908 (9th Cir. 2001). The case was argued before the court en banc on December 11, 2001. A decision remains forthcoming at the time of this article's publication.

[4] *See infra* notes 73-93 and accompanying text.

been injured or killed, and update the site to reflect new "hits."[5]

Using the expression contained on this website as a vehicle, this article explores how the conceptual point articulated above should be applied to modern electronic communication. The conclusion ultimately reached is that, although the ex post regulation of consequence-free speech is illegitimate, we should be reticent, in the context of Internet speech, to dismiss the causative role of such expression vis-à-vis social harm without first affording this connection close scrutiny.

The article is structured as follows: Part I delineates the theory outlined above, and does so using various real world and hypothetical scenarios as illustrative tools; Part II explores how this theory should be applied in the Internet age, and focuses especially upon the *Nuremberg Files* as an example of the sort of communication to which the theory must be addressed; and Part III sets forth a brief conclusion.

I. A THEORY CONCERNING THE EX POST REGULATION OF CONSEQUENCE-FREE SPEECH

A. *The Evolution and Theoretical Underpinnings of the Imminent Lawless Action Standard*

The First Amendment protects speech in most of its myriad forms. Excluding narrow categories of non-protected expression such as fighting words,[6] defamation,[7] and obscenity,[8] speech is unassailable by "content-based"[9] government regulation except under extraordinary circumstances. Indeed, the ideal of free expression is preeminent within the universe of American civil rights and social values. As such, this particular species of liberty is subject to state usurpation only when such is the narrowest means possible by which a compelling governmental interest may be served.[10]

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[5] *See infra* notes 77-80 and accompanying text.

[6] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572-74 (1942).

[7] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 267 (1964); S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond* Brandenburg, 41 WM. & MARY L. REV. 1159, 1187 n.95 (2000) ("Causes of action exist for slander, libel, and various invasion of privacy torts.").

[8] *See* Miller v. California, 413 U.S. 15, 24 (1973); Roth v. United States, 354 U.S. 476, 485 (1957).

[9] "Content-based" regulations may be contrasted with "content-neutral" regulations, that "'are justified without reference to the content of the regulated speech.'" Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[10] *See, e.g.*, United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000) ("[C]ontent-based speech restriction . . . can stand only if it satisfies strict scrutiny. If a statute regulates speech based on its content, it must be narrowly tailored to promote a

Yet like most civil liberties, the right to free speech is far from absolute.[11] One justification — indeed, among the most fundamental of all justifications — for the abridgement of this freedom has been the rudimentary need to maintain social order.[12] As stated by O. Lee Reed, "[a] tension always exists . . . between the interpretation of free speech guaranteed by the First Amendment and the maintenance of what J.S. Mill asserted was the primary purpose of government: to protect citizens from 'harm.'"[13] The popular adage that one may not lawfully yell "Fire!" in a crowded theater is a paradigmatic example of the way in which the First Amendment yields to the need to prevent potentially dangerous disorder.[14] Thus,

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compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.") (citations omitted).

[11] *See, e.g.*, Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("[A]lthough the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral.").

[12] *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (holding that a student could be punished for sexually suggestive remarks made at a school assembly where school order and discipline was endangered); Yates v. United States, 354 U.S. 298, 321 (1957) (holding that "when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur," its exhortations to immediate violent action are unprotected by the Free Speech Clause); Dennis v. United States, 341 U.S. 494, 510 (1951) (adopting Chief Judge Learned Hand's interpretation of the "clear and present danger" test as "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger"); Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting):

> This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

Cf. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (holding that students' wearing of black armbands in protest of the Vietnam War could not be legitimately proscribed by school authorities, as it did not substantially interfere with the maintenance of order within the school).

[13] O. Lee Reed, *The State Is Strong but I Am Weak: Why the "Imminent Lawless Action" Standard Should Not Apply to Targeted Speech that Threatens Individuals with Violence*, 38 AM. BUS. L.J. 177, 179 (2000) (citing John Stuart Mill, *On Liberty*, *in* 43 GREAT BOOKS OF THE WESTERN WORLD 271 (Robert Maynard Hutchins ed., 1952)).

[14] *See* Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."). As articulated by Justice Holmes in *Schenck*, this example was employed as a

it is not only the case that "[t]he First Amendment does not protect violence,"[15] but moreover that words tending to lead to civil unrest enjoy no greater protection than do the violent acts themselves.[16]

During the early portion of the twentieth century, this principle was embodied in the "clear and present danger" standard. Under this test, first announced by Justice Holmes in *Schenck v. United States*,[17] the regulation of otherwise protected speech was considered constitutionally permissible if "the words [in question] are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[18]

The test was refined in 1927 by Justice Brandeis, concurring in *Whitney v. California*,[19] wherein he stated:

> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.[20]

Brandeis may thus be credited, to a large extent, with making explicit this prominent rationale underpinning the guarantee of freedom of speech. He also

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vehicle to illustrate the operation of the "clear and present danger" test. Today such a prohibition would certainly be sustainable in that the maintenance of social order is among the most compelling of all governmental interests, and that anything short of a complete prohibition on such expression would fail to achieve that end. Alternatively, the regulation could be upheld on "imminent lawless action" grounds. *See generally* Reed, *supra* note 13, at 182.

[15] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982).

[16] As stated in *Brandenburg*:

> [T]he constitutional guarantees of free speech and free press do not permit a State 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 is likely to incite or produce such action.*

395 U.S. at 447 (emphasis added).

[17] 249 U.S. 47 (1919).

[18] *Id.* at 52.

[19] 274 U.S. 357 (1927).

[20] *Id.* at 376 (Brandeis, J., concurring).

thereby demonstrated the importance of limiting its usurpation to situations in which the danger to be averted is so significant that it would threaten the very integrity of this freedom.

This broad view of expressive liberty, and the conviction as to its paramount importance within American socio-political life in which it was rooted, was embraced by a majority of the Court a decade later in *Herndon v. Lowry*.[21] For governmental restraints on speech to be considered valid under this formulation, the evil sought to be prevented had to be serious, probable, and imminent.[22]

The doctrinal evolution of the clear and present danger principle culminated in the 1951 case of *Dennis v. United States*.[23] In *Dennis*, the Court strayed from the presumptively disapproving stance toward state regulation of speech that the test had come to embody, and adopted Judge Learned Hand's less restrictive measure of governmental action.[24] Instead of requiring that the harm to be avoided be serious, probable, *and* imminent, the Hand formulation called for an examination of "the gravity of the 'evil,' discounted by its improbability," to determine whether the invasion of free speech was justified.[25] In essence, this test mandated that the harm be serious *or* probable. The comparably lax nature of this formulation is illustrated by its application in *Dennis* itself. Dennis was charged with violating section three of the Smith Act, which prohibited individuals from conspiring to "teach the duty . . . of overthrowing or destroying any government in the United States by force or violence."[26] Although the chances of his efforts meeting with success were virtually nil, the seriousness of the potential harm was so great that his

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[21] 301 U.S. 242 (1937).

[22] *Id.* at 254.

[23] 341 U.S. 494 (1951). *But see Brandenburg*, 395 U.S. at 453 (Douglas, J., concurring) ("But in *Dennis v. United States*, we opened wide the door, distorting the 'clear and present danger' test beyond recognition.") (citation omitted).

[24] *Dennis*, 341 U.S. at 510.

[25] United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950).

[26] *Dennis*, 341 U.S. at 496 (quoting Smith Act, ch. 439, tit. I, § 2(a)(1), 54 Stat. 670, 671 (1940) (current version at 18 U.S.C. § 2385 (2000))); *cf.* 18 U.S.C. § 2385 (2000):

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government . . . [s]hall be fined under this title or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

Id.

conviction was nonetheless sustained.[27] By contrast, it seems clear that under the original Holmes/Brandeis formulation, Dennis would have remained a free man.

As the Warren era reached its close and *Dennis*'s permissive stance fell from favor, the Court reverted to a more stringent approach to state regulation of speech. In *Brandenburg*,[28] the Court evaluated the constitutionality of a conviction under the Ohio Criminal Syndicalism Statute.[29] In holding the statute to be unconstitutional, the Court focused upon the fact that it outlawed the mere advocacy of the violent overthrow of the government. It stated:

> [T]he constitutional guarantees of free speech and free press do not permit a State 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 is likely to incite or produce such action.*[30]

The doctrinal shift announced in *Brandenburg*, then, was from requiring that state regulation of speech be necessary to avert a clearly or presently dangerous harm, to the modern standard of mandating that such regulation prevent the likely incitement of imminent lawless action.

This move was not overly extreme; it certainly was less doctrinally jarring than was the initial adoption of the clear and present danger standard in *Herndon*, as it embodied a return to familiar jurisprudential ground. In fact, the *Brandenburg* approach has been described as "the successor to the clear and present danger test."[31] The shift may thus be conceived of, in functional terms, simply as manifesting a change in intellectual leaning as opposed to a more significant turn in analytical focus or methodology.

In fact, the analytical framework to be employed in these contexts is identical. Under both standards, the state must demonstrate the reasonableness of its determination that the predicate condition to its regulation of speech — regardless of its precise formulation — has been satisfied.[32] More importantly, at the root of both tests are two crucial convictions. First, the ability to speak freely

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[27] *Dennis*, 341 U.S. at 510-11.

[28] 395 U.S. 444 (1969).

[29] OHIO REV. CODE ANN. § 2923.13 (1919) (repealed 1972).

[30] *Brandenburg*, 395 U.S. at 447 (emphasis added).

[31] Bernard H. Siegan, *Separation of Powers & Economic Liberties*, 70 NOTRE DAME L. REV. 415, 461 (1995).

[32] *See* Reed, *supra* note 13, at 206 ("Ultimately, in evaluating the state's response to an instance of speech regulated under clear and present danger, courts must determine the reasonableness of the state's assessment of clear and present danger. The same reasonableness standard also applies to assessing imminent lawless action.").

is an invaluable element of ordered liberty[33] and constitutes the essence of a genuinely democratic political order.[34] But second, and of even greater importance, is the paramount weight afforded to the preservation of the social structure in which our ideas are expressed. One popular metaphor for this structure is the "marketplace of ideas,"[35] and the ideal it represents has played a significant role in shaping free speech jurisprudence.[36]

In brief, the idea is that truth is most effectively gleaned through an unrestrained dialogue in which all ideas vie to persuade the market's intellectual patrons. Undesirable or unpersuasive ideas will fail to attain acceptance through their considered rejection, as opposed to their ex ante preclusion. Yet the effectiveness — indeed the feasibility — of this process is contingent upon the proper functioning of the market. When an idea, as expressed through speech, threatens the structural integrity of the marketplace (i.e. endangers the physical stability of the forum in which its consideration would transpire), it has been the judgment of the Supreme Court that the need to protect speech is subservient to the need to ensure the continued existence of a forum for the exchange of ideas.[37] Put differently, we are willing to exclude a particularly dangerous or destructive idea from the marketplace to ensure that the market will continue to function. This

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[33] *See* Palko v. Connecticut, 302 U.S. 319, 324-25 (1937) (describing the right to free speech as being "implicit in the concept of ordered liberty").

[34] *See* C. Thomas Dienes, *Trial Participants in the Newsgathering Process*, 34 U. RICH. L. REV. 1107, 1114 (2001) ("If 'We the People' are to exercise meaningfully that governing role in our democracy, freedom of expression, especially on matters of public interest and concern, is a necessity."). *See generally* Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757 (1995) (discussing the democratic purposes of the First Amendment).

[35] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting):

> [M]en have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

[36] *See* James A. Gross, *A Human Rights Perspective on United States Labor Relations Law: A Violation of the Right of Freedom of Association*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 65, 99-100 (1999) ("The Supreme Court, at least in theory, is influenced mainly by the 'search for truth' or 'marketplace of ideas' approach to speech and considers it essential to a democratic system of government because it contributes to informed decision-making by the electorate.").

[37] *See* Malloy & Krotoszynski, *supra* note 7, at 1197 ("When the nature of the speech itself creates a palpable danger, however, the government is less concerned with censorship and more concerned with the viewpoint neutral cadence of the public safety.").

notion was well articulated by Justice Douglas, dissenting in *Dennis*, wherein he stated: "When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt. Otherwise, free speech which is the strength of the Nation will be the cause of its destruction."[38] It is the delineation of this point, where the market is no longer capable of functioning, at which both the clear and present danger test was, and the imminent lawless action standard is, aimed.

Translated into practically applicable terms, it is impossible for an idea to receive thoughtful consideration amidst physical chaos. Thus, when this condition becomes manifest, the primary historical justification for the freedom of speech is rendered inapposite, and the power of the state may be justifiably (in both theoretical and legal terms) employed to suppress the speech as a means of preserving social order.

B. *Imminent Lawless Action and Speech Aimed at Social Protest*

One substantive context in which these conceptual underpinnings are especially applicable is the realm of social protest. Indeed, the enterprise of social protest is one largely characterized by passionate advocacy guided by deep-seated, personal, and often spiritual conviction.[39] As stated by Wendy Brown Scott in the context of the historic Black freedom movement:

> "Part of the historic strength of the Black freedom movement was the deep connections between political objectives and ethical prerogatives. This connection gave the rhetoric of Frederick Douglass, Sojourner Truth, W.E.B. DuBois, Paul Robeson, and Fannie Lou Hamer a clear vision of the moral ground that was simultaneously particular and universal." Deeply held religious beliefs were incorporated into the ideological core of

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[38] *Dennis*, 341 U.S. at 585 (Douglas, J., dissenting).

[39] *See generally* Texas v. Johnson, 491 U.S. 397, 399 (1989) (describing a demonstration "protest[ing] the policies of the Reagan administration and of certain Dallas-based corporations" marked by "'die-ins,' intended to dramatize the consequences of nuclear war," flag burning, and chants of "America, the red, white, and blue, we spit on you"); Cohen v. California, 403 U.S. 15, 16 (1971) ("[T]he defendant was observed in the Los Angeles County Courthouse . . . wearing a jacket bearing the words 'Fuck the Draft' which were plainly visible. . . . The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft."); Barnum v. Chambliss, 247 F. Supp. 794, 799 (M.D. Ga. 1965) (describing civil rights marches as featuring exuberant hand-clapping, shouting and singing); Ryszard Cholewinski, *The Protection of Human Rights in the New Polish Constitution*, 22 FORDHAM INT'L L.J. 236, 245 (1998) (noting the interrelatedness of social and moral protests).

> principles in the struggle for civil and human rights, and provided the strategy and human resolve to participate in organized protests and acts of civil disobedience to gain the equality and freedom guaranteed by law.[40]

Anchored by such fundamental ideological principles, civil protestors are frequently unwilling to relent in the face of counter-demonstrations, threats of arrest, or even physical violence.[41] Additionally, these strong motivating forces have sometimes spurred protesters themselves to undertake violent acts.[42] It is thus unsurprising

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[40] Wendy Brown Scott, *Transformative Desegregation: Liberating Hearts and Minds*, 2 J. GENDER RACE & JUST. 315, 335 (1999) (quoting Manning Marable, *Racism and Multicultural Democracy*, *in* DOUBLE EXPOSURE: POVERTY AND RACE IN AMERICA 151, 159 (Chester Hartman ed., 1997)).

[41] *See generally* City of Houston v. Hill, 482 U.S. 451, 453-54 & nn.1 & 2 (1987) (describing a confrontation between an activist and Houston police, in which the activist, in an effort to divert the attention of the police from an individual who appeared to be in the midst of a seizure, shouted to the police: "[T]he kid has done nothing wrong. If you want to pick on somebody, pick on me."). The activist later stated:

> I would rather that I get arrested than those whose careers can be damaged; I would rather that I get arrested than those whose families wouldn't understand; I would rather that I get arrested than those who couldn't spend a long time in jail. I am prepared to respond in any legal, nonaggressive or nonviolent way, to any illegal police activity, at any time, under any circumstances.

Id. at 453 n.1. *See also* O'Shea v. Littleton, 414 U.S. 488, 508-09 (1974) (Douglas, J., dissenting) (describing the continuation of anti-discrimination protests despite continued police retribution); Robert D. Sack, *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill, "Defamation and Privacy Under the First Amendment,"* 100 COLUM. L. REV. 294, 304 (2000) (discussing the editorial that constituted the focus of *New York Times Co. v. Sullivan*, describing the ongoing demonstrations in the face of "'intimidation and violence' directed toward the activists' leader, Dr. Martin Luther King, Jr.," and asserting that the editorial "was published against the background of civil-rights demonstrations throughout the South . . . that had been met from time to time by repression and violence, some of it by, or with the complicity of, the police"); Tracy S. Craige, Note, *Abortion Protest: Lawless Conspiracy or Protected Free Speech?*, 72 DENV. U. L. REV. 445, 485 (1995) (discussing the violence characterizing many anti-abortion protests).

[42] *See, e.g.*, United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 718 (1966) (describing a strike by the United Mine Workers that featured the beating of an organizer of a rival union); Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 291-92 (1941) (discussing union protests characterized by violence, property damage, beatings, and a display of guns); Craige, *supra* note 41, at 484-85 (discussing anti-abortion "protestors who threaten violence, commit violence, or physically block a clinic door"); *see also Planned Parenthood*, 244 F.3d at 1014:

that, to a degree increasing proportionately with both the controversial nature of the relevant issue and the aggressiveness of the protestors, violent confrontation and civil unrest are frequent bedfellows of social reform movements. Accordingly, a paradox is created: despite the fact that speech designed to convey a political message "lies at the heart of the First Amendment,"[43] the speech of civil protesters is more susceptible to *legitimate* state regulation than is expression in most other social contexts.

C. *The Shortcomings of* Brandenburg

Accepting this theoretical background, a great deal of uncertainty remains as to its application in the context of speech aimed at social protest. When, precisely, can it be said that the marketplace of ideas is in such immediate danger of destruction so as to validate governmental regulation of speech? This is the question to which both the clear and present danger and imminent lawless action principles were designed as responses. It is here contended, however, that the answer manifested in today's imminent lawless action standard, as articulated in *Brandenburg*, is less than satisfactory. Specifically, because that test apparently would permit the ex post punishment of "consequence-free speech" — or speech that actually results in no legally-punishable wrong — it is broader in scope than is permitted by its conceptual moorings. In order to illustrate precisely why this is so, it is helpful to consider the two ways in which the state might possibly usurp the free speech right in the name of preserving social order.

First, it is possible to impose a prior restraint on speech. Although it is true that prior restraints lie at the center of the realm of governmental action at which the First Amendment takes aim,[44] they occasionally are justified when the

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> Extreme rhetoric and violent action have marked many political movements in American history. Patriots intimidated loyalists in both word and deed as they gathered support for American independence. John Brown and other abolitionists, convinced that God was on their side, committed murder in pursuit of their cause. In more modern times, the labor, antiwar, animal rights and environmental movements all have had their violent fringes.

[43] Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 429 (1992) (Stevens, J., concurring in judgment) ("[W]hen government regulates political speech or 'the expression of editorial opinion on matters of public importance,' 'First Amendment protectio[n] is at its zenith.'") (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 375-76 (1984), and Meyer v. Grant, 486 U.S. 414, 425 (1988)) (second alteration in original).

[44] *See* Alexander v. United States, 509 U.S. 544, 568-69 (1993) (Kennedy, J., dissenting) (stating that even during the late eighteenth century, when the First Amendment was afforded its most constrictive Blackstonian reading, it was considered to generally prohibit prior restraints); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931) ("[T]he chief

maintenance of structured civil relations is at stake.[45] Consider, for example, the facts of *NAACP v. Claiborne Hardware*.[46] That case centered around the boycott by African Americans of white merchants in Claiborne County, Mississippi. Charles Evers, field secretary of the NAACP in Mississippi, not only helped to organize the boycott, but further gave speeches in its support. As reiterated by the Supreme Court, the trial court found as a matter of fact that:

> Evers told his audience that they would be watched and that blacks who traded with white merchants would be *answerable to him*. According to Sheriff Dan McKay, who was present during the speech, Evers told the assembled black people that any "uncle toms" who broke the boycott would "have their necks broken" by their own people. Evers' remarks were directed to all 8,000-plus black residents of Claiborne County, and not merely the relatively few members of the Claiborne NAACP.[47]

The trial court also found that Evers had stated during a subsequent speech to a crowd of several hundred boycotters: "If we catch any of you going in any of them

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purpose of the [free speech] guaranty [is] to prevent previous restraints upon publication."); *see also* S.E. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975):

> The presumption against prior restraints is heav[y] . . . . [A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

[45] *See* Craig Peyton Gaumer, *Punishment for Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problem of Hate Crimes*, 39 S.D. L. REV. 1, 32-33 (1994) (discussing the World War II case of *Thomas v. Collins*, 323 U.S. 516 (1945), and stating that "[i]nsofar as neither the [defendant] union leader's words nor the caucus of union supporters presented any discernable danger to public safety, the Court failed to find any cogent state interest significant enough to permit a prior restraint on Thomas' free speech . . . rights"); Richard E. Wawrzyniak, Comment, *Unauthorized Use of a Celebrity's Name in a Movie Title: Section 43(a) of the Lanham Act and the Right of Publicity,* Rogers v. Grimaldi, 55 MO. L. REV. 267, 283 n.143 (1990) ("Prior restraint . . . is generally forbidden and may be unconstitutional unless the existence of certain conditions necessitate such action for the public safety, public welfare, or the preservation of the social order.") (quoting Rosemont Enters., Inc. v. Irving, 375 N.Y.S.2d 845, 868 (N.Y. App. Div. 1975)); W. Doug Waymire, Note, Alexander v. United States: *When a Picture's Worth 1000 Years*, 26 U. TOL. L. REV. 237, 244 (1994) ("[P]ublic safety and welfare concerns militate in favor of allowing prior restraint against incitement to acts of violence.").

[46] 458 U.S. 886 (1982).

[47] *Id.* at 900 n.28 (emphasis in original).

racist stores, we're gonna break your damn neck."[48]

In reality, these speeches, while rhetoric-intensive and inflammatory, incited no riots. But what if the crowd had become violent, or — to take the clearer case — what if Evers, in the midst of his "emotionally charged"[49] harangue, had credibly urged the crowd to destroy the white-owned stores instead of boycotting them? If the Claiborne County authorities had intervened at that point, it is likely that their actions would have been justified, not only as a consequence of the satisfaction of the imminent lawless action standard, but also, in theoretical terms, due to the breakdown of the marketplace of ideas. Moreover, strong policy reasons would also support a finding that such intervention does not violate the First Amendment, namely the exceedingly compelling nature of the governmental interest in preventing physical harm to persons and property ex ante, as opposed to merely punishing it ex post.[50]

The second means by which the state can regulate speech in order to preserve social order is the ex post punishment of expression. This is clearly the less optimal of the two alternatives, as this brand of governmental action necessarily transpires after the harm has occurred (i.e., people were injured or property was destroyed, and the marketplace of ideas has broken down). Yet, due to practical considerations that make it infeasible in many cases to intervene in a timely fashion, ex post punishment is often the only recourse available.

Because the state action in this context is temporally removed from the speech in question, governmental decision makers enjoy the benefit of hindsight in determining whether to punish the expression. In the case of ex post intervention, therefore, it is possible to further distinguish between two different scenarios. In the first, it is known that harm did stem from the speech in question, but the state was unable, for whatever reason, to prevent it before it accrued, and is substituting ex post punishment for ex ante prevention. This would be the case, in the hypothetical variant on *Claiborne Hardware*, if the county officials had been unaware of Evers' address when it was being delivered, or were physically unable to silence him before his words incited violence or otherwise lawless action. Given this scenario, ex post punishment is justified, despite its likely chilling effect on future expression of the same variety, because the speech in question actually did

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[48] *Id.* at 902.

[49] *Id.* at 928.

[50] *See generally* United States v. Rahman, 189 F.3d 88, 116 (2d Cir. 1999) ("One of the beneficial purposes of the conspiracy law is to permit arrest and prosecution before the substantive crime has been accomplished."); Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1310 (1999) (discussing as perhaps the primary benefit of granting ex ante regulatory authority "an agency's ability to impose remedies and avert harm. This is because *ex ante* enforcement occurs *before* the challenged conduct has been undertaken, and so averts violations before they occur.").

cause the breakdown of the marketplace of ideas, not to mention violence to persons and their property. Because of the direct causal link between the speech and this sort of harm, the First Amendment does not pose a barrier to punishment in this case.

In the second scenario, however, lawless action did not transpire, and here we would do well to consider the facts of *Brandenburg* as illustrative of precisely such a situation. As stated above, *Brandenburg* concerned a prosecution under the Ohio Criminal Syndicalism Statute. Specifically, the defendant in that case telephoned a reporter for a Cincinnati television station and invited him to attend a Ku Klux Klan rally. The reporter accepted, and filmed the events. His film depicted twelve hooded figures, some of whom carried firearms, gathered around a burning cross. At one point, the defendant stated: "[I]f our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[51] These scenes were not transmitted live, but rather were taped, and were not broadcast until later.[52] The Court reversed Brandenburg's conviction, holding that the Criminal Syndicalism Act was unconstitutional in that it punished the mere advocacy of violence without regard to whether the speech was likely to produce imminent lawless action.

Examined in the abstract, this appears to be the correct result. Because the events at issue consisted merely of a few individuals speaking and otherwise expressing themselves while alone in a field, the sort of threat to the marketplace of ideas that could justify state usurpation of the free speech right was absent. Yet upon closer inspection, the deficiency in the reasoning in *Brandenburg* — and, indeed, in the Court's approach to speech that, with the benefit of hindsight, we know with certainty has given rise to no unlawful actions — becomes apparent. Oddly, the problem with the *Brandenburg* analysis is that there was any analysis at all.

The Court knew, by virtue of this perfect hindsight, that no legitimately proscribed harm[53] resulted from the expression at issue. Given this, any pragmatic or theoretical justification for the punishment of Brandenburg's speech simply evaporated. Indeed, regardless of whether Ohio could legitimately have intervened ex ante (a question which turns on the satisfaction of the imminent lawless action

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[51] *Brandenburg*, 395 U.S. at 446.

[52] *Id.* at 445.

[53] While it is unquestionable that many of those who viewed the filmed ritual were deeply offended by what they saw, this sort of harm to one's sensibilities is distinct from that which may be proscribed in a manner consistent with the First Amendment. *See* Miller v. California, 413 U.S. 15, 33 (1973) ("People . . . vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."). *Cf.* Boy Scouts of Am. v. Dale, 530 U.S. 640, 701 (2000) (Souter, J., dissenting) ("[T]he First Amendment protects expressive association: individuals have a right to join together to advocate opinions free from government interference.").

test), ex post punishment was unjustified. This is so because, in theoretical terms, the marketplace of ideas never ceased to function; practically speaking, no one was hurt[54] as a consequence of Brandenburg's words. It thus seems that the Court should simply have noted this fact and reversed his conviction.[55] By instead announcing the imminent lawless action standard, the Court actually stopped short of fully embracing this principle.

Put differently, the imminent lawless action standard, on its face, proscribes too little in the way of government regulation of speech. It allows for punishment in cases where harm does not result from expression, so long as it appeared at the time of the verbalization that harm was imminent. Indeed, the *Brandenburg* analysis strongly suggests that had the facts of the case been different, and the likely consequence of Brandenburg's expression had been lawless action, his ex post punishment would have been justified, despite his actually having caused no legally cognizable harm. The Court's ruling fails to make proper use of the insights afforded by hindsight.

By way of further illustration, it is helpful to return to the hypothetical variant on the facts of *Claiborne Hardware*. Let us suppose that in a secret meeting Evers advocated the destruction of the white-owned shops, and that his oratorical skills were such that the attentive crowd was stirred into a frenzy, hell-bent on carrying out his directions. Yet, just as they were gathering the baseball bats that would be used to smash the store windows, one older demonstrator within the crowd had a heart attack, and so distracted the mob that the plan was aborted. The next day, when Claiborne County authorities learned of the events of the preceding day, they arrested Evers and charged him with attempting to incite a riot. In this case, it seems that the *Brandenburg* standard would be satisfied; the speech consequently would be rendered outside the protection of the First Amendment, and the prosecution deemed valid. Yet this is unsupportable; just as Ohio was unable to legitimately punish Brandenburg for his consequence-free words, county officials would lack conceptual grounding for inflicting a punishment on Evers in the case of the riot that was not.[56]

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[54] *See supra* note 53.

[55] It should be noted, in the Court's defense, that the analysis in *Brandenburg* was not directed squarely at the petitioner's actions, but instead at assessing the constitutionality of the Ohio Criminal Syndicalism Statute. To the extent that the Court held that statutes criminalizing mere advocacy without a likelihood of imminent incitement run afoul of the First and Fourteenth Amendments, then, it is to be lauded. This does not, however, rectify the deficiency in the Court's analysis — its failure to embrace the principle that any speech that does not result in harm may not be justifiably punished by the state.

[56] The conceptual point articulated here does entail strong ramifications in the contexts of attempt and conspiracy. For example, not only would it preclude the conviction of Evers for attempting or conspiring to incite a riot, but taken to its natural conclusion, the theory would preclude the legitimacy of any such conviction.

If we had perfect foresight, we would punish only speech that we knew was destined to cause harm.[57] Of course, we are not omniscient, and it is for this reason that we may legitimately regulate speech that we credibly *believe* is about to cause significant harm. Crucially, however, when we act with the benefit of perfect hindsight this pragmatic justification for state intervention vanishes, and the sole remaining rationale for the punishment of expression is its empirically verified, causative role vis-à-vis the harm we wish to prevent. The imminent lawless action standard, in apparently permitting ex post punishments where we know that no harm resulted from the speech in question, thus fails the test of conceptual legitimacy.[58]

D. *A Limitation*

Before discussing the application of this theory in the modern age, it is vital to place one significant limitation on the attack on ex post punishment of consequence-free speech. To this point, this article has focused on the context of social protest, and speech aimed at the realization of social or political change. It is important to note, however, that this focus is more than a convenient vehicle by which to illustrate the conceptual point articulated above. Significantly, the point enjoys a degree of validity in this context that it does not possess in the case of non-political, private speech. There is an intuitive difference between public political speech of the variety at issue in *Claiborne Hardware* and private non-political

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[57] An argument could be made that it is desirable to exact ex post punishment of non-harm causing speech as a means of deterring future harms generally — i.e. individuals will hesitate before speaking in ways that are likely to cause harm if they know that similar speech has resulted in punishment in the past. We might view this as a variant on what I have contended is legitimate ex ante regulation, with the time of punishment being antecedent to the future harm. However, this argument fails because the harm to be prevented is not imminent; the speech in question could not be said to *cause* the anticipated harm, even though its punishment might serve to prevent it. As such, even under the *Brandenburg* standard, this sort of deterrence-minded punishment would violate the First Amendment.

[58] The Court in *Claiborne Hardware* did state that:

> An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open."

Claiborne Hardware, 458 U.S. at 928 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). Nonetheless, it is far from clear that this language overrules the unambiguous implication of *Brandenburg* that non-harm causing speech may be punished ex post so long as the imminent lawless action standard is satisfied.

speech — for example, a crime boss's instruction to a paid assassin.[59] Although it is argued that the First Amendment poses a constitutional barrier to the post hoc punishment of speech where that expression does not actually result in a legally cognizable harm, the same cannot be said for the instruction to the assassin if, for example, the killer decides that he would rather retire from his life of crime than fulfill the boss's wishes. In the case of both the riot that was not and the assassination that was not, no harm occurred, but in the second instance, unlike the first, punishment would be justifiable.

The reconciliation between these two apparently conflicting positions lies in the fact that, whereas the social value of the public speech is so great that it lies at the center of the First Amendment,[60] the assassination order lies much farther from that locus, and is likely outside the scope of the free speech guarantee altogether.[61] Thus, it is only where the speech in question is public, consequence-free, and substantively prominent within the hierarchy of First Amendment values that its post hoc punishment is illegitimate.

With this limitation in mind, then, it is important to consider the socio-technological context in which modern expression transpires, and the relationship between this setting and the idea that the ex post punishment of consequence-free speech is conceptually and doctrinally unjustifiable. Indeed, standing in isolation, the conceptual point delineated above is of marginal utility; in order to serve as a pragmatically workable basis for First Amendment doctrine, an understanding of its application in the era of e-communication is indispensable.

II. THE APPLICATION OF THIS THEORY IN THE INTERNET AGE

A. *The Nature of Modern Expression*

With the dawning of the twenty-first century, social protest and civil disobedience have assumed unprecedented forms. Often facilitated by technological development, some of these new modes of protest permit the transmission of ideas at speeds and distances previously inconceivable. From a doctrinal perspective, these new means of protest force us to reconceptualize some of our most fundamental assumptions concerning the First Amendment, the

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[59] *See generally* Daniel T. Kobil, *Advocacy On Line*: Brandenburg v. Ohio *and Speech in the Internet Era*, 31 U. TOL. L. REV. 227, 235 (2000) (noting that the imminent lawless action test *rightfully* precludes people from "soliciting murder for hire").

[60] *See supra* note 43.

[61] *See, e.g.*, United States v. Rahman, 189 F.3d 88, 116 (2d Cir. 1999) ("Congress could have achieved its public safety aims 'without chilling First Amendment rights' by punishing only 'substantive acts . . . .' [Nonetheless], it is well established that the Government may criminalize certain preparatory steps towards criminal action, even when the crime consists of the use of conspiratorial or exhortatory words.").

marketplace of ideas, and the potential for its destruction.

Of particular concern in assessing these developments must be the development of the Internet as a forum for speech aimed at social reform. As stated by Nadine E. McSpadden in an aptly descriptive passage:

> The Internet is a massive resource, the likes of which the world has never before seen. It connects people around the world by offering new and instantaneous methods of communicating and transmitting information. This medium is entirely unique and, because of its uniqueness, presents new problems for our judicial bodies. Analysis that courts have traditionally used for other broadcast media simply does not apply to the Internet.[62]

It is true that never before in the history of humankind has it been possible for a single group or individual to simultaneously communicate with every other person on the entire globe with access to a computer and a telephone line. Indeed, given the lack of spatial and temporal limitations on e-communication, "it is just as easy for a New Yorker to [instantly] access the Louvre's home page as it is to access the Metropolitan Museum of Art's home page."[63] More generally, the Internet is "the first mass medium to combine the intimacy and connectedness of one-to-one communication on the telephone with the range and reach of one-to-many communications like broadcasting and newspapers."[64]

This newfound interconnectedness bears responsibility for many laudatory social developments. People with similar interests are able to share their passions where they previously would have been unaware of each other's existence.[65] The desperately ill are able to seek obscure and exotic last-ditch treatments for their ailments. Moreover, as Robert E. Litan notes:

> Perhaps the most enthusiastic users of the new technology are academic scholars, many of whom use the Internet daily to communicate with other experts in their fields, as well as to collaborate on articles or books in a fashion and at a speed that only a short time ago would have been

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[62] Nadine E. McSpadden, Note, *Slow and Steady Does Not Always Win the Race:* The Nuremberg Files *Website and What it Should Teach Us About Incitement and the Internet*, 76 IND. L.J. 485, 486 (2001) (footnotes omitted).

[63] *Id.* at 488.

[64] *Id.* (citation omitted). In reality, given the *complete* lack of geographic boundaries on the Internet, the physical range of e-communication is far greater than that of any single newspaper or airborne broadcast signal.

[65] *See, e.g.*, *Barbed Wire Collector Magazine*, *at* http://www.barbwiremuseum.com/BarbedWireCollectorMagazine.htm (last visited Oct. 17, 2001) (providing instructions to barbed wire enthusiasts on how to obtain copies of this publication).

unimaginable.[66]

Yet as Litan continues, "[i]t is not clear that all Internet-empowered communities are positive developments."[67] While the Internet entails such remarkable potential as a channel of communication and a means of human edification, it poses a commensurate risk that it will be abused and employed as a mechanism of destructive violence.[68] Precisely because the Internet is such an effective means of connecting people, those with hateful and violent proclivities that are repugnant to mainstream society have been especially vigilant in soliciting the support of others with similar antisocial impulses.[69] In fact, "[o]ver fifty hate groups currently communicate on the Internet, discussing conspiracies and providing bomb-making formulas to their cyberspace visitors."[70] It has been suggested that by creating such a sense of community among those with deviant leanings (i.e., the sort that generally have been rebuffed within the marketplace of ideas), the Internet "emboldens [such individuals] to carry out acts of violence."[71]

This troublesome employment of the Internet as a means of spreading hate, and even worse, of facilitating the commission of violent acts, illustrates why those charged with the formulation of legal doctrine should be concerned with this medium as a general matter. A realization of the potentially noxious effects of instantaneous global communication, however, does not indicate precisely why this means of communication requires a rethinking of some aspects of traditional First Amendment analysis. In order to best accomplish this task, it will be helpful to employ as an illustrative tool the most noteworthy recent case in which speech

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[66] Robert E. Litan, *Law and Policy in the Age of the Internet*, 50 DUKE L.J. 1045, 1054-55 (2001).

[67] *Id.* at 1055.

[68] *See* McSpadden, *supra* note 62, at 504:

> [The Internet] can and will likely someday be a tool of dangerous groups, used to instruct, inflame, and commit acts of violence. Because of several of its unique features, the Internet is particularly vulnerable to groups wanting to use it for the global dissemination of dangerous information.
>
> There are already many hate groups communicating on the Internet, using its various resources to transmit frightening and repugnant information.

[69] *See* Kobil, *supra* note 59, at 230 (noting that the Internet has been prominently involved in the proselytization efforts and violent acts perpetrated by white supremacists, neo-Nazis, the Ku Klux Klan, and by Eric Harris and Dylan Klebold, the young men responsible for the 1999 massacre at Columbine High School in Littleton, Colorado).

[70] McSpadden, *supra* note 62, at 504.

[71] Kobil, *supra* note 59, at 230.

aimed at social reform,[72] the Internet, and the violent disruption of the marketplace of ideas were tragically linked.

B. *The Nuremberg Files*

The *Nuremberg Files*[73] is a web site established and operated by the American Coalition of Life Activists (ACLA), a group dedicated to the eradication of both the practice of abortion and, as a means to this end, those who provide it or facilitate its provision. The site itself features abundant Holocaust imagery, a collage of what appear to be the limbs, torsos and heads of aborted fetuses, with blood dripping steadily from the menagerie, and a great deal of inflammatory rhetoric.[74] Specifically, "[a]bortion providers are labeled 'baby butchers,' who deliver 'Satan' 'his daily diet of slaughtered babies.'"[75] The site also features a link to a second site, where the viewer is presented with gruesome, graphic photographs of aborted fetuses in various positions and in varied states of decomposition.[76] But most troubling, and most relevant from the perspective of this paper, is the fact that the "Files" also contains a list of abortion providers,[77] with a legend atop the page: a name written in plain black text indicates that the abortion provider is "working," a "grayed-out" name indicates that the individual had been "wounded," and a crossed-out name denotes a "fatality."[78] Between March 1993 and October 1998, four American abortion providers were killed by anti-abortionists,[79] and each of

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[72] It would be understandable to refuse to countenance a description of the *Nuremberg Files* as "speech aimed at social reform." Nonetheless, the Court of Appeals for the Ninth Circuit, analogizing directly to *Claiborne Hardware*, did state that "the two cases have one key thing in common: Political activists used words in an effort to bend opponents to their will." *Planned Parenthood*, 244 F.3d at 1014.

[73] *See* The Nuremberg Files — Motivation, *at* http://www.xs4all.nl/~oracle/nuremberg/ (last visited Oct. 17, 2001) (mirror of the original Nuremberg Files web site).

[74] *See id.*

[75] Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV. 541, 555 (2000).

[76] *See* Pictures of Aborted Children of God, *at* http://209.41.174.82/smdead.html (last visited Oct. 17, 2001).

[77] Nuremberg Files: Abortionists on Trial, *at* http://www.xs4all.nl/~oracle/nuremberg/aborts.html (last visited Oct. 17, 2001).

[78] *Id.*

[79] These slain individuals were Drs. David Gunn, George (Wayne) Patterson, John Britton, and Barnett Slepian. *See* Sharon Lerner, *The Nuremberg Menace*, THE VILLAGE VOICE, Apr. 10, 2001, at 48. Although the *Nuremberg Files* list only American abortion providers, it is worth noting that at least three Canadian abortionists — Drs. Garson Romalis, Hugh Short and Jack Fainman — also were attacked between November 1994 and November 1996. *See* T. Trent Gegax & Lynette Clemetson, *The Abortion Wars Come Home*, NEWSWEEK, Nov. 9, 1998, at 34.

their names appears, crossed out, on the *Nuremberg Files* web site.[80]

The fear instilled by the Files in other abortion providers was both extreme and understandable. In addition to "donning bulletproof vests, drawing the curtains on the windows of their homes and accepting the protection of U.S. Marshals,"[81] a group of Portland, Oregon-based doctors brought suit as a means of protecting themselves.[82] They filed an action in the District Court for the District of Oregon,[83] alleging that the ACLA's actions violated the Freedom of Access to Clinic Entrances Act ("FACE").[84] In an amended order featuring a total of 465 factual findings, the district court concluded that the names of the plaintiffs had been released (through inclusion in the *Nuremberg Files*) by the ACLA into an environment known to be violently hostile toward abortion providers.[85] This, the court reasoned, did indeed constitute a violation of FACE. The court dismissed the First Amendment defense raised by the ACLA, holding that the Files constituted "a true threat to bodily harm, assault or kill one or more of the plaintiffs,"[86] and were thereby rendered outside the protection of the First Amendment.[87] Accordingly, the ACLA was enjoined from continuing to post the Files, and a jury verdict subsequently was returned against the defendants in the amount of $107 million.[88]

For the physician-plaintiffs, however, this victory was relatively short-lived. In late March 2001, the Court of Appeals for the Ninth Circuit dissolved the injunction and vacated the damage award, reasoning that the Files constituted protected speech under the First Amendment.[89] The precise basis for the court's reversal was that, in its view, a statement can be deemed a "true threat," and thereby removed from the protection of the free speech guarantee, only if the expression conveys to its listener the intent of the speaker herself to cause serious bodily harm to the listener.[90] While acknowledging that the Files could have put the doctors in harm's way (i.e., subjected them to the violent acts of third parties), the court flatly

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[80] *See* Nuremberg Files: Abortionists on Trial, *supra* note 77.

[81] *Planned Parenthood*, 244 F.3d at 1013.

[82] *See* Planned Parenthood v. Am. Coalition of Life Activists, 41 F. Supp. 2d 1130 (D. Or. 1999).

[83] *Id.*

[84] 18 U.S.C. § 248 (1994).

[85] *Planned Parenthood*, 41 F. Supp. 2d at 1134-36.

[86] *Id.* at 1133. A "true threat," at least in the view of the Ninth Circuit, is one that seriously expresses an intent *by the speaker* to assault or do bodily harm to the target. *See Planned Parenthood*, 244 F.3d at 1013 n.4, 1016-17.

[87] *See Planned Parenthood*, 41 F. Supp. 2d at 1155.

[88] *Planned Parenthood*, 244 F.3d at 1013.

[89] *See id.* at 1019-20.

[90] *Id.* at 1017 ("[T]he jury could have concluded that ACLA's statements contained 'a serious expression of intent to harm,' not because they authorized or directly threatened violence, but because they put the doctors in harm's way. However, the First Amendment does not permit the imposition of liability on that basis.").

rejected this as a basis for holding the First Amendment to be inapplicable.[91] Thus, the question was, in the eyes of the Ninth Circuit, "whether ACLA's statements could reasonably be construed as saying that ACLA (or its agents) would physically harm doctors who did not stop performing abortions."[92] The court concluded in the negative by noting that unlike, for example, Charles Evers's speech in *Claiborne Hardware*, the ACLA never explicitly advocated violence, and surmising that, if Evers's speech was protected by the First Amendment, then surely the Files, as a less overt call for violent action, must also be protected.[93]

C. *What is Really Going on Here?: Causation and the Internet*

It appears clear that lurking just below the surface (and sometimes actually poking through into the text)[94] of the Ninth Circuit's opinion is the issue of causation. Indeed, it is this issue with which the Supreme Court truly was wrangling in *Brandenburg*, and it is, I submit, also the issue to which the court's analysis in *Planned Parenthood* speaks most directly.[95] In evaluating the notion of causation espoused by the Ninth Circuit in *Planned Parenthood*, two functions are served, two points illustrated. The first highlights a divergence between the standard announced in *Brandenburg* and the court's analysis in *Planned Parenthood*, thereby casting a long shadow of doubt over the doctrinal correctness of the latter decision. The second answers the question posed at the outset of this section: precisely how does the advent of the Internet force us to reconceptualize First Amendment doctrine? The response to this question is framed by applying the

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[91] *Id.*

[92] *Id.*

[93] *See id.* at 1019 ("If Charles Evers's speech was protected by the First Amendment, then ACLA's speech is also protected.").

[94] *See Planned Parenthood*, 244 F.3d at 1015 n.8:

> A doctor who discloses an adverse prognosis often instills fear in the patient and his family; predicting a future event — "That bus is about to hit your child!" — can cause the listener intense apprehension. Yet such statements are not (and cannot be made) unlawful. Nor does it matter that the speaker makes the statement for the very purpose of causing fear.

Id.

[95] *Brandenburg*, in holding that speech is within the scope of the First Amendment so long as it does not pose a credible threat of imminent lawless action, certainly can be conceived of as answering the question: "When are we willing to say that speech actually causes or threatens to cause harm, and is thus prohibitable?" Similarly, insofar as *Planned Parenthood* holds that speech that threatens harm by someone other than the speaker or her agent cannot, under the First Amendment, form the basis for liability, it too may be categorized as defining the relationship between causation and the First Amendment.

above-delineated theory — that the ex post punishment of consequence-free speech is unacceptable — to the facts of both *Planned Parenthood* and *Brandenburg*, and comparing the results. The conclusions reached as to the legitimacy of the regulation in these two cases are diametrically different, and this highlights precisely how the Internet requires us to reassess the nature of the causative link between incendiary speech and violence in the age of e-expression.

1. The Shortcomings of the *Planned Parenthood* Decision

Put simply, the *Planned Parenthood* decision was incorrect, and the reason for this is straightforward. *Brandenburg*, as explicitly acknowledged by the Ninth Circuit, "held that the First Amendment protects speech that encourages others to commit violence, unless the speech is capable of 'producing imminent lawless action.'"[96] The Court of Appeals also conceded that if the ACLA "'authorized, ratified, or directly threatened' violence," then it could be held liable for so doing.[97] Yet subsequent to these acknowledgements, the *Planned Parenthood* court held that "[t]he jury would be entitled to hold defendants liable if it understood the statements as expressing their intention to assault the doctors *but not* if it understood the statements as merely encouraging or making it more likely that *others* would do so."[98] The court then confirmed its view that the harm at issue must actually be caused (or be likely to be caused) by the speaker — as opposed to a third party — if the speech is to be considered unprotected by the First Amendment: "[T]he jury could have concluded that ACLA's statements contained 'a serious expression of intent to harm,' not because they authorized or directly threatened violence, but because they put the doctors in harm's way. However, the First Amendment does not permit the imposition of liability on that basis."[99]

Surely this is erroneous. Regardless of whether the Files constitute a "true threat," they are an incitement to lawless action that, under *Brandenberg*, is not entitled to First Amendment protection. It is clear, under *Brandenburg*, that if a party merely advocates violence, but does so in a setting and manner that is likely to imminently produce such violence (through the reaction of the listener), this suffices to render the First Amendment inapplicable to that particular expression.[100]

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[96] *Planned Parenthood*, 244 F.3d at 1015 (quoting *Brandenburg*, 395 U.S. at 447).

[97] *Id.* at 1014 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 929 (1982)).

[98] *Id.* at 1016 (emphasis added).

[99] *Id.* at 1017 (quoting United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990).

[100] As stated by the *Brandenburg* Court, "a State [is not permitted] to forbid or proscribe advocacy of the use of force . . . except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447. *Cf.* Cohen v. California, 403 U.S. 15, 18 (1971) ("[S]o long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen

Indeed, advocacy under such conditions constitutes incitement, and is thus devoid of constitutional protection.[101] Yet the Ninth Circuit, in insisting that the speaker herself must cause the harm, disregarded this crucial facet of incitement doctrine. In fact, the court largely ignored the doctrine as a basis for denying First Amendment protection to the Files, focusing instead on the true threats doctrine.[102]

To the extent that the ruling did speak to incitement, it might be said that the Ninth Circuit did not strictly insist that the speaker must be the instrument by which her own threats are effectuated.[103] Under its holding, the First Amendment will be deemed inapplicable if she "authorizes" violence on the part of others.[104] Yet this notion of authorization is narrower than *Brandenburg*'s focus on advocacy under conditions likely to produce imminent violence, and it fails to appreciate the causative role played by the Internet. Indeed, in the sentences following the mention of authorization, the Ninth Circuit explained what it meant in holding that the "authorization" of violence could render the First Amendment inapplicable: "If defendants threatened to commit violent acts, by working alone or with others, then their statements could properly support the verdict. But if their statements merely encouraged unrelated terrorists, then their words are protected by the First

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could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position of the inutility or immorality of the draft his jacket reflected.").

It has been passionately argued by several prominent scholars that speakers should not be held liable for the voluntary acts undertaken by their listeners, as to impose such liability is to demean the listeners' capacities for cognitive thought and independent, consequence-laden decision making, and to understate the extent to which the harm actually is caused not by the speaker but rather by the listeners themselves. One variant of this argument has been advanced by Professor C. Edwin Baker, who argues that liability in such a case is improper "because the speaker and the listener are two autonomous individuals." Beth A. Fagan, Note, Rice v. Paladin Enterprises: *Why Hit Man Is Beyond the Pale*, 76 CHI.-KENT L. REV. 603, 628 (2000) (footnote omitted) (citing C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 992-93 (1997)). A similar notion has been advanced by Professor David Dow, who contends that "the *Brandenburg* analysis rests on the untenable notion that 'words alone can overcome human will' and thus denies the 'potency' of an individual's self-determinations." *Id.* (quoting David R. Dow, *The Moral Failure of the Clear and Present Danger Test*, 6 WM. & MARY BILL RTS. J. 733, 734, 739 (1998)). Although these arguments certainly are well conceived, they are simply in inextricable tension with the *Brandenburg* standard. Indeed, one of Professor Dow's primary purposes in so arguing is to explicitly take issue with the substance of that standard. Though far from perfect, *Brandenburg* is the law, and as such will guide the doctrinal (though not the theoretical) discussion in this paper.

[101] *See* McSpadden, *supra* note 62, at 494 ("In Brandenburg, the Supreme Court . . . [drew a] line between incitement, which is unprotected by the First Amendment, and advocacy, which is protected.") (citing *Brandenberg*, 395 U.S. at 449).

[102] *See Planned Parenthood*, 244 F.3d at 1016-19.

[103] *Id.*

[104] *Id.* at 1014.

Amendment."[105]

There are two responses to this. First, because of the speed and breadth of the Internet's reach, the "terrorists" to which the court's opinion refers are functionally no less related to the ACLA than was the gathered crowd to Charles Evers in the hypothetical variant on *Claiborne Hardware*.[106] In both cases, the audience received the message the instant it was delivered, and in both, liability is appropriate. Thus, to the extent that the Ninth Circuit failed to recognize this technologically-produced parallel, the decision is inadequate. Second, and more fundamentally, the *Brandenburg* standard is broader than that fashioned by the Ninth Circuit. Under the Supreme Court's formulation, the First Amendment *is* inapplicable even where, to use the language employed in *Planned Parenthood*, a speaker merely "encourag[es] or ma[kes] it more likely that others [will perpetrate violent acts],"[107] so long as the expression transpires under conditions in which the speech will likely lead to imminent violence.[108] As argued more fully below,[109] this condition seems to have been squarely met by the acts of the ACLA. Indeed, such was the plain import of the finding of the District Court that the "[d]efendants [r]eleased [t]heir [t]hreats into a [k]nown [a]tmosphere of [v]iolence [a]gainst [a]bortion [p]roviders."[110]

Thus, the Ninth Circuit's opinion, in imposing the additional "speaker as perpetrator or authorizer" requirement, simply does not accord with *Brandenburg*. From a more conceptual perspective, the court failed to fully embrace the range of ways in which the speech of one person or entity may be said to cause the violent acts of others, especially in the age of instantaneous electronic communication.

Viewed in theoretical context, the shortcomings of the Ninth Circuit's approach are further accentuated. Given that the First Amendment has uniformly been interpreted to yield in situations where the physical integrity of the marketplace of ideas is in jeopardy,[111] we would expect, given the holding in *Planned Parenthood*, that the *Nuremberg Files* posed no substantial danger of creating or enhancing conditions under which the reasoned consideration of the

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[105] *Id.* at 1014-15. One possible interpretation of this statement — although the persuasiveness of this reading is not completely clear — is that the Ninth Circuit, in focusing on "authorization," implicitly required the existence of a formal power or agency relationship between the speaker and listener (i.e., the listener would be powerless to commit the violent act) if the lawless act of the latter is to be causally charged to the former.

[106] *See supra* text accompanying notes 49-50.

[107] *Planned Parenthood*, 244 F.3d at 1016.

[108] *See generally* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 432 n.1 (1993) (Blackmun, J., concurring); Communist Party of Ind. v. Whitcomb, 414 U.S. 441, 447-48 (1974); Hess v. Indiana, 414 U.S. 105, 108 (1973).

[109] *See* text accompanying *infra* notes 111-18.

[110] *Planned Parenthood*, 41 F. Supp. 2d at 1134.

[111] *See supra* text accompanying notes 37-38.

ACLA's message would be impeded. Yet upon even a moment's reflection, it becomes clear that such simply is not the case.

The Files were first launched in January 1996 at the end of a three-year stretch that featured the first abortion-related murders and attempted murders in recent American history.[112] This period was also marred by unprecedented incidents of arson, death threats, and stalkings, all in connection with the provision of abortion-related services.[113] Moreover, and quite paradoxically, FACE, enacted in 1994, may be credited with contributing to a subsequent rise in the violent character of abortion protests, as that legislation outlawed many of the non-violent means employed by pro-life advocates to convey their anti-abortion message.[114] In short, this was not an environment in which the marketplace of ideas concerning abortion was functioning properly.

The effect of the Files could in no sense have been calming or restorative of a deliberative intellectual climate. Contrarily, their purpose and consequence was to fan the flames of lawlessness; to provide an incentive for those inclined to be responsible for another name being crossed off of the infamous list, and to memorialize the efforts of such individuals. For example, following the murder of Dr. John Bayard Britton, Advocates for Life Ministries, a co-maintainer of the *Nuremberg Files* site, "put forth public praise of Dr. Britton's assassin, stating: 'The man's a hero. May his tribe increase.'"[115] Indeed, even the Ninth Circuit conceded that the striking through and graying out of the names of slain or wounded abortion providers "may connote approval"[116] of such actions, and that "ACLA offered rewards to those who stopped the doctors."[117] Thus, it seems clear that the conceptual justification for the free speech guarantee was not served by allowing the *Nuremberg Files* to remain operative. The site in no sense contributed to a reasoned, principled debate about the merits of abortion. Rather, the Files exacerbated, in a manner unique to Internet communication, conditions that were, in the words of Justice Douglas, "so critical that there [was] no time to avoid the

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[112] *See* National Abortion Federation, NAF Violence and Disruption Statistics (Aug. 31, 2001), *at* http://www.prochoice.org/Violence/stats.pdf (last visited Oct. 17, 2001).

[113] *Id.*

[114] *See* William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1890 n.52 (2000) (making this argument); Note, *Safety Valve Closed: The Removal of Nonviolent Outlets for Dissent and the Onset of Anti-Abortion Violence*, 113 HARV. L. REV. 1210, 1226 (2000) ("The patterns of anti-abortion violence, however, suggest that further limiting nonviolent protests — either by increasing penalties for interfering with access or by establishing buffer zones within which activists cannot demonstrate or distribute literature — is counterproductive; such limits appear to have contributed to the increase of violence.").

[115] McSpadden, *supra* note 62, at 492 (quoting *Planned Parenthood*, 41 F. Supp. 2d at 1135).

[116] *Planned Parenthood*, 244 F.3d at 1018 n.14.

[117] *Id.* at 1019 n.16.

evil the speech threaten[ed]."[118] Viewed in theoretical terms, then, the Ninth Circuit's holding in *Planned Parenthood* is unsupportable.

2. The *Nuremberg Files* as Illustrative of the Causative Potential of Internet Speech

While the above discussion demonstrates the shortcomings in the analysis of the Ninth Circuit in *Planned Parenthood,* it also indicates a significant way in which contemporary First Amendment doctrine simply does not incorporate a realistic view of causation in the Internet age. In this section, this point will more fully be explored, and to do so, the theory delineated in Part I will be applied to a variant on the facts of *Planned Parenthood.* In concluding that ex post punishment would have been justified in the context of the *Nuremberg Files*, whereas it was not in *Brandenburg*, the seminal point highlighted is the way in which the Internet expands the scope of causation in the modern era.

To render this discussion parallel with that of the post hoc punishment sought to be imposed in *Brandenburg,*[119] it is necessary to modify slightly, for purposes of this discussion, the nature of the suit in *Planned Parenthood.* Imagine that, instead of the doctors suing for the emotional harms they allegedly were suffering at the hands of the ACLA, the widow of slain abortion provider Dr. Barnett Slepian sued that group for the wrongful death of her husband. Or, to maintain the criminal law theme from the *Brandenburg* discussion, we might suppose that the New York Attorney General[120] brought criminal charges against the ACLA's leaders for the murder. The ACLA naturally would raise a First Amendment defense and, setting to the side the issue of whether the Files constitute a "true threat" (an alternate basis for holding the First Amendment to be inapplicable), the ultimate question would be whether the Files can be said to have caused the harm alleged. If so, the ex post punishment of this speech would be consonant with the theory underlying this paper and, under the incitement doctrine, would comport with the First Amendment.

The import of the above argument is that if, by virtue of hindsight, we know speech to have been truly consequence-free, it must be free from punitive ramifications. But were the *Nuremberg Files* the cause of Dr. Slepian's murder? This question may be unanswerable, at least in a definitive sense; it is likely that

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[118] *Dennis*, 341 U.S. at 585 (Douglas, J., dissenting). As evidence of the existence of such conditions, consider the fact that five individuals associated with the provision of abortions already had been murdered, and two more would be so victimized in 1998. *See* National Abortion Federation, *supra* note 112.

[119] *See supra* text accompanying notes 51-55.

[120] Dr. Slepian was murdered inside his home in Amherst, New York, a suburb of Buffalo. *See* Joie Tyrrell, *Slain by Sniper: Outrage After Upstate Attack on Abortion Doc*, NEWSDAY, Oct. 25, 1998, at A5.

only James C. Kopp, the man who allegedly killed Dr. Slepian,[121] knows with any degree of certainty exactly what led him to end the doctor's life. But certain aspects of this killing suggest that the *Nuremberg Files* did play a causative role. First, while Dr. Slepian lived outside of Buffalo, New York, Mr. Kopp was a resident of St. Albans, Vermont.[122] Although, again, it would be purely speculative to make any assertion as to whether Kopp serendipitously encountered Dr. Slepian in person prior to his appearance in the Files, it seems likely that, given the geographic distance between the residences of each, Kopp knew of Slepian's existence solely as a product of the latter's inclusion in the Files. To this extent, the ACLA can be charged with *sine qua non* causation of Slepian's murder. Moreover, as stated previously, Slepian's name was crossed out in the Files "the day he was killed."[123] Although far from logically conclusive, this suggests that this sort of ratification may have motivated Kopp to fire a single shot through the doctor's kitchen window.

Though it features several facts that remain unknown, the Slepian case is valuable as a demonstration of the capacity of the Internet to cause harm to individuals geographically removed from the "speaker" (here the ACLA). Indeed, somewhat ironically, while the essence of the Ninth Circuit's holding in *Planned Parenthood* is that harms perpetrated by third parties can virtually never justify the inapplicability of the First Amendment, the most valuable aspect of the Internet is the very capacity to reach, and thus influence, third parties in unprecedented numbers and with unprecedented speed. If we assume that the suppositions set forth above actually are true — that Kopp is in fact the killer of Dr. Slepian and that he would not have killed (indeed, known of) Dr. Slepian but for his inclusion in the *Nuremberg Files* — then it seems clear that the ACLA may be charged with responsibility for his acts to the same degree that Charles Evers could have been held accountable for exhorting the crowd to immediate acts of violent destruction.[124]

Thus, whereas the speech in *Brandenburg* was beyond the reach of legitimate governmental sanctions, as it genuinely was consequence-free, it is likely that the same cannot be said about the *Nuremberg Files*. Unlike conventional means of communication, Internet transmissions are capable of instantly reaching targeted groups at any geographic distance who are willing to act in antisocial ways

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[121] *See* Rebecca Leung, *James Kopp: A Portrait of a Fugitive*, ABCNEWS.com, *at* http://abcnews.go.com/sections/us/dailynews/kopp_bio_990506.html (last visited Oct. 18, 2001).

[122] *Id.*

[123] *Abortion Doctor Slaying Suspect Caught*, ABCNEWS.com, *at* http://abcnews.go.com/sections/us/DailyNews/kopp010328.html#2 (last visited Oct. 18, 2001); *see also* Horsley v. Feldt, 128 F. Supp. 2d 1374, 1376 (N.D. Ga. 2000) ("Following his murder, Dr. Slepian's name appeared on an Internet website . . . called 'The Nuremberg Files' with a strike-out graphic or a black line through his name.").

[124] This, of course, is not what actually transpired in Claiborne County, Mississippi, but rather is the hypothetical variant on *Claiborne Hardware* articulated above.

based upon the information that they receive. And once such actions are undertaken, the Internet is capable of providing immediate recognition to the perpetrators of such acts, such as occurred when Dr. Slepian's name was crossed out. Put differently, the Internet entails the power to cause harms and, in conceptual terms, to destroy the marketplace of ideas more quickly and at much greater distances than is contemplated by traditional notions of causation, as manifested in First Amendment jurisprudence. Thus, we must recalibrate the *corpus juris* to accommodate this newfound causative potential. Framed in terms of the operative theory of this paper, while it remains conceptually unjustifiable to impose ex post punishments of consequence-free speech, the Internet renders speakers capable of exacting consequences in unprecedented ways. Accordingly, when it comes to e-communication, we should approach the issue of causation with a significantly broader notion of such in mind. By way of juxtaposition, this conception should unquestionably be more encompassing than that which is evident in the decision of the Ninth Circuit in *Planned Parenthood.*

III. CONCLUSION

The theoretical import of this paper lies in the realization that it is unjustifiable for the government to impose ex post punishments for consequence-free speech, regardless of whether ex ante intervention would have been justified through the satisfaction of the imminent lawless action standard. Yet given that we must apply this theory in the context of real world expression, it is crucial to understand the scope of the consequences potentially imposed by Internet communication. Thus, the practical import of this article is the delineation of the potential posed by the Internet for causing legally cognizable harms in unparalleled ways.[125] Specifically, the Internet has the potential to cause harms at speeds and distances previously unknown, and thus unaccounted for, in the law of incitement.

When we combine these two facets of the article, we are left with the following proposition: although ex post regulation of consequence-free speech is illegitimate, we should be reticent, in the context of Internet speech, to dismiss the causative role of such expression without first affording this connection close scrutiny. Just as Brandenburg was not properly charged with criminal wrongdoing when he uttered his hateful rhetoric in a nearly empty field, any individual whose speech does not cause violence or any other legally-prohibitable harm cannot validly be punished after the fact of her expression. Yet it appears unarguable that the likelihood of Brandenburg's culpability would have increased with the size of

[125] This realization is especially important given that the Internet is still proliferating at astonishing speed. *See* Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 930 (2001) ("The Internet is the fastest growing network in history.").

his audience, as the odds that one of his listeners would have taken "some revengeance" would similarly have grown. Such is precisely the effect of the Internet, and the development of such drastically more efficient modes of communication (and thus incitement) indicates the need for a commensurate evolution in the jurisprudence that governs the expression they convey.