CYBER-HATE ON THE INTERNET

Remarks of Christopher Wolf, Chair of the International Network Against Cyber-Hate, at the Conference on Hate on the Internet, Co-hosted by the Canadian Human Rights Commission and the Association of Canadian Studies, December 16, 2005

It is commonly assumed that in the United States, the First Amendment allows any and all speech, no matter how repugnant and inflammatory.[1] That is not necessarily the case. Even in the land of ultimate free speech, there are limits to what one can say. If speech constitutes a real, discernible threat and borders on imminent violence, it can be enjoined or even criminalized.[2] The cases interpreting what is a real, discernible threat may be surprising in terms of their breadth, given that legal standard.

But to be clear, such restraints on speech, online or offline, are to be rarely employed under the First Amendment. The text of that constitutional provision and its rationale support the notion that, rather than banning unpopular speech, it can and should be neutralized with counter-speech, or tempered by the filters built into the minds of the listeners through upbringing and education. The U.S.-based Anti-Defamation League abides by the dictum of Supreme Court Justice Louis Brandeis, "Sunlight is the best disinfectant." It believes that the proper response of free men and women to speech that they abhor is more speech, reason, evidence, truth, moral outrage, and moral witness. That is why Americans make no apologies for the fact that all speech in the United States is presumptively protected as free expression, unless certain limited conditions are met.

U.S. courts have been reluctant to ban expressions of even the most heinous hate speech, as demonstrated by the historic case in Skokie, Illinois, which allowed a "Nazi parade" to march through the streets of the predominantly Jewish town.[3] The U.S. Supreme Court later confirmed its reluctance in permitting regulation of hate speech when it struck down a Minnesota city ordinance banning speech that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender." The Supreme Court noted that it shall not permit a government to impose special prohibitions on those who express disfavored views.

The old cliché, "life imitates art," has been all over cable news channels and in the headlines. Recently, an actor who once played an aspiring mobster on "The Sopranos" was charged with murder earlier this week. He was accused of shooting an off-duty police officer in New York City during a bungled burglary attempt. Many think that viewing fictional violence breeds real-world violence. Some will contend that acting in a violent TV role may result in violent conduct in real life. So, after repeating the cliché about life imitating art, we can expect calls for media controls on violent shows like "The Sopranos". It won't be long before the right-wing group Focus on the Family once again urges limits on "violent media," which, as they put it, "affects the brain."

Focus on the Family ignores the possibility that the brain actually might process TV violence in ways that rejects it, based on upbringing, education, morality and rational thinking. They disregard the factors other than TV that influence human behavior, such as messages of non-violence, tolerance and understanding that don't get much notice but that nevertheless are present in daily life. Ironically, the homophobic broadcasts of Focus on the Family lead some to link them to physical attacks on gays and lesbians and to demand controls on what that group is saying.

But in the United States, controls on speech, no matter how violent or repug-

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nant, are largely out of bounds under the First Amendment to the United States Constitution. This is because what is repugnant speech to some may be legitimately viewed as free expression of ideas by others. The difficulty in censorship envisioned by our Founding Fathers is who gets to decide what speech is allowed and what is prohibited. How do you draw the line?

Justice Brandeis explained how to draw the line under the First Amendment this way in a famous concurrence:

> [E]ven advocacy of [violence], however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger *it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.*
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> *Whitney v. California*, 274 US 357 (1927) (emphasis supplied).

As eloquently set forth by Justice Brandeis, there are times when the First Amendment will not serve as a shield against government regulation. When speech contains a direct, credible threat against an identifiable individual, organization, or institution, it crosses the line to criminal conduct and is not protected by the First Amendment. In conjunction with civil remedies, criminal law is in fact a tool that can be used against hate speech in the U.S.

Courts have struggled to "draw the line" that divides protected personal opinions and illegal hate speech on the Internet, but these cases should indicate to you how the law can be used as a remedy against hate speech in the U.S.:

- The so-called Nuremberg Files case involved an anti-abortion website that targeted doctors with their names and addresses. The site was updated regularly with dripping blood strike-throughs of the names of murdered doctors, and was deemed to encourage and support such murders. Although the courts went back and forth on whether such speech was protected, it was – in the end – declared prohibited speech. The website operator was forced to pay millions of dollars in damages and to shut down its site.[4]
- The case of *United States v. Machado* was one of the first successful prosecutions of hate online. Richard Machado, a 21-year old expelled college student, sent a threatening email message to 60 Asian students, stating: "I personally will make it my life career [sic] to find and kill everyone one [sic] of you personally. OK?????? That's how determined I am…" A trial in 1998 resulted in Machado's conviction for interference with federally protected activities in violation of a federal statute. He was sentenced to one year in prison.[5]
- In *State v. Belanger*, a case from the State of Maine, Casey Belanger was a 19-year old freshman university student who posted his resume on the university's computer network. The resume included a statement that he "dislike[d] fags." Later that same day, Belanger posted a threatening message to student groups affiliated with gay and lesbian causes, which stated [expletives deleted]: "I hope that you die screaming in hell…you'd [sic] better watch your [...] back you little... I'm [sic] gonna shoot you in the back of the…head…. I hate gay/lesbian/bisexuals, so…what…." The State Attorney General brought an action against Belanger under the Maine *Civil Hate Crimes Act* seeking an injunction to require the student to cease from threatening any person because of the person's sexual orientation, race, color, religion, ancestry, sex, national origin, or physical or mental disability. The court issued a permanent injunction. [6]
- A year after the Belanger case, Ryan Wilson, a white supremacist, started a website for his racist organization, ALPHA, depicting a bomb destroying the office of a fair housing specialist who regularly organized anti-hate activities. Next to her picture, the ALPHA website stated, "Traitors like this should beware, for in our day, they will be hung from the neck from the nearest tree or lamp post." Wilson was charged by the Pennsylvania Commonwealth's Attorney General with threats, harassment,

and ethnic intimidation. Wilson did not contest the State's action under Pennsylvania's *Civil Hate Crimes Act*; the site was removed from the Internet, and the court issued an injunction against the defendant and his organizations barring them from displaying certain messages on the Internet.

- In *United States v. Kingman Quon*, a college student sent e-mail messages to hundreds of Hispanic persons across the nation. The racially derogatory messages discussed Quon's hatred of Latinos, accused them of being "too stupid" to have been accepted to a university or have obtained employment without the help of affirmative action programs, and concluded that he intended to "come down and kill" them. In 1999, the U.S. Department of Justice charged the defendant with interfering with the students' federal rights in violation of federal civil rights law. Quon pled guilty and received a two-year prison sentence.

As the *Machado, Belanger, Alpha HQ* and *Quon* cases demonstrate, hate speech will in fact be prosecuted and enjoined if a credible threat to an individual or group exists. So when the recent injunction here in Canada made news, the inevitable comparisons with U.S. law (and its First Amendment) took place, suggesting that the Canadians have a remedy unavailable in the U.S. But one should remember that U.S. law *does* step in when real threats of violence occur.

But perhaps the overuse of the power to step in will weaken the law as a tool against online hate. The recent failed U.S. prosecution of Sami al-Hussayen is an example.

After September 11, terrorists' use of the Internet to spread extremist propaganda came to the attention of many people. Many websites include articles that condemn Jews, contain biographies of Islamists killed in battle, and set forth biased accounts of the wars in Iraq and Afghanistan.[7] For example, the Azzam Publications site stated that, "due to the advances of modern technology it is easy to spread news, information, articles and other information over the Internet. We strongly urge Muslim Internet professionals to spread and disseminate news and information about the Jihad though e-mail lists, discussion groups, and their own websites. If you fail to do this, and our site closes down before you have done this, we may hold you to account before Allah on the Day of Judgment."[8]

Against this background, the U.S. government accused Sami Al-Hussayen of conspiring with the Islamic Assembly of North America (IANA) to support terrorism by operating and maintaining a radical Islamic website. One of the websites registered by Al-Hussayen on September 11, 2000, (www.alasr.ws) published an article entitled "Provision of Suicide Operations" and written by a radical Saudi sheikh, which included language of how a Mujahid (warrior) must kill himself and how this can be accomplished.

The prosecution was labeled by some as "the case that goes too far" because it appeared to be prosecuting a "webmaster" for merely facilitating the spread of information, as opposed to advocating the content of the speech itself. The United States argued that Al-Hussayen's web sites contained content so subversive that it convinced people to finance terrorism or become part of it.[9] Al-Hussayen's case was particularly interesting in the post-9/11 landscape because under the *Patriot Act*, enacted one month after 9/11, a person within the United States or subject to the jurisdiction thereof who knowingly provides material support or resources to a foreign terrorist organization, or attempts to conspire to do so, which includes expert advice or assistance, may be prosecuted for conspiracy to support terrorism and imprisoned for up to 15 years.[10] There is no First Amendment exception; thus even when assistance counts as free speech, or free association, it still may fall within the Act.

The indictment against Al-Hussayen charged that from at least October 1998, he engaged in computer website activities that far exceeded his course of study in computer science at the University of Idaho.[11] These activities included those similar to an ISP, such as providing expert computer services, advice, assistance and support to organizations and individuals, including the IANA, in the form of website registration, management, administration and maintenance, including a number of sites that advocated violence against the United States.

Al-Hussayen filed a motion to dismiss earlier in the case, claiming that he has the right under the First Amendment to advocate for the use of force or the violation of the law,[12] to advocate for illegal action at some indefinite time in the future,[13] to advocate political goals of a terrorist organization, including praising such groups for

using terrorism to achieve its objectives,[14] and even to advocate for action that makes it more likely that someone will be harmed at some unknown time in the future by an unrelated third party.[15]

The U.S. government prevailed against Al-Hussayen's motion to dismiss, stating that the defendant had mischaracterized his prosecution as an attempt to punish the publication of speech protected by the First Amendment. Rather, he was being charged with criminal conduct – financial support and services, communications equipment, expert advice and assistance, and personnel, in violation of specific statutes. In addition to the charges relating to creating a terrorist Internet network, the government has also charged Al-Hussayen with making false statements and visa fraud for allegedly trying to hide his association with the Michigan-based IANA.

Al-Hussayen's defense team claimed that he merely helped maintain the IANA websites in order to promote Islam generally. That "help," Al-Hussayen has argued, came in the form of facilitating the creation of websites at a technical level, not in the creation of content. The hateful and vitriolic content, they further argued, was not a reflection of Al-Hussayen's views; he has claimed that any radical or subversive material posted on the Islamic Assembly websites or linked to them did not represent his personal views and in any event would be constitutionally protected under the First Amendment if they did. The jury ultimately found that the father of three, who was publicly on record as denouncing the September 11, 2001, attacks *was not guilty* of supporting terrorism for serving as a webmaster. Thus, despite the theoretical legal battle won by the U.S. prosecutors, in the end the jury found the defendant was simply a techie who wanted to provide Internet access to others.

This result in the Idaho trial was recently mirrored in the acquittal on most charges of Sami Al-Arian, a former university professor in Florida accused of acting as the communications arm of the Palestinian Islamic Jihad. He was accused of spreading the word and raising money that went toward the suicide attacks that have killed hundreds. A Florida jury agreed with Al-Arian that although he was a vocal advocate in the United States for the Palestinian cause, the government had no proof that they planned or knew about any violence, and in the U.S. individuals should not be prosecuted for speech not directly tied to an ascertainable threat.[16]

These failed prosecutions may deter other prosecutions of hate speech – even hate speech that truly does encourage and incite violence. The lesson to be learned from the *Al-Hussayen* and Al-Arian cases is that where the law permits prosecution of speech, the ultimate goal of restricting content and censoring speech may be thwarted if the facts are not truly egregious. That is because, in the United States, the spirit of the First Amendment imbues all legal actions with a presumption of free speech, even when legal remedies are available to limit that speech.

Again, it is our national ethos that we fight hate speech with counter-speech rather than legal actions except in the most egregious circumstances.

Endnotes

1 See generally Christopher D. Van Blarcum, Note, *Internet Hate Speech: The European Framework and the Emerging American Haven*, 62 WASH & LEE L. REV. 781 (2005).

2 *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA*, 23 F. Supp. 2d 1182 (D. Or. 1999); 41 F. Supp. 2d 1130 (D. Or. 1999)(vacated and remanded); 244 F.3d 1007 (9th Cir. 2001)(reh'd en banc granted); 268 F.3d 908 (9th Cir. 2001)(affirmed in part, vacated in part and remanded); 290 F.3d. 1058 (9th Cir. 2002).

3 *Nat'l Socialist Party v. Village of Skokie*, 432 U.S. 43, 44 (1977).

4 *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA*, 23 F. Supp. 2d 1182 (D. Or. 1999); 41 F. Supp. 2d 1130 (D. Or. 1999)(vacated and remanded); 244 F.3d 1007 (9th Cir. 2001)(reh'd en banc granted); 268 F.3d 908 (9th Cir. 2001) (affirmed in part, vacated in part and remanded); 290 F.3d. 1058 (9th Cir. 2002).

5 *United States v. Machado*, 195 F.3d 454 (9th Cir. 1999).

6 For more information on *State v. Belanger*, see Anti-Defamation League, *Investigating Hate Crimes on the Internet*, 2003.

7 Anti-Defamation League, Jihad Online: *Islamic Terrorists and the Internet*, p. 10-12 (2002).

8 *Id.*

9 See Anita Ramasastry, "Is Being a Webmaster for Controversial Islamic Web sites a Crime? A USA Patriot Act Prosecution Raises the Issue," available at http://writ.findlaw.com/ramasastry/20040503.html (last visited February 10, 2006).

10 H.R. 3162, Title 8, §§805, 807 (2001).

11 See *United States v. Al-Hussayen*, Cr. No. 03-0048-C-EJL (D. Idaho March, 2004)

12 *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969).

13 *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973).

[14] *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 133 (9th Cir. 2000), affirmed, 352 F.3d 382 (9th Cir. 2003).

[15] *Planned Parenthood of the Columbia/Willamette Inc. v. ACLA*, 244 F.3d 1007, 1015 (9th Cir. 2001), vacated on other grounds, 290 F.3d 1058 (9th Cir. 2002)(en banc).

[16] Editorial, *The Al-Arian Verdict*, St. Petersburg Times, Dec 7, 2005 at A20.