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Social Media Thoughtcrimes

Daniel S. Harawa*

I. Introduction

“Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain.”

-John G. Roberts, Chief Justice of the United States¹

The Supreme Court has “long recognized that each medium of expression presents special First Amendment problems.”² Social media has proved this statement exceedingly accurate. Social media has created a new frontier of constitutional issues, exacerbating the difficulty in defining the boundaries between free expression and criminal acts.

Social media is a necessary part of modern interaction. And although Facebook, widely considered the leader of the social media pack,³ was created just for college students, social media is no longer exclusively for the youth. As such, 73% of online adults use social media sites,⁴ 56% of all Americans have at least one social media profile,⁵ and the average age of Facebook users is most rapidly increasing in the 45-to-54 year-

* J.D., Georgetown University Law Center; B.A., University of Richmond. I am grateful to Professor Leslie Garfield, the participants in the Pace Law Review Social Justice Social Media Symposium, and the Pace Law Review editors for their insightful comments, conversations, and feedback.

1. *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (emphasis added).

2. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (citation omitted).

3. *The History of Social Networking*, DIGITAL TRENDS (Aug. 5, 2014), <http://www.digitaltrends.com/features/the-history-of-social-networking/#!OMCd2>.

4. Maeve Duggan & Aaron Smith, *Social Media Update 2013*, PEW RES. INTERNET PROJECT (Dec. 30, 2013), <http://www.pewinternet.org/2013/12/30/social-media-update-2013/>.

5. Jay Baer, *11 Shocking New Social Media Statistics in America*, CONVINCING & CONVERTING DIGITAL MKTG. ADVISORS (May 19, 2014), <http://www.convinceandconvert.com/social-media-research/11-shocking-new-social-media-statistics-in-america/>.

old age bracket.⁶ Social media has become integral to connecting people around the world. But in an age where people are able post a steady stream of consciousness in 140 characters or less, and can constantly take pictures in order to walk their followers visually through their day, broader implications concerning both criminal law and constitutional law loom. How will the burgeoning use of social media impact America's laws? Does the Constitution protect people's tweets, Facebook posts, instapics, and other online social interactions?⁷ Can social media activity expose the average American to criminal liability?

These questions are brought into even sharper focus when one considers the ways in which the government and private entities monitor social media sites. Sites such as Facebook, Twitter, Instagram, YouTube, and LinkedIn make no bones about the fact that users who post information on these websites have no expectation of privacy or exclusivity in that information.⁸ And this fact, in the wake of constant Big-Brother-like revelations of government Internet search capabilities,⁹ raises real concern as to how people use, and the government polices, social media.¹⁰

The First Amendment to the Constitution trumpets

6. Cooper Smith, *7 Statistics About Facebook Users that Reveal Why It's Such a Powerful Marketing Platform*, BUS. INSIDER (Nov. 16, 2013, 8:00AM), <http://www.businessinsider.com/a-primer-on-facebook-demographics-2013-10>.

7. See generally Brandon Griggs, *When is social-media use a crime?*, CNN TECH (Dec. 19, 2012, 5:41AM), <http://www.cnn.com/2012/12/18/tech/social-media/newtown-social-media-crime>.

8. See, e.g., *Social Networking Privacy*, ELEC. PRIVACY INFO. CTR. (May 7, 2014), <http://epic.org/privacy/socialnet/>.

9. See, e.g., Associated Press, *Everyone is Under Surveillance Now, Says Whistleblower Edward Snowden*, THE GUARDIAN (May 3, 2014), <http://www.theguardian.com/world/2014/may/03/everyone-is-under-surveillance-now-says-whistleblower-edward-snowden>; Editorial Board, *Edward Snowden, Whistle-Blower*, N.Y. TIMES, Jan. 1, 2014, http://www.nytimes.com/2014/01/02/opinion/edward-snowden-whistle-blower.html?_r=0; James Risen & Laura Poitras, *N.S.A. Collecting Millions of Faces from Web Images*, N.Y. TIMES, May 31, 2013, <http://www.nytimes.com/2014/06/01/us/nsa-collecting-millions-of-faces-from-web-images.html?ref=us>.

10. See Justin P. Murray & Adrian Fontecilla, *Social Media Evidence in Government Investigations and Criminal Proceedings: A Frontier of New Legal Issues*, 19 RICH. J.L. & TECH. 11 (2013).

“Congress shall make no laws . . . abridging the freedom of speech.”¹¹ While there has always been tension as to where to draw the line between free expression and criminal acts, in the age of social media this tension is unprecedented. As such, there is a need to revisit the way we protect and criminalize online speech.¹² Antiquated notions of freedom of speech and outmoded First Amendment doctrine do not suffice in an age where private thoughts and conversations are more often than not broadcasted in a public sphere. Obviously, the Framers of the Bill of Rights did not fully anticipate the advent of the Internet and the social media explosion. Moreover, in developing First Amendment protections, the Supreme Court could not adequately forecast how integral the Internet and social media would become to everyday life.¹³

As people live out their lives online, what is protected expression and what is criminal speech? This article begins to explore this fine distinction, and advocates for a shift in the way online speech is protected vis-à-vis the First Amendment. Part I provides examples of criminalized social media activity and explores why people seemingly treat online speech as private communications. Part II looks at existing jurisprudence regarding the criminalization of speech and First Amendment protections. And Part III attempts to determine where to draw the line by advocating for a return to simpler times in First Amendment jurisprudence.

II. The Thought Police

“1984 may have come a bit later than predicted, but it’s here at last.”¹⁴

People around the world have been arrested for their social

11. U.S. CONST. amend I.

12. See, e.g., Leslie Yalof Garfield, *The Death of Slander*, 35 COLUM. J. GENDER & L. 1 (2011).

13. The Supreme Court did not discuss the regulation of materials distributed via the Internet and free speech until 1997. See *Reno v. ACLU*, 521 U.S. 844 (1997).

14. *United States v. Pineda-Moreno*, 617 F.3d 1120, 1121 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of rehearing en banc.) (emphasis added).

media use. For example, Turkish authorities arrested dozens of protestors for inciting anti-government sentiments over Twitter,¹⁵ a group of men was arrested for creating a Facebook page allegedly slandering President Sleiman of Lebanon,¹⁶ a man in Canada was arrested for harassing someone over Twitter,¹⁷ and an English teen was arrested for posting abhorrent comments about a recently murdered girl on Facebook.¹⁸ In the United States, however, arresting people for their social media activity alone once seemed a far-fetched proposition.¹⁹ As a result, popular media and legal scholarly discourse paid closer attention to social media's impact on other aspects of life, including how it has changed workplace harassment,²⁰ whether student online speech can be regulated,²¹ the relatively new phenomena of cyber-bullying and sexting,²² and social media's evolving role in sex crimes

15. Luke Harding & Constanze Letsch, *Turkish Police Arrest 25 People for Using Social Media to Call for Protest*, THE GUARDIAN (June 5, 2013), <http://www.theguardian.com/world/2013/jun/05/turkish-police-arrests-social-media-protest>.

16. Adrian Blomfield, *Man Arrested for 'Insulting Lebanese President on Facebook'*, THE TELEGRAPH (July 28, 2010), <http://www.telegraph.co.uk/news/worldnews/middleeast/lebanon/7914474/Man-arrested-for-insulting-Lebanese-president-on-Facebook.html>.

17. Kim Magi, *Man Charged with Harassment after Twitter Attacks*, THE STAR.COM (Nov. 21, 2012), http://www.thestar.com/news/gta/2012/11/21/man_charged_with_harassment_after_twitter_attacks.html.

18. Press Association, *April Jones Murder: Teenager Jailed Over Offensive Facebook Posts*, THE GUARDIAN (Oct. 8, 2012), <http://www.theguardian.com/uk/2012/oct/08/april-jones-teenager-jailed-facebook?newsfeed=true>.

19. See *infra* Part I.A.

20. See, e.g., Jeremy Gelms, *High-Tech Harassment: Employer Liability Under Title VII for Employee Social Media Misconduct*, 87 WASH. L. REV. 249 (2012).

21. Michael W. Macleod-Ball, *Student Speech Online: Too Young to Exercise the Right to Free Speech?*, 7 I/S J. L. & POL'Y FOR INFO. SOC'Y 101 (2011).

22. See, e.g., Heather Benzmilller, Note & Comment, *The Cyber-Samaritans: Exploring Criminal Liability for the "Innocent" Bystanders of Cyberbullying*, 107 NW. U. L. REV. 927 (2013); Jamie L. Williams, Note, *Teens, Sexts, & Cyberspace: The Constitutional Implications of Current Sexting & Cyberbullying Laws*, 20 WM. & MARY BILL RTS. J. 1017 (2012); Allison V. King, Note, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845 (2010).

and child abuse.²³

It is time to refocus discourse on social media to understand how it aligns with First Amendment rights and basic criminal law principles as American arrests for social media activity are becoming increasingly commonplace. People are no longer only being prosecuted for online speech that is inherently criminal, such as fraud or defamation,²⁴ or social media activity depicting evidence of a crime that has been committed, such as the man who posted a picture of his dead wife on Facebook.²⁵ Americans are being placed in the criminal justice system for posting *thoughts* that express criminal ideas — words that foreshadow a criminal event with no other action in furtherance of the crime — what I call social media thoughtcrime.²⁶ Criminalizing thoughts, even when posted online, pose serious problems given that speech should be by default protected by the First Amendment, subject to (supposedly) narrow exceptions.

The Orwellian tenor may seem hyperbolic, but one just

23. See, e.g., Eva Conner, Comment, *Why Don't You Take a Seat Away from That Computer?: Why Louisiana Revised State 14:91.5 Is Unconstitutional*, 73 LA. L. REV. 883 (2013).

24. See Garfield, *supra* note 12.

25. See Snejana Farberov, *Man Who Shot Dead His Wife Then Posted 'RIP' Picture of Her Corpse on Facebook Page Played a Gun-Toting Gang Member in TV Series and Has Dreams of Fame*, DAILYMAIL.COM (Aug. 6, 2013), <http://www.dailymail.co.uk/news/article-2387305/Derek-Medina-Florida-man-posts-picture-dead-wife-Jennifer-Alfonso-Facebook.html>.

26. This phrase was used by George Orwell in his famous novel on dystopian society, *1984*. To explore this question, it is important to underline what is not being explored. This article does not explore the many issues that arise as a result of government social media monitoring. See, e.g., April Warren, *Law Enforcement Increasingly Turning to Social Media*, OCALA STAR BANNER, May 30, 2013, <http://www.ocala.com/article/20130530/ARTICLES/130539959>. Likewise, it does not address private monitoring and social media sites turning over users' information to assist with government investigations. See, e.g., Mallory Allen & Aaron Orheim, *Get Outta My Face[book]: The Discoverability of Social Networking Data and the Passwords Needed to Access Them*, 8 WASH. J. L. TECH. & ARTS 137 (2012). Nor does it focus on the use of social media in criminal prosecutions. See, e.g., Ken Strutin, *Social Media and Vanishing Points of Ethical and Constitutional Boundaries*, 31 PACE L. REV. 228 (2011). Finally, it takes no position on the criminalization of direct threats sent over social media platforms. These are all important issues implicated by the question explored herein that are worthy of further discussion, but largely outside the scope of this article.

need turn on the news to see this very issue played out in real time. Tweeters and Facebook users have been arrested for sharing their thoughts, ideas, and crude senses of humor. What once seemed a fantastical parade of horrors is now a reality; this past year alone has demonstrated that Americans can, and are arrested for their social media activity.

A. *Kids Being Kids?*

1. Justin Carter

Perhaps the most famous story of a social media inspired arrest is the story of Justin Carter. During an online exchange while playing the game League of Legends, then-eighteen-year-old Justin Carter posted on Facebook an allegedly sarcastic comment about how he was going to “shoot up a kindergarten.”²⁷ Justin made the comment at an extremely sensitive time — two months after the Sandy Hook Elementary School shooting.²⁸ Another Facebook user saw the comment and reported it to authorities.²⁹ Justin was arrested and charged with the felony of making a terrorist threat.³⁰ Justin’s case has received widespread media attention and generated public outcry, with over 100,000 people petitioning for his release.³¹ Justin’s case got so much attention that an anonymous donor posted his \$500,000 bond.³² Justin is currently awaiting trial, and is facing up to eight years in prison.³³

27. Brandon Griggs, *Teen jailed for Facebook ‘joke’ is Released*, CNN (July 13, 2013, 8:42 AM), <http://www.cnn.com/2013/07/12/tech/social-media/facebook-jailed-teen/>.

28. *Id.*

29. *Id.*

30. *Id.*

31. Suzanne Choney, *Petition to Free Jailed Facebook Teen Reaches 100,000 Signatures*, TODAY (July 9, 2013, 7:11PM), <http://www.today.com/money/petition-free-jailed-facebook-teen-reaches-100-000-signatures-6C10584678>.

32. *Id.*

33. Andrew Delgado & Rogello Mares, *Trial Continues for New Braunfels Teen Accused of Making Facebook Threats*, KENS5.COM (Mar. 27, 2014), <http://www.kens5.com/videos/news/local/2014/06/27/10675082/>.

While Justin's story garnered the most public attention, he is not the only person recently arrested for their social media activities.

2. Chicago Teenager

A fifteen-year-old teenager was arrested in Chicago and charged with a felony for tweeting he would commit "mass homicide" if George Zimmerman was found not guilty in the killing of Trayvon Martin.³⁴ Although the police recognized the teen did not possess any weapons nor did he pose a credible threat, police still charged him with felony disorderly conduct.³⁵

3. Cameron D'Ambrosio

Cameron D'Ambrosio, a Massachusetts high school student, was arrested and charged with communicating terroristic threats for posting this rap lyric on Facebook: "fuck a boston bombinb [sic] wait till u see the shit I do, I'ma be famous rapping, and beat every murder charge that comes across me!"³⁶ The teen got off lightly, however, when the grand jury refused to indict him, requiring his release.³⁷

4. Leigh Van Bryan & Emily Bunting

Two British tourists were arrested and detained for over twelve hours at the Los Angeles airport for their Twitter

34. Nicholas Demas, *8 Social Media Users Arrested for What They Said Online*, POLICY MIC (July 17, 2013), <http://www.policymic.com/articles/54961/8-social-media-users-arrested-for-what-they-said-online>.

35. Hunter Stuart, *Teen Charged With Felony After Threatening 'Mass Homicide' If Zimmerman Acquitted*, HUFFINGTON POST (July 15, 2013, 10:34 PM), http://www.huffingtonpost.com/2013/07/15/mass-homicide-zimmerman_n_3599238.html.

36. John Knefel, *Grand Jury Rejects Indictment of Teen Arrested for Rap Lyrics*, ROLLING STONE (June 6, 2013), <http://www.rollingstone.com/politics/news/grand-jury-rejects-indictment-of-teen-arrested-for-rap-lyrics-20130606>.

37. *Id.*

activity.³⁸ Leigh Van Bryan was arrested for tweeting “Free this week, for quick gossip/prep before I go and destroy America?”³⁹ Little did Department of Homeland Security know that “destroy” is British slang for party.⁴⁰ Homeland Security also detained and questioned Leigh’s companion Emily Bunting, in part for her quoting popular American sitcom *Family Guy*, tweeting, “3 weeks today, we’re totally in LA [pissing] people off on Hollywood Blvd and diggin’ Marilyn Monroe up!”⁴¹

5. “Sarah,” the Dutch Teenager

Most recently, a Dutch teenager identified as “Sarah,” tweeted to American Airlines: “@AmericanAir hello my name’s Ibrahim and I’m from Afghanistan. I’m a part of Al Qaida and on June 1st I’m gonna do something really big bye[.]”⁴² American Airlines responded, telling Sarah, “we take these threats very seriously. Your IP address and details will be forwarded to security and the FBI.”⁴³ Sarah then attempted to double-back on her original tweet, saying that she was “stupid” and “scared,” at one point saying her friend was responsible for the tweet.⁴⁴ The recantations were not enough, however, as Sarah later turned herself over to the Rotterdam police for questioning.⁴⁵

The unexpected twist to Sarah’s story is that in an

38. Richard Hartley-Parkinson, *I’m Going to Destroy American Dig Up Marilyn Monroe: British Pair Arrested in U.S. on Terror Charges Over Twitter Jokes*, DAILYMAIL.COM (Jan. 31, 2012, 8:08 AM), <http://www.dailymail.co.uk/news/article-2093796/Emily-Bunting-Leigh-Van-Bryan-UK-tourists-arrested-destroy-America-Twitter-jokes>.

39. *Id.*

40. *Id.*

41. *Id.*

42. Salma Abdelaziz, *Teen Arrested for Tweeting Airline Terror Threat*, CNN (Apr. 14, 2014, 1:29 PM), <http://www.cnn.com/2014/04/14/travel/dutch-teen-arrest-american-airlines-terror-threat-tweet/>.

43. *Id.*

44. Ben Mutzabaugh, *Teen Girl Who Sent Terroristic Tweet To AA is Arrested*, USA TODAY (Apr. 15, 2014, 12:32 PM), <http://www.usatoday.com/story/todayinthesky/2014/04/14/girl-sends-terroristic-tweet-to-aa-gets-unwanted-response/7694161/>.

45. *Id.*

apparent show of solidarity, dozens of teenagers tweeted bomb “jokes” to American airlines, despite the risk of arrest.⁴⁶ The reactions to Sarah’s arrest highlighted the fact that despite the increasing number social media-based arrests, either many still do not understand the potential gravitas of their online activity, or they are willing to risk arrest in an effort to protect their freedom of speech online.

In the above stories, is the social media activity insensitive? Yes. Crude? Most definitely. But criminal? This article proposes a framework for this much-needed debate. Although technically a public forum, social media sites have become a place of primary communication for many Americans. People, especially youth, feel comfortable sharing private thoughts online because they are sharing them with their “friends,” not necessarily the world at large.⁴⁷ Society’s expectation of privacy in its social media activity is important to consider when deciding when to criminalize social media thoughtcrimes.

These examples are important to keep in mind as such cases are litigated and First Amendment parameters around social media activity are defined. As it is the criminalization of this form of speech — asinine, insensitive, tasteless, and often-juvenile social media activity, designed to be shared with friends but is available to the world—that is relevant to this article.

B. *Why (Young) People Consider Public Speech Private*

The relationship between Americans and social media is

46. Caitlin Dewey, *Dozens of Teenagers Are Now Tweeting Bomb Jokes to American Airlines*, WASH. POST (Apr. 14, 2014), <http://www.washingtonpost.com/blogs/style-blog/wp/2014/04/14/dozens-of-teenagers-are-now-tweeting-bomb-jokes-to-american-airlines/>.

47. See Bobbie Johnson, *Privacy No Longer a Social Norm, Says Facebook Founder*, THE GUARDIAN (Jan. 10, 2010, 8:58 PM), <http://www.theguardian.com/technology/2010/jan/11/facebook-privacy>. This phenomenon has extended beyond thoughts, as a “sexting” culture has emerged, where people are now sharing intimate pictures of themselves through various online platforms. Gwen O’Keeffe & Kathleen Clarke-Pearson, *The Impact of Social Media on Children, Adolescents, and Families*, 127 AM. ACAD. OF PEDIATRICS 800 (2011), available at <http://pediatrics.aappublications.org/content/127/4/800.full.html>.

complicated. “In America, we live in a paradoxical world of privacy. On one hand, teenagers reveal their intimate thoughts and behaviors online and, on the other hand, government agencies and marketers are collecting personal data about us.”⁴⁸ However, it is not happenstance that people are beginning to share the most intimate aspects of their lives, including their thoughts, online. Social scientists have started to develop the social psychology behind the way in which people, especially young people, use social media, which should be considered when deciding how to define the constitutional boundaries around social media activity.

In many ways, social media has become part of human identity. It provides a forum for people to shape their perfect self — allowing them to portray to the world who they want it to see.⁴⁹ A person’s behavior on social media is not necessarily an accurate reflection of self, but instead is an aggrandizement based on who that person wants to be, or who she or he believes those viewing the profile will find most attractive or appealing.⁵⁰ And while a person’s social media footprint may not be an accurate reflection of who that person is, it *is* becoming a necessary tool for identity formation. It is well documented that an active social media presence is often seen as necessary to engage with and belong to broader society;⁵¹ it is important for the creation and maintenance of social capital.⁵² For many, this public activity is a critical vehicle of self-expression. It is important to remember when considering whether it is permissible to criminalize social media activity, that a person’s social media behavior is often an online caricature.

48. Susan B. Barnes, *A Privacy Paradox: Social Networking in the United States*, 11 FIRST MONDAY 9 (Sept. 4, 2006), <http://firstmonday.org/ojs/index.php/fm/article/view/1394/1312>.

49. See, e.g., *id.* (“[T]eenagers sometimes fabricate information to post on these sites. Increasingly, many teenagers feel pressured to show themselves doing more risqué things, even if they are not actually doing them” (internal quotation marks omitted)).

50. *Id.*

51. Nicole B. Ellison, et al., *Negotiating Privacy Concerns and Social Capital Needs in a Social Media Environment*, in PRIVACY ONLINE 19, 21 (Springer Berlin Heidelberg, 2011).

52. *Id.* at 24.

Social media is also increasingly important for identity development. As one author put it, it is a safe place to conduct adolescence.⁵³ Millennials have substituted in-person interaction with online communication, using the Internet as a primary vehicle for communication.⁵⁴ While adolescences and teenagers previously made the mistakes of youth in private, today, they often occur in a forum that someone is actively monitoring.⁵⁵ And replicating the natural maturation process, there is evidence that young people do not make the same misjudgments throughout their online lives; as people mature, their social media habits evolve with them.⁵⁶ Thus, the virtual aspects of adolescence and its attendant misjudgments and mistakes are necessary to consider when viewing social media activity in the criminal context.

Finally, it is important to remember how people are using social media at the most fundamental level. In an increasingly globalized world, social media is integral to maintaining relationships.⁵⁷ Data suggests that a majority of people do not use social media to interact with strangers, but instead, to stay connected with people with whom a relationship had been developed offline.⁵⁸ Moreover, most do not use social media networks haphazardly. People consciously consider who sees what aspect of their online persona — carefully maintaining privacy settings and deciding what information to share with whom.⁵⁹ That many people use social media to interact with

53. Sonia Livingstone, *Taking Risky Opportunities in Youthful Content Creation: Teenagers' Use of Social Networking Sites for Intimacy, Privacy and Self-Expression*, 10 *NEW MEDIA & SOC'Y* 393, 396 (2008).

54. *See id.* at 404; *see also* Barnes, *supra* note 48.

55. *See* Barnes, *supra* note 48.

56. *See generally* Janna Q. Anderson & Lee Rainie, *Millennials Will Make Online Sharing in Networks a Lifelong Habit*, PEW INTERNET & AM. LIFE PROJECT, at 8-11 (2010), available at http://www.pewinternet.org/files/old-media/Files/Reports/2010/PIP_Future_Of_Millennials.pdf.

57. *See* Patricia Reaney, *Email Connects 85 Percent of the World; Social Media Connects 62 Percent*, HUFFINGTON POST (Mar. 27, 2012, 5:12 AM), http://www.huffingtonpost.com/2012/03/27/email-connects-the-world_n_1381854.html.

58. *See* Nicole Ellison, Charles Steinfield, & Cliff Lampe, *The Benefits of Facebook "Friends": Social Capital and College Students' Use of Online Social Network Sites*, 12 *J. COMPUTER-MEDIATED COMM'N* 1143, 1153-55 (2007).

59. *See* Mary Madden, *Privacy Management on Social Media Sites*, PEW

real-life friends (as opposed to virtual friends), and think that they have a modicum of control over the privacy of their postings, helps explain why people share private thoughts online, despite the fact that they are technically available to the world at large.⁶⁰

Though the stories of social media thoughtcrimes above may seem ludicrous in isolation, in context, it is not without reason why people share private thoughts online.⁶¹ And although one can cast these examples off as extreme incidents of government overreach or isolated examples of social media misuse, where eventually the prosecution will be dropped or the jury will nullify, it is not clear that social media's current trajectory will prove this the case. As social media becomes ubiquitous, monitoring capabilities advance, and the fear of terrorism intensifies, social media thoughtcrime arrests will almost certainly continue to multiply in number. Therefore, the general context of social media use, and its modern day explosion is important to keep in mind when considering the First Amendment protections of social media activity, recognizing that prior First Amendment doctrines and antiquated notions of private versus public fora may not neatly fit the online arena.

III. Protection of Speech, or Lack Thereof

“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem”⁶²

INTERNET & AM. LIFE PROJECT, at 7 (2012), available at http://www.pewinternet.org/files/old-media/Files/Reports/2012/PIP_Privacy_management_on_social_media_sites_022412.pdf.

60. See Barnes, *supra* note 48.

61. In a study performed by Pew Research Center, only 9% of teen social media users expressed high-level concern of third-party access to their data. Mary Madden et al., *Teens, Social Media, and Privacy*, PEW RESEARCH CENTER, at 10 (May 21, 2013), available at <http://pewinternet.org/Reports/2013/Teens-Social-Media-And-Privacy.aspx>.

62. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (emphasis added) (footnote omitted).

While the First Amendment declares that Congress, and by incorporation the states, shall make no laws abridging the freedom of speech, the Supreme Court has made clear that free speech protections are not absolute.⁶³ What is also clear, at least in theory, is that “[t]he First Amendment protects a wide array of distasteful, disturbing, defamatory or factually false, profane, ‘anti-American,’ and hateful speech.”⁶⁴

States and the federal government tend to criminalize speech intended to cause direct and imminent injury, which courts often hold to be a permissible restriction on free speech.⁶⁵ Yet when it comes to proscribing unpopular speech, the Supreme Court has tended to view such restraints with intense skepticism, intimating that crass speech deserves just as much protection, if not more, than other types of expression.⁶⁶ To test First Amendment boundaries, the Supreme Court first looks at whether an activity constitutes “speech,”⁶⁷ and if it does, the Court then decides whether it falls outside of constitutional protections.⁶⁸

A. *Online Activity Is Speech*

For the purpose of social media postings, two categories of

63. See, e.g., *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682-85 (1986); *Roth v. United States*, 354 U.S. 476, 479-88 (1957).

64. S. Cagle Juhan, Note, *Free Speech, Hate Speech, and the Hostile Speech Environment*, 98 VA. L. REV. 1577, 1578 (2012). A recent case bears this out. In *United States v. Alvarez*, the Court struck down the Stolen Valor Act, which criminalized false statements concerning awards of military honors. 132 S. Ct. 2537 (2012). Although the Justices could not reach a consensus as to why the Stolen Valor Act violated the First Amendment – four justices felt that falsity by itself is insufficient to justify criminal prosecution, *id.* at 2547-48, while two Justices felt the objectives of the Stolen Valor Act could have been achieved in a less-restrictive way. *Id.* at 2551 (Breyer, J., concurring). The fact remained that free speech triumphed and lies were protected. For a discussion on *Alvarez*, see Rodney A. Smolla, *Categories, Tiers of Review, and the Rolling Sea of Free Speech Doctrine and Principle: A Methodological Critique of United States v. Alvarez*, 76 ALB. L. REV. 499 (2012).

65. Susan Brenner, *Criminalizing “Problematic” Speech Online*, 11 J. INTERNET L. 1, 1 (2007).

66. See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377, 382-83 (1992).

67. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

68. See, e.g., *id.* at 406-08.

speech are especially relevant. First, there is “pure speech,” which consists of communicative thoughts or words that are verbalized and/or written.⁶⁹ This category of speech would seemingly encompass Facebook statuses, tweets, and other means by which users express their thoughts through writing, because the Supreme Court made clear that acts “disclosing” or “publishing” information constitutes “pure speech.”⁷⁰ And in case there was any doubt whether online activity is speech protected by the First Amendment, the Supreme Court has clearly held that online speech deserves the complete protections of the First Amendment.⁷¹ Thus, although when the Court first used the term “pure speech” it may not have envisioned social media activity, such as tweeting, as conveying “pure speech,” it ostensibly falls within the First Amendment definition and is therefore deserving of the highest level of constitutional protection.⁷²

Then there is symbolic expression, which is also “speech” for First Amendment purposes, and therefore privy to its protections. To determine whether symbolic expression falls under the First Amendment definition of “speech,” the Supreme Court uses a two-part test, asking whether (1) there is intent to convey a particularized message; and (2) there is a great likelihood that those encountering the message would understand it.⁷³ First Amendment communicative expression would appear to cover some instances of online picture posting,⁷⁴ sharing certain content or webpages,⁷⁵ retweeting, reposting other people’s thoughts, or even “liking” a Facebook page or status.⁷⁶ Thus, the First Amendment should protect, in

69. BLACK’S LAW DICTIONARY, 1529 (9th ed. 2009).

70. See *Bartnicki v. Vopper*, 532 U.S. 514, 526-27 (2001).

71. See *Reno v. ACLU*, 521 U.S. 844 (1997).

72. For a more detailed discussion of the various approaches courts take to delimiting online speech, see Steven M. Puzis, “*Tinkering With the First Amendment’s Protection of Student Speech on the Internet*,” 29 J. MARSHALL J. OF COMPUTER & INFO. L. 167, 197-202 (2011).

73. See *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (per curiam).

74. See Puzis, *supra* note 72, at 197.

75. *Id.*

76. See *Bland v. Roberts*, 730 F.3d 368, 384-87 (4th Cir. 2013); Ira P. Robbins, *What is the Meaning of “Like”: The First Amendment Implications of Social Media Expression*, 7 FED. CT. L. REV. 127, 145 (2013). There is also an

theory, a wide array of social media activity unless it falls into one of the limited predefined exceptions previously laid out by the Supreme Court.

B. Current Exceptions to First Amendment Free Speech Protections

Just because some social media usage falls within the First Amendment definition of “speech” does not automatically guarantee *all* social media activity has constitutional protection. The Supreme Court has carved out certain types of speech that do not fall within the ambit of First Amendment safeguards. Categories of unprotected speech include: advocacy intended and likely to incite imminent lawless action;⁷⁷ obscenity;⁷⁸ defamation;⁷⁹ child pornography;⁸⁰ “fighting words”;⁸¹ fraud;⁸² true threats;⁸³ speech integral to criminal conduct;⁸⁴ and speech presenting a grave and imminent threat the government has the power to prevent.⁸⁵ In the eyes of the Supreme Court, this speech is undeserving of First Amendment protections because “such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by social interest in order and morality.”⁸⁶

The examples of social media speech in Part I clearly do not fit into most of the defined First Amendment exceptions. Many of the categories, such as fraud and defamation, focus on

argument to be made that such expression constitutes pure speech under the First Amendment. *See id.* at 144.

77. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

78. *Miller v. California*, 413 U.S. 15 (1973).

79. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

80. *New York v. Ferber*, 458 U.S. 747 (1982).

81. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

82. *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

83. *Watts v. United States*, 394 U.S. 705 (1969).

84. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

85. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam); *Near v. Minn. ex rel. Olson*, 283 U.S. 697 (1931).

86. *Chaplinsky*, 315 U.S. at 572.

direct harm to an individual, which most would agree the government has the power to proscribe. Other categories center on expression that is so distasteful (an amorphous standard), such as obscenity and pornography, that the activity does not have the value of “speech” protected by the First Amendment. No one would argue that the examples of social media thoughtcrime contained herein fall outside of the First Amendment’s grace because of these exceptions.

However, two categories of First Amendment exceptions are especially salient for the purposes of the conversation: imminent lawlessness and true threats, which are criminalized based on public harm and criminal advocacy. However, while in the abstract it may make sense to except threats and criminal advocacy from First Amendment protections much in the same way that inherently criminal speech is excepted, in practice, as shown below, defining these exceptions has been much harder to accomplish.

1. Imminent Lawlessness

In *Brandenburg v. Ohio*, the Supreme Court struck new ground by advancing the imminent lawlessness exception to First Amendment speech protections.⁸⁷ In *Brandenburg*, the Court found that the First Amendment protects speech-advocating violence at a Ku Klux Klan rally.⁸⁸ The Klan members advocated returning the “nigger . . . to Africa, [and] the Jew . . . to Israel[;]” and declared that “revengeance” may be needed if the Supreme Court, Congress, and the President continue to suppress “the white, Caucasian race.”⁸⁹ Authorities arrested the Klan members for violating Ohio’s criminal syndicalism statute.⁹⁰ The Court reversed, finding that the First Amendment protected the Klan’s openly hostile speech, and that the Ohio syndicalism statute is unconstitutional because it punished “mere advocacy.”⁹¹ The Court explained, “constitutional guarantees of free speech . . . do not permit a

87. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

88. *Id.* at 446, 448-49.

89. *Id.* at 447.

90. *Id.* at 444-45.

91. *Id.* at 448-49.

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.”⁹² The Court drew a distinction between advocating illegal acts versus “steeling” a group for violent behavior.⁹³

Recognizing that the concept of “imminence” is inherently ambiguous, the Court attempted to clarify the imminent lawlessness exception in *Hess v. Indiana*.⁹⁴ Here, a student protester faced arrest for statements made at a university rally, where the sheriff overheard the protester saying, “We’ll take the fucking street later” (or something to that effect).⁹⁵ The sheriff arrested the student for disorderly conduct, which the student challenged on First Amendment grounds. The State of Indiana defended the arrest by arguing the speech incited imminent lawless action, and therefore was not protected by the First Amendment.⁹⁶ The Court disagreed, clarifying that unless there is “evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, those words could not be punished by the State on the ground that they had a tendency to lead to violence.”⁹⁷ *Hess* leaves open the natural follow-up question of how imminent is imminent.⁹⁸

2. True Threats

The Supreme Court first articulated the true threats doctrine in the 1969 case *Watts v. United States*.⁹⁹ In *Watts*, a young African-American man was protesting the draft by participating in a public rally, and said: “They always holler at

92. *Id.* at 447 (footnote omitted).

93. *Id.* at 448.

94. *Hess v. Indiana*, 414 U.S. 105 (1973).

95. *Id.* at 107.

96. *Id.* at 109.

97. *Id.* (internal quotation marks omitted).

98. It has not gone unnoticed how difficult it is to define “imminence,” and how this difficulty is exacerbated in a time of terror. See, e.g., Robert S. Tanenbaum, *Preach Terror: Free Speech of Wartime Incitement*, 55 AM. U. L. REV. 785, 805 (2006).

99. *Watts v. United States*, 394 U.S. 705 (1969).

us to get an education. And now I have already received my draft classification . . . I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.”¹⁰⁰ As a result of this public outcry, Watts was arrested and charged with making criminal threats against the President.¹⁰¹ Watts challenged his arrest, arguing he did not intend to harm the President, stressing the context of the speech and the fact that he made the statement in the course of a political debate.¹⁰²

The Court sided with Watts. Calling his speech “political hyperbole,” the Court held that Watts’s speech did not constitute a “true threat” removing it from First Amendment protections, because: one, the comments were made accompanying a political debate; two, the threats were conditional in nature; and three, when putting the speech into context, the listening audience did not perceive Watts’ words to be threatening — in fact, many listeners laughed at Watts’ remarks.¹⁰³ Context was essential to the Court when deciding whether speech is a “true threat” allowing the government to criminalize it. Still, although the Court found that Watts’ speech was not a true threat excepting it from the First Amendment, the Court did little to explain what *would* be a true threat, instead framing its holding in the negative.

In *Virginia v. Black*, a plurality of the Court attempted to clarify the definition of a “true threat.”¹⁰⁴ Writing for four justices, Justice O’Connor explained that a true threat simply requires a speaker to convey a threatening message to a wider audience.¹⁰⁵ To her, it did not matter whether the speaker actually intended “to carry out the threat. Rather, a prohibition on true threats ‘protect[s] individuals from the fear of violence’ and ‘from the disruption that fear engenders,’ in addition to protecting people ‘from the possibility that the threatened violence will occur.’”¹⁰⁶ Under this broad

100. *Id.* at 706.

101. *Id.* at 705-06.

102. *Id.* at 707.

103. *Id.* at 708.

104. *Virginia v. Black*, 538 U.S. 343, 344 (2003).

105. *Id.* at 359-60.

106. *Id.* at 360 (citations omitted).

articulation of the true threat doctrine, it is arguable that the broadcasting of a threatening message is enough to except the message from First Amendment protections, regardless of the intent of the speaker or the effect on the audience.

C. *The Difficulty of Applying Present First Amendment Exceptions to Social Media Thoughtcrime*

It is relatively clear that the social media thoughtcrimes described in Part I do not fall under most of the exceptions to the First Amendment.¹⁰⁷ It is murky, however, as to whether the online activity is excepted from the First Amendment under the true threats or imminent lawlessness doctrines, and the answer will often turn on the identity of the decision-maker. It is for these reasons that neither test provides an adequate measure by which to judge whether the First Amendment protects social media activity.

1. *Brandenburg* Does Not Work

While most view *Brandenburg* as a ringing endorsement of free speech rights, it has left open more questions than it has answered. Unfortunately, the Supreme Court has done little to resolve the questions left in the wake of *Brandenburg*,¹⁰⁸ the most glaring of which, is how to define imminence. While the Court said in a future case, that if the unlawful activity advocated is weeks or months down the road, it will likely not be considered imminent, short of that, there are no clear parameters.¹⁰⁹ What is imminent, therefore, necessarily relies on the discretion of the factfinder. And while most legal tests rely on discretion to some degree, there needs to be clearer guidelines when considering First Amendment rights in the context of social media activity, as the everyday activities of the vast majority of Americans are implicated.

The ambiguity of imminence is not the only fault of

107. See *supra* Part II.B for a list of exceptions to the First Amendment.

108. See Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 667-70 (2009).

109. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982).

Brandenburg, however. There is a question if the *Brandenburg* test is limited to speech that is “political advocacy,” or if it applies to all speech. If *Brandenburg* is limited to political advocacy, some social media thoughtcrimes may be judged under the test and some might not. This also begs the question, what exactly is political advocacy? Does *Brandenburg* only apply to speech that encourages others to commit criminal acts in a show of political protest, or does it apply when the individual speaker discusses their own criminal proclivities in a political context or in relation to a political event?¹¹⁰ Regardless, applying two separate tests to generally similar conduct can lead to strange results, which is unhelpful when free speech rights in the online context need to be clearly defined.

There is also a question as to whether *Brandenburg* applies to private acts, or if it is solely limited to public speech.¹¹¹ Some argue that speech must be communicated in a public setting for *Brandenburg* to apply.¹¹² The question of whether *Brandenburg* is limited to public speech becomes even further complicated when asked in the social media context, as some social media users often think their activity is private, when technically most activity is public in some sense. Therefore, should the amount of protection social media activities receive turn on a user’s privacy setting? Is online speech truly private given the level of monitoring that occurs by both public and private actors? These gray areas leave in limbo quasi-private online acts and do not clearly explain how *Brandenburg* applies to social media activity.

While *Brandenburg* was a useful step in the evolution of freedom of speech, as it stands now, the imminent lawlessness test applied in *Brandenburg* is hard to apply in the social media context and may produce varying results. Because the import and reach of *Brandenburg* is largely unsettled as it

110. See Healy, *supra* note 108, at 681.

111. *Id.*; see also Tenenbaum, *supra* note 98, at 817-18 (citing *Herceg v. Hustler Mag.*, 814 F.2d 1017, 2020-23 (5th Cir. 1987), where the court implied that the state interest in regulating private speech is much less than the state interest in regulating public speech).

112. See, e.g., 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 (2000).

presently stands, it is an ineffective means to regulate online speech and test its validity under the First Amendment.

2. The True Threats Doctrine Is Unwieldy

The Supreme Court has never given an adequate definition of what constitutes a true threat, and its one attempt to provide clarity further obfuscated the issue. As such, there is a fracas in the lower courts applying the true threats doctrine, with all forms of tests emerging when applying the amorphous First Amendment exception.¹¹³ The uncertainty shrouding the true threats doctrine is evidenced by the fact that there is even a question if the true threats doctrine is a standalone test, or merely a refinement or subpart of the test announced in *Brandenburg*.¹¹⁴

Courts are divided as to whether there needs to be identifiable targets of the threats, or if a general threat is enough to except speech from the First Amendment.¹¹⁵ Some courts have interpreted Justice O'Connor's definition of true threats to subsume every threat made in public, regardless of the intent of the speaker.¹¹⁶ Others believe the true threats definition used in *Black* requires intent on the part of the speaker — that the speaker must have intended to carry out the threat that she or he publically conveyed; yet whether this is a subjective or objective standard of intent divides the courts.¹¹⁷ Again, the ambiguities raise challenging questions in the social media context, and may yield different results depending on the arbiter.¹¹⁸

113. See Paul T. Crane, “*True Threats*” and the Issue of Intent, 92 VA. L. REV. 1225, 1265-69 (2006); Steven G. Gey, *Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1326-27, 1331-33 (2005).

114. See Gey, *supra* note 113, at 1331.

115. *Id.* at 1332-33.

116. See, e.g., Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 616-17 (5th Cir. 2004).

117. Crane, *supra* note 113, at 1261-69 (discussing various cases applying subjective or objective intent requirements).

118. The Supreme Court has recently heard argument on the application of the true threats doctrine to the social media context. See *Elonis v. United States*, No. 13-983 (U.S. argued Dec. 1, 2014). The case involves threats the petitioner made against his wife over Facebook - he was arrested for violating 18 U.S.C. § 875(c) (2012), which prohibits the transmission of threats in

Some scholars have suggested that *Black's* true threats doctrine is inapplicable to private speech.¹¹⁹ Their reasoning is that privately communicated threats receive little or no protection under the First Amendment, and that the true threats inquiry is therefore irrelevant to threats made in private.¹²⁰ However, this raises questions as to how to define publically-communicated threats versus privately-communicated threats. Should it depend on the number of views a post receives, whether only a social media user's "friends" can view the threat, or does it depend on how many "friends" a social media user has? Alternatively, are social media posts punishable when the public at large can view them? If someone intended to convey a private threat online, is it no longer private because of the inherent lack of privacy on social media networks?

Applying the concept of a "true threat" to the online sphere is like trying to fit a round peg in a square hole. Very little of what is conveyed online is accurate, and much online speech is flat-out false, even when people are portending to portray their personal life. The concept of "truth" is fleeting online, and therefore, the true threats doctrine is dangerous to apply given the context.

Like *Brandenburg*, there are too many questions presently left open by *Black* for the true threats doctrine to be useful in defining whether social media activity should be protected or not. As explained in the next section, it is time to move away from the current First Amendment exceptions when deciding whether social media activity is punishable. There should be one question based on established Supreme Court precedent that authorities and courts should ask when deciding whether the First Amendment protects social media speech: Does the social media activity create a clear and present danger? If not, the First Amendment protects it.

IV. Protecting Online Speech - A Return to Simpler Times

interstate commerce. *United States v. Elonis*, 730 F.3d 321 (3d Cir. 2013).

119. Gey, *supra* note 113, at 1350.

120. See Reed, *supra* note 112, at 206-07.

It is important to define the line between online speech and criminal activity as social media becomes an indispensable part of basic human expression; “What is a threat must be distinguished from what is constitutionally protected.”¹²¹ Most would agree that arrest and prosecution for social media thoughtcrimes is a waste of scarce resources, unnecessarily involving young people in the criminal justice system.¹²² Conversely, many would argue that we should not tie the hands of law enforcement, and that policing online activity is a valid method of ferreting out nefarious actors.¹²³ Given this tension, when attempting to understand how social media should be used vis-à-vis the criminal justice system, law enforcement, prosecutors, and the public need a simple directive to guide the criminalization of online speech. Luckily, the Supreme Court, through First Amendment maverick Justice Holmes, announced a First Amendment test, the clear and present danger test, that with some refinement may provide the necessary answer to the First Amendment online speech conundrum.

A. *The Development of Clear and Present Danger*

The Supreme Court was at best apathetic and at worst openly hostile to the idea of free speech up until the early 1900s. Then, with Justice Brandeis at his side, Justice Holmes began to forge a new path in First Amendment jurisprudence,

121. *Watts v. United States*, 394 U.S. 705, 707 (1969).

122. If nothing but anecdotal evidence, the public reactions to the stories outlined in Part I, including the petition for Justin Carter, and the grand jury’s failure to indict Cameron D’Ambrosio, show that the public in some regard does not think that this form of speech should be criminally sanctioned.

123. For example, Boston Marathon bombing suspect Tamerlan Tsarnaev allegedly posted a number of radical jihadist videos on YouTube, leaving people to wonder why his social media activity did not raise red flags and prompt further investigation. See David W. Kearns, *The Boston Marathon Bombing One Year Later: What We Still Don’t Know*, HUFFINGTON POST (Apr. 25, 2014, 5:59 AM), http://www.huffingtonpost.com/david-w-kearns/the-boston-marathon-bombing_2_b_5213398.html; Tim Lister & Paul Cruickshank, *Dead Boston bomb suspect posted video of jihadist, analysis shows*, CNN (Apr. 22, 2013, 11:13 AM), <http://www.cnn.com/2013/04/20/us/brother-religious-language/>.

with many crediting the duo for the free speech protections we have today.¹²⁴ In a 1919 trio of cases, Justice Holmes wrote three First Amendment opinions for a unanimous Court.¹²⁵ Although the Court decided all three cases against the person claiming free speech protections, one case in particular stands out for its rhetorical endorsement of the First Amendment.

In *Schenck v. United States*, Charles Schenck, a popular socialist, was arrested for distributing flyers to American service members that asserted the draft was the equivalent of involuntary servitude in violation of the Thirteenth Amendment.¹²⁶ For his actions, authorities charged Schenck with violating the Espionage Act, as he was conspiring “to cause insubordination.”¹²⁷ Before the Supreme Court, Schenck argued his arrest violated his First Amendment rights, but the Court, through Justice Holmes, affirmed his conviction.¹²⁸ In finding that the arrest and conviction did not infringe upon Schenck’s First Amendment rights, Holmes first used the language of clear and present danger, saying:

The question in every case is whether the words used 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.¹²⁹

Holmes provided a pragmatic test relying on imminence and context, because “the character of every act depends upon the

124. It has been hypothesized that Justice Holmes’ clear and present danger standard was inspired in part by his relationship with Judge Learned Hand, who had announced a similar incitement test for advocacy of criminal activity. *Masses Pub. Co v. Patten*, 244 F. 535 (S.D.N.Y. 1917). See Thomas Healy, *The Justice Who Changed His Mind: Oliver Wendell Holmes, Jr., and the Story Behind Abrams v. United States*, 39 J. SUP. CT. HISTORY 35, 70 (2014), available at <http://ssrn.com/abstract=2384855>.

125. See *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Deb v. United States*, 249 U.S. 211 (1919).

126. *Schenck*, 249 U.S. at 50-51.

127. *Id.* at 48-49.

128. *Id.* at 52-53.

129. *Id.* at 52.

circumstances in which it is done.”¹³⁰

Funnily, Holmes did not mention the clear and present danger test in the other two cases unanimously decided that term. Instead, he summarily affirmed the convictions in the face of First Amendment challenges, leading some to wonder whether the seemingly righteous endorsement of speech used in *Schenck* was accidental drafting or incidental lip service.¹³¹ In practice, Holmes and the Court seemed to side effortlessly with the government’s attempts to criminalize speech.

Then, Holmes disabused any notion that he was not a free speech champion with his dissent later that year in *Abrams v. United States*.¹³² The facts of *Abrams* were not all that dissimilar from *Schenck*; the Supreme Court affirmed the conviction of a man charged under the Espionage Act for distributing pamphlets with anti-war sentiments.¹³³ However, writing for himself and Justice Brandeis, Justice Holmes dissented. Reviving the clear and present danger test, Justice Holmes found the behavior here was protected by the First Amendment.¹³⁴ He clarified that the clear and present danger test relies on criminal common law principles of attempt, in that for criminal advocacy to fall outside of the reach of the First Amendment, the speaker must intend to commit or have result the crime advocated, and take some act in furtherance of that intent.¹³⁵ As such, he notes that a person cannot be arrested for speech expressing criminal advocacy if the criminal act itself is preconditioned on the acts of others.¹³⁶ Justice Holmes “Great Dissent” in *Abrams* provided the platform for modern First Amendment jurisprudence, and forms the basis for the present understanding of free speech protections.¹³⁷

130. *Id.*

131. See Healy, *supra* note 124, at 55-75.

132. For an interesting discussion on Holmes’ evolution, see Healy, *supra* note 124; David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1303-22 (1983).

133. *Abrams v. United States*, 250 U.S. 616, 617 (1919).

134. See *id.* at 624-31 (Holmes, J., dissenting).

135. *Id.* at 628 (Holmes, J., dissenting).

136. *Id.*

137. See THOMAS HEALY, THE GREAT DISSSENT - HOW OLIVER WENDELL HOLMES CHANGED HIS MIND - AND CHANGED THE HISTORY OF FREE SPEECH IN

In his dissent in *Abrams*, Justice Holmes cited one of his own opinions in which he explained the concept of criminal attempt, in *Swift & Co. v. United States*.¹³⁸ In *Swift*, Justice Holmes clearly laid out what was necessary for criminal attempt, proclaiming: “Where acts alone are not sufficient in themselves to produce a result which the law seeks to prevent . . . but require further acts . . . to bring that result to pass, an intent to bring it to pass is necessary to produce a dangerous probability that it will happen.”¹³⁹ Justice Holmes went on to say, “[n]ot every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt.”¹⁴⁰ Using the same language that he used in *Schenck*, Holmes reminded that it is still always going to be “. . . a question of proximity and degree.”¹⁴¹ It was the “well known” criminal law doctrine of attempt as articulated in *Swift*, that Justice Holmes believed should guide the clear and present danger First Amendment test.¹⁴²

Then, to solidify his place in First Amendment jurisprudence, Justice Holmes dissented once again with Justice Brandeis in *Gitlow v. New York*.¹⁴³ In arguing that the prosecution of the petitioner under a state criminal anarchy statute for publishing and distributing various socialist pamphlets violated the First Amendment, Justice Holmes wrote this now famous passage:

Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker’s enthusiasm for the result. Eloquence may set fire to reason. But whatever may be

AMERICA (Metropolitan Book 2013).

138. *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).

139. *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905).

140. *Id.* at 402.

141. *Id.*

142. *Id.*

143. *Gitlow v. New York*, 268 U.S. 652 (1925).

thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.¹⁴⁴

As explained below, it is Justice Holmes' articulation of the clear and present danger standard in *Schenck*, constructed on the foundation of *Swift* and elaborated upon in *Abrams* and *Gitlow*, that should be the standard by which social media speech is considered for First Amendment purposes.

B. *Online Speech Should Be Judged by the Clear and Present Danger Test*

The issues surrounding social media are so complex that the relative simplicity of the clear and present danger test, grounded in the well-aged principles of criminal attempt, would be helpful when deciding whether social media activity is constitutionally protected.¹⁴⁵

144. *Id.* at 673 (Holmes, J., dissenting).

145. This is not to say clear and present danger test does not have critics. However, many of the test's critiques have centered on how it has been applied (or not applied) by the courts rather than the test itself. See, e.g., David Feister, *How Clear Is the Clear and Present Danger Test*, 1 GROVE CITY C. J. L. & SOC. POL'Y 39 (2010). Other critiques have focused on the fact that the clear and present danger test protects too little speech, advocating for a near-absolutist interpretation of the First Amendment. See David R. Dow, *The Moral Failure of the Clear and Present Danger Test*, 6 WM. & MARY BILL OF RTS. J. 733 (1998); David R. Dow & R. Scott Schieldes, *Rethinking the Clear and Present Danger Test*, 73 IND. L. J. 1217 (1998). Finally, there is a question as to how the clear and present danger test is related to *Brandenburg* and *Watts*, and whether the imminent lawless action test is a refinement of the clear and present danger standard, or a departure. See Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1175 (1982); Hans A. Linde, "Clear and Present Danger" Reexamined: *Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163 (1970). However, whether

There is a multitude of benefits of applying the clear and present danger test as announced in *Schenck* and clarified in *Abrams* and *Gitlow* to social media speech. The clear and present danger test has the imminence component that makes *Brandenburg* speech protective, and is especially salient in the online context.¹⁴⁶ The imminence component is borne in part from the idea that if the criminal act is not imminent, a good-doer has time to intercede, or the speaker has time to change her mind.¹⁴⁷ This idea is magnified ten-fold in the social media context, as it is a medium of communication designed for immediate response. Therefore, if a person truly thought the teenager in Chicago was going to shoot up his neighborhood if the jury eventually found George Zimmerman not guilty, someone would have certainly had the chance to respond and intercede, telling him that even if he was serious, that there are better ways he can express his frustrations. Requiring there to be imminent danger ensures social media users who publish online threats have a chance to recognize their foolishness and retract their statement, or be persuaded to change their mind prior to risking arrest.

In a similar vein, the clear and present danger test draws from criminal law and looks at the motive of the speaker and whether he or she had actual criminal intent, and then whether the speaker took some action in furtherance of that intent. And this will often require more than just an online posting, which is so easy to do with very little thought, and will necessitate some further corroboration of the user's intent. Further, in line with general principles of criminal attempt, there will also have to be proof of some action in furtherance of the crime discussed via social media to warrant arrest and allow conviction. Before social media thoughtcrime is punishable, the government would have to show that the social media user actually intended to commit a crime and has the ability to do so.

Brandenburg and *Watts* represent a refinement of the clear and present danger test, a departure, or a strange permutation, the tests as explained herein are largely unworkable in the online context.

146. In fact, Justice Holmes actually uses the word imminence in his *Abrams* dissent in place of "present" when describing the standard. See *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting).

147. See Gey, *supra* note 113, at 706.

Another attractive aspect of the clear and present danger test is that it takes into account the context of speech and the audience receiving it. People say things online that they would never say in person, because for many, social media is a way to aggrandize in a setting with limited repercussions. This context is crucial when deciding whether speech constitutes a clear and present danger — when there is just social media activity with nothing more, the answer is likely it does not. Intimate conversations that were had in the living room in front of the television, at the neighborhood bar, or on playground are taking place on social media platforms. Therefore, treating social media speech in the same manner as speech shouted at public rallies or mass-distributed pamphlets is in many ways nonsensical. However, criminalizing social media activity that creates imminent danger has applicability that is more sensible, with the understanding that words alone rarely can constitute a significant enough threat to remove the speech from the protections of the First Amendment.¹⁴⁸

In situations where an online speaker *does* intend to threaten his audience on a social media network and the threat is seemingly imminent, the next step would be to put the threat in context, and determine whether the person who is viewing the threat would perceive it as such. In other words, did the person with whom the speaker was communicating feel immediately threatened by the post. In that case, similar to the common law principles of assault, perhaps the speech can be criminalized, because the speech “. . . operates more like a physical action than a verbal or symbolic communication of ideas or emotions.”¹⁴⁹ But there should also be an objective analysis as to whether it was reasonable for the person to feel threatened given the surrounding context.¹⁵⁰

Some may posit that posting criminal thoughts or threats in the public sphere is enough to warrant the exemption of

148. See *Yates v. United States*, 354 U.S. 298, 327 (1957) (“Instances of speech that could be considered to amount to ‘advocacy of action’ are [] few and far between.”).

149. Steven G. Gey, *The Nuremberg Files and The First Amendment Value of Threats*, 78 TEX. L. REV. 541, 593 (2000).

150. See *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (describing the clear and present danger test as requiring both reasonable fear of injury, and that the danger apprehended be imminent).

speech from the First Amendment given the harm that can result. This argument is based on the fear that such speech engenders and the panic it can cause.¹⁵¹ While the argument is well taken, the threatening, bullying, and violent language used regularly online undermines this argument. If threats online, in whatever form, can be criminalized, the slippery slope is actually a vertical line. Moreover, there is a difference between making threats with people in close physical proximity, and posting threats in an online forum where the speaker may be continents away. Taking the classic example used by Justice Holmes, shouting “fire” in a crowded theater is unlikely to have the same effect in a popular chatroom.¹⁵² And in the instances that it does have a similar effect, where social media activity does create mass hysteria, in that case perhaps abrogation of free speech rights is necessary.¹⁵³

Another counterargument this proposed solution is likely to face is that it essentially requires law enforcement to wait until the crime is near completion, which, as seen in countless examples in a Post-9/11 world, could have disastrous consequences. My thesis, however, does not reach government monitoring of social media — although there are certainly constitutional issues that abound as a result of such programs. It also does not prevent law enforcement from using social media as a tool for further investigation — there may very well be instances where a social media post can give rise to reasonable suspicion, allowing limited law enforcement interaction, that social media activity can “counsel” further investigation.¹⁵⁴ My argument is simply stating that it should be rare a case where a person’s speech through a social media

151. See Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J. L. PUB. POL’Y 283, 291 (2001).

152. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing panic.”).

153. I am sure some would argue that the hypothesis outlined herein is not protective enough. See, e.g., *supra* note 145. However, this article rests on the assumption that there will not be a tectonic shift in First Amendment jurisprudence in the near future, and therefore works with the precedent presently on the books.

154. *Navarette v. California*, 134 S. Ct. 1683, 1696 (2014) (Scalia, J., dissenting).

outlet results in arrest and prosecution.¹⁵⁵ And in deciding whether social media speech can be criminalized, or whether the First Amendment protects it, *with protection of speech serving as the default*, the clear and present danger test can serve as a commonsense guide for government officials.

Although not necessarily one's first impulse, returning to nearly century-old precedent and defining 21st century online speech protections in accordance with criminal law is internally consistent; harmonizing speech advocating criminal acts with common law attempt principles makes sense. The concept of a "clear and present danger" is something that the average person can conceptualize and think about as he or she engages in online social media activity, and it is something police and prosecutors can latch onto when deciding whether further action is warranted. It refocuses the protections of speech with an eye as to what is criminal versus what is socially acceptable in a way that the average person can understand.

V. Conclusion

Some may argue that social media thoughtcrime deserves no protection as it adds no value to the marketplace, and after all, the First Amendment protects speech for its value to society.¹⁵⁶ Although this First Amendment concept is important, it is just as important to remember that the First Amendment was also designed to protect an individual's right of expression.¹⁵⁷ Moreover, some of the speech exemplified above *does* add to the value of the marketplace of ideas and democracy in its own way. Yes, at first blush the examples seem to consist solely of silly posts made by reckless young people with no larger value. However, each post has its own place within larger social discourse. For example, while Justin

155. See *Yates v. United States*, 354 U.S. 298, 327 (1957).

156. See Healy, *supra* note 108, at 700.

157. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[The Framers] valued liberty both as an end and as a means. They believed liberty to be the secret to happiness and courage to be the secret of liberty."); Steven J. Heyman, *The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence*, 19 WM. & MARY BILL OF RIGHTS J. 661, 699-700 (2011).

Carter may have been joking (allegedly) about shooting up a school — in his own way he was highlighting the absurdity and the inhumanity of the Sandy Hook shootings. The Chicago teenager reacting to the Zimmerman trial was adding his commentary to a salient social-political issue in which almost all of America was engaged. While Sarah the Dutch teenager may have been pulling an online prank when tweeting about placing a bomb on an American Airlines plane, those who tweeted similar sentiments after her were doing so in a seeming show of subversive solidarity, protesting her arrest. Finally, the British youths that were arrested for using popular slang is just further evidence of a transatlantic and cross-generational communication divide that has always existed.

While it is easy to write off social media speech as valueless, and therefore undeserving of First Amendment protections, this entire article is premised on the fact that there is value to be had by allowing people to express themselves via social media. That social media expression is often a method of engaging in larger social dialogue regardless of how crude the expression might be. And even when social media activity is not contributing to a larger social dialogue, social media is an important tool of self-expression. It is a primary means of communication for people around the world, supplanting speech that was previously conducted in private that people would not dream of criminalizing. Finally, it is critical to remember that freedom of speech is the baseline, and as the Internet becomes even more deeply entrenched in the human experience, the vigorous protection of online speech, including social media speech, will be of paramount importance.